

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.

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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, 2002³ and extended on May 30, 2003⁴ 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

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.

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

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*

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."

In March 2004 and in May 2003, the Commission extended the three cent *de minimis* exemption for additional nine-month periods, in order to assess trading data associated with the *de minimis* exemption and to consider whether to adopt the *de minimis* exemption on a permanent basis, to adopt some other alternative solution, or to allow the exemption to expire. As a result of its review of trading data associated with the *de minimis* exemption, the Commission has proposed, as part of its market structure initiatives, Regulation NMS under the Act, which would include a new rule relating to trade-throughs.¹¹ Because the Commission has not yet taken action with respect to proposed Regulation NMS, the Commission believes it is appropriate to extend the *de minimis* exemption.

This extension of the *de minimis* exemption, however, applies only to the DIA and the SPY, and not the QQQ. On December 1, 2004, trading of the QQQ transferred from the American Stock Exchange to Nasdaq, and trades in the QQQ ceased to be subject to the trade-through provisions of the ITS Plan. Accordingly, an exemption for the QQQ is no longer necessary.

The Commission believes that an extension of the *de minimis* exemption for an additional nine-month period 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. Depending on the action the Commission takes on proposed Regulation NMS prior to September 4, 2005, the Commission

de minimis exemption was implemented, a day after the exemption was implemented before Island, an ECN, stopped displaying its orders to anyone, even its subscribers (going "dark"), and a day after the exemption was implemented when Island was "dark." The analysis showed that the percent of trades executed outside the national best bid and offer ("NBBO") did not increase, and that less than 1% of total trades were executed more than three cents away from the NBBO, after the *de minimis* exemption was implemented. A copy of the analysis is available in File No. S7-10-04.

¹¹ On February 24, 2004, the Commission proposed Regulation NMS for public comment. Securities Exchange Act Release No. 49325 (February 26, 2004), 69 FR 11126 (March 9, 2004). On May 20, 2004, the Commission published a supplemental request for comment and extended the period for comment on proposed Regulation NMS. Securities Exchange Act Release No. 49749 (May 20, 2004), 69 FR 30142 (May 26, 2004). In part, proposed Rule 611 of Regulation NMS would require certain identified market centers to establish, maintain, and enforce policies and procedures reasonably designed to prevent trade-throughs. Extension of the *de minimis* pilot in no way prejudices or determines what actions the Commission may take with respect to any rule proposal.

may determine to modify, withdraw, or extend the *de minimis* exemption. The Commission emphasizes, as it did in the March 2004 Order, the May 2003 Order and the August 2002 Order, that the *de minimis* exemption does not relieve brokers and dealers of their best execution obligations under the federal securities laws and SRO rules.

Accordingly, it is ordered, pursuant to Section 11A of the Act and Rule 11Aa3-2(f) thereunder,¹² that participants of the ITS Plan and their members are hereby exempt from Section 8(d) of the ITS Plan during the period covered by this Order with respect to transactions in DIAs and SPYs that are executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS. This Order extends the *de minimis* exemption from December 4, 2004 through September 4, 2005.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50792; File No. SR-Amex-2004-38]

Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change and Amendment Nos. 2, 3 and 4 Thereto by the American Stock Exchange LLC Relating to the Listing and Trading of the iShares® COMEX Gold Trust

December 3, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 24, 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 November 9, 2004, Amex amended its proposal; however, the Exchange withdrew this amendment on November 17, 2004. On November 10, 2004 the Exchange submitted a second amendment.³ On November 16, 2004,

the Exchange submitted a third amendment.⁴ On December 1, 2004, the Exchange submitted a fourth amendment.⁵ 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 list and trade under new Amex Rules 1200A *et seq.* iShares® COMEX Gold Trust Shares ("Gold Shares"). The text of the proposed rule change, as amended, is set forth below. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

Exchange Rules

Commodity-Based Trust Shares

Rule 1200A. (a) Applicability. The Rules in this Section are applicable only to Commodity-Based Trust Shares. In addition, except to the extent specific Rules in this Section govern or unless the context otherwise requires, the provisions of the Trust Issued Receipt rules and the Constitution and all other rules and policies of the Board of Governors shall be applicable to the trading on the Exchange of such securities. Pursuant to the provisions of Article I, Section 3(i) of the Constitution, Commodity-Based Trust Shares are included within the definition of "security" or "securities" as such terms are used in the Constitution and Rules of the Exchange.

(b) Definitions. The following terms as used in the Rules shall, unless the context otherwise requires, have the meanings herein specified:

(1) Commodity-Based Trust Shares. The term "Commodity-Based Trust Shares" means a security (a) that is issued by a trust (the "Trust") that holds a specified commodity deposited with the Trust; (b) that is issued by such Trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (c) that, when aggregated in the same specified minimum number, may

corresponding description. Amendment No. 2 replaced Amex's original filing in its entirety.

⁴ See Amendment No. 3, dated November 16, 2004 ("Amendment No. 3"). In Amendment No. 3, the Exchange proposed clarifying changes to certain aspects of Amendment No. 2 and modified the proposed rule text.

⁵ See Amendment No. 4, dated December 1, 2004 ("Amendment No. 4"). In Amendment No. 4, the Exchange provided additional description of the creation and redemption process for the Gold Trust shares and made clarifying changes to the proposed rule text. Amendment No. 4 replaced Amex's amended proposal in its entirety.

¹² 17 CFR 240.11Aa3-2(f).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Amendment No. 2, dated November 10, 2004 ("Amendment No. 2"). In Amendment No. 2, the Exchange revised the proposed rule text and