

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50637; File No. SR-Amex-2004-86)

November 5, 2004

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Trading of Exchange Traded Fund Shares Pursuant to Unlisted Trading Privileges

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 October 26, 2004, 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 proposal pursuant to Section 19(b)(3)(A) of the Act,<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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 Amex Rules 1, 118, 131 and 205 to accommodate the trading of Exchange Traded Fund Shares pursuant to the Nasdaq UTP Plan. Proposed new language is in *italics*; proposed deletions are in [brackets].

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

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

**Rule 1. Hours of Business**

No change.

. . . Commentary

.01 through .04 No change.

.05 The hours of business for a security traded on the Exchange pursuant to unlisted trading privileges shall generally be the same as the hours during which the security is traded in the primary market for such security. Notwithstanding the foregoing, in accordance with Rules 1000 and 1000A, Portfolio Depository Receipts and Index Fund Shares trading on the Exchange pursuant to unlisted trading privileges may trade until 4:00 p.m. or 4:15 p.m. as specified by the Exchange.

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**Rule 118. Trading in Nasdaq National Market Securities**

(a) through (i) No change.

(j) Odd-Lot Orders --Odd lot orders in Nasdaq National Market securities, except for Portfolio Depository Receipts or Index Fund Shares (collectively known as Exchange Traded Funds), shall be executed in the following manner:

(i) through (vi) No change.

(k) through (l) No change.

(m) Market-on-Close and Limit-on-Close Orders --The following procedures apply to market-on-close (MOC) and limit-on-close (LOC) orders in Nasdaq National Market securities. Notwithstanding the foregoing, the following procedures will not apply to any Nasdaq National Market security the pricing of which is based on another security or an index (e.g., Exchange Traded Funds).

(i) through (vi) No change.

(n) through (q) No change.

. . . Commentary

.01 The following rules refer to trading in Nasdaq National Market securities and should be consulted by members and member organizations trading Nasdaq National Market securities on the Floor: Rule 1 (Commentary .05); Rule 3; Rule 7 (Commentary .02); Rule 24 (b); Rule 109 (Commentary .02); Rule 115 (Commentary .01); Rule 131 (Commentary .02 and .03); Rule 156 (Commentary .01); Rule 170 (Commentary .11); Rule 175; Rule 190 (Commentary .06); and Rule 205 (Commentary .05).

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**Rule 131. Types of Orders**

(a) through (t) No change.

. . Commentary

.01 through .02 No change.

.03 Paragraph (a) "Market at 4:00 p.m." orders. An order in Portfolio Depositary Receipts or Index Fund Shares that trade on the Exchange until 4:15 p.m. (including those Portfolio Depositary Receipts and Index Fund Shares trading pursuant to unlisted trading privileges) may be designated as "market at 4:00 p.m." to denote that it is a market order which is to be executed at or as close as practicable to the close of the regular equity trading session on the exchange (normally 4:00p.m. Eastern Time).

(b) through (c) No change.

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**Rule 205. Manner of Executing Odd-Lot Orders**

As used in this rule, except where otherwise provided or where the context otherwise requires, the term "effective transaction" refers to the round lot transaction on which the execution of the odd-lot order is to be based. Unless otherwise provided, references to round lot transactions are to transactions regular way.

No differential may be charged on any odd-lot order transactions, for either market or limit orders, except as otherwise specified in Section C(2) below.

Odd-lot orders shall be executed in the following manner:

A. through C. No change.

. . . Commentary

.01 through .04 No change.

.05 Odd-lot orders in Nasdaq National Market securities shall be executed in accordance with Rule 118(j). Notwithstanding the foregoing, odd-lot orders in Nasdaq National Market securities that are Portfolio Depository Receipts or Index Fund Shares shall be executed in accordance with the foregoing rule and commentary and not in accordance with Rule 118(j).

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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 Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 2, 2002, the Exchange received Commission approval for the adoption of Rule 118 and the amendment of various other rules to provide for the trading of Nasdaq Stock Market, Inc (“Nasdaq”) National Market (“NNM”) securities pursuant to unlisted trading privileges (“UTP”).<sup>5</sup> The Exchange has been trading NNM securities since August 2002 in accordance with these rules and with provisions of the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-listed Securities Traded on Exchanges on an Unlisted Trading Privileges basis (the “Nasdaq UTP Plan”). Recently, the Exchange has considered trading pursuant to the UTP Plan certain Portfolio Depositary Receipts and Index Fund Shares (collectively known as "Exchange Traded Fund Shares" or “ETFs”) that are or will be listed as Nasdaq NNM securities. In order to accommodate trading of such ETFs, the Exchange proposes to amend the following rules. It should be noted however that the substance of these rules would not be changed. The rule amendments would only clarify whether or not specific rules apply to ETFs trading on the Amex pursuant to the Nasdaq UTP Plan.

