• Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–OPRA–2004–05 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–OPRA–2004–05. 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 plan amendment that are filed with the Commission, and all written communications relating to the proposed plan amendment 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 OPRA. 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–OPRA–2004–05 and should be submitted on or before December 27, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E4–3575 Filed 12–8–04; 8:45 am]

BILLING CODE 8010–01–P

[9] 17 CFR 200.30–3(a)(29).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50794; File No. PCAOB–2004–08]

Public Company Accounting Oversight Board; Notice of Filing and Order Granting Accelerated Approval of Proposed Temporary Transitional Rule Relating to PCAOB Auditing Standard No. 2, ''An Audit of Internal Control Over Financial Reporting Performed in Conjunction With an Audit of Financial Statements''

December 3, 2004.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the ''Act''), notice is hereby given that on December 1, 2004, the Public Company Accounting Oversight Board (the ''Board'' or the ''PCAOB'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule, described in Items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons and is approving the proposal on an accelerated basis.

I.Board's Statement of the Terms of Substance of the Proposed Rule

On November 30, 2004, the Board adopted a temporary transitional provision for PCAOB Auditing Standard No. 2, ''An Audit of Internal Control Over Financial Reporting Performed in Conjunction With an Audit of Financial Statements.'' (PCAOB Rule 3201T). The proposed rule text is set out below.

SECTION 3. PROFESSIONAL STANDARDS

* * * * *

Part 1—General Requirements

* * * * *

Rule 3201T. Temporary Transitional Provision for PCAOB Auditing Standard No. 2, ''An Audit of Internal Control Over Financial Reporting Performed in Conjunction With an Audit of Financial Statements.''

(a) Notwithstanding Auditing Standard No. 2, in connection with the audit of an issuer that does not file *Management's annual report on internal control over financial reporting* in reliance on SEC Release No. 34–50754, Order Under Section 36 of the Securities Exchange Act of 1934 Granting an Exemption from Specified Provisions of Exchange Act Rules 13a–1 and 15d–1 (November 30, 2004), a registered public accounting firm and its associated persons need not:

(1) Date the auditor's report on management's assessment of the effectiveness of internal control over financial reporting with the same date as the auditor's report on the issuer's financial statements, provided that the date of the auditor's report on management's assessment of the effectiveness of internal control over financial reporting is later than the date of the auditor's report on the issuer's financial statements; or

(2) Add a paragraph to the auditor's separate report on the financial statements of an issuer that refers to a separate report on management's assessment of the effectiveness of internal control over financial reporting.

(b) This temporary rule will expire on July 15, 2005.

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rule.

A.Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

(a) Purpose

The Board adopted the proposed rule in response to an exemptive order of the Commission (the Exemptive Order).[1] The Exemptive Order allows certain issuers an additional 45 days to file *Management's annual report on internal control over financial reporting*, required by Item 308(a) of Regulation S–K, and the related Attestation report of the *registered public accounting firm*, required by Item 308(b) of Regulation S–K. The proposed rule would temporarily relieve auditors, in connection with the audit of an issuer relying on the Exemptive Order, from certain provisions of PCAOB Auditing Standard No. 2, *An Audit of Internal Control Over Financial Reporting Performed in Conjunction With an Audit of Financial Statements* (''Auditing Standard No. 2''). The proposed rule would permit eligible auditors to date a report on management's assessment of the effectiveness of internal control over financial reporting later than the date of the report on the same issuer's financial statements. The proposed rule would also permit these auditors to omit reference in the auditor's separate report on the issuer's financial statements to the auditor's report on management's

[1] Exchange Act Release No. 50754 (Nov. 30, 2004).

assessment of the effectiveness of internal control over financial reporting.

Specifically, Rule 3201T consists of two paragraphs. Paragraph (a) provides that the proposed rule would apply to registered public accounting firms and their associated persons in connection with the audit of an issuer relying on the Exemptive Order. Such auditors are temporarily relieved from certain provisions of Auditing Standard No. 2, described in subparagraphs (a)(1) and (a)(2). Subparagraph (a)(1) permits eligible auditors to date a report on management's assessment of the effectiveness of internal control over financial reporting later than the date of the report on the same issuer's financial statements. Subparagraph (a)(2) permits these auditors to omit reference in the auditor's separate report on the issuer's financial statements to the auditor's report on management's assessment of the effectiveness of internal control over financial reporting. Paragraph (b) provides that the rule expires on July 15, 2005.

(b) Statutory Basis

The statutory basis for the proposed rule is Title I of the Act.

B.Board's Statement on Burden on Competition

The Board does not believe that the proposed rule will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule would temporarily relieve auditors, in connection with the audit of an issuer relying on the Exemptive Order, from certain provisions of Auditing Standard No. 2.

