

(44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission ("Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget ("OMB") for extension and approval.

Under rule 20(c) of the Act, Form U-1 must be used by any person filing for amending an application or declaration under sections 6(b), 7, 9(c)(3), 10, 12(b), (c), (d), or (f) of the Act. The form must also be used for filings under any rule under other sections of the Act for which a form is not prescribed. The Commission estimates that the total annual reporting and recordkeeping burden is 24,753 (111 annual responses  $\times$  223 hours = 24,753 burden hours). This represents a decrease of 2,684 hours annually in the paperwork burden from the prior estimate, and this decrease was caused by a decrease in the number of annual responses. The Commission needs the information because rule 20(c) requires it. The Commission uses this information to determine the existence of detriment to the interests the Act was designed to protect. Compliance with the requirements to provide the information is mandatory. The information will not be kept confidential.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549.

Dated: January 9, 2004.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-1076 Filed 1-16-04; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Proposed Collection; Comment Request

Upon Written Request, Copies Available

From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 1(c) and Form U5S; SEC File No. 270-168; OMB Control No. 3235-0164.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission ("Commission") is soliciting comments on the collections of information summarized below. The Commission plans to submit these existing collections of information to the Office of Management and Budget ("OMB") for extension and approval.

Under rule 1(c) and section 14 of the Public Utility Holding Company Act of 1935 ("Act"), Form U5S must be filed annually by all registered holding companies. Form U5S contains broad ranging information such as a description of system companies, acquisitions and sales of utility assets, securities transactions, and other information necessary for the staff to ascertain compliance with the Act. The Commission estimates that the total annual reporting and recordkeeping burden is 445.5 (28 original annual responses plus 5 amendments  $\times$  13.5 hours = 445.5 burden hours). This represents an increase of 189 hours annually in the paperwork burden from the prior estimate, and this increase was caused by an increase in the number of registered holding companies over the period as well as the need for some registrants to make a subsequent amendment to the Form U5S due to the inadequacy of their original filing. The Commission needs the information because rule 1(c) requires it. The Commission uses this information to determine the existence of detriment to the interests the Act was designed to protect. Compliance with the requirements to provide the information is mandatory. The information will not be kept confidential.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate

is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549.

Dated: January 7, 2004.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-1077 Filed 1-16-04; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49058; File No. SR-Amex-2002-35]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto by the American Stock Exchange LLC To Codify in Rules 128A, 1000, and 1000A the Current Practices Regarding the Participation in Exchange Traded Fund Trades Executed on the Exchange by Registered Traders and Specialists and the Allocation by the Specialist of Those Trades to the Appropriate Party

January 12, 2004.

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 April 22, 2002, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change. On February 13, 2003, September 8, 2003, November 3, 2003,

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

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

and December 10, 2003, respectively, the Amex filed Amendment Nos. 1, 2, 3, and 4 to the proposed rule change.<sup>3</sup> The proposed rule change is 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, 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 codify in Amex Rules 128A, 1000, and 1000A current practices regarding the participation in Exchange Traded Fund trades executed on the Exchange by registered traders and specialists and the allocation by the specialist of those trades to the appropriate party. The text of the proposed rule change, as amended, is set forth below. Deleted language is in [brackets]; proposed new language is *italicized*.<sup>4</sup>

\* \* \* \* \*

**Rule 128A Automatic Execution for Exchange Traded Funds**

The Exchange shall determine the size and other parameters of orders eligible for execution by its Automatic Execution System (Auto-Ex). An Auto-Ex eligible order for any account in which the same person is directly or indirectly interested may only be entered at intervals of no less than 10 seconds between entry of each such order on the same side of the market in a security. Members and member organizations are responsible for establishing procedures to prevent orders in a security on the same side of the market for any account in which the same person is directly or indirectly interested from being entered at intervals of less than 10 seconds.

\* \* \* Commentary

- .01 through .04 No change.
- .05 Specialists and Registered Options Traders that sign-on to Auto-Ex

<sup>3</sup> See letters from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated February 12, 2003 ("Amendment No. 1"); September 5, 2003 ("Amendment No. 2"); October 30, 2003 ("Amendment No. 3"); and December 9, 2003 ("Amendment No. 4"). Amendment No. 4 replaced Form 19b-4 in its entirety.

<sup>4</sup> With the Exchange's consent, the Commission has made technical corrections to the text of the proposed rule change, which the Exchange has committed to correct formally by filing an amendment. Telephone conversation between Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, and Cyndi N. Rodriguez, Special Counsel, Division, Commission, on January 8, 2004.

will be automatically allocated the contra side of Auto-Ex trades for ETFs [according to the following schedule:] in accordance with participation percentages ("target ratios") determined by the ETF Trading Committee.