**Rule 1. Hours of Business**

Commentary .05 to Rule 1 provides that the hours of business for securities traded on the Exchange pursuant to UTP shall be the same as the hours during which the security is traded in its primary market. Exchange Rules 1000 and 1000A currently provide that ETFs may trade until 4:15 p.m. each trading day, which may not coincide

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<sup>5</sup> See Securities Exchange Act Release No. 46305 (August 2, 2002), 67 FR 51609 (August 8, 2002) (SR-Amex-01-106).

with the hours of trading in their primary market. Thus, the Exchange proposes to amend Commentary .05 to provide that ETFs traded pursuant to UTP may also have hours of trading that extend to 4:15 p.m. If the Exchange were to determine to trade an ETF listed on Nasdaq past the 4:00 p.m. closing hour, the Exchange is aware of and would make an accommodation for the requirement set forth in Section 11(B)(i) of the Nasdaq UTP Plan. Section 11(B)(i) requires the use of “.T” to designate trades in eligible securities occurring after normal market hours.

#### **Rule 118 (j) Odd-Lot Orders**

Currently, the procedures for handling odd-lot orders<sup>6</sup> are different for NNM securities traded pursuant to UTP. Odd-lot procedures for equities and ETFs traded on the Exchange are more automated given the use of the Odd-lot Holding Tank (“OLHT”) for those products. The OLHT allows non-executable limit, stop, and stop limit orders to be routed to a “holding tank” for accumulation until such time as they can be automatically executed. According to the Exchange, use of the OLHT has cut down considerably on the number of orders being printed at the specialist’s post and handled manually. However, the OLHT is not currently available for NNM securities trading pursuant to UTP and Rule 118 (j) sets forth different procedures for handling odd-lot orders in such securities. The Exchange expects to expand the use of the OLHT to NNM securities as soon as necessary systems changes are complete. The Exchange had a proposal pending with the Commission to amend Rule 118 (j) once those changes were

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<sup>6</sup> Odd-lot Orders are orders for less than the normal trading unit known as a round lot or 100 shares.

implemented;<sup>7</sup> that proposal was withdrawn, but the Exchange will re-file it once a firm date for completion is established for the necessary systems changes. In the meantime, however, the Exchange proposes to amend Rule 118 (j) to provide that NNM ETFs traded pursuant to UTP would use the OLHT and operate under the current rules and procedures for trading odd-lot orders in equities and ETFs.<sup>8</sup> The Exchange believes this would be appropriate in order to give consistency to the handling of odd-lot orders in ETFs and to provide automated handling of odd-lot orders given the large number of orders the Exchange expects to receive for these ETFs. In addition, Rule 205, Commentary .05 is proposed to be amended to reflect the application of Rule 205 to the trading of NNM ETFs.

#### **Rule 118 (m) Market-on-close and Limit-on-close Orders**

The Exchange's policy and procedures with respect to market-on-close and limit-on-close orders is set forth in Rule 131A for securities listed on the Exchange and in Rule 118 (m) for NNM securities traded pursuant to UTP. Rule 131A specifies that its procedures do not apply to any security whose price is based on another security or an index, which would include ETFs. Thus, the Exchange proposes to amend Rule 118 (m) to specify that its market-on-close and limit-on-close procedures for NNM securities in the UTP program would not apply to ETFs or other securities whose price is based upon another security or an index.

#### **Rule 131, Commentary .03 Types of Orders**

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<sup>7</sup> See, SR-Amex 2004-01, filed January 6, 2004.

<sup>8</sup> See, Exchange Rule 205.

Rule 131, Commentary .03 currently provides that an order in an ETF trading on the Exchange to 4:15 p.m. may be designated as a “market at 4 p.m.” to denote that it is a market order which is to be executed at or as close as practicable to the close of the regular equity trading session on the Exchange (normally 4:00 p.m. New York Time). The Exchange proposes to amend this provision to reflect that it would include ETFs traded pursuant to UTP. Rule 118, Commentary .01 would also be amended to reference Commentary .03 to Rule 131.

The Exchange believes these minor changes to its rules would be useful in clarifying the various procedures for trading ETFs pursuant to the Nasdaq UTP program. Although Rule 118 (b) already applies the Exchange’s Constitution and Rules to the trading of NNM securities, unless the context otherwise requires, the Exchange believes it is important for members and the investing public to understand specifically where the context requires the use of other exchange rules and procedures for the trading of ETFs pursuant to the Nasdaq UTP Plan

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5)<sup>10</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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

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

<sup>10</sup> 15 U.S.C. 78f(b)(5).



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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act,<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup> At any time within 60 days of the filing of the proposed rule change the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). The Commission notes that the Exchange provided written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change at least five business days prior to the date of filing of the proposed rule change.

interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to make clarifying changes to existing rules to cover the trading of ETFs pursuant to the Nasdaq UTP Plan and to ensure that those changes are effective upon implementation of trading of ETFs pursuant to the Nasdaq UTP Plan.<sup>13</sup>

#### 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:

##### 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-2004-86 on the subject line.

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<sup>13</sup> For purposes only of waiving the 30-day operative delay of the proposed rule change, the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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-2004-86. 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 Room. Copies of the 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-2004-86 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).