

proprietary capacity; ordered Feeley to cease and desist from committing or causing any violations or any future violations of the antifraud provisions of the Securities Act and the Exchange Act; ordered Feeley to cease and desist from aiding and abetting and causing any violations or any future violations of the antifraud provisions or specified reporting and recordkeeping provisions of the Advisers Act; ordered FWAM and Feeley jointly and severally to disgorge \$95,000 plus prejudgment interest; and ordered FWAM and Feeley to pay civil money penalties of \$150,000 and \$15,000 respectively.

Among the issues likely to be argued are:

1. Whether respondents committed the alleged violations; and
2. If respondents committed violations, whether sanctions should be imposed in the public interest.

The subject matter of the Closed Meeting scheduled for Wednesday, June 4, 2003 will be: post-argument Discussion.

The subject matter of the Closed Meeting scheduled for Thursday, June 5, 2003 will be: institution of administrative proceedings of an enforcement nature; and institution and settlement of injunctive actions.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted, or postponed, please contact:

The Office of the Secretary at (202) 942-7070.

Dated: May 29, 2003.

Jonathan G. Katz,
Secretary.

[FR Doc. 03-13935 Filed 5-29-03; 3:48 pm]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47914; File No. SR-AMEX-2002-112]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Relating to Its Performance Evaluation and Allocations Procedures

May 23, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and rule 19b-4 thereunder,² notice is hereby given that on December

19, 2002, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I, II and III below, which items have been prepared by the Amex. On May 1, 2003, the Amex amended the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to revise its performance evaluation and allocations procedures. Below is the text of the proposed rule change. Proposed new text is *italicized* and proposed deleted text is [bracketed].⁴

* * * * *

Performance Committee

Rule 26. (a) The Committee on Floor Member Performance (the "Performance Committee") shall consist of *twelve* [16] persons comprised as follows: *three* [four] representatives of upstairs member firms and *nine* [twelve] Floor members divided as equally as possible among specialists, registered traders and brokers *provided, however, that in situations where specialist relations with listed companies or sponsors of Exchange Traded Funds ("ETFs") are in issue a representative of issuers or ETF sponsors as applicable shall be substituted for one of the nine Floor members.* The Performance Committee shall be drawn from a roster of not less than 32 persons representing *issuers and ETF sponsors*, upstairs member firms, specialists, registered traders and brokers. The minimum quorum for the transaction of business by the Performance Committee shall be *seven* [nine] persons including at least one representative of an upstairs member firm. The Performance Committee shall be chaired by a Floor Governor who may not vote except to make or break a tie. In the event that no Floor Governor is able to chair the Committee, a Senior Floor Official may chair the Committee.

³ See letter from William Floyd Jones, Associate General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 30, 2003 ("Amendment No. 1"). In Amendment No. 1 the Exchange submitted a new Form 19b-4 which replaced the original filing in its entirety.

⁴ The Exchange requested that the Commission correct a typographical error in Amex rule 26(e) and Amex rule 29(d) of the proposed rule language. Telephone discussion between William Floyd-Jones, Assistant General Counsel, Amex, Christopher B. Stone, Special Counsel, and Mia C. Zur, Attorney, Division, Commission (January 30, 2003).

The Performance Committee may delegate any or all of its responsibilities to one or more subcommittees consisting of *four* [six] persons including at least one representative of an upstairs member firm, provided, however, that a subcommittee only may take the following actions: (1) Send admonitory letters, (2) refer matters to the Minor Floor Violation Disciplinary Committee for possible action pursuant to Exchange rule 590, (3) refer matters to the full Performance Committee with or without a recommendation, (4) prohibit registered option traders from effecting opening transactions for specific periods of time for failing to meet zone requirements, or (5) counsel members on how to improve their performance. The minimum quorum for the transaction of business by a subcommittee shall be *three* [four] persons including one representative of an upstairs member firm.

(b) through (d) No change.

(e) The Performance Committee may meet with one or more specialists, specialist units, registered traders or brokers that may have failed to meet minimum performance standards. In such an event, the member or members shall be notified in writing of the grounds to be considered by the Performance Committee and afforded an opportunity to make a presentation of relevant information in rebuttal. Such member or members shall *deliver to the Amex staff coordinator for the Performance Committee copies of all materials that they will provide to the Performance Committee and the names of any persons that they intend to present to the Performance Committee at least three business days prior to the meeting. Such member or members, likewise, shall be given access to all written material to be provided by the Amex staff to [reviewed by] the Performance Committee and the names of all persons that the staff will present to the Committee at least three business days prior to the meeting.* [, and a] All persons appearing before the Performance Committee may be represented by counsel. However, formal rules of evidence shall not apply in Performance Committee meetings. A failure to meet minimum performance standards may form the basis for Performance Committee remedial action against one or more specialists, specialist units, registered traders or brokers. Any member or member organization affected by a decision of the Performance Committee shall be informed in writing of the decision, which decision shall include the findings, conclusions, any remedial

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

action to be taken (hereinafter "written notification").