[Number of ROTs Signed on to Auto-Ex in a Crowd]	Approximate Number of Trades Allocated to the Specialist Throughout the Day ("Target Ratio")	Approximate Number of Trades Allocated to ROTs Signed on to Auto-Ex Throughout the Day ("Target Ratio")
1 .....	60%	40%
2-4 .....	40%	60%
5-7 .....	30%	70%
8-15 .....	25%	75%
16 or more .....	20%	80%

At the start of each trading day, the sequence in which trades will be allocated to the specialist and Registered Options Traders signed-on to Auto-Ex will be randomly determined. Auto-Ex trades then will be automatically allocated in sequence on a rotating basis to the specialist and to the Registered Options Traders that have signed-on to the system so that the specialist and the crowd achieve their "target ratios" over the course of a trading session. If an Auto-Ex eligible order is greater than 100 shares, Auto-Ex will divide the trade into lots of 100 shares each. Each lot will be considered a separate trade for purposes of determining target ratios and allocating trades within Auto-Ex.

.06 No change.  
\* \* \* \* \*

**Rule 1000 Portfolio Depository Receipts**

- (a) through (b) No change.
- \* \* \* Commentary
  - .01 through .04 No change.
  - .05 [Reserved]
  - .06 [Reserved]
  - .07 (a) *When two or more bids (offers) are made simultaneously by the specialist dealing for his own account and by registered traders, all such bids (offers) shall be on parity and any securities sold (bought) in execution of such bids (offers) shall be divided among the specialist and registered trader(s) so that the specialist shall receive a percentage, as determined by the ETF Trading Committee, of the shares executed and the registered traders shall divide the remainder in accordance with Commentary .08(a)(iii). Notwithstanding the foregoing, neither the specialist nor a registered trader will be allocated more executed shares than*

the number representing the specialist's or registered trader's portion of the aggregate quote size, except when the number of executed shares to be allocated exceeds the aggregate quotation size disseminated for that Portfolio Depository Receipt.

(b) *The above provision applies only when the specialist and registered trader(s) are on parity and does not include situations where a customer order is also on parity with the specialist and registered traders. When a customer is on parity with the specialist and registered traders, the specialist will allocate executed shares (1) to the customer and to those registered traders or specialist on parity with the customer on equal basis subject to Commentary .08(a)(v) below; and then (2) to the specialist and the registered trader in accordance with Commentary .08(a)(iii) below. The following rules set forth provisions regarding priority and parity of registered traders and specialists when customer orders are involved: Rule 111, Commentary .07 provides that registered traders in establishing or increasing a position may not retain priority over or have parity with a customer order, and Rule 155 requires a specialist to yield precedence to orders entrusted to him as agent before executing a purchase or sale at the same price for an account in which he has an interest.*

.08 (a) *It is the responsibility of the specialist to allocate executed Portfolio Depository Receipts among all participants to a trade.*

(i) *In order for specialists to fulfill this function, registered traders must announce either at the start of the trading day, upon entry into the trading crowd or prior to the dissemination of a quotation, the number of shares for each Portfolio Depository Receipts in which they are willing to participate. The specialist may not assume a size for any registered trader and only those registered traders that have announced their sizes as discussed above will be allocated any executed shares.*

(ii) *The registered traders announced sizes shall be promptly communicated to the Exchange as required by SEC Rule 11Ac1-1(c).*

(iii) *As transactions occur the specialist shall allocate to the extent mathematically possible (A) the portion of the executed shares that the customer is entitled to and the portion of the executed shares to those on parity with the customer on an equal basis subject to subparagraph (v) of this paragraph (a); (B) the portion of the executed shares that the specialist is entitled to in accordance with Commentary .07 above; and (C) the portion of the*

executed shares participating registered traders are entitled to individually. The allocation pursuant to (C) is subject to the following provisions:

1. Where all participants have equal stated sizes, their participations shall be equal;
2. Where participants' stated sizes are not equal, their participations will depend upon whether the number of executed shares left to be allocated exceeds in the aggregate the participants' stated sizes;

3. If the number of executed shares left to be allocated does not exceed the participants' aggregate stated sizes, the specialist will allocate the executed shares equally, unless a participant's stated size is for an amount less than an equal allocation, then the smallest sizes will be allocated first, until the number of executed shares remaining to be allocated requires an equal allocation.
4. If the number of executed shares left to be allocated does exceed the participants' aggregate stated sizes, the

specialist will allocate the executed shares by first allocating to each participant the number of executed shares equal to each participant's stated size with the remainder being allocated based on the percentage a participant's stated size is of the participants' aggregate stated size.

