

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58199; File No. SR-Amex-2008-44)

July 21, 2008

Self-Regulatory Organizations; American Stock Exchange LLC; Order Approving a Proposed Rule Change Modifying the Provisions Governing Contacts Between Specialists and Issuers

I. Introduction

On May 20, 2008, 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”)¹ and Rule 19b-4 thereunder,² a proposal to amend Amex Rule 27 to (i) modify the provisions governing contacts between specialists and issuers or, in the case of exchange traded funds (“ETFs”) and structured products, sponsors, and (ii) clarify other procedures applicable to the allocation of securities to specialists. The proposed rule change was published for comment in the Federal Register on June 18, 2008.³ The Commission received no comments regarding the proposal. This order approves the proposed rule change.

II. Description

The purpose of the proposed rule change is to revise Amex Rule 27 in order to better reflect the different treatment that is afforded ETFs and structured products in connection with the allocation of securities to specialists. This is reflected in the fact that ETFs and structured products are typically allocated to a specialist within a few days after approval of the issuer’s application for listing on the Exchange. However, in the case of other equity securities, the allocation process may take a longer period of time so that

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 57952 (June 11, 2008), 73 FR 34809.

allocation to a specialist may not occur within a few days of approval of the issuer's listing application.

Amex Rule 27 sets forth the procedures and policies pursuant to which the Allocations Committee allocates securities listing on the Exchange to specialists. In particular, paragraph (e) describes the Exchange's "issuer choice" program under which issuers or, in the case of an ETF or structured product, sponsors, select their specialists from a list of the most qualified specialists prepared by the Allocations Committee and is designed to be read in conjunction with Commentaries .02 and .03 thereto.

Commentaries .02 and .03 contain guidelines for communications between specialists and issuers or, in the case of ETFs and structured products, sponsors that have not yet listed a security on the Exchange, have applied to list a security on the Exchange and/or have a security that has been approved for listing on the Exchange.

(i) Commentary .02

Commentary .02 applies to equity securities other than ETFs and structured products, and prohibits specialists and other members from making direct or indirect contact with an issuer that has requested a listing qualification review⁴ for the purpose of influencing the issuer's choice of a specialist. In addition, any communication between equity specialists and issuers is prohibited once an issuer has been approved for listing and the Allocations Committee has prepared the list of qualified specialists. The

⁴ The listing qualification review is the process whereby an issuer undergoes review by the Exchange's Listing Qualifications Department. The listing qualification review will commence once the listing application is submitted to the Exchange.

exception to such prohibition is Exchange-arranged interviews between an issuer approved for listing and any specialist(s) the issuer requests to interview.

The interviews are closely monitored by the Exchange and the Exchange will take appropriate action in the event an inappropriate communication is deemed by the Exchange to have occurred during the interview. The Exchange proposes to clarify that such appropriate action may include the disqualification of a specialist for the allocation.

The Exchange also proposes adding a provision to Commentary .02 addressing post-interview communications between specialists and issuers approved for listing on the Exchange. The proposed rule change would prohibit post-interview contacts between specialists and issuers and provide a means for issuers to obtain further information from the specialists through the Exchange's Equity Sales Group.

Finally, the Exchange proposes to simplify the description of the procedures set forth in Commentary .02 by adding defined terms and moving the provision concerning an issuer's ability to request specialists to be placed on the list of qualified specialists to paragraph (e)(i) of Rule 27.

(ii) Commentary .03

Current Commentary .03 applies only to ETFs and structured products and contains provisions governing contacts between specialists and other members and sponsors and issuers prior to such sponsor or issuer deciding to list a security on the Exchange. Pursuant to current Commentary .03, specialists and other members must notify the Exchange in writing before any planned contact with a potential sponsor or issuer for the purpose of listing the ETFs or structured products of such sponsor or issuer

on the Exchange, or within five (5) business days of unanticipated contact where discussions regarding the listing occur. Exchange approval of planned contact is required and the Exchange will grant such approval where it appears that the contact will assist rather than impede the Exchange's effort to list the new ETF or structured product.

