

|        |    |                   |                 |        |                 |                   |
|--------|----|-------------------|-----------------|--------|-----------------|-------------------|
| May-04 | 20 | 2,253,135,847,669 | 112,656,792,383 | -0.019 |                 |                   |
| Jun-04 | 22 | 2,106,449,803,404 | 95,747,718,337  | -0.163 |                 |                   |
| Jul-04 | 21 | 2,203,895,014,681 | 104,947,381,651 | 0.092  |                 |                   |
| Aug-04 | 22 | 2,027,596,448,411 | 92,163,474,928  | -0.130 |                 |                   |
| Sep-04 | 21 | 1,987,599,548,361 | 94,647,597,541  | 0.027  |                 |                   |
| Oct-04 | 21 | 2,407,510,364,975 | 114,643,350,713 | 0.192  |                 |                   |
| Nov-04 | 21 | 2,569,602,996,944 | 122,362,047,474 | 0.065  |                 |                   |
| Dec-04 | 22 | 2,665,399,229,376 | 121,154,510,426 | -0.010 |                 |                   |
| Jan-05 | 20 | 2,568,659,427,333 | 128,432,971,367 | 0.058  |                 |                   |
| Feb-05 | 19 |                   |                 |        | 131,460,417,421 | 2,497,747,931,005 |
| Mar-05 | 22 |                   |                 |        | 134,559,227,001 | 2,960,302,994,030 |
| Apr-05 | 21 |                   |                 |        | 137,731,082,301 | 2,892,352,728,325 |
| May-05 | 21 |                   |                 |        | 140,977,705,168 | 2,960,531,808,532 |
| Jun-05 | 22 |                   |                 |        | 144,300,858,037 | 3,174,618,876,824 |
| Jul-05 | 20 |                   |                 |        | 147,702,344,889 | 2,954,046,897,770 |
| Aug-05 | 23 |                   |                 |        | 151,184,012,225 | 3,477,232,281,168 |
| Sep-05 | 21 |                   |                 |        | 154,747,750,075 | 3,249,702,751,583 |

[FR Doc. 05-4214 Filed 3-3-05; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51258; File No. SR-Amex-2005-001]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Relating to the Adoption of Generic Listing Standards for Index-Linked Securities

February 25, 2005.

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 January 6, 2005, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. On February 25, 2005, Amex amended its proposal.<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 add section 107D to the *Amex Company Guide* for the purpose of adopting generic listing standards pursuant to Rule 19b-4(e) of

the Act<sup>4</sup> in connection with index-linked securities ("Index Securities").

The text of the proposed rule change, as amended, is set forth below.

Proposed new language is in *italics*; proposed deletions are in brackets.

\* \* \* \* \*

#### Amex Company Guide

##### Section 107 Other Securities

The Exchange will consider listing any security not otherwise covered by the criteria of sections 101 through 106, provided the issue is otherwise suited for auction market trading. Such issues will be evaluated for listing against the following criteria:

A-C. No Change

D. [Reserved] *Index-Linked Securities*

*Index-linked securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying index or indexes. Such securities may or may not provide for the repayment of the original principal investment amount. The Exchange may submit a rule filing pursuant to section 19(b)(2) of the Securities Exchange Act of 1934 to permit the listing and trading of index-linked securities that do not otherwise meet the standards set forth below in paragraphs (a) through (k). The Exchange will consider for listing and trading pursuant to Rule 19b-4(e) under the Securities Exchange Act of 1934, index-linked securities provided:*

*(a) Both the issue and the issuer of such security meet the criteria set forth above in "General Criteria," except that the minimum public distribution shall be 1,000,000 units with a minimum of 400 public holders, except, if traded in thousand dollar denominations, then no minimum number of holders.*

*(b) The issue has a minimum term of one (1) year but not greater than ten (10) years.*

*(c) The issue must be the non-convertible debt of the issuer.*

*(d) The payment at maturity may or may not provide for a multiple of the positive performance of an underlying index or indexes; however, in no event will payment at maturity be based on a multiple of the negative performance of an underlying index or indexes.*

*(e) The issuer will be expected to have a minimum tangible net worth in excess of \$250,000,000, and to otherwise substantially exceed the earnings requirements set forth in section 101(a) of the Company Guide. In the alternative, the issuer will be expected: (i) to have a minimum tangible net worth of \$150,000,000 and to otherwise substantially exceed the earnings requirement set forth in section 101(a) of the Company Guide, and (ii) not to have issued securities where the original issue price of all the issuer's other index-linked note offerings (combined with index-linked note offerings of the issuer's affiliates) listed on a national securities exchange or traded through the facilities of Nasdaq exceeds 25% of the issuer's net worth.*

*(f) The issuer is in compliance with Rule 10A-3 under the Securities Exchange Act of 1934.*

*(g) Initial Listing Criteria—Each underlying index is required to have at least ten (10) component securities. In addition, the index or indexes to which the security is linked shall either (1) have been reviewed and approved for the trading of options or other derivatives by the Commission under section 19(b)(2) of the 1934 Act and rules thereunder and the conditions set forth in the Commission's approval order, including comprehensive surveillance sharing agreements for non-U.S. stocks, continue to be satisfied, or (2) the index or indexes meet the following criteria:*

*(i) Each component security has a minimum market value of at least \$75*

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

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

<sup>3</sup> See Amendment No. 1, dated February 25, 2005 ("Amendment No. 1"). In Amendment No. 1, the Exchange revised the proposed rule text and corresponding description. Amendment No. 1 replaced Amex's original filing in its entirety.