5. The following chart illustrates how different numbers of executed shares will be allocated to participants whose aggregate stated size is 1,000 shares:

Number of Executed Shares To Be Allocated

Each participant's stated size	2,000	900	700	500
500 .....	1,000	400	250	168
300 .....	600	300	250	167
200 .....	400	200	200	165

(iv) In the event a specialist or registered trader declines to accept any portion of the available executed shares, any remaining executed shares shall be apportioned among the remaining participants who bid or offered at the best price at the time the market was established in accordance with paragraph (iii) above, until all executed shares have been allocated.

(v) Specialists and registered traders may direct some or all of their participation amount to competing public orders in the trading crowd.

(b) Notwithstanding the foregoing, when the transaction occurs without the participation of the specialist (either as principal or agent), the floor broker representing the contra-side of the trade distributes the executed shares equally among the participating registered traders, unless a registered trader's portion of the disseminated size is less than an equal distribution. That registered trader will be given a less than equal distribution and the remaining contracts will be allocated equally among the remaining participants to the trade. In addition, if neither the specialist nor a floor broker representing a customer is participating in the trade, the participating registered traders shall allocate the executed shares among themselves and other participants on parity in accordance with subparagraph (a)(iii) above.

\* \* \* \* \*

**Rule 1000A Index Fund Shares**

(a) through (b) No change.

\* \* \* Commentary

.01 through .05 No change.

.06 [Reserved]

.07 [Reserved]

.08 (a) When two or more bids (offers) are made simultaneously by the specialist dealing for his own account and by registered traders, all such bids (offers) shall be on parity and any securities sold (bought) in execution of such bids (offers) shall be divided among the specialist and registered trader(s) so that the specialist shall receive a percentage, as determined by the ETF Trading Committee, of the orders executed and the registered traders shall divide the remainder in accordance with Commentary .09(a)(iii). Notwithstanding the foregoing, neither the specialist nor a registered trader will be allocated more executed shares than the number representing the specialist's or registered trader's portion of the aggregate quote size, except when the number of executed shares to be allocated exceeds the aggregate quotation size disseminated for that Portfolio Depositary Receipt.

(b) The above provision applies only when the specialist and registered trader(s) are on parity and does not include situations where a customer order is also on parity with the specialist and registered traders. When a customer is on parity with the specialist and registered traders, the specialist will allocate executed shares (1) to the customer and to those registered traders or specialist on parity with the customer on equal basis subject to Commentary .09(a)(v) below; and then (2) to the specialist and the registered trader in accordance with Commentary .09(a)(iii) below. The following rules set forth provisions regarding priority and parity of registered traders and specialists when customer orders are involved: Rule 111, Commentary .07 provides that registered traders in establishing or increasing a position may not retain

priority over or have parity with a customer order, and Rule 155 requires a specialist to yield precedence to orders entrusted to him as agent before executing a purchase or sale at the same price for an account in which he has an interest.

.09 (a) It is the responsibility of the specialist to allocate executed Index Shares among all participants to a trade.

(i) In order for specialists to fulfill this function, registered traders must announce either at the start of the trading day, upon entry into the trading crowd or prior to the dissemination of a quotation, the number of shares for each Index Fund Share in which they are willing to participate. The specialist may not assume a size for any registered trader and only those registered traders that have announced their sizes as discussed above will be allocated any executed shares.

(ii) The registered traders announced sizes shall be promptly communicated to the Exchange as required by SEC Rule 11Ac1-1(c).

(iii) As transactions occur the specialist shall allocate to the extent mathematically possible (A) the portion of the executed shares that the customer is entitled to and the portion of the executed shares to those on parity with the customer on an equal basis subject to subparagraph (v) of this paragraph (a); (B) the portion of the executed shares that the specialist is entitled to in accordance with Commentary .08 above; and (C) the portion of the executed shares participating registered traders are entitled to individually. The allocation pursuant to (C) is subject to the following provisions:

1. Where all participants have equal stated sizes, their participations shall be equal;

2. Where participants' stated sizes are not equal, their participations will depend upon whether the number of executed shares left to be allocated exceeds in the aggregate the participants' stated sizes;

3. If the number of executed shares left to be allocated does not exceed the participants' aggregate stated sizes, the

specialist will allocate the executed shares equally, unless a participant's stated size is for an amount less than an equal allocation, then the smallest sizes will be allocated first, until the number of executed shares remaining to be allocated requires an equal allocation.

4. If the number of executed shares left to be allocated does exceed the participants' aggregate stated sizes, the specialist will allocate the executed

shares by first allocating to each participant the number of executed shares equal to each participant's stated size with the remainder being allocated based on the percentage a participant's stated size is of the participants' aggregate stated size.

5. The following chart illustrates how different numbers of executed shares will be allocated to participants whose aggregate stated size is 1,000 shares:

Number of Executed Shares To Be Allocated

Each participant's stated size	2,000	900	700	500
500 .....	1,000	400	250	168
300 .....	600	300	250	167
200 .....	400	200	200	165

(iv) In the event a specialist or registered trader declines to accept any portion of the available executed shares, any remaining executed shares shall be apportioned among the remaining participants who bid or offered at the best price at the time the market was established in accordance with paragraph (iii) above, until all executed shares have been allocated.

