

DPM a supplemental fee of \$.25 per contract, the Exchange proposes to assess the MNX DPM and all MNX market-makers a license fee of \$.10 per contract (in addition to the regular transaction fee of \$.24 per contract) to help the Exchange meet its license fee obligation to Nasdaq.

The Exchange believes that the proposed license fee results in a more equitable allocation of the MNX license fee obligation in MNX's new Hybrid Trading System environment. The proposed license fee is consistent with similar license fees that the Exchange has previously implemented to recover license costs for the RUT and DJX option classes.<sup>4</sup> The Exchange intends to implement this license fee on December 1, 2004.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>6</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members.

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

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

### 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 rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A)(ii)<sup>7</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>8</sup> thereunder. 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 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. 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-CBOE-2004-76 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-CBOE-2004-76. 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 CBOE. 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-CBOE-2004-76 and should be submitted on or before January 7, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50839; File No. SR-ISE-2004-39]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment Nos. 1 and 2 by the International Securities Exchange, Inc., Relating to the Hours of Trading for Options on Fund Shares, Including the Nasdaq 100 Tracking Stock

December 10, 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 December 2, 2004, the International Securities Exchange, Inc. ("Exchange" or "ISE") 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. On December 6, 2004, the Exchange filed Amendment No. 1 to the proposed rule change, and on December 9, 2004, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>3</sup> The Exchange filed the proposed rule change, as amended, as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>4</sup> and Rule 19b-4(f)(6) thereunder.<sup>5</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

ISE proposes to codify its existing policy relating to hours of trading for options on certain Fund Shares, including the Nasdaq 100 Tracking Stock ("QQQ"). The text of the proposed rule change, as amended, is set forth below.

<sup>9</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> The substance of Amendment Nos. 1 and 2 is incorporated into this notice.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>5</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> Securities Exchange Act Release No. 49601 (April 22, 2004), 69 FR 23836 (April 30, 2004) (SR-CBOE-2004-19) (RUT license fee), and Securities Exchange Act Release Act No. 48223 (July 24, 2003), 68 FR 44978 (July 31, 2003) (SR-CBOE-2003-26) (DJX license fee).

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

<sup>6</sup> 15 U.S.C. 78f(b)(4).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>8</sup> 17 CFR 240.19b-4(f)(2).

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

\* \* \* \* \*

#### Rule 700. Days and Hours of Business

The Board shall determine the days the Exchange shall be open for business (referred to as "business days") and the hours of such days during which transactions may be made on the Exchange. No Member shall make any bid, offer, or transaction on the Exchange before or after such hours.

(a) Except for unusual conditions as may be determined by the Board, hours during which transactions in options on individual stocks may be made on the Exchange shall correspond to the normal business days and hours for business set forth in the rules of the primary market trading the stocks underlying Exchange options; provided, however, that transactions may be effected in an options class on the Exchange until two (2) minutes after the primary market on which the underlying stock trades closes for trading.

*(b) Options on Fund Shares, as defined in Rule 502(h), may be traded on the Exchange until 4:15 p.m. each business day.*

[(b)](c) The Exchange shall not be open for business on the following holidays: New Year's Day, Martin Luther King, Jr. Day, Presidents' Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day or Christmas Day. When any holiday observed by the Exchange falls on a Saturday, the Exchange will not be open for business on the preceding Friday. When any holiday observed by the Exchange falls on a Sunday, the Exchange will not be open for business on the following Monday, unless unusual business conditions exist at the time.

\* \* \* \* \*

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

In its filing with the Commission, ISE included statements concerning the purpose of, and statutory 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. ISE 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

The purpose of this proposed rule change is to amend ISE Rule 700 ("Days and Hours of Business") by adding a new subsection (b) that will codify ISE's practice of trading options on certain Fund Shares, including the QQQ, until 4:15 p.m. (New York Time). The 4:15 p.m. termination coincides with the trading hours termination time for options on stock indexes. Recently, the Nasdaq Stock Market, Inc. ("Nasdaq") announced its intention to transfer the listing of the QQQ from the American Stock Exchange ("Amex") to Nasdaq, effective as of the opening of trading on December 1, 2004. QQQ previously traded on the Amex until 4:15 p.m., but as of December 1, 2004, Nasdaq closes trading in the QQQ at 4 p.m., but will allow trading in the QQQ to continue in after hours trading until 8 p.m. ISE intends to continue to trade options on the QQQ during its regular trading session until 4:15 p.m., as it does options on certain other Fund Shares and indexes.

ISE notes that Amex and the Pacific Exchange, Inc. ("PCX") trade options on QQQ until 4:15 p.m. (New York Time) under their respective rules.<sup>6</sup> The new proposed subsection (b) to ISE Rule 700 will codify ISE's longstanding practice of trading options on QQQ and certain Fund Shares until 4:15 p.m. The ISE submits that this rule change will serve to avoid any confusion in the marketplace over the trading hours of QQQ options in light of Nasdaq's shift of the listing venue of QQQ and to codify the trading hours for options on certain Fund Shares and on QQQ.

