

of publication of notice of the filing in the **Federal Register**. The Commission believes that granting accelerated approval of the proposal will allow Nasdaq to expeditiously implement the permanent reduction in market data fees, on a retroactive basis, without any unnecessary delay and should confer a benefit upon those firms that provide real-time data to their customers and subscribers. The Commission also notes that it did not receive any comments on the pilot program. Accordingly, the Commission does not believe that the current filing raises any regulatory issues not raised by the previous filing.

*It is therefore ordered*, pursuant to Section 19(b)(2)<sup>11</sup> of the Act, that the proposed rule change, as amended, (SR-NASD-2001-32) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44352; File No. SR-NYSE-2001-08]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. Amending Its Rules To Provide for the Trading of Exchange-Traded Funds on an Unlisted Trading Privileges Basis

May 25, 2001.

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 25, 2001, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule changes is described in Items I, II, and III below, which Items have been prepared by the Exchange. On May 22, 2001, the NYSE filed Amendment No. 1 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 amend the following NYSE rules and policies to accommodate the trading of certain exchange-traded funds ("ETFs") on an unlisted trading privileges ("UTP") basis: NYSE Rule 98, NYSE Rule 36, paragraph (1) of the Guidelines to NYSE Rule 105, NYSE Rule 111, NYSE Rule 13, NYSE Rules 104.20 and 104.21, and the NYSE's Market-On-Close/Limit-At-The-Close and Pre-Opening Price Indications Policies.

The text of the proposed rule change is available upon request from the Office of the Secretary, the NYSE or 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 place 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

As part of its overall business strategy, the Exchange believes that it appropriate to trade ETFs on the NYSE Floor. In December 2000, the Exchange began trading an ETF on the S&P Global 100 (symbol IOO).<sup>4</sup> The Exchange intends to trade additional ETFs listed by other ETF sponsors, on a UTP basis, that are currently listed and trading on other markets. These ETFs may include the NASDAQ 100 Trust (symbol QQQ), Standard and Poor's Depositary Receipts (symbol SPY) and the Dow Industries DIAMONDS (symbol DIA). It should be noted the UTP ETFs will trade at a post separate from any other type of security trading on the Exchange.

<sup>4</sup> See Securities Exchange Act Release No. 43658 (December 1, 2000), 65 FR 77408 (December 11, 2000).

#### Summary of Proposed Rule and Policy Changes

##### NYSE Rule 98

Exchange Rule 98 provides that affiliates of a specialist organization can receive an exemption from certain rules applicable to specialists (principally impacting proprietary trading and investment banking), providing that they establish a system of information barriers between themselves and the affiliated specialist. One of the conditions for the NYSE Rule 98 exemption is that the specialist organization be capitalized separately and apart from any affiliate. The Exchange is proposing to delete this requirement in the case of a specialist organization that is registered solely in ETFs. The Exchange believes that the question of adequacy of capital can be appropriately addressed by the special allocation committee<sup>5</sup> in allocating the ETF. However, a specialist organization that is registered only in ETF's will remain subject to the minimum capital requirements specified in NYSE Rule 104.20.

##### NYSE Rule 105

Currently, Guideline (1) to NYSE Rule 105 prohibits affiliates of specialist units from acting as a primary market maker in the option on a specialty security. The NYSE proposes to permit an affiliate of a NYSE ETF specialist to act in any market making capacity with respect to options on an ETF as long as NYSE rule 98 information barriers are established.<sup>6</sup> the Exchange believes that, because ETFs are derivatively priced, the conflicts of interest with respect to market making in both the underlying security and its corresponding option are not present. The Exchange also proposes to permit an affiliate of the EFT specialist to act in a market making capacity (but not as a specialist) in the EFT itself on another market center so long as NYSE Rule 98 information barriers are established.

##### NYSE Rules 36.30 and 111

NYSE Rule 36.30 governs the establishment of telephone or electronic communications between the Exchange's trading floor and any other location.<sup>7</sup> The Exchange proposes to

<sup>5</sup> See Securities Exchange Act Release No. 44272 (May 5, 2001).

