

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-49525; File No. SR-BSE-2004-12)

April 2, 2004

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Boston Stock Exchange, Inc. to Retroactively Apply and Extend its Specialist Evaluation Program Pilot

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 23, 2004 the Boston Stock Exchange, Inc. (“BSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by BSE. On April 1, 2004 and April 2, 2004, the Commission received Amendment Nos. 1³ and 2,⁴ respectively, to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and to approve the proposal, on an accelerated basis.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from John Boese, Vice President, Legal and Compliance, BSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation (“Division”), Commission, dated March 31, 2004 (“Amendment No. 1”). In Amendment No. 1, BSE requested a two-year extension of its Specialist Performance Evaluation Program pilot applied retroactively from September 30, 2002 to September 30, 2004 (the original proposal sought only an extension of the pilot through June 30, 2004). In addition, BSE changed the basis of the proposal from Section 19(b)(3)(A) of the Act to Section 19(b)(2) of the Act and requested accelerated approval.

⁴ See letter from John Boese, Vice President, Legal and Compliance, BSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated April 2, 2004 (“Amendment No. 2”). In Amendment No. 2, the BSE conformed its rule text to reflect the extension of the pilot until September 30, 2004.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to extend its Specialist Performance Evaluation Program ("SPEP") pilot retroactively from September 30, 2002 and to renew it prospectively until September 30, 2004.

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 III 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 seeks a two-year extension of its SPEP pilot to be applied retroactively from September 30, 2002, and prospectively until September 30, 2004.⁵

Under the SPEP pilot program, the Exchange regularly evaluates the performance of its specialists by using objective measures, such as turnaround time, price improvement, depth, and added depth. Generally, any specialist who receives a deficient score in one or more measures may be required to attend a meeting with the Performance Improvement Action Committee, or the Market Performance Committee.

⁵ See Securities Exchange Act Release No. 46220 (July 17, 2002), 67 FR 48236 (July 23, 2002) (extending the SPEP pilot until September 30, 2002). See also Amendment No. 1, supra note 3 (requesting retroactive approval).

While the Exchange believes that the SPEP program has been a very successful and effective tool for measuring specialist performance, it believes that modifications are necessitated as a result of changes in the industry, particularly decimalization. Accordingly, the Exchange is seeking to extend the pilot period of this program so that evaluation and modification can be undertaken before permanent approval is requested. The Exchange requests accelerated approval of the extension of the pilot program so that the Exchange will be able to continue evaluating the performance of its specialists without interruption, pending approval by the Commission of the Exchange's anticipated proposed changes to the program.

2. Statutory Basis

BSE believes that the statutory basis for the proposed rule change is Section 6(b)(5) of the Act,⁶ in that the proposed rule change is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 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

The Exchange has neither solicited nor received comments on the proposed rule change.

⁶ 15 U.S.C. 78f(b)(5).

III. 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. All comment letters should refer to File No. SR-BSE-2004-12. This file number should be included on the subject line if e-mail is used. To help the Commission process and review 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, as amended, that are filed with the Commission, and all written communications relating to the proposed rule change, as amended, 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 such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to file number SR-BSE-2004-12 and should be submitted by [insert date 21 days from the date of publication].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, the Commission finds that the Exchange's proposal to retroactively extend the SPEP pilot from September 30, 2002 until September 30, 2004 is consistent with the requirements of the Act and rules and regulations thereunder. Specifically, the Commission

finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,⁷ which requires that the rules of the Exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. The Commission believes that the retroactive application of the SPEP pilot should allow the Exchange to continue to assess specialist performance without interruption, while allowing the Exchange adequate time to evaluate the program.

The Commission expects that, during the SPEP pilot, the Exchange will continue to monitor threshold levels and propose adjustments, as necessary, and continue to assess whether each SPEP measure is assigned an appropriate weight. In addition, the Exchange should continue to closely monitor the conditions for review and should take steps to ensure that all specialists whose performance is deficient and/or diverges widely from the best units will be subject to meaningful review.

The Commission finds good cause for granting the Exchange's request for a two-year extension of the SPEP pilot prior to the thirtieth day after the date of publication of notice of filing thereof in the Federal Register.⁸ Among the obligations imposed upon specialists by the Exchange, and by the Act and rules promulgated thereunder, is the maintenance of fair and orderly markets in their securities. To ensure that specialists fulfill these obligations, it is important that the Exchange be able to evaluate specialist performance. The Exchange's SPEP

⁷ 15 U.S.C. 78f(b)(5).

⁸ The Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

pilot assists the Exchange in conducting its evaluation of specialist performance and accelerated approval of the proposed rule change would permit the SPEP pilot to continue on an uninterrupted basis. Therefore, the Commission believes good cause exists to approve the extension of the SPEP pilot from September 30, 2002 until September 30, 2004, on an accelerated basis. Accordingly, the Commission finds that granting accelerated approval of the requested extension is appropriate and consistent with Sections 6(b)(5) and 19(b)(2) of the Act.⁹

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-BSE-2004-12), as amended is hereby approved on an accelerated basis until September 30, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland
Deputy Secretary

⁹ 15 U.S.C. 78f(b)(5) and 15 U.S.C. 78s(b)(2).

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).