ETF and structured product specialists are also currently required to promptly report to the Exchange any representations or commitments that they, or an individual acting on their behalf, have made to an employee of, or any individual acting on behalf of, an issuer or sponsor. The Exchange proposes to amend Commentary .03 to require specialists to only disclose in their applications to be allocated an ETF or structured product representations or commitments that relate to the prospective listing of the ETF or structured product and that are made within the six (6) months preceding the date allocation applications are solicited with respect to that ETF or structured product. The Exchange further proposes, in the event an ETF or structured product is not allocated within five (5) days of the allocation application, to require specialists and other members to update their applications accordingly to report all representations or commitments since last reported to the Exchange.

Commentary .03 also includes procedures related to the interview process. The Exchange proposes to clarify that such procedures apply to issuers and sponsors whose securities have been approved for listing on the Exchange in accordance with Rule 27(e)(i).

(iii) Other Changes

Finally, the Exchange proposes to make technical revisions to paragraphs (c) and (e)(i) of Rule 27 in order to consistently use the term "issuer" as opposed to "company",

clarify the applicability of the provisions to equity, ETF and structured product listings and, in general, to simplify the reading of the text.

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁵ In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,⁶ which requires, among other things, that a national securities exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to and to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Specifically, the Exchange is proposing, among other things, to amend Commentary .03 to Amex Rule 27 to eliminate the requirement that specialists and other members notify the Exchange in writing before any planned contact with a potential sponsor or issuer for the purpose of listing the ETFs or structured products of such sponsor or issuer on the Exchange, or within five business days of unanticipated contact where discussions regarding the listing occur. As noted above, under current Commentary .03, the Exchange will grant such approval where it appears that the contact will assist rather than impede the Exchange's effort to list the new ETF or structured product. The Exchange has stated that it no longer believes this restriction is necessary because it is unlikely that such contact would impede the Exchange's effort to list an

⁵ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁶ 15 U.S.C. 78f(b)(5).

issuer. The Commission believes this is a reasonable modification of the Exchange's allocation procedures. As discussed below, representations or commitments that relate to the prospective listing still must be disclosed on the listing application.

The Exchange also proposes to shorten the disclosure timeframe in Commentary .03 to require specialists to only disclose in their applications to be allocated an ETF or structured product representations or commitments that relate to the prospective listing of the ETF or structured product and that are made within the six months preceding the date allocation applications are solicited with respect to that ETF or structured product. The Commission believes that this shorter timeframe should be sufficient to enable the Exchange to continue to monitor the appropriateness of such representations and/or commitments, without impairing the allocation process by requiring specialists to disclose every representation or commitment that they have ever made to the issuer or sponsor. The Commission also notes that ETFs and structured products are generally allocated to the specialist very quickly after approval of the listing application. However, in the event an ETF or structured product is not allocated within five days of the allocation application, specialists and other members would be required to update their applications to report all representations or commitments since last reported to the Exchange, which should help to ensure the integrity of the allocation process.

In addition, the Exchange proposes a change to Commentary .03 to clarify that the Exchange may arrange telephone or in-person interviews on the Exchange's premises, if an issuer or sponsor wishes to interview one or more specialists once the Allocation Committee has prepared the list of qualified specialists. Because ETFs and structured products are typically allocated to a specialist within a few days after (and often the same

day as) approval of the issuer's application for listing on the Exchange, the Commission would expect such interviews to occur infrequently. Should an interview occur, the Commission notes that Commentary .03 permits the Performance Committee to disqualify any specialist that has made inappropriate representations.

Finally, in addition to other minor changes to Rule 27 and Commentaries .02 and .03 thereto, the proposal amends Commentary .02 to clarify that the Exchange's Performance Committee may disqualify for allocation any specialist that is deemed to have made an inappropriate communication to an issuer of an equity security that has been approved for listing on the Exchange. The Commission notes that this proposed change would make Commentary .02 more consistent with Commentary .03. The Exchange also proposes adding a provision to Commentary .02 that would prohibit post-interview contacts between specialists and issuers and provide a means for issuers to obtain further information from the specialists through the Exchange's Equity Sales Group. The Commission believes that these proposed changes to Commentary .02 are reasonable modifications of, and should further the public interest by helping to promote the integrity of, the allocation process.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁷ that the

⁷ 15 U.S.C. 78s(b)(2).

proposed rule change (SR-Amex-2008-44) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Florence E. Harmon
Acting Secretary

⁸ 17 CFR 200.30-3(a)(12).