<sup>6</sup> As discussed above, the NYSE has proposed to eliminate the separate capital requirement with respect to ETF specialists. See also Securities Exchange Act Release No. 44175 (April 11, 2001), 66 FR 19825 (April 17, 2001).

<sup>7</sup> Currently, NYSE Rule 36.30 allows specialists to have telephone lines to the floor of an options or futures exchange for the purpose of entering hedging orders.

<sup>11</sup> *Id.*

<sup>12</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 letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Nancy Sanow, Assistant Director Division of Market Regulation, Commission, dated May 21, 2001 ("Amendment No. 1"). In Amendment No. 1, the NYSE amended the proposed rule text to reflect the correct wording of current NYSE Rule 36,

permit ETF specialists to use communication devices at the Post to enter proprietary orders in the ETF, or in component securities of the ETF and would permit the ETF specialist to obtain market information with respect to ETFs, options, futures, and component securities.

The Exchange proposes to amend NYSE Rule 111 to permit the NYSE ETF specialist to initiate an order at the post in component stocks of the ETF for hedging purposes. The Exchange believes this will put Exchange ETF specialists on an equal footing with market makers in ETFs on other market centers.

#### *NYSE Rule 13*

NYSE Rule 13 currently provides that stop and stop limit orders in an ETF can be elected by a bid (in the case of an order to buy) or an offer (in the case of an order to sell), provided that the specialist obtains the prior approval of a Floor Governor or two Floor Officials. The Exchange proposes to delete this prior approval requirement, because it believes that such a requirement may prove cumbersome and impractical in markets in which bids and offers are changing to reflect the relationship between ETFs and their component securities, and stop orders, which can only be elected by transactions, may receive inferior prices.

#### *NYSE Rules 104.20 and 104.21—Capital Requirement*

NYSE Rules 104.20 and 104.21 are proposed to be amended to provide a capital requirement of \$500,000 per ETF. A specialist registered only in an ETF would be subject to the \$1,000,000 minimum capital requirement of NYSE Rule 104.20. The Exchange believes at the present time that these requirements are reasonable but reserves the right to revisit these requirements in terms of actual experience.

#### *NYSE'S Market-On-Close/Limit-At-The-Close Policy*

The Exchange proposes that orders in ETFs will not be subject to the Exchange's Market-On-Close ("MOC")/Limit-At-The-Close ("LOC") policy concerning order entry limitations, cancellation of orders during a regulatory halt, imbalance publications, and any other limitations or procedures with respect to MOC/LOC procedures. A MOC/LOC order in an ETF would be permitted to be entered at any time without regard to the limitations of the Exchange's MOC/LOC policies. In addition, the closing price of an ETF will not be subject to publication of imbalances under the Exchange's MOC/

LOC policy. Furthermore, ETFs will trade until 4:15 p.m.

Similarly, the Exchange proposes that its policies regarding mandatory dissemination of pre-opening price indications (other than ITS pre-opening notifications) in the case of significant order imbalances and potentially large price dislocation from the prior close will not apply to ETFs. Both the MOC/LOC procedures and the mandatory pre-opening price indications policy are intended to solicit offsetting contra side interest to minimize price dislocation. This rationale does not apply in the case of ETFs, which will be priced in relation to the values of the underlying component securities, regardless of the extent of an order imbalance.

The Exchange will inform its members and member organizations of these proposed changes to its policies by publication of an Information Memo.

#### *2. Statutory Basis*

The Exchange believes the proposed rule change, as amended, is consistent with Section 6(b) of the Act<sup>8</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>9</sup> in particular, because it is 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.

More specifically, the Exchange believes that trading ETFs on a UTP basis will provide investors with increased flexibility in satisfying their investment needs because they will be able to purchase and sell a security that replicates the performance of a broad portfolio of stocks at negotiated prices throughout the business day.

#### *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 that is not necessary or appropriate in the furtherance of the purposes of the Act.

#### *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 written comments on the proposed rule change.

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

### **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. 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 such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-NYSE-2001-08 and should be submitted June 20, 2001.

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

**Margaret H. McFarland,**  
Deputy Secretary.

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<sup>10</sup> 17 CFR 200.30-2(a)(12).