<sup>4</sup> 17 CFR 240.19b-4(e).

million, except that for each of the lowest weighted component securities in the index that in the aggregate account for no more than 10% of the weight of the index, the market value can be at least \$50 million;

(ii) Each component security shall have trading volume in each of the last six months of not less than 1,000,000 shares, except that for each of the lowest weighted component securities in the index that in the aggregate account for no more than 10% of the weight of the index, the trading volume shall be at least 500,000 shares in each of the last six months;

(iii) In the case of a capitalization weighted index, the lesser of the five highest weighted component securities in the index or the highest weighted component securities in the index that in the aggregate represent at least 30% of the total number of component securities in the index, each have an average monthly trading volume of at least 2,000,000 shares over the previous six months;

(iv) No underlying component security will represent more than 25% of the weight of the index, and the five highest weighted component securities in the index do not in the aggregate account for more than 50% of the weight of the index (60% for an index consisting of fewer than 25 component securities);

(v) 90% of the index's numerical value and at least 80% of the total number of component securities will meet the then current criteria for standardized option trading set forth in Exchange Rule 915;

(vi) Each component security shall be a 1934 Act reporting company which is listed on a national securities exchange or is traded through the facilities of a national securities system and is subject to last sale reporting; and

(vii) Foreign country securities or American Depository Receipts ("ADRs") that are not subject to comprehensive surveillance agreements do not in the aggregate represent more than 20% of the weight of the index.

(h) Continued Listing Criteria—(1) The Exchange will commence delisting or removal proceedings (unless the Commission has approved the continued trading of the subject index-linked security), if any of the standards set forth above in paragraph (g) are not continuously maintained, except that:

(i) The criteria that no single component represent more than 25% of the weight of the index and the five highest weighted components in the index can not represent more than 50% (or 60% for indexes with less than 25 components) of the weight of the Index,

need only be satisfied for capitalization weighted and price weighted indexes as of the first day of January and July in each year;

(ii) The total number of components in the index may not increase or decrease by more than 33⅓ percent from the number of components in the index at the time of its initial listing, and in no event may be less than ten (10) components;

(iii) The trading volume of each component security in the index must be at least 500,000 shares for each of the last six months, except that for each of the lowest weighted components in the index that in the aggregate account for no more than 10% of the weight of the index, trading volume must be at least 400,000 shares for each of the last six months; and

(iv) In a capitalization-weighted index, the lesser of the five highest weighted component securities in the index or the highest weighted component securities in the index that in the aggregate represent at least 30% of the total number of stocks in the index have had an average monthly trading volume of at least 1,000,000 shares over the previous six months.

(2) In connection with an index-linked security that is listed pursuant to paragraph (g)(1) above, the Exchange will commence delisting or removal proceedings (unless the Commission has approved the continued trading of the subject index-linked security) if an underlying index or indexes fails to satisfy the maintenance standards or conditions for such index or indexes as set forth by the Commission in its order under section 19(b)(2) of the 1934 Act approving the index or indexes for the trading of options or other derivatives.

(3) The Exchange will also commence delisting or removal proceedings (unless the Commission has approved the continued trading of the subject index-linked security), under any of the following circumstances:

(i) If the aggregate market value or the principal amount of the securities publicly held is less than \$400,000;

(ii) If the value of the index or composite value of the indexes is no longer calculated or widely disseminated on at least a 15-second basis; or

(iii) If such other event shall occur or condition exists which in the opinion of the Exchange makes further dealings on the Exchange inadvisable.

(i) Index Methodology and Calculation—(i) Each index will be calculated based on either a capitalization, modified capitalization, price, equal-dollar or modified equal-dollar weighting methodology. (ii)

Indexes based upon the equal-dollar or modified equal-dollar weighting method will be rebalanced at least quarterly. (iii) If the index is maintained by a broker-dealer, the broker-dealer shall erect a "firewall" around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer. (iv) The current value of an index will be widely disseminated at least every 15 seconds. (v) If the value of an index-linked security is based on more than one (1) index, then the composite value of such indexes must be widely disseminated at least every 15 seconds.

(i) Surveillance Procedures. The Exchange will implement written surveillance procedures for index-linked securities, including adequate comprehensive surveillance sharing agreements for non-U.S. securities, as applicable.

(k) Index-linked securities will be treated as equity instruments.