(v) Specialists and registered traders may direct some or all of their participation amount to competing public orders in the trading crowd.

(b) Notwithstanding the foregoing, when the transaction occurs without the participation of the specialist (either as principal or agent), the floor broker representing the contra-side of the trade distributes the executed shares equally among the participating registered traders, unless a registered trader's portion of the disseminated size is less than an equal distribution. That registered trader will be given a less than equal distribution and the remaining contracts will be allocated equally among the remaining participants to the trade. In addition, if neither the specialist nor a floor broker representing a customer is participating in the trade, the participating registered traders shall allocate the executed shares among themselves and other participants on parity in accordance with subparagraph (a)(iii) above.

\* \* \* \* \*

**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, as amended, 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. Purpose**

Since the inception of trading Exchange Traded Funds<sup>5</sup> at the Exchange, both specialists together with registered traders ("traders") have had the responsibility of making markets in these products.<sup>6</sup> Exchange rules require that both specialists' and traders' transactions constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and they should not enter into transactions or make bids or offers that are inconsistent with such a course of dealings. Specialists and traders shall engage, to a reasonable degree under the existing circumstances, in dealings for their own accounts when there exists a lack of price continuity or a temporary disparity between the supply of and demand for a specific ETF. In discussing the role of a registered trader, the Commission has stated "\* \* \* registered floor traders will be expected to trade in a way that assists the specialist in maintaining a fair and

orderly market \* \* \*"<sup>7</sup> (emphasis supplied). Specialists do, however, have additional obligations and responsibilities and are subject to certain costs that registered traders do not have, which include: (1) Their continuous obligation to the market, updating and disseminating quotes in all securities; (2) reflecting all market interest in the displayed quotes; (3) acting as contra-party on the automatic execution system at all times; (4) the fixed staffing costs committed to market making in a particular security whether it is actively traded or not; (5) the costs of licenses to list and trade these products; (6) the costs associated with participating in educational and marketing functions; and (7) the costs associated with a course of dealings designed to attract order flow to the Exchange.

In the course of making markets, specialists are often on parity with registered traders, that is, bidding and offering simultaneously to provide liquidity. Generally, Exchange Rule 126 provides that when bids (offers) are made simultaneously all such bids (offers) are on parity, and any securities sold (bought) in execution of such bids (offers) shall be divided as equally as possible between those on parity up to the participant's stated or generally known sizes. In addition, as further discussed below, the trading crowds in many option classes give the specialist a greater than equal share when on parity with registered traders. This proposal seeks to codify in the Exchange's rules these current allocation practices.

Although this rule proposal seeks to codify the participation in and

<sup>5</sup> Exchange Traded Funds include SPDRS, DIAMONDS and the NASDAQ 100 shares as well as other products listed pursuant to Rules 1000 and 1000A. These products will be referred to hereinafter as "ETFs."

<sup>6</sup> See Amex Rule 958, Commentary 10.

<sup>7</sup> See Securities Exchange Act Release No. 11144 (December 19, 1974), 40 FR 3258 (January 20, 1975).

allocation of trades among specialists and registered traders on parity, the following is a general description of the Exchange's rules regarding customer priority and parity. Exchange Rules 155 and 111 for specialists and registered traders, respectively, set forth their obligations and responsibilities when handling or interacting with customer orders. Amex Rule 155 requires a specialist to yield precedence to orders entrusted to him as agent before executing a purchase or sale at the same price for an account in which he has an interest. Amex Rule 111, Commentary .07 provides that registered traders in establishing or increasing a position may not retain priority over or have parity with a customer order. Thus, the rules would require that, when the specialist as agent receives a customer's marketable limit order, he and any registered trader establishing or increasing a position yield precedence to the customer order. However, registered traders closing or reducing a position and specialists not acting in an agency capacity can be on parity with the customer order.

It is the specialist's responsibility to allocate executed ETF shares among all participants to a trade. This is generally a manual process involving the inputting of participant information into the Point of Sale (or POS) Book. However, as provided in the proposed Rules 1000, Commentary .08(b) and 1000A, Commentary .09(b), whenever a trade occurs without the participation of the specialist (*i.e.*, the order is represented by a floor broker with registered traders as contra-parties to the trade), the Floor Broker representing the contra-side of the trade would distribute the executed shares equally among the participating registered traders, unless a registered trader's portion of the disseminated quote size is less than an equal distribution. That registered trader would be given a less than equal distribution, and the remaining shares would be allocated equally among the remaining participants to the trade. In addition, when only registered traders are on both sides of a trade (*i.e.*, neither the specialist nor a customer is participating in the trade), the registered traders would allocate the executed shares among themselves in accordance with the same provisions setting forth allocations by the specialist.<sup>8</sup> In this situation, as well as others, registered traders are only required to participate up to their portion of the Exchange's

