

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-53793; File No. SR-Amex-2005-103)

May 11, 2006

Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval of Proposed Rule Change and Amendment Nos. 1, 2, 3 and 4 Thereto Allowing Issuers of Listed Equity Securities, Structured Products, and Exchange Traded Funds a Right to Request a New Specialist

On October 13, 2005, the American Stock Exchange LLC (“Amex” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend Amex Rule 27 to give issuers of listed equity securities and structured products, as well as sponsors of exchange traded funds (“ETFs”), a right to request a new specialist. On January 26, 2006, Amex filed Amendment No. 1 to the proposed rule change.<sup>3</sup> On January 30, 2006, Amex filed Amendment No. 2 to the proposed rule change.<sup>4</sup> On February 17, 2006, Amex filed Amendment No. 3 to the proposed rule change.<sup>5</sup> On March 6, 2006, Amex filed Amendment No. 4 to the proposed rule change.<sup>6</sup> The proposed rule change, as amended, was published for comment in the Federal Register on April 4, 2006.<sup>7</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> In Amendment No. 1, the Exchange proposed further changes to Amex Rule 27(e) and (f) and made revisions to the purpose section of the proposed rule change.

<sup>4</sup> In Amendment No. 2, the Exchange made revisions to the purpose section of the proposed rule change to reflect changes to the text of Amex Rule 27(f) made in Amendment No. 1.

<sup>5</sup> In Amendment No. 3, the Exchange proposed further changes to Amex Rule 27(e) and (f) and made revisions to the purpose section of the proposed rule change.

<sup>6</sup> In Amendment No. 4, the Exchange proposed minor technical changes to the text of Amex Rule 27(e) and (f).

<sup>7</sup> See Securities Exchange Act Release No. 53561 (March 29, 2006), 71 FR 16841.

I. Description of the Proposal

Amex Rule 27(e) currently gives the issuer of an equity security or a structured product and the sponsor of an ETF a one-time right to request a reallocation to a different specialist unit within twelve months after the listing of the security.

The Exchange proposed to amend Amex Rule 27(e)(ii) to permit the issuer of an equity security or structured product or the sponsor of an ETF to request a specialist reassignment for “good cause” by filing a written notice (“Notice”) with the officer in charge of Equities Administration or the officer in charge of the ETF Marketplace, as applicable. The Notice must indicate the specific issues prompting the request and any steps previously taken to attempt to address these issues. Amex proposes to define “good cause” as the failure of the specialist to make competitive markets; the failure of the specialist unit to risk capital commensurate with the type of security; the failure of the specialist unit to assign competent personnel to the securities; or any statements made publicly by the specialist unit that substantially denigrate the security.

Further, the proposed revisions to Amex Rule 27(e) would require that copies of the Notice be provided to the Chief Regulatory Officer of the Exchange (“CRO”) and to the Exchange’s Committee on Floor Member Performance. In addition, the subject specialist unit would be notified that a mediation is being commenced with respect to the request for reassignment, and would be provided a copy of the Notice. The specialist unit may submit a written response within two weeks (“Specialist Response Date”), which response must be provided to the CRO and the Committee on Floor Member Performance. If the specialist unit does not submit a response during this two-week time period, there will be no mediation. In such case, the Allocations Committee will be convened to reallocate securities pursuant to Amex Rule 27(b).

The CRO would review the Notice and any specialist response, and may request a review of the matter by the Regulatory Oversight Committee (“ROC”) of the Exchange’s Board of Governors. In addition, the Committee on Floor Member Performance would review the Notice and any specialist response. Prior to the commencement of the mediation, the Committee on Floor Member Performance would make any determination that “good cause” does not exist. A determination that “good cause” does not exist would preclude the commencement of a mediation. In this circumstance, the security would not be reallocated and the issuer or sponsor may request an appeal of the decision of the Committee on Floor Member Performance to be heard by the Amex Adjudicatory Council.<sup>8</sup> If the decision of the Committee on Floor Member Performance is upheld, then the security will not be reallocated.

The mediation of the issues that have arisen between the issuer or sponsor and the specialist unit may be conducted pending the outcome of the CRO’s and, if applicable, the ROC’s review of the request. However, where a review by the ROC has been requested, no change of specialist unit may occur until the ROC makes a final determination that it is appropriate to permit such change. In making such determination, the ROC may consider all relevant regulatory issues, including without limitation whether the requested change appears to be in aid or furtherance of conduct that is illegal or violates Exchange rules, or in retaliation for a refusal by a specialist to engage in conduct that is illegal or violates Exchange rules. Notwithstanding reviews by the CRO, ROC and/or Committee on Floor Member Performance of any matter raised during the process described herein, the Amex Division of Regulation and Compliance (including Listing Qualifications) and/or the NASD Amex Division may at any time take any regulatory action that it may determine to be warranted. The Amex represents that

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<sup>8</sup> See Article II, Section 7(a) of the Amex Constitution.

reassignment may not occur without prior notice that the CRO has decided not to refer the matter to the ROC or that the ROC has determined that the change is appropriate.