E. No Change

\* \* \* \* \*

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Amex 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 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 the Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

The Exchange proposes to add new Section 107D to the Amex *Company Guide* to provide generic listing standards to permit the listing and trading of Index Securities pursuant to Rule 19b-4(e) under the Act.<sup>5</sup> Rule 19b-4(e) provides that the listing and trading of a new derivative securities product by a self-regulatory organization shall not be deemed a proposed rule change, pursuant to paragraph (c)(1) of Rule 19b-4,<sup>6</sup> if the Commission has approved, pursuant to section 19(b) of the Act,<sup>7</sup> the self-regulatory

<sup>5</sup> 17 CFR 240.19b-4(e).

<sup>6</sup> 17 CFR 240.19b-4(c)(1).

<sup>7</sup> 15 U.S.C. 78s(b).

organization's trading rules, procedures and listing standards for the product class that would include the new derivatives securities product, and the self-regulatory organization has a surveillance program for the product class.<sup>8</sup>

The Commission has previously approved the listing and trading of several Index Securities by the Exchange based on a variety of debt structures and market indexes.<sup>9</sup> In approving these securities for Exchange trading, the Commission thoroughly considered the structures, their usefulness to investors and to the markets, and Amex rules that govern their trading. The Exchange believes that adopting generic listing standards for these securities and applying Rule 19b-4(e) should fulfill the intended objective of that Rule by allowing those Index Securities that satisfy the proposed generic listing standards to commence trading, without the need for the public comment period and Commission approval.<sup>10</sup> This has the potential to reduce the time frame for bringing Index Securities to market and thereby reducing the burdens on issuers and other market participants. The failure of a particular index to comply with the proposed generic listing standards under Rule 19b-4(e), however, would not preclude the Exchange from submitting a separate filing pursuant to section 19(b)(2), requesting Commission approval to list and trade a particular index-linked product.

Under section 107A of the Amex *Company Guide*, the Exchange may approve for listing and trading securities that cannot be readily categorized under the listing criteria for common and preferred securities, bonds, debentures, or warrants.<sup>11</sup> The Amex proposes in this rule filing to adopt generic listing standard for Index Securities under new Section 107D.<sup>12</sup> Index Securities are

designed for investors who desire to participate in a specific market segment or combination of market segments through index products. Each Index Security is intended to provide investors with exposure to an identifiable underlying market index. Index Securities may or may not make interest payments to the holder during their term. Despite the fact that Index Securities are linked to an underlying index, each will trade as a single, exchange-listed security.

The Exchange proposes that generic listing standards appropriate for Index Securities provide that each index or combination of indexes (the "Underlying Index" or "Underlying Indexes") meet the criteria set forth in proposed section 107D(g) or be an index previously approved for the trading of options or other derivative securities by the Commission under section 19(b)(2) of the Act and rules thereunder. In all cases, an Underlying Index is required to have a minimum of ten (10) component securities. The specific criteria for each underlying component security in proposed section 107D(g) is set forth below in the section entitled "Eligibility Standards for Underlying Component Securities." In general, the criteria for the underlying component securities of an Underlying Index is substantially similar to the requirements for index options set forth in Commentary .02 to Amex Rule 901C.

*Description of Index-Linked Securities.* Index Securities are the non-convertible debt of an issuer that have a term of at least one (1) year but not greater than ten (10) years. The issuer of an Index Security may or may not provide for periodic interest payments to holders based on dividends or other cash distributions paid on the securities comprising the Underlying Index or Indexes during a prescribed period.<sup>13</sup> The holder of an Index Security may or may not be fully exposed to the appreciation and/or depreciation of the underlying component securities. For example, an Index Security may be subject to a "cap" on the maximum principal amount to be repaid to holders or a "floor" on the minimum principal amount to be repaid to holders at maturity. A typical Index Security listed and traded on the Exchange provides for a payment amount in a multiple greater than one (1) times the positive index

return or performance, subject to a maximum gain or cap.<sup>14</sup>

The proposed generic listing standards will not be applicable to Index Securities where the payment at maturity may be based on a multiple of negative performance of an underlying index or indexes. An Index Security may not provide for a minimum guaranteed amount to be repaid, *i.e.*, no "principal protection." Other Index Securities provide for participation in the positive return or performance of an index with the added protection of receiving a payment guarantee of the issuance price or "principal protection." Further iterations may also provide "contingent" protection of the principal amount, whereby the principal protection may disappear if the Underlying Index at any point in time during the life of such security reaches a certain pre-determined level.<sup>15</sup> The Exchange believes that the flexibility to list a variety of Index Securities will offer investors the opportunity to more precisely focus their specific investment strategies.