disseminated quote size as required by the firm quote rule.<sup>9</sup>

Depending upon the level of activity and volatility of a particular ETF, the level of participation of an individual registered trader in each ETF would vary. Registered traders who regularly or only occasionally trade a particular ETF are currently expected to and would be required under the proposed codification in Rules 1000 and 1000A, to announce, either at the start of the trading day, upon entry into the trading crowd, or prior to the dissemination of a quotation, the number of shares in which they are willing to participate. These generally known sizes would be aggregated into the size disseminated by the Exchange pursuant to the firm quote rule so that the disseminated quote in each ETF reflects the level of participation by the specialist and each registered trader. While the specialist would not be required to announce his size to the trading crowd, his size could be determined from the disseminated quote size. As transactions occur, the specialist would allocate ETF shares to registered traders based upon these stated participation sizes.

The Exchange states that over the years, it, as well as registered traders and specialists, has recognized that, given their role, specialists should be entitled to a greater than equal share when on parity with registered traders. As a result, a practice has developed in Amex trading crowds for many products to give the specialist a greater than equal share when on parity with registered traders. The Exchange now seeks to codify this practice.

The Exchange believes that it is appropriate to provide a greater participation to specialists since they have responsibilities and are subject to certain costs that registered traders do not have. For example, they have a continuous obligation to the market; to update and disseminate quotes in all securities; to reflect all market interest in the displayed quotes; and to act as contra-party on Auto-Ex at all times. In addition, specialists incur the fixed staffing costs committed to market making in a particular security whether it is actively traded or not, and the costs associated with participating in educational and marketing functions to attract order flow. In order to attract to the Exchange specialist units that are willing to accept these responsibilities, the Amex believes it is necessary to provide specialists with an enhanced participation in ETFs. The Exchange also believes that in order to be

competitive with other exchanges that currently trade ETFs without market makers or registered traders, it must have the flexibility to determine the appropriate specialist participation.

The Exchange has determined that the specialist's participation for each ETF can and should vary depending upon the liquidity of the product, the type of orders sent to the Exchange and its competitors, and the type of order flow the Exchange seeks to attract in each ETF product. As a result, the Exchange has established the ETF Trading Committee ("Committee") to determine the level of the specialist's participation on a case-by-case basis for ETFs.<sup>10</sup> The Committee shall not determine in any ETF the specialist's participation level at anything less than the specialist participation level in place today.<sup>11</sup>

Exchange policy currently applies the following specialist's participation levels:

<i>Number of traders on parity</i>	<i>Approximate number of shares allocated to the specialist</i>	<i>Approximate number of shares allocated to the traders (as a group)</i>
1 .....	60%	40%
2-4 .....	40%	60%
5-7 .....	30%	70%
8-15 .....	25%	75%
16 or more .....	20%	80%

The Committee would be composed of the Exchange's four Floor Governors, the Chairmen (or their designee) of the Specialists Association, the Options Market Makers Association and the Floor Brokers Association, and three members of the Exchange's senior staff. It is expected that the designated Committee member from the Specialists Association specialize in one or more ETF products, and that the designated Committee member from the Options Market Maker Association trade one or more ETF products on a regular basis. All members of the Committee, including Exchange senior staff members, would have a vote on determining the level of specialist participation for each ETF. The Exchange currently trades over 100 different ETFs whose volume and liquidity vary widely. Each ETF would be evaluated individually by the Committee to determine the appropriate

<sup>10</sup> The Exchange states that the Committee would be described and approved by the Exchange's Board of Governors on an annual basis as part of the Exchange's Committee structure. The Committee and its structure would also be discussed in an Information Circular that is expected to be issued after this proposed rule change is approved by the Commission.

<sup>11</sup> Footnote 11, which includes a table, has been incorporated in the text.

<sup>8</sup> See proposed Rules 1000, Commentary .08(a)(iii) and 1000A, Commentary .09(a)(iii).

<sup>9</sup> See Rule 11Ac-1-1 under the Act, 17 CFR 240.11Ac-1-1.

level of specialist participation based on the liquidity of the product, the type of orders sent to the Exchange and its competitors, and the type of order flow the Exchange seeks to attract in each ETF product. An enhanced participation, if deemed appropriate by the Committee, would give specialists the ability to attract order flow to the Exchange and thereby give its customers tighter, more competitive markets. As a result, the Exchange would be able to attract new specialist units and retain the services of existing units.

