

the Applicants or another parent company deem appropriate, provided that the consent of all other shareholders or owners of equivalent interests to a change has been obtained if the Nonutility Applicant in question is not a direct or indirect wholly-owned subsidiary company of one of the Applicants. The requested authority would permit a Nonutility Applicant to increase the number of its authorized shares of capital stock or equivalent interests, change the par value of its capital stock, change between par value and no-par value stock, or convert from one form of business organization to another without additional Commission approval.

In addition, to the extent that these transactions are not otherwise exempt under the Act or the Commission's rules under the Act, Applicants request approval to consolidate, sell, transfer, or otherwise reorganize all or any part of their direct and indirect ownership interests in Nonutility Applicants, as well as investment interests in entities that are not subsidiary companies. To effect any consolidation or other reorganization, Applicants may wish either to contribute the equity securities of one Nonutility Applicant to another Nonutility Applicant, including a newly formed intermediate company ("Intermediate Company"),<sup>23</sup> or sell (or cause a Nonutility Applicant to sell) the equity securities or all or part of the assets of one Nonutility Applicant to another. These transactions also may occur through a Nonutility Applicant selling or transferring the equity securities of a subsidiary or all or part of the subsidiary's assets as a dividend to an Intermediate Company or to another Nonutility Applicant, and the acquisition, directly or indirectly, of the equity securities or assets of the subsidiary, either by purchase or by receipt of a dividend. The purchasing Nonutility Applicant in any transaction structured as an intra-system sale of equity securities or assets may execute and deliver its promissory note evidencing all or a portion of the consideration given. Allegheny and AE Supply also may liquidate or merge Nonutility Applicants.

#### *E. Exemption of Certain Transactions From At-Cost Requirements*

Allegheny and AE Supply seek an exemption under rule 13(b) for the Nonutility Applicants to provide certain services in the ordinary course of their

business to each other, in certain circumstances described below, including but not limited to cost or fair market prices.<sup>24</sup> Any services provided by the Nonutility Applicants to the Operating Companies and Mountaineer will continue to be provided "at cost" consistent with rules 90 and 91. A Nonutility Applicant will not provide services at other than cost to any other Nonutility Applicant that, in turn, provides these services, directly or indirectly, to any other associate company that is not a Nonutility Applicant, except under the requirements of the Commission's rules and regulations under Section 13(b) or an exemption from those rules and regulations obtained from the Commission.

Applicants request authority for the Nonutility Applicants to provide services to each other at other than cost in any case where the Nonutility Applicant receiving the services is:

(a) A FUCO or an EWG that derives no part of its income, directly or indirectly, from the generation, transmission, or distribution of electric energy for sale within the United States;

(b) An EWG that sells electricity at market-based rates that have been approved by the Federal Energy Regulatory Commission ("FERC"), provided that the purchaser of the electricity is not an associate public utility company;

(c) A "qualifying facility" ("QF") within the meaning of the Public Utility Regulatory Policies Act of 1978, as amended ("PURPA"), that sells electricity exclusively (a) at rates negotiated at arm's-length to one or more industrial or commercial customers purchasing the electricity for their own use and not for resale, and/or (b) to an electric utility company (other than an associate utility company) at the purchaser's avoided cost as determined in accordance with FERC's regulations under PURPA;

(d) A domestic EWG or QF that sells electricity at rates based upon its cost of service, as approved by FERC or any state public utility commission having jurisdiction, provided that the purchaser of the electricity is not an associate public utility company; or

(e) A direct or indirect subsidiary of Allegheny formed under rule 58 under the Act or any other nonutility company that (i) is partially owned by Allegheny,

<sup>24</sup> By order dated October 27, 1995 (Holding Co. Act Release No. 26401), Allegheny has received authorization for Ventures to provide, directly or through a special purpose subsidiary, energy management services and demand side management services to non-associate companies at market prices.

provided that the ultimate recipient of the services is not an associate public utility company, or (ii) is engaged solely in the business of developing, owning, operating, and/or providing services to Nonutility Applicants described in clauses (a) through (d) immediately above, or (iii) does not derive, directly or indirectly, any material part of its income from sources within the United States and is not a public utility company operating within the United States.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51070; File No. SR-Amex-2005-008]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC Relating to Options Transaction Fees in Connection With the Standard & Poor's Depository Receipts

January 21, 2005.

