

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-49991; File No. SR-Amex-2004-49)

July 9, 2004

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Allow Amex Hearing Officers to Preside Over Default and Settlement Proceedings Without Empanelling Members of the Hearing Board to Serve on an Amex Disciplinary Panel

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 28, 2004, 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 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 Amex proposes to amend Section 1(b) of Article V of the Amex Constitution, and Rule 2(b) of the Amex Rules of Procedure in Disciplinary Matters, to allow Amex hearing officers to preside over default and settlement proceedings without empanelling members of the Hearing Board to serve on an Amex Disciplinary Panel. The text of the proposed rule change is available at the Amex and at the Commission.

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 Exchange included statements concerning the purpose of and basis for its proposal and discussed any comments it received

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

regarding the proposal. 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. Purpose

The Exchange proposes to amend Article V, Section 1(b) of the Amex Constitution, and Rule 2(b) of the Amex Rules of Procedure in Disciplinary Matters, to allow Amex hearing officers to preside over default and settlement proceedings without empanelling members of the Hearing Board to serve on an Amex Disciplinary Panel ("Disciplinary Panel" or "Panel"). Article V, Section 1(b) of the Amex Constitution currently requires disciplinary proceedings to be held before a Panel, which consists of a hearing officer who serves as Panel Chairman, and two to four persons selected from the Hearing Board.³ Consistent with the Amex Constitution, Rule 2(b) of the Rules of Procedure in Disciplinary Matters states that the Panel Chairman must review the Statement of Charges initiating a disciplinary proceeding or the Stipulation of Facts and Consent to Penalty ("Stipulation"), and select members of the Hearing Board to serve on a Disciplinary Panel. The Amex believes that the requirement to appoint panelists from the Hearing Board, which includes vetting each panelist's background for experience and conflicts of interest, can cause unnecessary delays in resolving default and settlement

³ Exchange Officials and other persons are appointed to the Hearing Board in accordance with Article V, Section 1(b)(2) of the Amex Constitution and Rule 1 of the Amex Rules of Procedure in Disciplinary Matters. Members of the Hearing Board are not compensated by the Exchange, but rather volunteer their time to adjudicate Amex disciplinary matters.

proceedings. There are no exceptions to the Panel selection process in default and settlement hearings, and the Exchange believes that the uncontested nature of such proceedings warrants a more efficient and cost-effective approach.⁴

A default hearing arises when a member, member organization or an employee thereof fails to respond to a Statement of Charges. In accordance with Article V, Section 1 of the Amex Constitution, failure to respond to a Statement of Charges results in an admission of the charge or charges.

A settlement hearing arises when the Exchange and a respondent successfully negotiate a resolution to an Enforcement investigation, which includes sanctions. The settlement may be negotiated before the issuance of a Statement of Charges, or in connection with a Statement of Charges before a hearing on the merits has begun. The result of a settlement negotiation is memorialized in a Stipulation.⁵ When presented with a Stipulation for review, a Disciplinary Panel has three alternatives: (1) accept the Stipulation; (2) reject the Stipulation based on a belief that the penalty agreed upon by the parties is too low or that the proposed settlement is otherwise inappropriate; or (3) if the panel finds mitigating factors, lower the penalty in the Stipulation.⁶ If the parties cannot negotiate a Stipulation that is acceptable to the Disciplinary Panel, the matter proceeds to a contested hearing.

⁴ The Exchange does not propose to alter the panel selection process in contested hearings.

⁵ In settlement proceedings, the respondent neither admits nor denies the allegations set forth in the Statement of Charges or the Stipulation.

⁶ See Article V, Section 2 of the Amex Constitution and Amex Rule 345(k).

Given the limited number of alternatives that can be taken by the Disciplinary Panel in default and settlement proceedings and, as described below, the use of sanction guidelines, precedent memoranda and the procedures for review by the Amex Adjudicatory Council (“AAC”)⁷ and the Amex Board, the Exchange believes that it is appropriate for the hearing officer to preside over such proceedings without convening a full disciplinary panel.

All disciplinary actions are subject to Amex Sanction Guidelines. When a particular violation is not addressed by Amex Sanction Guidelines, it is the policy of the Exchange to use NASD Sanction Guidelines, to the extent applicable and absent sufficient reason to depart from those guidelines. In addition, for each disciplinary action, the Exchange will prepare a “precedent memorandum” highlighting factually similar cases and the penalty or penalties associated therewith.⁸ The Amex believes that the use of sanction guidelines and precedent memoranda ensures the fair and consistent assessment of penalties.

Pursuant to Article V, Section 1(c) of the Amex Constitution and Amex Rule 345(f), any determination or penalty imposed by a Disciplinary Panel may be appealed to, or called for review by, the AAC. The AAC has authority to affirm, modify or remand any determination or penalty imposed by a Disciplinary Panel. Similarly,

⁷ The AAC, which is comprised of Floor and Public Governors, has the authority to act on behalf of the Board with respect to any appeal or review of a disciplinary proceeding or any review of a Stipulation. See Article II, Section 6(a) of the Amex Constitution. Upon the request of any four of its members, the Board may review any determination of the AAC. See Article V, Section 1(d) of the Amex Constitution and Amex Rule 345(g).

⁸ Precedent memoranda are provided to both respondents and members of the Disciplinary Panel.

pursuant to Article V, Section 2 of the Amex Constitution and Amex Rule 345(k), any Disciplinary Panel determination in connection with a Stipulation may be called for review by the AAC. If called for review, the AAC has authority to affirm or lower the penalty associated with the Stipulation or to reject the Stipulation.

In view of the foregoing, the Exchange believes that a three to five member Disciplinary Panel is not necessary in default and settlement hearings, as such proceedings are uncontested. In default proceedings, the facts are undisputed, as the respondent is deemed to have admitted each allegation in the Statement of Charges. In settlement proceedings, the Exchange and the respondent have negotiated and agreed to the terms of a settlement as evidenced by the Stipulation. With respect to the appropriateness of penalties assessed in default and settlement proceedings, the hearing officer will be informed by sanction guidelines and precedent memoranda. Moreover, in light of the AAC and the Board's authority to review the outcome of any disciplinary action, the Amex believes sufficient safeguards exist to ensure the fairness of the Exchange's disciplinary process. As an added safeguard, this proposed rule change preserves a hearing officer's authority to select members of the Hearing Board to serve on a Disciplinary Panel in default and settlement proceedings when the hearing officer believes that their judgment or expertise is required.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act⁹ in general, and furthers the objectives of Section 6(b)(7) of the Act¹⁰ in

⁹ 15 U.S.C. 78(f)(b).

¹⁰ 15 U.S.C. 78(f)(b)(7).

particular in that it is designed to provide a fair and efficient procedure for the disciplining of members and persons associated with members. Moreover, the Amex believes the proposed rule change furthers the objectives of Section 6(b)(5) of the Act¹¹ in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to protect investors and the public interest, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition.

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

No written comments were solicited or received with respect to 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

¹¹ 15 U.S.C. 78f(b)(5).

- (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 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Amex-2004-49 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-Amex-2004-49. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Amex-2004-49 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland
Deputy Secretary

¹² 17 CFR 200.30-3(a)(12).