It should be emphasized that the participation rights being established by the Committee would apply only when the specialist and/or registered traders are on parity and would not include situations where a customer order is also on parity with the specialist and registered traders. It should be noted, however, that a specialist cannot be on parity with an order for which he is acting as agent, and registered traders (who never act as agents and trade only for their own accounts) cannot be on parity with a customer when either establishing or increasing their position in the ETF. In such situations, as provided in proposed Rules 1000, Commentary .08(a)(iii) and 1000A, Commentary .09(a)(iii), the specialist would first allocate executed shares to the customer and to the specialist and/or those registered traders on parity with the customer. Any shares that remain would be allocated among the specialist and registered traders in accordance with proposed Rules 1000, Commentary .07 and 1000A, Commentary .08, which provides that the specialist would receive a participation in the remaining shares in accordance with the level set by the Committee. In addition, neither the specialist nor a registered trader would be allocated more executed shares than the number of shares representing the specialist's or registered trader's portion of the aggregate quotation size that the responsible broker or dealer would be obligated to communicate to the Exchange pursuant to firm quote rule, except when the number of executed shares to be allocated exceeded the aggregate quotation size disseminated for that ETF. Thus, for the following two examples, assume that the aggregate quotation size is 1,000 shares, the specialist's portion is 250 shares, and the registered trader's portion is 750 shares.

*First example.* An off-floor order to sell 800 shares is submitted for execution at the disseminated bid. The Committee has determined for this ETF that the specialist would be entitled to 60% of the executed

shares. The specialist, however, would only be allocated 250 executed shares, and the registered trader would be allocated 550 executed shares.

*Second example.* An off-floor order to sell 2,000 shares is submitted for execution at the disseminated bid. The specialist and registered trader would first be allocated 250 shares and 750 shares respectively, plus the specialist would receive 60% of the remaining 1,000 shares for a total of 850 shares, and the registered trader would receive 40% for a total of 1,150 shares.

Once the specialist determines his portion of the trade depending upon the number of traders on parity, he would deduct his portion and allocate the remaining shares to the registered traders based upon: (i) An equal distribution, as described in the first example below; (ii) filling the smallest size(s) first, as described in the second example below; (iii) a combination based on filling the smallest size first and equal distribution, as described in the third example below; or (iv) prorated based on the registered traders' generally known sizes and the percentage those sizes represent of their aggregate disseminated size, as described in the fourth example below. The number of shares in the incoming order would determine which of the methods would be used in the allocation.

Assume the following information for each of the following four examples: the disseminated bid for a particular ETF has an aggregate size of 10,000 shares. The specialist is bidding for 6,500 shares, and four registered traders' generally known sizes are as follows: Trader A—2,000 shares; Trader B—1,000 shares; Trader C—300 shares; and Trader D—200 shares. There are no customer orders participating in the bid. The Committee has determined for this ETF that the specialist would receive 40% of the executed shares, and the registered traders would split the remaining 60%.

*First example.* An off-floor order to sell 1,000 shares is submitted for execution at the disseminated bid. The specialist would allocate the executed shares as follows: the specialist would receive 400 shares (or 40%), and would allocate the remaining executed shares equally to each of the four traders 150 shares (or 25% of the remaining 600 shares).

*Second example.* An off-floor order to sell 5,000 shares is submitted for execution at the disseminated bid. The executed shares would be allocated by the specialist as follows: (i) The specialist would receive 40% (2,000 shares) of the 5,000 executed shares pursuant to the Committee's determination; and (ii) the remaining 60% (3,000 shares) would be divided among the registered traders based upon their generally known sizes with an attempt to completely fill the smallest size(s)

first, which in this example would be 200 shares for Trader D, 300 shares for Trader C, and 1,000 shares for Trader B. A total of 1,500 shares would be deducted, leaving 1,500 shares to be allocated to Trader A.

*Third example.* An off-floor order to sell 2,000 shares is submitted for execution at the disseminated bid. The executed shares would be allocated by the specialist as follows: (i) The specialist would receive 40% (800 shares) of the 2,000 executed shares pursuant to the Committee's determination; and (ii) the remaining 60% (1,200 shares) would be divided among the registered traders based upon their generally known sizes with an attempt to completely fill the smallest size(s) first and an equal distribution of any remainder. Thus, the smallest sizes would be filled first: 200 shares for Trader D, and 300 shares for Trader C, and the remaining 1,100 shares would be divided equally, with 550 shares distributed each to Trader A and Trader B. Trader B would not receive 1,000 shares (its generally known size) because such size would be more than an equal share of the remaining 1,100 shares.

