

3. Applicant represents that Mr. Talbot is solely responsible for making the investment decisions for the Fund. At present, Mr. Talbot owns more than 90 percent of the Fund's capital.

4. The Fund's limited partners currently consist of Mr. Talbot's wife, three of Mr. Talbot's adult children and one of their spouses, eight of Mr. Talbot's grandchildren, and a small partnership ("BIF") whose partners currently consist of Mr. Talbot and one of his adult children.² Mr. Talbot's children acquired their interests in the Fund with assets received as gifts from Mr. Talbot's parents; Mr. Talbot's grandchildren acquired their interests as gifts from Mr. Talbot or from him and his former spouse. Mr. Talbot's daughter acquired her interest in the BIF partnership as a gift from Mr. Talbot.

5. Applicant represents that the partners of the Fund will be limited to Mr. Talbot, his siblings, spouse, direct lineal descendants by birth or adoption, spouses of such persons, estates of such persons, and trusts established by or for the benefit of such persons (collectively, "Family Members"), as well as partnerships whose partners consist only of Family Members.

6. Applicant states that it wants to participate in investment opportunities managed by registered investment advisers that seek to charge it a performance-based advisory fee pursuant to rule 205-3 under the Advisers Act. Applicant represents further that neither it nor any of its partners has any relationship (other than a present investment relationship) with, or is an affiliate or an interested person of, any registered investment adviser that would seek to charge it a performance fee pursuant to rule 205-3.

7. Applicant represents that the Fund is a "qualified purchaser" as defined in section 2(a)(51)(A)(ii) of the Investment Company Act³ and satisfies the net worth requirement for a "qualified client" as set forth in rule 205-3(d)(1) under the Advisers Act.⁴ Applicant

² Applicant represents that Mr. Talbot is the general partner of, and is solely responsible for the investment decisions for, the BIF partnership.

³ Applicant asserts that limiting partnership in the Fund to Family Members will assure that the Fund will continue to be a qualified purchaser under section 2(a)(51)(A)(ii).

⁴ Rule 205-3(d)(1) includes, as "qualified clients," a natural person who or a company that immediately after entering into the contract has at least \$750,000 under the management of the investment adviser; a natural person who or a company that the investment adviser reasonably believes, immediately prior to entering into the contract, to have a net worth exceeding \$1.5 million or to be a "qualified purchaser" as defined in section 2(a)(51)(A) of the Investment Company Act at the time the contract is entered into; and certain personnel of the investment adviser.

represents further that Mr. Talbot is a "qualified client" as defined in rule 205-3(d)(1) under the Advisers Act.

8. Applicant states that, of Mr. Talbot's children and grandchildren, only one is a "qualified client."

Applicant's Legal Analysis

1. Section 205(a)(1) of the Advisers Act generally prohibits a registered investment adviser, unless exempt from registration pursuant to section 203(b) of the Act, from entering into, extending, renewing, or performing under any investment advisory contract that provides for compensation based upon "a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client," commonly referred to as performance-based compensation or a performance fee.

2. Rule 205-3(a) under the Act provides an exemption from the prohibition in section 205(a)(1) provided each client entering into an investment advisory contract that provides for performance-based compensation is a "qualified client." Under rule 205-3(b), each equity owner of a "private investment company" is considered a client for purposes of rule 205-3(a).⁵ Applicant asserts that the Fund is a private investment company.

3. Because a number of the Fund's limited partners are not qualified clients, the Fund may not be treated as meeting the requirements of rule 205-3(a).

4. Applicant requests an order under section 205(e) of the Advisers Act granting an exemption from section 205(a)(1) of the Act so as to permit registered investment advisers to charge the Fund performance fees. Applicant asks that the relief requested be applicable to any Family Members that are not qualified clients and that are now or may later be admitted as partners in the Fund or the BIF partnership.

5. Section 205(e) of the Advisers Act provides that the Commission, by order upon application, may exempt any person, or any class or classes of persons, from section 205(a)(1) of the Act, if and to the extent that the exemption relates to an investment advisory contract with any person that the Commission determines does not need the protection of section 205(a)(1), on the basis of such factors as financial sophistication, net worth, knowledge of and experience in financial matters, and

⁵ Under rule 205-3(d)(3), a private investment company is a company that would be defined as an investment company under section 3(a) of the Investment Company Act of 1940 but for the exception provided from that definition by section 3(c)(1) of such Act.

such other factors as the Commission determines are consistent with section 205.

