

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

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]

**BILLING CODE 8010-01-P**

#### 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.*

<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).

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.*

[FR Doc. E4-3706 Filed 12-16-04; 8:45 am]

BILLING CODE 8010-01-P

## 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+®)

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

effectiveness of the pilot program ("Pilot") for NYSE Direct+® ("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.

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).

<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.

<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).