*Fourth example.* An off-floor order to sell 20,000 shares is submitted for execution at the disseminated bid. Pursuant to the firm quote rule, the specialist and registered traders, as the responsible broker or dealers, would be obligated to execute order(s) at the disseminated bid up to their disseminated size. The specialist and traders would be able to execute the first 10,000 shares at the disseminated bid and execute the remaining shares at a lower bid or bids. If, however, the specialist and registered traders have determined, either individually or collectively (pursuant to Rule 958(h)(ii)), to execute the entire order at their disseminated bid, the executed shares would be allocated as follows: (i) The specialist would receive 6,500 executed shares representing his portion of the aggregate quotation size, plus 40% of the remaining 10,000 executed shares pursuant to the participation rates set forth above for a total of 10,500 executed shares; and (ii) the remaining 60% (9,500 shares) would be divided among the registered traders proportionally based upon their generally known sizes, the aggregate of which, in this example would be 3,500 shares: Trader A would receive an allocation of approximately 5,420 shares ( $2,000/3,500=57\%$  of the 9,500); Trader B would receive an allocation of approximately 2,750 shares ( $1,000/3,500=29\%$  of the 9,500 shares); Trader C would receive an allocation of approximately 810 shares ( $300/3,500=8.5\%$  of the 9,500 shares); and Trader D would receive an allocation of approximately 520 shares ( $200/3,500=5.5\%$  of the 9,500 shares).

In addition, the proposed rule text sets forth a chart that illustrates how different numbers of executed shares would be allocated to registered traders after the specialist has allocated portions to the customer and to the specialist. In each example, the chart assumes the aggregate stated size is 1,000 shares:

## Number of Executed Shares To Be Allocated

Each participant's stated size	2,000	900	700	500
500 .....	1,000	400	250	168
300 .....	600	300	250	167
200 .....	400	200	200	165

The first column illustrates the situation when the number of executed shares exceeds the registered traders' aggregate stated size, and each registered trader has determined either individually or collectively to participate for a larger size. The rest of the columns illustrate situations when the number of executed shares is less than the registered traders aggregate stated size: The second column illustrates the situation when two of the three registered traders' smaller sizes would be filled first and the third registered trader would be allocated the remainder; the third column illustrates the situation when only one registered trader's smallest size would be filled and the remaining executed shares would be allocated equally between the two remaining registered traders; and the fourth column illustrates the situation when all executed shares would be allocated equally among the participating registered traders.

In addition, a question has arisen with respect to other products in which the Exchange has codified its rules regarding the allocation of executed orders<sup>12</sup> of whether a specialist or registered options trader can decline an allocation of executed contracts. As noted above, the firm quote rule requires specialists and registered traders to be "firm" up to their disseminated size unless one of the exceptions set forth in the rule applies. If a specialist or registered trader declines an allocation or "backs away" from his disseminated size in whole or in part, he would be in violation of the firm quote rule, investigated, and sanctioned accordingly. If the other participants to the disseminated quote size determine to increase the size of their participation to cover for the declining specialist or registered trader, the executed shares would be allocated based upon the principles discussed above. That is, the specialist's participation would be based upon one less registered trader participating, and the allocation among registered traders would be increased proportionately. Moreover, if the size of the incoming

order is greater than the disseminated size and one or more registered traders are not willing to participate in a size larger than their disseminated size, then the additional executed shares would be allocated to the remaining participants based upon their participation rights as set forth in proposed Rules 1000, Commentary .08 and 1000A, Commentary .09.

Finally, with respect to automatic execution for ETFs, the Exchange proposes to amend Rule 128A to replace the schedule set forth in the rule, which shows the percentage of the approximate number of trades allocated to the specialist and registered traders signed on to Auto-Ex in a given ETF, with a reference to the Committee's determination of the appropriate percentages to be used in allocating Auto-Ex executed ETF shares.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with section 6(b) of the Act<sup>13</sup> in general, and furthers the objectives of section 6(b)(5) of the Act<sup>14</sup> in particular, 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, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

#### 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 Exchange consents, the Commission will:

- (A) By order approve such 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. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-Amex-2002-35. 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, comments should be sent in hardcopy or by e-mail but not by both methods. 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 the 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-2002-35 and should be submitted by February 10, 2004.

<sup>12</sup> See Securities Exchange Act Release No. 47729 (April 24, 2003), 68 FR 23344 (May 1, 2003) (codifying the allocation of option contracts and trades).

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

<sup>14</sup> 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-1082 Filed 1-16-04; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49049; File No. SR-Amex-2003-103]

### Self-Regulatory Organizations; American Stock Exchange, LLC; Order Granting Accelerated Approval to Proposed Rule Change Relating to Issuer Fees

January 9, 2004.

On November 25, 2003, 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 sections 140, 141, 142, and 144 of the Amex *Company Guide* to designate as non-refundable the current one-time \$5,000 application processing fee, establish a late change of \$2,500 payable by issuers whose annual listing fees are more than 60 days past due, and increase fees for listing additional shares. The Exchange further proposed to amend Sections 141 and 142 of the Amex *Company Guide* to clarify that annual listing fees and additional listing fees do not apply to Nasdaq National Market securities to which the Exchange has extended unlisted trading privileges.

