

Amex Rule 128A also provides that the Chairman and Vice Chairman of the Exchange, acting jointly, determine which ETFs are Auto-Ex eligible.

## 2. Basis

The Exchange believes the proposed rule change is consistent with section 6 of the Act,<sup>9</sup> in general, and with section 6(b)(5) of the Act,<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 regulating, clearing, settling, processing information with respect to and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The proposed rule change will allow the Auto-Ex for ETFs pilot program to continue for an additional six months. The Exchange believes that the proposal also facilitates the comparison and settlement of trades since Auto-Ex transactions result in "locked-in" trades.

Moreover, Auto-Ex for ETFs automatically provides investors with price improvement on their orders.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

Amex believes that the proposed rule change will impose no burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposal, in fact, will enhance competition among markets and market makers and thereby benefit investors by allowing the Exchange to continue to provide Auto-Ex for ETFs with price improvement.

### *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 (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any

significant burden on competition; and (3) by its terms, does not become operative until 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, and the exchange provided the Commission with 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 or such shorter time as designated by the Commission, 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>

Amex has requested that the Commission waive the usual five-business-day notice period and the usual 30-day pre-operative waiting period. The Commission notes that this proposal simply extends the existing pilot program and does not alter the pilot in any way. As a result, the Commission believes that it is consistent with the protection of investors and the public interest to waive the five-business-day notice period and accelerate the operative date so that the pilot can continue without delay and because the proposal raises no new regulatory issues. Therefore, the Commission designates that the proposal become operative immediately.<sup>13</sup> This pilot extension will expire on December 19, 2003.

At any time within 60 days of the filing of this 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 interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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 Amex. All submissions should refer to File No. SR-Amex-2003-61 and should be submitted by July 31, 2003.

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

**J. Lynn Taylor,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48123; File No. SR-NASD-2002-77]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating To Disclosure of Audit Opinions With Going Concern Qualifications

July 2, 2003.

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 June 11, 2002, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), 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 Nasdaq. 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 Change

Nasdaq proposes to amend NASD Rule 4350(b) to add a requirement for issuers to announce publicly any audit opinions with going concern

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

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>14</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>9</sup> 15 U.S.C. 78f.

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

qualifications.<sup>3</sup> Below is the text of the proposed rule change. Proposed new language is italicized.

\* \* \* \* \*

Rule 4350. Qualitative Listing Requirements for Nasdaq National Market and Nasdaq SmallCap Market Issuers Except for Limited Partnerships Traded on the Nasdaq National Market

(a) No change.

(b) Distribution of Annual and Interim Reports.

(1) (A) Each issuer shall distribute to shareholders copies of an annual report containing audited financial statements of the company and its subsidiaries. The report shall be distributed to shareholders a reasonable period of time prior to the company's annual meeting of shareholders and shall be filed with Nasdaq at the time it is distributed to shareholders.

(B) *An issuer that receives an audit opinion that contains a going concern qualification must make a public announcement through the news media disclosing the receipt of such qualification. Prior to the release of the public announcement, the issuer must provide the text of the public announcement to the StockWatch section of Nasdaq's MarketWatch Department ("Nasdaq StockWatch").\* The public announcement shall be provided to Nasdaq StockWatch and released to the media not later than seven calendar days following the filing of such audit opinion in a public filing with the Securities and Exchange Commission.*

(2)-(3) No change

Footnote to Rule 4350(b)(1)(B):

\* Notification may be provided to the Nasdaq StockWatch at 1-800-537-3929 or (240) 386-6046 (telephone), (240) 386-6047 (facsimile).

\* \* \* \* \*

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

In its filing with the Commission, Nasdaq 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. Nasdaq has prepared summaries, set forth in sections A, B,

<sup>3</sup> See also Securities Exchange Act Release No. 47516 (March 17, 2003), 68 FR 14451 (March 25, 2003) (NASD 2002-141) for a description of additional proposed revisions to NASD's corporate governance listing standards.

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

Nasdaq represents that, as a result of recent events, it has focused on ways to improve the corporate governance of listed companies. After considering these issues, Nasdaq identified several rule changes that could be instituted in the short term and identified these changes in an April 11, 2002, letter to then-Commissioner Chairman Harvey Pitt. Nasdaq now proposes to effect some of those changes. Specifically, the proposed rule change will require issuers to disclose in a press release the receipt of an audit opinion with a going concern qualification. Ordinarily, the continuation of an entity as a going concern is assumed in financial reporting in the absence of significant evidence to the contrary. If an auditor concludes that substantial doubt exists about the entity's ability to continue as a going concern for a reasonable period of time, however, the auditor provides this conclusion through an explanatory paragraph in the auditor's report. While the audit opinion is available in the Form 10-K, Nasdaq believes that receipt of a going concern qualification is so material that it should be brought to the attention of investors and potential investors through a press release issued promptly after the filing of the Form 10-K. In the event management has developed plans to address the going concern qualification, it would be free to discuss those plans in the press release.

Nasdaq will make this filing effective upon approval by the Commission.

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with section 15A(b)(6) of the Act<sup>4</sup> in that the proposed rules are 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.

### B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not

<sup>4</sup> 15 U.S.C. 78o-3(b)(6).

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

Written comments were neither solicited nor received.

## 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 self-regulatory organization 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 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 NASD. All submissions should refer to File No. SR-NASD-2002-77 and should be submitted by July 31, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

J. Lynn Taylor,

Assistant Secretary.

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<sup>5</sup> 17 CFR 200.30-3(a)(12).