

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** (68 FR 5058, January 31, 2003).

**STATUS:** Open meeting.

**PLACE:** 450 Fifth Street, NW., Room 1C30, the William O. Douglas Room, Washington, DC.

**DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING:** Tuesday, February 4, 2003, at 10 a.m.

**CHANGE IN THE MEETING:** Time change.

The open meeting scheduled for Tuesday, February 4, 2003, at 10 a.m. has been changed to Tuesday, February 4, 2003, at noon.

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: January 31, 2003.

**Jonathan G. Katz,**

Secretary.

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**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47281; File No. SR-Amex-2002-48]

### Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Relating to its Marketing Performance Standards for Exchange Specialists

January 29, 2003.

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> notice is hereby given that on May 30, 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 Exchange. On January 27, 2003, the Exchange filed an amendment to the proposed rule change.<sup>3</sup> 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 Exchange proposes to adopt Commentary .08 to Amex Rule 26 ("Performance Committee") to establish marketing performance standards for Exchange specialists. The text of the proposed rule change is available at the Office of the Secretary, 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, 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 the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Committee on Floor Member Performance ("Performance Committee") reviews specialist performance and may take remedial action, including terminating a specialist's registration or reallocating securities, when it identifies inadequate performance. The Exchange believes that the Performance Committee protects 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.<sup>4</sup>

Commission, dated January 14, 2003 ("Amendment No. 1"). Amendment No. 1 clarifies in the proposed rule text that contacts by exchange specialists to issuers or representatives of member organizations will be conducted either off the Exchange floor or, if on the Exchange floor, outside of normal auction market business hours.

<sup>4</sup> See *In the Matter of the Application of Pacific Stock Exchange's Options Floor Post X-17*, Admin. Proc. File No. 3-7285, Securities Exchange Act Release No. 31666 (December 29, 1992), 51 SEC Dkt. 261. The Commission determined that performance evaluation processes fulfill a combination of business and regulatory interests at exchanges and are not disciplinary in nature. The Commission states in the *Post X-17* case:

We believe that the reallocation of a market maker's (or a specialist's) security due to poor

The Exchange recently amended its rules to include "competition with other markets" and "administrative factors" among the standards by which the Performance Committee may evaluate specialist performance.<sup>5</sup> Pursuant to these standards, the Exchange is proposing to adopt objective requirements regarding specialist communications with listed companies and order flow providers.<sup>6</sup> The Exchange believes that the purpose of the proposed rule change is to enhance the specialist's communication function by requiring that the specialist maintain frequent and personal contact with the listed companies and member firm customers that he or she serves.

Under the proposal, specialists would be required to contact off the Floor or, if on the Trading Floor, outside of the Exchange's regular auction market business hours, listed companies and the sponsors or issuers of Exchange Traded Funds, structured products, Trust Issued Receipts, and other equity derivatives on a quarterly basis. These quarterly "issuer" contacts are expected to help foster an understanding of the specialist function, the operations of the

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.

<sup>5</sup> See Amex Rule 26(b), and Securities Exchange Act Release No. 45260 (January 9, 2002), 67 FR 2255 (January 16, 2002) (order approving SR-Amex-2001-19).

<sup>6</sup> The Exchange notes that specialist communications with issuers, and, in particular, the scope of permissible disclosure between specialists and issuers, are discussed in further detail in Section 910 of the *Amex Company Guide*. ?=

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

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

<sup>3</sup> See letter from William Floyd-Jones, Assistant General Counsel, Amex, to Katherine England, Assistant Director, Division of Market Regulation,