(f) through end. No change.

Allocations Committee

Rule 27. (a) through (i) No change.

* * * Commentary

.01 No change.

.02 Contacts with Unlisted Companies. [Specialists and other members must submit a "Notice of Marketing Interest" ("NOMI") (1) prior to contacting an unlisted company, or (2) within five business days of any unanticipated contact with an unlisted company where discussions regarding listing occur or are contemplated by the specialist or other member. The NOMI must identify the company that the specialist or other member would like to contact and is valid for no more than 12 months after Amex staff has given written approval to the request (the "contact period"). Amex staff may decline to approve a specialist's or other member's request to contact an unlisted company where it is felt that such activity could hinder the Exchange's overall listing efforts. For example, a request to contact an unlisted company generally will not be granted where Amex staff have begun discussions with the company.]

[A specialist or other member may request one extension of the contact period. The request must be in writing and must describe the specific activities that the specialist or other member has undertaken which it believes will result in a favorable listing decision. If the request is deemed sufficient by Amex staff, the contact period may be extended up to an additional six months. After the expiration of the contact period and any extension, a specialist or other member may not request permission to again contact the company until six months have elapsed from the expiration of the contact period or extension as applicable. Amex staff may contact an unlisted company as to which there is an approved NOMI, provided the staff notify the subject specialist or other member prior to contacting the company.]

[Only one NOMI can be on file for any company. A designated senior officer of the Exchange, however, may approve a second NOMI with respect to a particular company when (1) sufficient evidence warrants a determination that the second NOMI would assist the Exchange's listing program, and (2) the second NOMI includes the written consent of the first specialist or other member to the approval of the second NOMI.]

Once an unlisted company has requested a listing qualification review,

specialists and other members are prohibited from making any direct or indirect contact with the company for the purpose of influencing its decision in the choice of a specialist. This prohibition includes the company's investment bankers or other advisors, or any other person in a position to influence the company's management.

The Allocations Committee only will be advised of a company's preference for a particular specialist where a specialist's or member's efforts actually have been instrumental in securing the listing as evidenced by the company filing a written preference with the Exchange for the specialist within two weeks of the Exchange initiating a listing qualification review. The Allocations Committee, however, is not obligated to honor such requests.

Once the Allocations Committee has prepared the list of six specialists to be submitted to the new listing candidate, specialists and other members may not initiate any direct or indirect communications with management, the company's investment banker or other advisors, or any person in a position to influence the company. If the company wishes to interview individual specialists, the Exchange will arrange for such interviews. The Chief Executive Officer of the Exchange or his or her designee may require a member of the Exchange staff to attend such interviews to ensure that any statements by specialists and their representatives are consistent with the Exchange's policies on communications with unlisted companies. Inappropriate communications include, but are not limited to, apparent misrepresentations as to market making capabilities or promises unrelated to the specialist's role in making a market in the issuer's stock. Specialists and their representatives also may not supply information concerning another specialist either orally or in writing, except they may refer to overall floor-wide statistics.

.03 through end. No change.

Market Quality Committee

Rule 29. (a) through (c) No change.

(d) The Market Quality Committee may meet with a UTP Specialist that may have failed to meet minimum performance standards with respect to UTP Securities. In such an event, the UTP Specialist shall be notified in writing of the grounds to be considered by the Market Quality Committee and afforded an opportunity to make a presentation of relevant information. Such UTP Specialist shall *deliver to the Amex staff coordinator for the Market Quality Committee copies of all*

materials that they will provide to the Market Quality Committee and the names of any persons that they intend to present to the Market Quality Committee at least three business days prior to the meeting. Such UTP Specialist, likewise, shall be given access to all written material to be provided by the Amex staff to [reviewed by] the Market Quality Committee and the names of all persons that the staff will present to the Committee at least three business days prior to the meeting. [, and a] All persons appearing before the Market Quality Committee may be represented by counsel. However, formal rules of evidence shall not apply in meetings of the Market Quality Committee. A failure to meet minimum standards relating to: (1) Quality of markets, (2) competition with other market centers, (3) administrative matters, or (4) willingness to promote the Exchange as a marketplace may form the basis for remedial action by the Market Quality Committee against a UTP Specialist. Any UTP Specialist affected by a decision of the Market Quality Committee shall be informed in writing of the decision, which decision shall include the findings, conclusions, and any remedial action to be taken (hereinafter "written notification").

