

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50498; File No. SR-Amex-2004-66]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Relating to Allocation Procedures for Relisted Options

October 6, 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 August 10, 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. On September 24, 2004, Amex filed 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

The Exchange proposes to amend Amex Rule 27. The text of the proposed rule change is set forth below. Proposed new language is *italicized*. Deleted language is in brackets.

\* \* \* \* \*

#### Allocations Committee

Rule 27 (a) through (i) No change.  
Commentary .01 through .03 No change.

.04 Relisted Securities. A specialist shall be automatically allocated a security in which the specialist previously was registered only if all of the following conditions are met: (1) the company relists within one year of delisting, (2) the company is substantially the same entity as prior to delisting, (3) the company has no objection, and (4) the specialist is not subject to an allocation prohibition. A relisted option *shall* [will] be *automatically allocated to the*

*previously registered specialist unless (1) that specialist is subject to a prohibition on the allocation of options at the time that the option is relisted, (2) the Exchange relists the option more than one year after it was delisted, or (3) the specialist declines the allocation in writing* [pursuant to the procedures described in paragraph (b) of this Rule]. *If any of these conditions exist, the Allocations Committee will allocate the relisted option pursuant to the Exchange's regular options allocations procedures.*  
(.05) No change.

\* \* \* \* \*

#### 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

A relisted security is a security that previously traded on the Exchange, was delisted, and is subsequently readmitted to dealings. In the case of options, the Exchange's rule on relisted securities currently provides that a relisted option will go to open allocation with no explicit preference given to the original specialist. Amex asserts that specialists, as a result, are reluctant to delist an inactive option because they are concerned that if they agree to delist the option, and it subsequently becomes active, they will have lost the opportunity to specialize in it.

To encourage specialists to delist inactive options, the Exchange is proposing to amend the Exchange's allocations rules on relisted securities to provide that a relisted option will be automatically allocated to its original specialist unless: (1) The specialist is subject to a prohibition on options allocations at the time that the option is relisted; (2) the Exchange relists the option more than one year after it was delisted; or (3) the specialist declines in writing to accept the allocation. If any of these conditions exists, the

Exchange's Allocations Committee will allocate the relisted option pursuant to its regular allocation procedures. The Exchange believes that this change in allocations policy will eliminate a disincentive to the delisting of inactive options. The Exchange further believes that this could benefit the options market and, consequently, investors in options by reducing quote traffic in options.

###### 2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act,<sup>4</sup> in general, and furthers the objectives of Section 6(b),<sup>5</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; 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 believes that the proposed rule change will impose no 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

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

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

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

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

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

<sup>3</sup> See letter from William Floyd-Jones, Associate General Counsel, Amex, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated September 23, 2004 ("Amendment No. 1"). Amendment No. 1 replaced the original proposed rule change in its entirety. Amendment No. 1 amended the proposal to limit the reallocation of a relisted option to the original specialist to a one year period.

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-Amex-2004-66 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-2004-66. 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 offices 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 you wish to make available publicly. All submissions should refer to File Number SR-Amex-2004-66 and should be submitted on or before November 5, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>6</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50502; File No. SR-NASD-2004-49]

##### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Establish Access Fees for Nasdaq's Brut Facility**

October 7, 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 October 4, 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. Nasdaq has designated this proposal as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under Section 19(b)(3)(A)(ii)<sup>3</sup> of the Act and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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**

Nasdaq proposes to establish access fees for its Brut trading facility. The text of the proposed rule change is available at the Office of the Secretary, Nasdaq, and at the Commission.

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

In its filing with the Commission, Nasdaq 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. Nasdaq 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

Nasdaq represents that, on September 7, 2004, Nasdaq completed its purchase of the Brut ECN ("Brut"). Once purchased by Nasdaq, Brut became a "facility" of a national securities association,<sup>5</sup> thereby making the pricing for Brut's services subject to Section 15A(b)(5) of the Act, which requires that the fees of a national securities association be equitably allocated among members and issuers and other persons using the facility.<sup>6</sup> In this filing, Nasdaq proposes to establish such a fee structure for members who access orders residing in Brut's system. Under the proposal, Nasdaq will create a tiered fee structure in which the per share fee charged to a member to access liquidity in Brut will vary based on the amount of liquidity added to Brut by that member. Members that provide an average daily volume of 50,000 shares or less over a calendar month will be charged \$0.003 per share when accessing liquidity in the Brut system for that same month. Members that provide an average daily volume of 50,001 shares or more over a calendar month will be charged \$0.0027 per share when accessing liquidity in the Brut system for that same month.

Nasdaq believes that the above approach provides a uniform and objective method to impose fees for accessing liquidity in the Brut system that also encourages the provision of liquidity beneficial to all members.

###### 2. Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,<sup>7</sup> in general, and with Section 15A(b)(5) of

<sup>5</sup> See Section 3(a)(2) of the Act, 15 U.S.C. 78c(a)(2).

<sup>6</sup> 15 U.S.C. 78o-3(b)(5). Nasdaq currently operates Brut pursuant to a Temporary Conditional Exemption ("Exemption") issued by the Commission pursuant to Section 36(a) of the Act. See Securities Exchange Act Release No. 50311 (September 3, 2004), 69 FR 54818 (September 10, 2004). The Exemption requires Nasdaq to file proposed rule changes under Section 19(b) of the Act if it seeks to modify Brut's fee schedule.

<sup>7</sup> 15 U.S.C. 78o-3.

<sup>6</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> 15 U.S.C. 78s(b)(3)(A)(ii).

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