C.Board's Statement on Comments on the Proposed Rule Received From Members, Participants or Others

The Board determined that public comment was not practicable in light of the timing of the Exemptive Order and the imminence of the filing requirements at issue.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule is consistent with the requirements of Title I of 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/pcaob.shtml*); or
- Send an E-mail to *rule-comments@sec.gov*. Please include File Number PCAOB–2004–08 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 PCAOB–2004–08. 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/pcaob.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule 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 PCAOB. All comments received will be posted without change; we do 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 PCAOB–2004–08 and should be submitted on or before January 10, 2005.

IV. Commission's Finding and Order Granting Accelerated Approval of Proposed Rule

The PCAOB's proposed rule is intended to address auditing issues attendant to the separate Commission Exemptive Order dated November 30, 2004. Pursuant to Commission rules adopted under the Securities Exchange Act of 1934 (''Exchange Act''), an accelerated filer is generally required to submit an annual report on Form 10–K within 75 calendar days after the end of such issuer's fiscal year. Regulation S–K under the Exchange Act requires that an accelerated filer's Form 10–K include, among other things, a management assessment on internal control over financial reporting and an attestation report on that assessment by a registered public accounting firm.[2] The Commission's Exemptive Order granted an exemption from these requirements for a period of 45 days to accelerated filers with less than $700 million in common equity market value outstanding as of the end of the second quarter of 2004 whose fiscal years end on or between November 15, 2004 and February 28, 2005. The PCAOB's proposed rule would exempt registered public accounting firms from compliance with (i) the concurrent reporting date requirement of Auditing Standard No. 2 with respect to audits of issuers exempt under the Commission's Exemptive Order and (ii) the requirement to add a paragraph to the auditor's report on the financial statements that refers to the auditor's report on management's assessment of the effectiveness of internal control over financial reporting.

As noted in the Commission's Exemptive Order, the Commission had become increasingly concerned that many smaller accelerated filers may not be in a position to meet the Form 10–K deadline. Accordingly, to ensure that there is a continuing and orderly flow of annual report information to investors and the U.S. capital markets, and to ensure that certain annual report filers and their registered public accounting firms are able to file complete and accurate reports regarding the effectiveness of the filers' internal control over financial reporting, the Commission determined that the exemptions were necessary and appropriate in the public interest and consistent with the protection of investors. The PCAOB's proposed rule is consistent with the substance and purpose of the Commission's order exempting smaller accelerated filers from the Form 10–K report deadline and it will assist auditors of issuers seeking to rely on the Exemptive Order. The proposed rule is a temporary measure and does not modify the substance of Auditing Standard No. 2 as originally approved by the Commission.

On the basis of the foregoing, the Commission finds that the proposed rule is consistent with the requirements of Sections 103 and 107(b) of the Act and the securities laws and is necessary and appropriate in the public interest and for the protection of investors.

The Commission also finds good cause to approve the proposed rule on an accelerated basis.[3] The Commission

[2] Item 308(a) and 308(b), respectively, of Regulation S–K.

[3] Section 107(b)(4) of the Act states that paragraphs (1) through (3) of section 19(b) of the Exchange Act, with certain amendments, govern

believes that the proposed rule is an important component of the relief provided in the Exemptive Order, and that together the proposed rule and the Exemptive Order would benefit both smaller accelerated filers and registered public accounting firms by providing the additional time necessary to produce complete, thorough and accurate audits of the internal control structure and procedures of affected filers. The Commission believes that it is in the public interest to approve the proposed rule on an accelerated basis in order to achieve the goals set forth in the Commission's Exemptive Order and to avoid any confusion resulting from inconsistencies between Auditing Standard No. 2 and the Commission's Exemptive Order.

Accordingly, the Commission finds that there is good cause, consistent with sections 103 and 107 of the Act, and section 19(b) of the Exchange Act, to approve the rule on an accelerated basis.

V.Conclusion

It is therefore ordered, pursuant to Section 107 of the Act and Section 19(b)(2) of the Exchange Act that the proposed rule (File No. PCAOB–2004–08) be and hereby is approved on an accelerated basis.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3568 Filed 12–8–04; 8:45 am]

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Commission approval of the rules of the Board. Section 19(b)(2) of the Exchange Act provides for the Commission to approve rules on an accelerated basis if ''the Commission finds good cause for so doing and publishes its reasons for so finding.''

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50795]

Order Pursuant to Section 11A of the Securities Exchange Act of 1934 and Rule 11Aa3–2(f) Thereunder Extending a de minimis Exemption for Transactions in Certain Exchange-Traded Funds from the Trade-Through Provisions of the Intermarket Trading System

December 3, 2004.