(e) through end. No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose⁵

The Committee on Floor Member Performance and Market Quality Committee review specialist performance may take remedial action

⁵ The Amex requested that the Commission make minor non-substantive modifications to language in the purpose section. Telephone discussions between William Floyd-Jones, Assistant General Counsel, Amex, Christopher B. Stone, Special Counsel, and Mia C. Zur, Attorney, Division, Commission (January 30 and 31, 2003).

up to terminating a specialist's registration as such or reallocating securities when it identifies inadequate performance. The Committees protect both the interests of investors (by taking remedial actions to correct poor performance) and the institutional interests of the Exchange (by ensuring that the Amex is as competitive as possible with other markets).⁶ The Allocations Committee allocates securities to qualified specialists. It, too, protects the interests of investors and the Exchange by ensuring that only qualified specialists receive allocations.

Performance Committee Size

The Exchange is proposing to reduce the size of the Performance Committee and to add issuer and ETF sponsor representatives to the Committee pool. Currently, the Performance Committee operates more slowly and less flexibly than it should due to the difficulties in coordinating the schedules of 16 persons (the current size of the Performance Committee). The Exchange also believes that issuer and ETF sponsor representatives should be added to the Performance Committee pool and used in situations where specialist relations with listed

⁶ See *In the Matter of the Application of Pacific Stock Exchange's Options Floor Post X-17*, Administrative Proceeding File No. 3-7285, Exchange Act Release No. 31666 (December 29, 1992) which states:

We believe that the reallocation of a market maker's (or a specialist's) security due to poor performance is neither an action responding to a violation of an exchange rule nor an action where a sanction is sought or intended. Instead, we believe that performance-based security reallocations are instituted by exchanges to improve market maker performance and to ensure quality of markets. Accordingly, in approving rules for performance-based reallocations, we historically have taken the position that the reallocation of a specialist's or a market maker's security due to inadequate performance does not constitute a disciplinary sanction.

We believe that an SRO's need to evaluate market maker and specialist performance arises from both business and regulatory interests in ensuring adequate market making performance by its market makers and specialists that are distinct from the SRO's enforcement interests in disciplining members who violate SRO or Commission rules. An exchange has an obligation to ensure that its market makers or specialists are contributing to the maintenance of fair and orderly markets in its securities. In addition, an exchange has an interest in ensuring that the services provided by its members attract buyers and sellers to the exchange. To effectuate both purposes, an SRO needs to be able to evaluate the performance of its market makers or specialists and transfer securities from poor performing units to the better performing units. This type of action is very different from a disciplinary proceeding where a sanction is meted out to remedy a specific rule violation. (Footnotes omitted.)

See also *In re James Niehoff and Company*, Administrative Proceeding File No. 3-6757, (November 30, 1986), and the other authorities cited in the Commission's *Post X-17* decision.

companies or ETF sponsors are in issue. This would occur, for example, where an issuer has expressed concerns regarding a possible lack of continuity and depth in the market for its securities. This would ensure that the perspective of issuers and sponsors is available to the Performance Committee in situations where it would be appropriate. The Amex, accordingly, is proposing to reduce the size of the Performance Committee from 16 to 12 persons. In line with that reduction, the Exchange proposes to reduce the size of any related subcommittees, the Performance Committee's minimum quorum, and the numbers of types of representatives on the Performance Committee. It also is proposing to add an issuer or ETF sponsor representative to the Performance Committee (in place of a floor member) in matters involving a specialist's relations with an issuer or ETF sponsor.

Exchange of Documents and Names

Exchange rules 26(e) and 29(d) provide that persons who are subject to a performance review receive a written notice of the matters to be considered by the Performance Committee or Market Quality Committee, and are given an opportunity to address the Committee and make a presentation of relevant information in support of their position. Persons that are the subject of performance reviews have a reasonable amount of time between delivery of the written notice and the Committee's meeting to prepare their presentation to the Committee.⁷ With the addition of upstairs member firm personnel to the Performance Committee, and the proposed addition of an issuer or ETF sponsor representative to the Performance Committee in certain circumstances, the Exchange believes that it should establish deadlines for persons to submit materials to the Amex staff so that these materials may be distributed prior to the meeting to persons that participate in Committee meeting by telephone. The Exchange, accordingly, is proposing to amend its rules to require persons appearing before either the Performance Committee or Market Quality Committee to disclose the names of the persons whom they intend to present to the Committee and the materials that they wish to submit to the Committee, at least three business days prior to the

⁷ A mutually convenient date for the performance review is selected by the person being reviewed and the Committee. Telephone discussions between William Floyd-Jones, Assistant General Counsel, Amex, Christopher B. Stone, Special Counsel, and Mia C. Zur, Attorney, Division, Commission (January 30 and 31, 2003).