#### 2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,<sup>7</sup> in general, and Section 6(b)(5) of the Act,<sup>8</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 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.

<sup>6</sup> See Commentary .02 to Amex Rule 1 and Commentary .02 to PCX Rule 7.1.

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

<sup>8</sup> 15 U.S.C. 78f(b)(5).

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

The proposed rule change does not 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 not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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

The Exchange has designated the proposed rule change, as amended, as a "non-controversial" rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>9</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>10</sup> The Exchange represents that the foregoing 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 for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the five-day pre-filing notice requirement and the 30-day operative delay period for "non-controversial" proposals and make the proposed rule change, as amended, effective and operative upon filing.

The Commission has determined to waive the five-day pre-filing notice requirement and the 30-day operative delay period.<sup>11</sup> The Commission notes that accelerating the operative date will allow the trading hours for options on the QQQ to remain unchanged and provide continuity to the marketplace. Therefore, the foregoing proposed rule change has become immediately effective and operative upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</sup>

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

<sup>11</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>12</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

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 interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.<sup>14</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 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-ISE-2004-39 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-ISE-2004-39. 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 Exchange. All comments

<sup>14</sup> For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers that period to commence on December 9, 2004, the date the Exchange filed Amendment No. 2 to the proposed rule change. See 15 U.S.C. 78s(b)(3)(C).

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-ISE-2004-39 and should be submitted on or before January 7, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>15</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E4-3702 Filed 12-16-04; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50838; File No. SR-NASD-2004-128]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval of Proposed Rule Change To Modify the Annual Fee for Certain Issuers Listed on the Nasdaq Stock Market, Inc.

December 10, 2004.

#### I. Introduction

On August 25, 2004, 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"), 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> a proposed rule change to modify the annual fee for domestic and foreign issuers (other than American Depositary Receipts) listed on the Nasdaq National Market and for all issuers listed on The Nasdaq SmallCap Market. The proposed rule change was published for notice and comment in the **Federal Register** on October 28, 2004.<sup>3</sup> The Commission received no comments in response to the proposal as published in the **Federal Register**. The Nasdaq Office of General Counsel, however, received one comment letter before the proposal was published for comment.<sup>4</sup> This order approves the proposed rule change as filed.

<sup>15</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 50577 (Oct. 21, 2004), 69 FR 62926 (Oct. 28, 2004).

Footnote number 3 of the release incorrectly identified Mr. Golub; his correct information is: Arnold Golub, Office of General Counsel, Nasdaq.

<sup>4</sup> See letter from Dorrance W. Lamb, Chief Financial Officer, Performance Technologies, Inc.,

#### II. Summary of Comments

The Nasdaq's Office of General Counsel received one letter in response to an e-mail it sent to listed issuers, before the proposal was published in the **Federal Register**, notifying listed issuers of the planned rule filing and the potential fee increase.<sup>5</sup> The commenter did not file a comment on the proposal with the Commission; however, the Nasdaq forwarded the letter to the Commission and the Commission placed the letter in the public file. The commenter opposed the proposed increase in the annual fee and expressed concern over the fee for the listing of additional shares. In particular, the commenter opined that the fee charged for listing additional shares unfairly burdens listed issuers who reissue treasury shares as a result of stock option exercises and, accordingly, can result in total fees consistent with, or more than, the fees charged to listed issuers with a higher range of total shares outstanding.

#### III. The Nasdaq's Response to the Comment

The Nasdaq acknowledged the commenter's concerns, but explained that the Nasdaq does not charge the fee for listing additional shares in connection with the reissuance of treasury shares.<sup>6</sup> Further, the Nasdaq affirmed that the proposed fee schedule does not, by its terms, preference any class of listed issuers, but rather applies equally to all similarly situated listed issuers.<sup>7</sup> The Nasdaq also noted that issuers falling into a higher total shares outstanding category similarly would be subject to the fee for listing additional shares, which fee would be proportionate to their total shares outstanding.<sup>8</sup> The Commission believes that the Nasdaq's response to the commenter's concerns is reasonable.

#### IV. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities

to Nasdaq Office of General Counsel, dated October 20, 2004.

<sup>5</sup> See *id.* The proposal was published in the **Federal Register** on October 28, 2004, eight days after the date of Performance Technologies, Inc.'s letter to Nasdaq.

<sup>6</sup> Telephone conference between Arnold Golub, Office of General Counsel, Nasdaq, and Richard Holley, Attorney, Division of Market Regulation, Commission, on December 3, 2004.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*