

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50622; File No. SR-BSE-2004-25)

November 2, 2004

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Order Approving a Proposed Rule Change and Amendment Nos. 1, 2 and 3 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 4 Thereto Relating to the Specialist Performance Evaluation Program

I. Introduction

On June 21, 2004, the Boston Stock Exchange, Inc. (“BSE” 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 its rules concerning its Specialist Performance Evaluation Program (“SPEP”). On July 26, 2004, the BSE submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On August 25, 2004, the BSE submitted Amendment Nos. 2<sup>4</sup> and 3<sup>5</sup> to the proposed rule change. The proposed rule change, as

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

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

<sup>3</sup> See letter from John Boese, Vice President, Chief Regulatory Officer, BSE, to Nancy Sanow, Assistant Director, Division of Market Regulation (“Division”), Commission, dated July 22, 2004 and accompanying Form 19b-4 (“Amendment No. 1”). Amendment No. 1 replaced and superceded the originally filed proposed rule change.

<sup>4</sup> See letter from John Boese, Vice President, Chief Regulatory Officer, BSE, to Nancy Sanow, Assistant Director, Division, Commission, dated August 18, 2004 (“Amendment No. 2”). Amendment No. 2 replaced and superceded BSE Rule Chapter XV, Section 17, Paragraph (a) of the previously filed proposed rule change.

<sup>5</sup> See letter from John Boese, Vice President, Chief Regulatory Officer, BSE, to Nancy Sanow, Assistant Director, Division, Commission, dated August 19, 2004 (“Amendment No. 3”). Amendment No. 3 replaced and superceded BSE Rule Chapter XV, Section 17, Paragraph (a) of the previously filed proposed rule change.

amended by Amendment Nos. 1, 2 and 3, was published for comment in the Federal Register on September 3, 2004.<sup>6</sup> The Commission received no comments on the proposed rule change.

On October 15, 2004, the BSE submitted Amendment No. 4 to the proposed rule change.<sup>7</sup> This order approves the proposed rule change, as amended by Amendment Nos. 1, 2, 3 and 4. Simultaneously, the Commission is providing notice of filing of Amendment No. 4 and granting accelerated approval of Amendment No. 4.

## II. Description

The Exchange proposes to amend the SPEP, which is set forth in Chapter XV, Dealer-Specialists, Section 17, Specialist Performance Evaluation Program. Specifically, the BSE proposes to eliminate the current measurement standards set forth in the rule and replace them with a ranking program based on statistics reported under Rule 11Ac1-5 under the Act<sup>8</sup> (“Rule 5”).<sup>9</sup> Because the measurement standards will no longer be set forth in the rule, the BSE proposes to communicate the measurement standards and thresholds to members via Floor Memoranda, at least thirty days in advance, at least each time a new Rule 5 measurement is chosen, or a new threshold is established. The BSE also proposes to replace references to the Performance Improvement Action Committee

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<sup>6</sup> See Securities Exchange Act Release No. 50287 (August 27, 2004), 69 FR 53966.

<sup>7</sup> See letter from John Boese, Vice President, Chief Regulatory Officer, BSE, to Nancy Sanow, Assistant Director, Division, Commission, dated October 6, 2004 (“Amendment No. 4”). In Amendment No. 4, the BSE proposed permanent approval of the SPEP by deleting Paragraph (f) of Chapter XV, Dealer-Specialists, Section 17, Specialist Performance Evaluation Program, which limited the effective date of the SPEP through December 31, 2004.

<sup>8</sup> 17 CFR 240.11Ac1-5.

<sup>9</sup> See Securities Exchange Act Release No. 43590 (November 17, 2000), 65 FR 75414 (December 31, 2000) (adopting Rule 5).

(“PIAC”) in the rule text with the Market Performance Committee (“MPC”), because the PIAC, a subcommittee of the MPC, has been abolished by the Exchange, and its duties have been subsumed by the MPC.

### III. Discussion

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange<sup>10</sup> and, in particular, the requirements of Section 6(b) of the Act<sup>11</sup> and the rules and regulations thereunder. The Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,<sup>12</sup> which requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, 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.

Specifically, the Commission finds that utilizing Rule 5 measurements for SPEP should provide the Exchange with greater flexibility in tailoring its SPEP criteria to respond to market conditions. The BSE, as part of its self-regulatory responsibilities, must conduct effective oversight of specialists. Among the obligations imposed upon specialists by the Act and the rules thereunder is engaging in a course of dealings for their own accounts to assist in the maintenance of fair and orderly markets in their designated securities.<sup>13</sup> To

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<sup>10</sup> In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation.  
15 U.S.C. 78c(f).

<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> Rule 11b-1, 15 CFR 240.11b-1.

ensure that specialists fulfill their obligations, the Exchange must review specialists' performance. The Commission believes that the BSE's SPEP is critical to this oversight.

The Commission notes that the proposed rule change, as amended, includes objective measures of performance, as derived from Rule 5. The Commission believes that the Rule 5 measurements should provide the BSE with adequate statistics upon which to evaluate its specialists' performance. Further, the SPEP contains procedures for the review and discipline of specialists who fail to perform their obligations adequately.

In Amendment No. 4, the BSE proposed to make its SPEP permanent. The Commission notes that the SPEP rule have been subject to notice and comment and that no comments have been received. The Commission believes that the proposed SPEP program, which utilizes Rule 5 measurements and sets forth a review and disciplinary procedures, merits permanent approval. The Commission emphasizes, however, that the BSE should continue to closely monitor the conditions for review and should take steps to ensure that all specialists whose performance is deficient will be subject to meaningful review. Accordingly, the Commission finds that there is good cause, consistent with Section 6(b)(5)<sup>14</sup> and Section 19(b)(2) of the Act,<sup>15</sup> to approve Amendment No. 4 on an accelerated basis prior to the 30<sup>th</sup> day of the date of publication of notice of filing thereof in the Federal Register.

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

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

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 4, including whether Amendment No. 4 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](mailto:rule-comments@sec.gov). Please include File Number SR-BSE-2004-25 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-BSE-2004-25. 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 Amendment No. 4 that are filed with the Commission, and all written communications relating to Amendment No. 4 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 also will be available for inspection and copying at the principal office of the BSE. 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-BSE-2004-25 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>16</sup> that the proposed rule change (File No. SR-BSE-2004-25), as amended by Amendment Nos. 1, 2 and 3, be, and hereby is, approved, and that Amendment No. 4 to the proposed rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>16</sup> 15 U.S.C. 78s(b)(2).

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