6. Applicant asserts that exemptive relief to permit the Fund to be charged performance fees is appropriate and consistent with the purposes of 205(a)(1) of the Advisers Act. Applicant asserts that the request for relief complies with the factors specified in section 205(e) of the Act. Applicant states that Mr. Talbot, the sole investment decision-maker for the Fund, is a qualified client meeting the net worth requirement of rule 205-3(d)(1)(ii)(A) under the Act. Applicant asserts that Mr. Talbot is financially sophisticated, has substantial knowledge of and experience in financial matters, and is fully able to assess the potential risks of performance fees. Applicant further asserts that Mr. Talbot has a father's or grandfather's love for his family and may be reasonably presumed to act in the best interests of the Family Members.

7. Applicant further asserts that Mr. Talbot's children have substantial experience and are financially sophisticated, which provides an extra layer of protection for their interests as well as those of their children.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4-3148 Filed 11-10-04; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50637; File No. SR-Amex-2004-86]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Trading of Exchange Traded Fund Shares Pursuant to Unlisted Trading Privileges

November 5, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 26, 2004, the American Stock Exchange LLC ("Amex" or "Exchange") 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 the Exchange.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

The Exchange filed the proposal pursuant to Section 19(b)(3)(A) of the Act,³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission. 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

The Exchange proposes to amend Amex Rules 1, 118, 131 and 205 to accommodate the trading of Exchange Traded Fund Shares pursuant to the Nasdaq UTP Plan. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

Rule 1. Hours of Business

No change.

* * * Commentary

.01 through .04 No change.

.05 The hours of business for a security traded on the Exchange pursuant to unlisted trading privileges shall generally be the same as the hours during which the security is traded in the primary market for such security. *Notwithstanding the foregoing, in accordance with Rules 1000 and 1000A, Portfolio Depositary Receipts and Index Fund Shares trading on the Exchange pursuant to unlisted trading privileges may trade until 4:00 p.m. or 4:15 p.m. as specified by the Exchange.*

* * * * *

Rule 118. Trading in Nasdaq National Market Securities

(a) through (i) No change.

(j) Odd-Lot Orders—Odd lot orders in Nasdaq National Market securities, *except for Portfolio Depositary Receipts or Index Fund Shares (collectively known as Exchange Traded Funds)*, shall be executed in the following manner:

(i) through (vi) No change.

(k) through (l) No change.

(m) Market-on-Close and Limit-on-Close Orders—The following procedures apply to market-on-close (MOC) and limit-on-close (LOC) orders in Nasdaq National Market securities. *Notwithstanding the foregoing, the following procedures will not apply to any Nasdaq National Market security the pricing of which is based on another security or an index (e.g., Exchange Traded Funds).*

(i) through (vi) No change.

(n) through (q) No change.

* * * Commentary

.01 The following rules refer to trading in Nasdaq National Market securities and should be consulted by members and member organizations trading Nasdaq National Market securities on the Floor: Rule 1 (Commentary .05); Rule 3; Rule 7 (Commentary .02); Rule 24 (b); Rule 109 (Commentary .02); Rule 115 (Commentary .01); Rule 131 (Commentary .02 and .03); Rule 156 (Commentary .01); Rule 170 (Commentary .11); Rule 175; Rule 190 (Commentary .06); and Rule 205 (Commentary .05).

* * * * *

Rule 131. Types of Orders

(a) through (t) No change.

* * * Commentary

.01 through .02 No change.

.03 Paragraph (a) "Market at 4:00 p.m." orders. An order in Portfolio Depositary Receipts or Index Fund Shares that trade on the Exchange until 4:15 p.m. (*including those Portfolio Depositary Receipts and Index Fund Shares trading pursuant to unlisted trading privileges*) may be designated as "market at 4:00 p.m." to denote that it is a market order which is to be executed at or as close as practicable to the close of the regular equity trading session on the exchange (normally 4:00p.m. Eastern Time).

(b) through (c) No change.

* * * * *

Rule 205. Manner of Executing Odd-Lot Orders

As used in this rule, except where otherwise provided or where the context otherwise requires, the term "effective transaction" refers to the round lot transaction on which the execution of the odd-lot order is to be based. Unless otherwise provided, references to round lot transactions are to transactions regular way.

No differential may be charged on any odd-lot order transactions, for either market or limit orders, except as otherwise specified in Section C(2) below.

Odd-lot orders shall be executed in the following manner:

A. through C. No change.

* * * Commentary

.01 through .04 No change.