Committee meeting. This is an administrative proposal intended to accommodate the transmission of these materials to persons participating by telephone and would allow either Committee to gauge the length of time required for a meeting. It also would be consistent with current Amex practice in which the Exchange staff provides specialists with the materials that the staff furnishes either Committee prior to the meeting. The pre-meeting disclosure rules for staff and persons appearing before either Committee would be identical.

Elimination of NOMI Process

The Exchange's rules currently require equity specialists to submit a Notice of Marketing Interest ("NOMI") and receive written approval from the Exchange prior to contacting an unlisted company. Once a specialist has been approved to contact an unlisted company, no other specialist may contact that company without the consent of the first specialist. There is a 12-month sunset on the NOMI approval, which may be extended for one six month period. After the NOMI has expired, it can be resubmitted after six months have elapsed.

The original purpose of the NOMI process was to prevent an unseemly rush of specialists to contact unlisted companies. In practice, however, it has resulted in some specialist firms requesting NOMIs for companies without then undertaking substantial contact with them. The NOMI process, thus, has had the perverse result in some situations of inhibiting the Exchange's listing efforts. Management, accordingly, is proposing to eliminate the NOMI process.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with section 6(b) of the Act,⁸ in general, and furthers the objectives of section 6(b),⁹ in particular, in that they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Amex consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR-Amex-2002-112 and should be submitted by June 23, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 03-13608 Filed 5-30-03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47913; File No. SR-BSE-2003-06]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to the Exchange's Nasdaq Trading Rules

May 22, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 21, 2003, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Nasdaq trading rules by deleting inapplicable and outdated sections and making certain additions to the rule text. Set forth below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

Chapter XXXV

Trading in Nasdaq Securities

Sec. 1—no change.

Sec. 2 (a)(i) Each Exchange specialist shall provide direct telephone *or other means of* access to the specialist post to Nasdaq System market makers, acting in their capacity as market makers, for each Nasdaq security in which the market maker is registered as a market maker. Access shall include appropriate procedures which assure the timely response to telephonic *or other* communications. Nasdaq System market makers may use such telephone *or other*

access to transmit orders for execution on the Exchange.

Any order received on the floor via telephone *or otherwise* from a Nasdaq System market maker shall be effected in accordance with the rules applicable to the making of bids, offers and transactions on the Floor (see Chapter II, Dealings on the Exchange, Chapter XV, Specialists). All limit orders shall be immediately displayed upon receipt, in accordance with Chapter II, Dealings on the Exchange, Section 40, Limit Order Display Rule.

(ii) Exchange specialists may send orders from the Floor for execution via telephone, *or otherwise*, to any Nasdaq System market maker in each Nasdaq security in which it is registered as specialist. All of the Boston Stock Exchange Rules related to the trading of securities shall be applicable to bids and offers transmitted by telephone, *or otherwise*, in the same way as they apply to orders transmitted via automated trading systems.

(iii) Comparisons of transactions effected with a Nasdaq System market maker via telephone access, *or otherwise*, will be made pursuant to procedures to be established between Nasdaq and the Exchange.

[(b)—Orders may be transmitted to a specialist via Nasdaq Workstation II ("NWII") at the election of a Nasdaq market maker originating the order. Orders transmitted through NWII may be executed by the system automatically or on a manual basis in accordance with the provisions of this Chapter XXXV.]

[(c)b)—[Specialists will have "Level III Service", as defined by the Nasdaq Unlisted Trading Privileges Plan, on the Nasdaq System. As such, specialists will have input and query ability with respect to quotations and sizes in securities included in the Nasdaq System. Access to the specialist via the Nasdaq System will be limited to floor brokers, BSE members, NASD members, NASD non-BSE members (including Electronic Communications Networks), and certain other member firms and other professionals represented by member firms ("clients"). Clients] *Members* may have access to enter orders to the specialist either electronically[, through the Nasdaq System,] or telephonically. Any order received by the specialist telephonically, or verbally in any manner other than electronically [through the Nasdaq System] must be memorialized in accordance with Chapter II, Dealings on the Exchange, Section 2, Recording of Sales, and Section 15, Record of Orders from Offices to Floor.

¹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.