The original public offering price of Index Securities may vary with the most

<sup>14</sup> See, *e.g.*, Securities Exchange Act Release Nos. 50812 (December 7, 2004), 69 FR 74544 (December 14, 2004) (approving the listing and trading of Wachovia Notes linked to the performance of the Nasdaq-100); 50278 (August 26, 2004), 69 FR 53751 (September 2, 2004) (approving the listing and trading of Citigroup Notes linked to the performance of the S&P 500); 50019 (July 14, 2004), 69 FR 43635 (July 21, 2004) (approving the listing and trading of Morgan Stanley PLUS Notes linked to the performance of the S&P 500); 50016 (July 14, 2004), 69 FR 43639 (July 21, 2004) (approving the listing and trading of Morgan Stanley PLUS Notes linked to the performance of the Nikkei 225 Index); 48152 (July 10, 2003), 68 FR 42435 (July 17 2003) (approving the listing and trading of a UBS Partial Protection Note linked to the S&P 500); 47983 (June 4, 2003), 68 FR 35032 (June 11, 2003) (approving the listing and trading of a CSFB Accelerated Return Notes linked to S&P 500); 47911 (May 22, 2003), 68 FR 32558 (May 30, 2003) (approving the listing and trading of notes (Wachovia TEES) linked to the S&P 500); 46883 (November 21, 2002), 67 FR 71216 (November 29, 2002) (approving the listing and trading of Market Recovery Notes on the DJIA) and 45966 (May 20, 2002), 67 FR 36942 (May 28, 2002) (approving the listing and trading of notes linked to the performance of the Nasdaq 100).

<sup>15</sup> See, *e.g.*, Securities Exchange Act Release Nos. 50850 (December 14, 2004), 69 FR 76506 (December 21, 2004) (approving the listing and trading of Wachovia Trigger Capitals linked to the performance of the S&P 500); 50414 (September 20, 2004), 69 FR 58001 (September 28, 2004) (approving the listing and Trading of Lehman Contingent Protection Notes on the S&P 500); 49453 (March 19, 2004), 69 FR 15913 (March 26, 2004) (approving the listing and Trading of Contingent Principal Protection Notes linked to the performance of the DJIA); 48486 (September 11, 2003), 68 FR 54758 (September 18, 2003) (approving the listing and trading of CSFB Contingent Principal Protection Notes linked to the performance of the S&P 500); and 48152 (July 10, 2003), 68 FR 42435 (July 17, 2003) (approving the listing and trading of a UBS Partial Protection Note linked to the performance of the S&P 500).

<sup>8</sup> See Securities Exchange Act Release No. 40761 (December 8, 1998), 63 FR 70952 (December 22, 1998) (the "19b-4(e) Order").

<sup>9</sup> See *infra* notes 14, 15 and 19.

<sup>10</sup> The Exchange has previously received Commission approval to list and trade certain index options, exchange-traded fund shares and trust issued receipts pursuant to Rule 19b-4(e). See Securities Exchange Act Release Nos. 41091 (February 23, 1999), 64 FR 10515 (March 4, 1999) (Index Options); 42787 (May 15, 2000), 65 FR 33598 (May 24, 2000) (ETFs); and 43396 (September 29, 2000), 65 FR 60230 (October 10, 2000) (TIRs).

<sup>11</sup> See Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8624 (March 8, 1990) (order approving File No. SR-Amex-89-29).

<sup>12</sup> See Securities Exchange Act Release No. 32343 (May 20, 1993), 58 FR 30833 (May 27, 1993) (first Commission order approving equity linked notes ("Original ELN Order")). See also Securities Exchange Act Release Nos. 42582 (March 27, 2001),

65 FR 17685 (April 4, 2000) (permitting ELN on up to 20 securities) and 47055 (December 19, 2002), 67 FR 79669 (December 30, 2002) (increasing allowable ELN basket to 30 securities).

<sup>13</sup> Interest payments may be based on a fixed or floating rate.

common offering price expected to be \$10 or \$1,000 per unit. As discussed above, Index Securities entitle the owner at maturity to receive a cash amount based upon the performance of a particular market index or combination of indexes. The structure of an Index Security may provide "principal protection" or provide that the principal amount is fully exposed to the performance of a market index. The Index Securities do not give the holder any right to receive a portfolio security, dividend payments, or any other ownership right or interest in the portfolio or index of securities comprising the Underlying Index. The current value of an Underlying Index or composite value of the Underlying Indexes will be widely disseminated at least every 15 seconds during the trading day.

Index Securities may or may not be structured<sup>16</sup> with accelerated returns, upside or downside, based on the performance of the Underlying Index. For example, an Index Security may provide for an accelerated return of 3-to-1 if the Underlying Index achieves a positive return at maturity. The Exchange submits that Index Securities are "hybrid" securities whose rates of return are largely the result of the performance of an Underlying Index or Indexes comprised of component securities. In connection with the listing and trading of Index Securities, the Exchange will issue an Information Circular to members detailing the special risks and characteristics of the securities. Accordingly, the particular structure and corresponding risk of any Index Security traded on the Exchange will be highlighted and disclosed.<sup>17</sup>

Index Securities are expected to trade at a lower cost than the cost of trading

each of the underlying component securities separately (because of reduced commission and custody costs) and are also expected to give investors the ability to maintain index exposure without the corresponding management or administrative fees and ongoing expenses. The initial offering price for an Index Security will be established on the date the security is priced for sale to the public. The final value of an Index Security will be determined on the valuation date at or near maturity consistent with the mechanics detailed in the prospectus for such Index Security.