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 January 13, 2005, 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. 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 modify its Options Fee Schedule by adopting a per contract license fee in connection with specialist and registered options traders ("ROTs") transactions in options on Standard & Poor's Depository Receipts ("SPDRs") and by updating the symbol for the NASDAQ-100 Index Tracking Stock. The text of the proposed rule change is available on Amex's Web site at <http://www.amex.com>, at the Amex's

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

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

<sup>23</sup> The Commission previously authorized AE Supply to organize Intermediate Companies to facilitate development and consummation of investments in exempt activities (Holding Co. Act Release No. 27383 (April 20, 2001)).

Office of the Secretary, and at the Commission's Public Reference Room.

## 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 the Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

The Exchange has entered into numerous agreements with issuers and owners of indexes for the purpose of trading options on certain exchange-traded funds ("ETFs"). The requirement to pay an index license fee to third parties is a condition to the listing and trading of these ETF options. In many cases, the Exchange is required to pay a significant licensing fee to issuers or index owners that may not be reimbursed. In an effort to recoup the costs associated with index licenses, the Exchange has previously established a per contract licensing fee for specialists and ROTs that is collected on every transaction in designated products in which a specialist and ROT is a party. The licensing fees currently imposed on specialists and ROTs are set forth in the Exchange's Options Fee Schedule.

The purpose of the proposed fee is for the Exchange to recoup its costs in connection with the index license fee for the trading SPDR (SPY) options. The proposed licensing fee will be collected on every option transaction of the SPDR in which the specialist or ROT is a party. The Exchange proposes to charge \$0.10 per contract side for options on the SPDR. Accordingly, the Exchange believes that requiring the payment of a per contract licensing fee by those specialists units and ROTs that are the beneficiaries of the Exchange's index license agreements is justified and is consistent with the rules of the Exchange. In addition, the Exchange believes that passing the license fee (on a per contract basis) along to the specialist(s) allocated to options on the SPDR and the ROTs trading such product is efficient and is consistent

with the intent of the Exchange to pass on its non-reimbursed costs to those market participants that are the beneficiaries of such license agreements.

The Exchange notes that it has increased recently a number of member fees to better align Exchange fees with the actual cost of delivering services and reduce Exchange subsidies of such services.<sup>3</sup> Implementation of this proposal is consistent with the reduction and/or elimination of these subsidies.

The Exchange submits that the proposed license fee will provide the Exchange with additional revenue and will allow the Exchange to recoup its costs associated with the trading of options on the SPDR. In addition, the Amex believes that this fee will help to allocate to those specialists and ROTs transacting in options on the SPDR a fair share of the related costs of offering such options. Accordingly, the Exchange believes that the proposed fee is reasonable.

In addition, the Exchange proposes to update its Options Fee Schedule, including the list of products in Section V (Options Licensing Fee) and the text in footnote 1, to reflect the symbol change, from QQQ to QQQQ, that accompanied the transfer of the listing of the NASDAQ-100 Index Tracking Stock to The Nasdaq Stock Market, Inc., which took place on December 1, 2004.<sup>4</sup>

#### 2. Statutory Basis

The Exchange believes that the proposed fee change is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and Section 6(b)(4) of the Act,<sup>6</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among exchange members and other persons using exchange facilities.

### 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.

<sup>3</sup> See Securities Exchange Act Release Nos. 45360 (Jan. 29, 2002), 67 FR 5626 (Feb. 6, 2002) (order approving a proposed rule change relating to a retroactive increase in floor, membership and options trading fees, including licensing fees); and 44286 (May 9, 2001), 66 FR 27187 (May 16, 2001) (relating to fees imposed on members and member organizations, including member fees, floor fees, booth rental fees, and membership registration fees).

<sup>4</sup> Telephone conversation between Jeffrey Burns, Associate General Counsel, Amex, and Richard Holley III, Attorney, Division of Market Regulation, Commission, on January 21, 2005.

