

up to terminating a specialist's registration as such or reallocating securities when it identifies inadequate performance. The Committees protect 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).⁶ The Allocations Committee allocates securities to qualified specialists. It, too, protects the interests of investors and the Exchange by ensuring that only qualified specialists receive allocations.

Performance Committee Size

The Exchange is proposing to reduce the size of the Performance Committee and to add issuer and ETF sponsor representatives to the Committee pool. Currently, the Performance Committee operates more slowly and less flexibly than it should due to the difficulties in coordinating the schedules of 16 persons (the current size of the Performance Committee). The Exchange also believes that issuer and ETF sponsor representatives should be added to the Performance Committee pool and used in situations where specialist relations with listed

⁶ See *In the Matter of the Application of Pacific Stock Exchange's Options Floor Post X-17*, Administrative Proceeding File No. 3-7285, Exchange Act Release No. 31666 (December 29, 1992) which states:

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

companies or ETF sponsors are in issue. This would occur, for example, where an issuer has expressed concerns regarding a possible lack of continuity and depth in the market for its securities. This would ensure that the perspective of issuers and sponsors is available to the Performance Committee in situations where it would be appropriate. The Amex, accordingly, is proposing to reduce the size of the Performance Committee from 16 to 12 persons. In line with that reduction, the Exchange proposes to reduce the size of any related subcommittees, the Performance Committee's minimum quorum, and the numbers of types of representatives on the Performance Committee. It also is proposing to add an issuer or ETF sponsor representative to the Performance Committee (in place of a floor member) in matters involving a specialist's relations with an issuer or ETF sponsor.

Exchange of Documents and Names

Exchange rules 26(e) and 29(d) provide that persons who are subject to a performance review receive a written notice of the matters to be considered by the Performance Committee or Market Quality Committee, and are given an opportunity to address the Committee and make a presentation of relevant information in support of their position. Persons that are the subject of performance reviews have a reasonable amount of time between delivery of the written notice and the Committee's meeting to prepare their presentation to the Committee.⁷ With the addition of upstairs member firm personnel to the Performance Committee, and the proposed addition of an issuer or ETF sponsor representative to the Performance Committee in certain circumstances, the Exchange believes that it should establish deadlines for persons to submit materials to the Amex staff so that these materials may be distributed prior to the meeting to persons that participate in Committee meeting by telephone. The Exchange, accordingly, is proposing to amend its rules to require persons appearing before either the Performance Committee or Market Quality Committee to disclose the names of the persons whom they intend to present to the Committee and the materials that they wish to submit to the Committee, at least three business days prior to the

Committee meeting. This is an administrative proposal intended to accommodate the transmission of these materials to persons participating by telephone and would allow either Committee to gauge the length of time required for a meeting. It also would be consistent with current Amex practice in which the Exchange staff provides specialists with the materials that the staff furnishes either Committee prior to the meeting. The pre-meeting disclosure rules for staff and persons appearing before either Committee would be identical.

Elimination of NOMI Process

The Exchange's rules currently require equity specialists to submit a Notice of Marketing Interest ("NOMI") and receive written approval from the Exchange prior to contacting an unlisted company. Once a specialist has been approved to contact an unlisted company, no other specialist may contact that company without the consent of the first specialist. There is a 12-month sunset on the NOMI approval, which may be extended for one six month period. After the NOMI has expired, it can be resubmitted after six months have elapsed.

The original purpose of the NOMI process was to prevent an unseemly rush of specialists to contact unlisted companies. In practice, however, it has resulted in some specialist firms requesting NOMIs for companies without then undertaking substantial contact with them. The NOMI process, thus, has had the perverse result in some situations of inhibiting the Exchange's listing efforts. Management, accordingly, is proposing to eliminate the NOMI process.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with section 6(b) of the Act,⁸ in general, and furthers the objectives of section 6(b),⁹ in particular, in that they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

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

The Exchange does not believe that the proposed rule change will impose

⁷ A mutually convenient date for the performance review is selected by the person being reviewed and the Committee. Telephone discussions between William Floyd-Jones, Assistant General Counsel, Amex, Christopher B. Stone, Special Counsel, and Mia C. Zur, Attorney, Division, Commission (January 30 and 31, 2003).

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).