

association,<sup>9</sup> and, in particular, the requirements of Section 15A(b)(5) of the Act.<sup>10</sup> The Commission believes that the proposed rule change will result in the equitable allocation of annual fees among listed issuers. The Commission notes that the Nasdaq plans to use the proposed fee increase to support its ongoing costs of issuer services and to fund future product and service investments.

## V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>11</sup> that the proposed rule change (SR-NASD-2004-128) be, and it hereby is, approved.

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. 34-50828; File No. SR-NYSE-2004-66]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. To Extend the Pilot for Its Automatic Execution Facility for Certain Limit Orders (NYSE Direct+<sup>®</sup>)

December 9, 2004.

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 November 22, 2004, the New York Stock Exchange, Inc. (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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 extend until December 23, 2005 the

<sup>9</sup>In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78o-3(b)(5).

<sup>11</sup> 15 U.S.C. 78s(b)(2).

<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.

effectiveness of the pilot program (“Pilot”) for NYSE Direct+<sup>®</sup> (“Direct+”). The Pilot was initially approved on a one-year basis and subsequently extended until December 23, 2004.

#### 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

In light of the fact that the Commission is still considering the Exchange’s proposed enhancements to Direct+ (“hybrid market proposal”),<sup>3</sup> the Exchange seeks to extend the Pilot as it currently operates for an additional year until December 23, 2005. Direct+ was originally approved as a one-year pilot ending on December 21, 2001.<sup>4</sup> The Pilot was subsequently extended for three additional one-year periods, and is currently scheduled to end on December 23, 2004.<sup>5</sup>

The Pilot provides for the automatic execution of limit orders of 1099 shares or less (“auto ex orders”) against trading interest reflected in the Exchange’s published quotation. It is not mandatory that all limit orders of 1099 shares be entered as auto ex orders; rather, the member organization entering the order, or its customer if enabled by the member organization, can choose to enter an auto ex order when such member organization (or customer) believes that the speed and certainty of an execution at the Exchange’s published bid or offer price is in its customer’s best interest.

<sup>3</sup> See Securities Exchange Act Release Nos. 50173 (August 10, 2004), 69 FR 50407 (August 16, 2004) and 50667 (November 15, 2004), 69 FR 67980 (November 22, 2004) (SR-NYSE-2004-05).

<sup>4</sup> See Securities Exchange Act Release No. 43767 (December 22, 2000), 66 FR 834 (January 4, 2001) (SR-NYSE-00-18).

<sup>5</sup> See Securities Exchange Act Release Nos. 45331 (January 24, 2002), 67 FR 5024 (February 1, 2002) (SR-NYSE-2001-50); 46906 (November 25, 2002), 67 FR 72260 (December 4, 2002) (SR-NYSE-2002-47); and 48772 (November 12, 2003), 68 FR 65756 (November 21, 2003) (SR-NYSE-2003-30).

The Exchange proposes to extend the Pilot for an additional year until December 23, 2005. Four filings which impact Direct+ and that have been approved by the Commission during the current Pilot are now part of the Pilot.<sup>6</sup> These filings are set forth below.

(a) A filing which amended NYSE Rule 1000 to provide that Direct+ executions would not be available if the resulting trade would be more than five cents away from the last sale.<sup>7</sup> The amendment also provided that during the process for completing NYSE Rule 127 transactions, the specialist should publish a bid and/or offer that is more than five cents away from the last reported transaction price in the subject security on the Exchange.

(b) A filing which (i) amended NYSE Rule 13 to provide for a one-year pilot program (also expiring on December 23, 2004) to expand Direct+ order size eligibility (for up to 10,000 shares) for Exchange-Traded Funds (“ETFs”) and Holding Company Depository Receipts (“HOLDRs”); (ii) amended NYSE Rule 1002 to include ETFs and HOLDRs and provide that ETFs trade until 4:15 p.m.; and (iii) amended NYSE Rule 1005 to reflect that the rule applies to ETFs and HOLDRs.<sup>8</sup>

(c) A filing which amended NYSE Rule 1005 to permit entry of limit orders up to 1099 shares within 30 seconds for an account in which the same person has an interest, provided that the orders are entered from different terminals and that the member or member organization responsible for the entry of the orders to the trading floor has procedures to monitor compliance with the separate terminal requirement.<sup>9</sup>