The proposed rule change was published for comment in the **Federal Register** on December 11, 2003.<sup>3</sup> The Commission received no comments on the proposal.

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 and, in particular, the requirement of Section 6(b)(4) of the Act that the rules of the Exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.<sup>4</sup>

Furthermore, the Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**.

Specifically, the Commission notes the Exchange has represented that these fee changes are necessary to adequately fund the Exchange's listed equities business and develop value-added services for Amex listed issuers.<sup>5</sup> The Exchange also represents that it has experienced a surge in listing applications and needs to implement the fee changes in an expeditious manner in order to provide appropriate funding for its application review process.<sup>6</sup> Accordingly, the Commission finds good cause, consistent with sections 6(b)(4) and 19(b)(2) of the Act,<sup>7</sup> to approve the proposed rule change on an accelerated basis.<sup>8</sup>

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (File No. SR-Amex-2003-103) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-1118 Filed 1-16-04; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49067; File No. SR-BSE-2003-19]

### Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendments No. 1 and 2 Thereto by the Boston Stock Exchange, Inc. Relating to the LLC Operating Agreement of the Proposed New Exchange Facility To Be Operated by the Boston Options Exchange Group LLC

January 13, 2004.

On October 16, 2003, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities

<sup>5</sup> See SR-Amex-2003-103.

<sup>6</sup> Telephone conversation between Eric Van Allen, Assistant General Counsel, Amex, and Marisol Rubecindo, Attorney, Division of Market Regulation, Commission, on January 6, 2004.

<sup>7</sup> 15 U.S.C. 78f(b)(4) and 78s(b)(2).

<sup>8</sup> In approving this proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</sup> 17 CFR 200.30-3(a)(12).

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 proposal to establish, through an operating agreement among its owners, a Delaware limited liability company known as the Boston Options Exchange Group LLC ("BOX LLC"). BOX LLC would operate a new options trading facility of the Exchange. On October 23, 2003, the Commission published the proposal in the **Federal Register**.<sup>3</sup> The Commission received one comment on the proposal.<sup>4</sup> On November 14, 2003, BSE submitted Amendment No. 1 to the proposal.<sup>5</sup> On January 9, 2004, BSE submitted Amendment No. 2 to the proposal.<sup>6</sup> This order approves the proposed rule change, issues notice of and solicits comment on Amendments No. 1 and 2, and approves Amendments No. 1 and 2 on an accelerated basis.

### I. Description of the Proposal

#### A. Corporate Organization of BOX LLC

Through a series of related filings, BSE is proposing to establish a new options trading facility<sup>7</sup> to be known as the Boston Options Exchange ("BOX").<sup>8</sup> In this filing, BSE is seeking the Commission's approval of the operating agreement of BOX LLC (the "LLCOA"). Unlike a corporation's charter or bylaws, the LLCOA is a signed contract between the owners of BOX LLC

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

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

<sup>3</sup> See Securities Exchange Act Release No. 48650 (October 17, 2003), 68 FR 60731 ("Notice").

<sup>4</sup> See *infra* Section II.

<sup>5</sup> See letter from George W. Mann, Jr., General Counsel, BSE, to Nancy Sanow, Division of Market Regulation ("Division"), Commission, dated November 13, 2003 ("Amendment No. 1"). In Amendment No. 1, BSE proposes a technical change to substitute the term "BSE" for the phrase "Regulatory Services Provider and its Affiliates."

<sup>6</sup> See letter from George W. Mann, Jr., General Counsel, BSE, to Nancy Sanow, Division, Commission, dated January 9, 2004 ("Amendment No. 2"). In Amendment No. 2, BSE proposes to clarify the restrictions on the Transfer of BOX LLC units and to clarify the Commission's jurisdiction over the owners of BOX LLC.

<sup>7</sup> See Section 3(a)(2) of the Act, 15 U.S.C. 78c(a)(2).

<sup>8</sup> Today the Commission is approving three other BSE proposals that together establish the BOX facility. See Securities Exchange Act Release Nos. 49066 (January 13, 2004) (SR-BSE-2003-17) (establishing fee schedule for proposed BOX facility); 49065 (January 13, 2004) (SR-BSE-2003-04) creating Boston Options Exchange Regulation LLC to which BSE would delegate its self-regulatory functions with respect to BOX facility; and 49068 (January 13, 2004) (SR-BSE-2002-15) (approving trading rules for BOX facility) ("BOX Rules"). In addition, the Commission previously approved BSE rules providing for the allocation of market maker appointments in the BOX facility. See Securities Exchange Act Release No. 48644 (October 16, 2003), 68 FR 60423 (October 22, 2003) (SR-BSE-2003-13).

<sup>15</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 48886 (December 5, 2003), 68 FR 69095.

<sup>4</sup> 15 U.S.C. 78f(b)(4).