*Eligibility Standards for Issuers.* The following standards are proposed for each issuer of Index Securities:

(A) *Assets/Equity*—The issuer shall have assets in excess of \$100 million and stockholders' equity of at least \$10 million. In the case of an issuer that is unable to satisfy the earnings criteria set forth in Section 101 of the Amex *Company Guide*, the Exchange generally will require the issuer to have the following: (i) assets in excess of \$200 million and stockholders' equity of at least \$10 million; or (ii) assets in excess of \$100 million and stockholders' equity of at least \$20 million.

(B) *Distribution*—Minimum public distribution of 1,000,000 notes with a minimum of 400 public shareholders, except, if traded in thousand dollar denominations, then no minimum number of holders.

(C) *Principal Amount/Aggregate Market Value*—Not less than \$4 million.

(D) *Term*—The issue has a minimum of one (1) year but not greater than ten (10) years.

(E) *Tangible Net Worth*—The issuer will be expected to have a minimum tangible net worth<sup>18</sup> in excess of \$250,000,000 and to otherwise substantially exceed the earnings requirements set forth in section 101 of the Amex *Company Guide*. In the alternative, the issuer will be expected: (i) to have a minimum tangible net worth of \$150,000,000 and to otherwise substantially exceed the earnings requirement set forth in section 101 of the Amex *Company Guide*, and (ii) not to have issued securities where the original issue price of all the issuer's other index-linked note offerings (combined with index-linked note offerings of the issuer's affiliates) listed on a national securities exchange or

traded through the facilities of Nasdaq exceeds 25% of the issuer's net worth.

*Description of Underlying Indexes.* Each Underlying Index will either be (i) an index meeting the specific criteria set forth below in proposed Amex *Company Guide* section 107D(g) that is similar to current Amex Rule Commentary .02 to Rule 901C; or (ii) an index approved for the trading of options or other derivatives securities by the Commission under section 19(b)(2) of the Act and rules thereunder. However, in all cases, an Underlying Index must contain at least ten (10) component securities.

Examples of Underlying Indexes intended to be covered under the proposed generic listing standards include the Standard & Poor's 500 Index ("S&P 500"), Nasdaq-100 Index ("Nasdaq 100"), the Dow Jones Industrial Average ("DJIA"), Nikkei 225 Index ("Nikkei 225"), the Dow Jones STOXX 50 Index ("DJ STOXX 50"), the Global Titans 50 Index ("Global Titans 50"), Amex Biotechnology Index ("Amex Biotech"), and certain other indexes that represent various industry and/or market segments.<sup>19</sup> The Exchange will require that all changes to an Underlying Index, including the deletion and addition of underlying component securities, index rebalancings and changes to the calculation of the index, will be made in accordance with the proposed generic criteria or the Commission's section 19(b)(2) order, which approved the similar derivative product containing the Underlying Index.

In order to satisfy the proposed generic listing standards, the Underlying Index will be calculated based on either a market capitalization,<sup>20</sup> modified market

<sup>16</sup> See, e.g., Securities Exchange Act Release Nos. 48280 (August 1, 2003), 68 FR 47121 (August 7, 2003). As stated, the proposed generic listing standards will not be applicable to Index Securities that are structured with "downside" accelerated returns.

<sup>17</sup> The Exchange notes that members conducting a public securities business are subject to the rules and regulations of the NASD, including NASD Rule 2310(a) and (b). Accordingly, NASD Notice to Members 03-71 regarding non-conventional investments or "NCIs" applies to Exchange members recommending/selling index-linked securities to public customers. This Notice specifically reminds members in connection with NCIs (such as index-linked securities) of their obligations to: (1) Conduct adequate due diligence to understand the features of the product; (2) perform a reasonable-basis suitability analysis; (3) perform customer-specific suitability analysis in connection with any recommended transactions; (4) provide a balanced disclosure of both the risks and rewards associated with the particular product, especially when selling to retail investors; (5) implement appropriate internal controls; and (6) train registered persons regarding the features, risk and suitability of these products.

<sup>18</sup> "Tangible net worth" is defined as total assets less intangible assets and total liabilities. Intangibles include non-material benefits such as goodwill, patents, copyrights and trademarks.