(d) A filing which amended NYSE Rules 1000 and 1001 in connection with the NYSE LiquidityQuote<sup>SM</sup> initiative.<sup>10</sup> In conjunction with autoquoting of bids and offers, NYSE Rule 1000 was amended to provide that a Direct+ order equal to or greater than the size of the published bid/offer would exhaust the entire bid/offer rather than decrease it to

<sup>6</sup>In addition, SR-NYSE-2003-20 proposed to disengage Direct+ in five actively-traded stocks on a pilot basis. However, this pilot expired on June 20, 2003 and, therefore, does not impact the Pilot as proposed to be extended. See Securities Exchange Act Release No. 47965 (June 2, 2003), 68 FR 34691 (June 10, 2003) (SR-NYSE-2003-20).

<sup>7</sup> See Securities Exchange Act Release No. 47463 (March 7, 2003), 68 FR 12122 (March 13, 2003) (SR-NYSE-2002-44).

<sup>8</sup> See Securities Exchange Act Release No. 47024 (December 18, 2002), 67 FR 79217 (December 27, 2002) (SR-NYSE-2002-37).

<sup>9</sup> See Securities Exchange Act Release No. 47353 (February 12, 2003), 68 FR 8318 (February 20, 2003) (SR-NYSE-2002-58).

<sup>10</sup> See Securities Exchange Act Release No. 47614 (April 2, 2003), 68 FR 17140 (April 8, 2003) (SR-NYSE-2002-55).

100 shares, and NYSE Rule 1001(c) was deleted.<sup>11</sup>

The above-mentioned filings became part of the Direct+ rules and were incorporated into the Pilot upon their respective approvals by the Commission.<sup>12</sup> Therefore, the Exchange proposes that an extension of the Pilot for an additional year would also extend the above-mentioned filings as part of the Pilot.

However, if the Commission approves the hybrid market proposal during the extension of the Pilot period (December 24, 2004 to December 23, 2005), the Exchange proposes that the hybrid market proposal would supersede this filing.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>13</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>14</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. The Exchange also believes that the proposed rule change is designed to support the principles of Section 11A(a)(1) of the Act<sup>15</sup> in that it seeks to assure economically efficient execution of securities transactions, makes it practicable for brokers to execute investors' orders in the best market, and provides an opportunity for investors' orders to be executed without the participation of a dealer.

### 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 has neither solicited nor received written comments on the proposed rule change.

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

Because the foregoing proposed rule 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, provided that the self-regulatory organization has given the Commission written notice of its intent to file 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, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>16</sup> and Rule 19b-4(f)(6) thereunder.<sup>17</sup> At any time within 60 days of the filing of such 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.<sup>18</sup>

The Exchange requests that the Commission waive the five business days pre-filing requirement and the 30-day operative delay under Rule 19b-4(f)(6)(iii).<sup>19</sup> The Exchange believes that the continuation of the Pilot is in the public interest as it will avoid inconvenience and interruption to the public.

The Commission believes that waiver of the 30 days operative delay is consistent with the protection of investors and the public interest,<sup>20</sup> because it will allow the Exchange to continue, without interruption, the existing operation of its Pilot for an additional year, while the Commission considers the hybrid market proposal. Accordingly, the Commission designates that the proposal shall become operative as of the date of this notice.

### 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. 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-NYSE-2004-66 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-NYSE-2004-66. 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, 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 NYSE. 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-NYSE-2004-66 and should be submitted on or before January 7, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>21</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>21</sup> 17 CFR 200.30-3(a)(12).

<sup>11</sup> NYSE Rule 1001(c) formerly provided that if executions of auto ex orders have traded with all trading interest reflected in the Exchange's published bid or offer, the Exchange will disseminate a bid or offer at that price of 100 shares until the specialist requotes that market.

<sup>12</sup> See Amendment No. 1 to SR-NYSE-2002-47, *supra* note 5.

<sup>13</sup> 15 U.S.C. 78f(b).

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

<sup>15</sup> 15 U.S.C. 78k-1(a)(1).

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

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

<sup>18</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>19</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>20</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).