

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-51573; File No. SR-NYSE-2004-71)

April 19, 2005

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. to Amend NYSE Rule 104 Regarding the Requirement that Specialists Obtain Floor Official Approval for Destabilizing Dealer Account Transactions in ETFs

On December 15, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to amend NYSE Rule 104 regarding the requirement that specialists obtain floor official approval for destabilizing dealer account transactions in ETFs. On February 28, 2005, the NYSE submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> The proposed rule change, as amended, was published for comment in the Federal Register on March 15, 2005.<sup>4</sup> The Commission received no comments on the proposal.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>5</sup> In particular, the Commission believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>6</sup> which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative practices, to promote just

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

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

<sup>3</sup> Amendment No. 1 superseded the originally filed proposed rule change in its entirety.

<sup>4</sup> See Securities Exchange Act Release No. 51329 (March 8, 2005), 70 FR 12769.

<sup>5</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation.  
15 U.S.C. 78c(f).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

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.

The Exchange has proposed to remove the current restriction on the ability of specialists to buy on plus ticks or sell on minus ticks without Floor Official approval, as set forth in NYSE Rules 104.10(5) and (6), for transactions in investment company units and Trust Issued Receipts (collectively referred to as "Exchange Traded Funds," or "ETFs"). The Commission believes that, because ETFs are priced derivatively, based on the value of an underlying basket of securities, the removal of this restriction is warranted, and notes that it has previously approved a similar rule change adopted by the American Stock Exchange LLC ("Amex").<sup>7</sup> In approving the proposed rule change, the Commission notes that an Exchange specialist must continue to engage in dealings for his or her own account to assist in the maintenance of a fair and orderly market.<sup>8</sup>

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<sup>7</sup> See Securities Exchange Act Release No. 49087 (January 15, 2004), 69 FR 3622 (January 26, 2004) (order approving, among other things, the removal of the restriction on Amex specialists from buying on plus ticks and selling on minus ticks without Floor Official approval for transactions in Exchange Traded Funds).

<sup>8</sup> See NYSE Rule 104 and Rule 11b-1 under the Act, 17 CFR 240.11b-1.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (File No. SR-NYSE-2004-71), as amended, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</sup> 17 CFR 200.30-3(a)(12).