.05 Odd-lot orders in Nasdaq National Market securities shall be executed in accordance with Rule 118(j). *Notwithstanding the foregoing, odd-lot orders in Nasdaq National Market securities that are Portfolio Depositary Receipts or Index Fund Shares shall be executed in accordance*

with the foregoing rule and commentary and not in accordance with Rule 118(j).

* * * * *

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

On August 2, 2002, the Exchange received Commission approval for the adoption of Rule 118 and the amendment of various other rules to provide for the trading of Nasdaq Stock Market, Inc ("Nasdaq") National Market ("NNM") securities pursuant to unlisted trading privileges ("UTP").⁵ The Exchange has been trading NNM securities since August 2002 in accordance with these rules and with provisions of the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-listed Securities Traded on Exchanges on an Unlisted Trading Privileges basis (the "Nasdaq UTP Plan"). Recently, the Exchange has considered trading pursuant to the UTP Plan certain Portfolio Depositary Receipts and Index Fund Shares (collectively known as "Exchange Traded Fund Shares" or "ETFs") that are or will be listed as Nasdaq NNM securities. In order to accommodate trading of such ETFs, the Exchange proposes to amend the following rules. It should be noted however that the substance of these rules would not be changed. The rule amendments would only clarify whether or not specific rules apply to ETFs trading on the Amex pursuant to the Nasdaq UTP Plan.

Rule 1. Hours of Business

Commentary .05 to Rule 1 provides that the hours of business for securities

⁵ See Securities Exchange Act Release No. 46305 (August 2, 2002), 67 FR 51609 (August 8, 2002) (SR-Amex-01-106).

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

traded on the Exchange pursuant to UTP shall be the same as the hours during which the security is traded in its primary market. Exchange Rules 1000 and 1000A currently provide that ETFs may trade until 4:15 p.m. each trading day, which may not coincide with the hours of trading in their primary market. Thus, the Exchange proposes to amend Commentary .05 to provide that ETFs traded pursuant to UTP may also have hours of trading that extend to 4:15 p.m. If the Exchange were to determine to trade an ETF listed on Nasdaq past the 4 p.m. closing hour, the Exchange is aware of and would make an accommodation for the requirement set forth in Section 11(B)(i) of the Nasdaq UTP Plan. Section 11(B)(i) requires the use of “.T” to designate trades in eligible securities occurring after normal market hours.

Rule 118 (j) Odd-Lot Orders

Currently, the procedures for handling odd-lot orders⁶ are different for NNM securities traded pursuant to UTP. Odd-lot procedures for equities and ETFs traded on the Exchange are more automated given the use of the Odd-lot Holding Tank (“OLHT”) for those products. The OLHT allows non-executable limit, stop, and stop limit orders to be routed to a “holding tank” for accumulation until such time as they can be automatically executed. According to the Exchange, use of the OLHT has cut down considerably on the number of orders being printed at the specialist’s post and handled manually. However, the OLHT is not currently available for NNM securities trading pursuant to UTP and Rule 118(j) sets forth different procedures for handling odd-lot orders in such securities. The Exchange expects to expand the use of the OLHT to NNM securities as soon as necessary systems changes are complete. The Exchange had a proposal pending with the Commission to amend Rule 118(j) once those changes were implemented;⁷ that proposal was withdrawn, but the Exchange will re-file it once a firm date for completion is established for the necessary systems changes. In the meantime, however, the Exchange proposes to amend Rule 118(j) to provide that NNM ETFs traded pursuant to UTP would use the OLHT and operate under the current rules and procedures for trading odd-lot orders in equities and ETFs.⁸ The Exchange believes this would be appropriate in

order to give consistency to the handling of odd-lot orders in ETFs and to provide automated handling of odd-lot orders given the large number of orders the Exchange expects to receive for these ETFs. In addition, Rule 205, Commentary .05 is proposed to be amended to reflect the application of Rule 205 to the trading of NNM ETFs.

Rule 118 (m) Market-on-Close and Limit-on-Close Orders

The Exchange’s policy and procedures with respect to market-on-close and limit-on-close orders is set forth in Rule 131A for securities listed on the Exchange and in Rule 118(m) for NNM securities traded pursuant to UTP. Rule 131A specifies that its procedures do not apply to any security whose price is based on another security or an index, which would include ETFs. Thus, the Exchange proposes to amend Rule 118(m) to specify that its market-on-close and limit-on-close procedures for NNM securities in the UTP program would not apply to ETFs or other securities whose price is based upon another security or an index.