<sup>19</sup> See *supra* notes 14, 15. See also Securities Exchange Act Release Nos. 49548 (April 9, 2004), 69 FR 20089 (April 15, 2004) (approving the listing and trading of notes linked to the performance of the Select Utility Index); 48151 (July 10, 2003), 68 FR 42438 (July 17, 2003) (approving the listing and trading of notes linked to the performance of the Amex Biotechnology Index); 46882 (November 21, 2002), 67 FR 71219 (November 29, 2002) (approving the listing and trading of notes linked to the performance of the Select Fifty Index); 45305 (January 17, 2002), 67 FR 3753 (January 25, 2002) (approving the listing and trading of notes linked to the performance of the Biotech-Pharmaceutical Index); 44342 (May 23, 2001), 66 FR 29613 (May 31, 2001) (Select Ten Index); 44437 (June 18, 2001), 66 FR 33585 (June 22, 2001) (approving the listing and trading of notes linked to the performance of the Industrial 15 Index); and 46021 (June 3, 2002), 67 FR 39753 (June 10, 2002) (approving the listing and trading of notes linked to the performance of the Select European 50 Index).

<sup>20</sup> A "market capitalization" index is the most common type of stock index. The components are weighted according to the total market value of the outstanding shares, i.e., share price times the

capitalization,<sup>21</sup> price,<sup>22</sup> equal-dollar<sup>23</sup> or modified equal-dollar<sup>24</sup> weighting methodology. If a broker-dealer is responsible for maintaining (or has a role in maintaining) the Underlying Index, such broker-dealer is required to erect and maintain a "firewall," in a form satisfactory to the Exchange, to prevent the flow of information regarding the Underlying Index from the index production personnel to the sales and trading personnel.<sup>25</sup> In addition, an Underlying Index that is maintained by a broker-dealer is also required to be calculated by an independent third party who is not a broker-dealer.

**Eligibility Standards for Underlying Securities.** Index Securities will be subject to the criteria in proposed Amex *Company Guide* section 107D(g) and (h) for initial and continued listing. For an Underlying Index to be appropriate for the initial listing of an Index Security,

number of shares outstanding. This type of index will fluctuate in line with the price moves of the component stocks.

<sup>21</sup> A "modified market capitalization" index is similar to the market capitalization index, except that an adjustment to the weights of one or more of the components occurs. This is typically done to avoid having an index that has one or a few stocks representing a disproportionate amount of the index value.

<sup>22</sup> A "price weighted" index is an index in which the component stocks are weighted by their share price. The most common example is the DJIA.

<sup>23</sup> An "equal dollar weighted" index is an index structured so that share quantities for each of the component stocks in the index are determined as if one were buying an equal dollar amount of each stock in the index. Equal dollar weighted indexes are usually rebalanced to equal weightings either quarterly, semi-annually, or annually.

<sup>24</sup> A "modified equal-dollar weighted" index is designed to be a fair measurement of the particular industry or sector represented by the index, without assigning an excessive weight to one or more index components that have a large market capitalization relative to the other index components. In this type of index, each component is assigned a weight that takes into account the relative market capitalization of the securities comprising the index. The index is subsequently rebalanced to maintain these pre-established weighting levels. Like equal-dollar weighted indexes, the value of a modified equal-dollar weighted index will equal the current combined market value of the assigned number of shares of each of the underlying components divided by the appropriate index divisor. A modified equal-dollar weighted index will typically be re-balanced quarterly.

<sup>25</sup> For certain indexes, an index provider, such as Dow Jones, may select the components and calculate the index, but overseas broker-dealer affiliates of U.S. registered broker-dealers may sit on an "advisory" committee that recommends component selections to the index provider. In such case, the Exchange should ensure that appropriate information barriers and insider trading policies exist for this advisory committee. See Securities Exchange Act Release No. 50501 (October 7, 2004), 69 FR 61533 (October 19, 2004) (approving NASD 2004-138, pertaining to index linked notes on the Dow Jones Euro Stoxx 50 Index). Telephone conversation between Jeffrey Burns, Associate General Counsel, Amex, and Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission, on February 23, 2005.

such Index must either be approved for the trading of options or other derivative securities by the Commission under section 19(b)(2) of the Act and rules thereunder or meet the following requirements:

- A minimum market value of at least \$75 million, except that for each of the lowest weighted Underlying Securities in the index that in the aggregate account for no more than 10% of the weight of the index, the market value can be at least \$50 million;

- Trading volume in each of the last six months of not less than 1,000,000 shares, except that for each of the lowest weighted Underlying Securities in the index that in the aggregate account for no more than 10% of the weight of the index, the trading volume shall be at least 500,000 shares in each of the last six months;

- In the case of a capitalization-weighted index, the lesser of the five highest weight Underlying Securities in the index or the highest weighted Underlying Securities in the index that in the aggregate represent at least 30% of the total number of Underlying Securities in the index, each have an average monthly trading volume of at least 2,000,000 shares over the previous six months;

- No component security will represent more than 25% of the weight of the index, and the five highest weighted component securities in the index will not in the aggregate account for more than 50% of the weight of the index (60% for an index consisting of fewer than 25 Underlying Securities);

- 90% of the index's numerical index value and at least 80% of the total number of component securities will meet the then current criteria for standardized options trading set forth in Exchange Rule 915;

- Each component security shall be a 1934 Act reporting company which is listed on a national securities exchange or is traded through the facilities of a national securities system and is subject to last sale reporting; and

- Foreign country securities or American Depositary Receipts ("ADRs") that are not subject to comprehensive surveillance agreements do not in the aggregate represent more than 20% of the weight of the index.