A Mediation Committee would be appointed and would consist of at least one floor broker, one senior floor official, one upstairs governor, and two independent governors for each mediation.<sup>9</sup> The Mediation Committee would meet with representatives of the issuer or sponsor and the specialist unit in an attempt to mediate the matters indicated in the Notice. During the course of the mediation, the issuer or sponsor may conclude the mediation if it determines that it wishes to continue with the same specialist unit. In the alternative, after the expiration of one month from the time of the specialist's response, subject to the conclusion of any review by the CRO and ROC, the issuer or sponsor may file written notice, signed by the issuer's or sponsor's chief executive officer, that it wishes to proceed with the change of specialist unit. The new specialist unit would be selected by the Allocations Committee pursuant to Amex Rule 27(b).

Finally, the Exchange proposes to amend Amex Rule 27(f) to provide that, in addition to the circumstances provided for in the existing rule, the Allocations Committee would be convened to reallocate securities when an issuer or sponsor files a written notice requesting a change of specialist unit and the Mediation Committee orders reallocation pursuant to proposed paragraph (e)(viii) of Amex Rule 27, or an issuer or sponsor files a written notice requesting a change of specialist unit and the specialist unit does not submit a response.

## II. Discussion

The Commission finds that the proposed rule change, as amended, is consistent with the

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<sup>9</sup> The Exchange represents that the Mediation Committee would consist of at least one floor broker, at least one senior floor official, at least one upstairs governor, and at least two independent governors for each mediation. Telephone conversation between Nyieri Nazarian, Assistant General Counsel, Amex and David Michehl, Special Counsel, Division of Market Regulation, Commission on May 11, 2006.

requirements of Section 6 of the Act,<sup>10</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>11</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>12</sup> which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The Commission believes that the proposed rule change, as amended, appropriately balances the need to revise the current Amex process by which issuers of equity securities or structured products or sponsors of ETFs request a new specialist with the need to incorporate appropriate procedures that are designed to provide that any such request is subject to mediation and review by the Exchange's Committee on Floor Member Performance and CRO and, if requested by the CRO, the ROC. While the proposal revises current time frame during which an issuer or sponsor may request a new specialist, it also introduces the involvement of the Exchange's Committee on Floor Member Performance and CRO to assure that the requested change of specialist unit is for a proper purpose. The Committee on Floor Member Performance and CRO would be provided copies of any Notice and response to such Notice by the specialist unit. When the CRO has requested a review by the ROC, no change of specialist unit may occur until after the ROC makes a final determination that it is appropriate to permit such a change. The ROC, in making its determination of whether to permit a change in specialist unit, may consider all relevant regulatory issues, including whether the requested change appears to be in

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<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> In approving this proposed rule change, as amended, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78f(b)(5).

aid or furtherance of conduct that is illegal or violates Exchange rules, or is in retaliation for a refusal by a specialist to engage in conduct that is illegal or violates Exchange rules. The Amex Division of Regulation and Compliance and/or the NASD Amex Division may at any time take any regulatory action that it may determine to be warranted. Therefore, the Commission believes that the proposed process would provide an appropriate mechanism for the Exchange to maintain independent oversight over an issuer's or sponsor's request to change specialist units, to ascertain that such requests are confined to proper reasons, and to obtain a review by the ROC when appropriate.

The Commission notes that the proposed rule change requires the Mediation Committee to commence to meet with representatives of the issuer or sponsor and the specialist unit "as soon as practicable" after the Specialist Response Date and does not limit the Mediation Committee's attempt to mediate the matters indicated in the Notice. The proposal further provides that the issuer or sponsor may at any time file a written notice stating that it wishes to conclude the mediation because it wishes to continue with the same specialist unit. After the expiration of one month from the Specialist Response Date, the issuer or sponsor may file a notice that it wishes to proceed with the change of specialist unit. The Commission believes that the proposed process is designed to provide the issuer or sponsor and the specialist unit ample opportunity to attempt to resolve the issues that prompted the issuer or sponsor to seek a new specialist unit and to allow the issuer or sponsor to seek a new specialist unit a reasonable period of time after the issuer or sponsor files its Notice.

Accordingly, the Commission finds that the proposed rule change, as amended, is consistent with the Act.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> that the proposed rule change (SR-Amex-2005-103), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

Nancy M. Morris  
Secretary

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<sup>13</sup> 15 U.S.C. 78s(b)(2).

<sup>14</sup> 17 CFR 200.30-3(a)(12).