Rule 131, Commentary .03 Types of Orders

Rule 131, Commentary .03 currently provides that an order in an ETF trading on the Exchange to 4:15 p.m. may be designated as a “market at 4 p.m.” to denote that it is a market order which is to be executed at or as close as practicable to the close of the regular equity trading session on the Exchange (normally 4 p.m. New York Time). The Exchange proposes to amend this provision to reflect that it would include ETFs traded pursuant to UTP. Rule 118, Commentary .01 would also be amended to reference Commentary .03 to Rule 131.

The Exchange believes these minor changes to its rules would be useful in clarifying the various procedures for trading ETFs pursuant to the Nasdaq UTP program. Although Rule 118(b) already applies the Exchange’s Constitution and Rules to the trading of NNM securities, unless the context otherwise requires, the Exchange believes it is important for members and the investing public to understand specifically where the context requires the use of other exchange rules and procedures for the trading of ETFs pursuant to the Nasdaq UTP Plan.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act⁹ in general, and

further the objectives of Section 6(b)(5)¹⁰ 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 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, or dealers.

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.

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 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, it has become effective pursuant to Section 19(b)(3)(A) of the Act,¹¹ and Rule 19b-4(f)(6) thereunder.¹² 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.

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(6). The Commission notes that the Exchange provided 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.

⁶ Odd-lot Orders are orders for less than the normal trading unit known as a round lot or 100 shares.

⁷ See, SR-Amex 2004-01, filed January 6, 2004.

⁸ See, Exchange Rule 205.

⁹ 15 U.S.C. 78f(b).

investors and the public interest because it will allow the Exchange to make clarifying changes to existing rules to cover the trading of ETFs pursuant to the Nasdaq UTP Plan and to ensure that those changes are effective upon implementation of trading of ETFs pursuant to the Nasdaq UTP Plan.¹³

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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. Please include File Number SR-Amex-2004-86 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-Amex-2004-86. 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. Copies of the filing also will be available for inspection and copying at the principal office of the Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that

¹³ For purposes only of waiving the 30-day operative delay of the proposed rule change, the Commission considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

you wish to make available publicly. All submissions should refer to File Number SR-Amex-2004-86 and should be submitted on or before December 3, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4-3149 Filed 11-10-04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50641; File No. SR-ISE-2004-29]

Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by International Securities Exchange, Inc., Relating to Proposed Amendments to Its Certificate of Incorporation and Constitution

November 5, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 22, 2004, the International Securities Exchange, Inc. ("Exchange" or "ISE") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III 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 is proposing to amend its Certificate of Incorporation and Constitution (also serving as the "Exchange's bylaws") in connection with its initial public offering ("IPO"). The proposed amendments, if approved, will become effective concurrently with the closing of the IPO. The proposed rule changes, including the proposed Amended and Restated Certificate of Incorporation ("Amended Certificate") and the proposed Amended and Restated Constitution ("Amended Constitution"), collectively referred to herein as the "proposed rule change," are available for viewing on the Commission's Web site, <http://www.sec.gov/rules/sro.shtml>, and at ISE and the Commission.

¹⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

The Exchange proposes to amend its Certificate of Incorporation and Constitution in connection with its contemplated IPO of the Class A common stock, par value \$.01 per share (the "Class A Common Stock"), of the Exchange.³ The proposed amendments, if approved, will become effective concurrently with the IPO.⁴

Following the IPO, the Exchange will continue to operate as a registered "national securities exchange" under Section 6 of the Act,⁵ and will maintain its current regulatory authority over its members. All persons using the Exchange will continue to be subject to the Exchange's rules. The Exchange will continue to interpret its rules to require that any revenues it receives from regulatory fees or regulatory penalties will be segregated and applied to fund the legal, regulatory and surveillance operations of the Exchange and will not be used to pay dividends to the holders of Class A Common Stock.⁶ Many of the proposed changes to the Certificate of Incorporation and Constitution are intended to ensure that the IPO of the Exchange will not unduly interfere with or restrict the ability of the Exchange or

³ Separately, the Exchange is also contemplating a reorganization into a holding company structure, the completion of which is contingent upon receipt of a favorable tax ruling from the Internal Revenue Service and Commission approval. The Exchange will separately file a rule change seeking approval of that reorganization. The Exchange currently anticipates that the reorganization will occur sometime following the IPO.

⁴ In connection with the proposed IPO, the Exchange filed a registration statement on Form S-1 with the Commission on July 2, 2004 (File No. 333-117145) (as amended from time to time, the "Registration Statement").

⁵ 15 U.S.C. 78f.

⁶ The Exchange adopted this interpretation in connection with its demutualization in 2002. See *infra*, note 8.