As described above in the section entitled "Description of Underlying Indexes," all Underlying Indexes are required to have at least ten (10) component securities.

The proposed continued listing criteria set forth in proposed Amex *Company Guide* section 107D(h)(1) regarding the underlying components of an Underlying Index provides that the

Exchange will commence delisting or removal proceedings of an Index Security (unless the Commission has approved the continued trading of the Index Security) if any of the standards set forth in the initial eligibility criteria of proposed Amex *Company Guide* section 107D(g) are not continuously maintained, except that:

- The criteria that no single component represent more than 25% of the weight of the index and the five highest weighted components in the index can not represent more than 50% (or 60% for indexes with less than 25 components) of the weight of the Index, need only be satisfied for capitalization weighted and price weighted indexes as of the first day of January and July in each year;

- The total number of components in the index may not increase or decrease by more than 33⅓% from the number of components in the index at the time of its initial listing, and in no event may be less than ten (10) components;

- The trading volume of each component security in the index must be at least 500,000 shares for each of the last six months, except that for each of the lowest weighted components in the index that in the aggregate account for no more than 10% of the weight of the index, trading volume must be at least 400,000 shares for each of the last six months; and

- In a capitalization-weighted index, the lesser of the five highest weighted component securities in the index or the highest weighted component securities in the index that in the aggregate represent at least 30% of the total number of stocks in the index have had an average monthly trading volume of at least 1,000,000 shares over the previous six months.

In connection with an Index Security that is listed pursuant to proposed Amex *Company Guide* section 107D(g)(1), the Exchange will commence delisting or removal proceedings (unless the Commission has approved the continued trading of the Index Security) if an underlying index or indexes fails to satisfy the maintenance standards or conditions for such index or indexes as set forth by the Commission in its order under section 19(b)(2) of the Act approving the index or indexes for the trading of options or other derivatives.

As set forth in proposed Amex *Company Guide* section 107D(h)(3), the Exchange will also commence delisting or removal proceedings of an Index Security (unless the Commission has approved the continued trading of the Index Security), under any of the following circumstances:

- If the aggregate market value or the principal amount of the securities publicly held is less than \$400,000;
- If the value of the Underlying Index or composite value of the Underlying Indexes is no longer calculated and widely disseminated on at least a 15-second basis; or
- If such other event shall occur or condition exists which is the opinion of the Exchange makes further dealings on the Exchange inadvisable.

The Amex represents that Index Securities listed and traded on the Exchange will be required to be in compliance with Rule 10A-3 under the Act.<sup>26</sup>

*Exchange Rules Applicable to Index-Linked Securities.* Index Securities will be treated as equity instruments and will be subject to all Exchange rules governing the trading of equity securities, including, among others, rules governing priority, parity and precedence of orders, market volatility related trading halt provisions pursuant to Amex Rule 117, and responsibilities of the specialist. Exchange equity margin rules and the regular equity trading hours of 9:30 a.m. to 4 p.m. will apply to transactions in Index Securities.

In addition, the Exchange will evaluate the nature and complexity of each Index Security and, if appropriate, distribute a circular to the membership, prior to the commencement of trading, providing guidance with respect to, among other things, member firm compliance responsibilities when handling transactions in Index Securities and highlighting the special risks and characteristics. Specifically, the circular, among other things, will discuss and emphasize the structure and operation of the Index Security, the requirement that members and member firms deliver a prospectus to investors purchasing an Index Security prior to or concurrently with the confirmation of a transaction, applicable Amex rules, dissemination information regarding the Underlying Index, trading information and applicable suitability rules.

In particular, the circular will set forth the Exchange's suitability rule that requires member and member organizations and employees thereof recommending a transaction in Index Securities: (1) To determine that such transaction is suitable for the customer (Amex Rule 411) and (2) to have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of such transaction.

The Exchange will closely monitor activity in Index Securities to identify and deter any potential improper trading activity in Index Securities. The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of Index Securities. Specifically, the Amex will rely on its existing surveillance procedures governing equities, options and exchange-traded funds, which have been deemed adequate under the Act. The Exchange has developed procedures to closely monitor activity in the Index Security and related Underlying Securities to identify and deter potential improper trading activity. Proposed Amex *Company Guide* section 107D(j) provides that the Exchange will implement written surveillance procedures for Index Securities.

The Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees. As detailed above in the description of the generic standards, if the issuer or a broker-dealer is responsible for maintaining (or has a role in maintaining) the Underlying Index, such issuer or broker-dealer is required to erect and maintain a "firewall" in a form satisfactory to the Exchange, in order to prevent the flow of information regarding the Underlying Index from the index production personnel to sales and trading personnel. In addition, the Exchange will require that calculation of Underlying Indexes be performed by an independent third party who is not a broker-dealer.