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

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

### 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 by the Exchange with respect to the proposed rule change.

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

The foregoing rule change has become effective immediately pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>7</sup> and Rule 19b-4(f)(2)<sup>8</sup> thereunder, in that it establishes or changes a due, fee, or other charge imposed by the Exchange. 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 of appropriate in the public interest, for the protection of investors, or otherwise in the 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-Amex-2005-008 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-2005-008. 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

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

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

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 such filing also will be available for inspection and copying at the principal offices 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-Amex-2005-008 and should be submitted on or before February 22, 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. 34-51078; File No. SR-NASD-2004-173]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc., To Establish Rules Governing the Operation of Nasdaq's Brut Facility

January 25, 2005.

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 3, 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") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On January 24, 2005, Nasdaq submitted Amendment No. 1 to the proposed rule change.<sup>3</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

Nasdaq proposes to establish rules governing the operation of its Brut trading facility. Nasdaq will implement the proposed rule change, as amended, immediately upon approval by the Commission. Below is the text of the proposed rule change, as amended. Proposed new language is *italicized*; proposed deletions are in [brackets].

##### 4900. BRUT SYSTEM (System)

##### 4901. Definitions

*Unless stated otherwise, the terms described below shall have the following meaning:*

(a) *The term "System securities" shall mean Nasdaq Market Center eligible securities as that term is defined in NASD Rule 4701(s) and exchange-listed Intermarket Trading System (ITS) eligible securities as defined in NASD Rule 5210(c).*

(b) *The term "Effective Time" shall mean, for orders so designated, the time at which the order shall become eligible for display and potential execution with other orders in the System.*

(c) *The term "Immediate or Cancel" shall mean, for limit orders so designated, that if after entry into the System the order (or a portion thereof) is not marketable, the order (or unexecuted portion thereof) shall be canceled and returned to the entering Participant.*

(d) *The term "limit order" shall mean an order to buy or sell a stock at a specified price or better. This order type is available for Nasdaq-listed and Exchange-listed securities.*

(e) *The term "market order" shall mean an unpriced order to buy or sell a stock at the market's current best price. A market order may have a limit price beyond which the order shall not be executed. This order type is available for Nasdaq-listed and Exchange-listed securities.*

(f) *The term "mixed lot" shall mean an order that is for more than a normal unit of trading but not a multiple thereof.*

(g) *The term "Nasdaq Market Center" shall mean the automated system owned and operated by The Nasdaq Stock Market, Inc. pursuant to NASD Rule 4700 Series.*

(h) *The term "The BRUT ECN System," or "System," shall mean the automated system owned and operated by Brut, which is owned and operated by The Nasdaq Stock Market, Inc.,*

*which enables Participants to execute transactions in System securities; to have reports of the transactions automatically forwarded to the appropriate National Market Trade Reporting System, if required, for dissemination to the public and the industry, and to "lock in" these trades by sending both sides to the applicable clearing corporation(s) designated by the System Participant(s) for clearance and settlement; and to provide System Participants with sufficient monitoring and updating capability to participate in an automated execution environment.*

(i) *The term "Participant" shall mean a NASD member that fulfills the obligations contained in Rule 4902 regarding participation in the System.*

(j) *The term "System Book Feed" shall mean a data feed for System eligible securities that Brut will make available to Participants and third-party vendors.*

(k) *The term "odd-lot order" shall mean an order that is for less than a normal unit of trading.*

(l) *The term "Reserve Size" shall mean the functionality that permits a Participant to display a portion of an order, with the remainder held in reserve on an undisplayed basis.*

(m) *The term "Good-till-Cancelled" shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution only until 4 p.m. Eastern Time on the day they are submitted unless cancelled before then by the entering party.*

(n) *The term "Good-till-Cancelled-Overnight" shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution until 4 p.m. Eastern Time, after which it shall be held by the System in a pending state, ineligible for display or execution, until the following trading day, when it will become eligible for display and execution from 7:30 a.m. until 4 p.m. Eastern Time on that and all subsequent trading days, until a date provided by the entering party (or if no such date is given, indefinitely) until cancelled by the entering party.*

(o) *The term "Good-till-Time," shall mean, for orders so designated, that if after entry into System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution until the time designated by the entering party, after which the order will be cancelled by the system. This time may*

<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> Amendment No. 1 replaced and superseded the originally filed proposed rule change.