This order extends, for an additional nine-month period, a *de minimis* exemption to the provisions of the Intermarket Trading System Plan (''ITS Plan''),[1] a national market system plan,[2] governing intermarket trade-throughs. The *de minimis* exemption was originally issued by the Commission on August 28, 2002 [3] and extended on May 30, 2003 [4] and on March 3, 2004.[5]

The ITS Plan system is an order routing network designed to facilitate intermarket trading in exchange-listed securities among participating SROs based on current quotation information emanating from their markets. Quotations in exchange-listed securities are collected and disseminated by the Consolidated Quote System (''CQS''), which is governed by a national market system plan that the Commission has approved pursuant to Rule 11Aa3–2 under the Act.[6] Under the ITS Plan, a member of a participating SRO may access the best bid or offer displayed in CQS by another Participant by sending an order (a ''commitment to trade'') through ITS to that Participant. Exchange members participate in ITS through facilities provided by their respective exchanges. NASD members participate in ITS through a facility of the Nasdaq Stock Market (''Nasdaq'') known as the Computer Assisted Execution System (''CAES''). Market makers and electronic communications networks (''ECNs'') that are members of the NASD and seek to display their quotes in exchange-listed securities through Nasdaq must register with the NASD as ITS/CAES Market Makers.[7]

The March 2004 Order continued the *de minimis* exemption from compliance with Section 8(d)(i) of the ITS Plan with respect to three specific exchange-traded funds (''ETFs''), the Nasdaq-100 Index ETF (''QQQ''), the Dow Jones Industrial Average ETF (''DIA''), and the Standard & Poor's 500 Index ETF (''SPY'').[8] Section 8(d)(i) of the ITS Plan provides that participants should not purchase or sell any security that trades on the ITS Plan system at a price that is worse than the price at which that security is otherwise being offered on the ITS Plan system.[9] By its terms, the March 2004 Order continued the exemption from the trade-through provisions of the ITS Plan any transactions in the three ETFs that are effected at prices at or within three cents away from the best bid and offer quoted in the CQS for a period of nine months, which ends on December 4, 2004.

The three cent *de minimis* exemption allows ITS participants and their members to execute transactions, through automated execution or otherwise, without attempting to access the quotes of other participants when the expected price improvement would not be significant. In providing the three cent *de minimis* exemption, the Commission believed that, on balance, exempting the specified transactions from the ITS trade-through provisions would provide investors increased liquidity and expand the choice of execution venues, while limiting the possibility that investors would receive significantly inferior prices.[10]

[1] The self-regulatory organizations (''SROs'') participating in the ITS Plan include the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the Chicago Stock Exchange, Inc., the National Stock Exchange, Inc. (formerly the Cincinnati Stock Exchange, Inc.), the National Association of Securities Dealers, Inc. (''NASD''), the New York Stock Exchange, Inc., the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc. (collectively, the ''participants''). *See* Securities Exchange Act Release No. 19456 (January 27, 1983), 48 FR 4938 (February 3, 1983).

[2] Securities Exchange Act of 1934 (''Act'') Rule 11Aa3–2(d), 17 CFR 240.11Aa3–2(d), promulgated under Section 11A, 15 U.S.C. 78k–1, of the Act requires each SRO to comply with, and enforce compliance by its members and their associated persons with, the terms of any effective national market system plan of which it is a sponsor or participant. Rule 11Aa3–2(f), 17 CFR 240.11Aa3–2(f), under the Act authorizes the Commission to exempt, either unconditionally or on specified terms and conditions, any SRO, member of an SRO, or specified security from the requirement of the rule if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.

[3] *See* Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002) (the ''August 2002 Order''). The August 2002 Order granted relief through June 4, 2003.

[4] *See* Securities Exchange Act Release No. 47950 (May 30, 2003), 68 FR 33748 (June 5, 2003) (the ''May 2003 Order''). The May 2003 Order granted relief through March 4, 2004.

[5] See Securities Exchange Act Release No. 49356 (March 3, 2004), 69 FR 11057 (March 9, 2004) (the ''March 2004 Order''). The March 2004 Order granted relief through December 4, 2004.

[6] 17 CFR 240.11Aa3–2.

[7] *See* Securities Exchange Act Release No. 42536 (March 16, 2000), 65 FR 15401 (March 22, 2000). Market Makers and ECNs are required to provide their best-priced quotations and customer limit orders in certain exchange-listed and Nasdaq securities to an SRO for public display under Commission Rule 11Ac1–1 and Regulation ATS. 17 CFR 240.11Ac1–1 and 242.301(b)(3).

[8] The Commission limited the *de minimis* exemption to these three securities because they share certain characteristics that may make immediate execution of their shares highly desirable to certain investors. In particular, trading in the three ETFs is highly liquid and market participants may value an immediate execution at a displayed price more than the opportunity to obtain a slightly better price.

[9] Each ITS participant has adopted a trade-through rule substantially similar to the rule of the ITS Plan. *See* ITS Plan, Section 8(d)(ii); *See, e.g.*, NYSE Rule 15A, NASD Rule 5262.

[10] *See* August 2002 Order, *supra* note 3. The Commission's Office of Economic Analysis conducted an analysis of trading in the QQQs in 2002, comparing trading on a day before the *de*

Continued