The Exchange submits that several Index Securities based on both broad-based and market segment indexes are currently trading on the Exchange.<sup>27</sup> Each of these products separately received approval for trading by the Commission. Amex believes that the

<sup>27</sup> See, e.g., Securities Exchange Act Release Nos. 48151 (July 10, 2003), 68 FR 42438 (July 17, 2003) (approving the listing and trading of notes linked to the Amex Biotech Index); 47983 (June 4, 2003), 68 FR 35032 (June 11, 2003) (approving the listing and trading of a CSFB Note linked to S&P 500); 47911 (May 22, 2003), 68 FR 32558 (May 30, 2003) (approving the listing and trading of notes linked to the S&P 500); 46021 (June 3, 2002), 67 FR 39753 (June 10, 2002) (approving the listing and trading of notes linked to the Select European 50 Index); 45639 (March 25, 2002), 67 FR 15258 (March 29, 2002) (approving the listing and trading of notes linked to the Oil Natural Gas Index); 45305 (January 17, 2002), 67 FR 3753 (January 25, 2002) (approving the listing and trading of notes linked to the Biotech-Pharmaceutical Index); 44437 (June 18, 2001), 66 FR 33585 (June 22, 2001) (approving the listing and trading of notes linked to the Industrial 15 Index); and 44342 (May 23, 2001), 66 FR 29613 (May 31, 2001) (approving the listing and trading of notes linked to the Select Ten Index). See also supra notes 13, 14 and 18.

proposed generic listing standards for Index Securities will serve to streamline and increase the efficiency of listing index-linked products on the Exchange.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act<sup>28</sup> in general and furthers the objective of section 6(b)(5)<sup>29</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principal 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 that is not necessary or appropriate in 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 did not solicit or receive any written comments 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. Comments may be submitted by any of the following methods:

<sup>28</sup> 15 U.S.C. 78f(b).

<sup>29</sup> 15 U.S.C. 78f(b)(5).

<sup>26</sup> See Rule 10A-3(c)(7), 17 CFR 240.10A-3(c)(7).



*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-Amex-2005-001 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-Amex-2005-001. 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 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. 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-Amex-2005-001 and should be submitted on or before March 25, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>30</sup>

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

[FR Doc. E5-875 Filed 3-3-05; 8:45 am]

**BILLING CODE 8010-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-51269; File No. SR-Amex-2005-025]

**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC Relating to Fees for Transactions in Options on the Nasdaq 100 Index (NDX) and Mini-Nasdaq 100 Index (MNX)**

February 28, 2005.

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 February 23, 2005, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to modify its Options Fee Schedule by increasing the per-contract license fee in connection with transactions by specialists and registered options traders ("ROT's") in options on the Nasdaq 100 Index ("NDX") and the reduced-value Nasdaq 100 Index ("MNX"). The text of the proposed rule change is available on Amex's Web site (<http://www.amex.com>), at the Amex's principal office, and at the Commission's Public Reference Room.

**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 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 the Statutory Basis for, the Proposed Rule Change*

**1. Purpose**

The Exchange has entered into numerous agreements with index providers for the purpose of trading index options. The requirement to pay an index license fee to such third parties is a condition to the listing and trading of these index options. In many cases, the Exchange is required to pay a significant licensing fee to issuers or index owners that may not be reimbursed. In an effort to recoup the costs associated with index licenses, the Exchange has previously established a per-contract licensing fee for specialists and ROTs that is collected on every transaction in designated products in which a specialist or ROT is a party. The licensing fees currently imposed on specialists and ROTs are set forth in the Exchange's Options Fee Schedule.

The current license fee charged to specialists and ROTs trading NDX and MNX options is \$0.10 per contract side. As a result of a recent change to the licensing agreement for NDX and MNX, the Exchange is now being charged a higher license fee. Accordingly, the Exchange now proposes to charge \$0.15 per contract side for NDX and MNX options.

The purpose of the proposed fee is for the Exchange to recoup its costs in connection with the index license fee for the trading of NDX and MNX options. The proposed license fee will be collected on every transaction in NDX or MNX options in which a specialist or ROT is a party. Accordingly, the Exchange believes that requiring the payment of a per-contract licensing fee by those specialists and ROTs that are the beneficiaries of the Exchange's index license agreements is justified and is consistent with the rules of the Exchange. The Exchange believes that passing the license fee (on a per-contract basis) along to the specialists allocated to NDX and MNX and the ROTs trading such products is efficient and consistent with the intent of the Exchange to pass on its non-reimbursed costs to those market participants that are the beneficiaries of such license agreements.

The Exchange notes that it has recently increased a number of member fees to better align Exchange fees with the actual cost of delivering services and

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

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

<sup>30</sup> 17 CFR 200.30-3(a)(12).