

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-62479; File No. SR-NYSEAmex-2010-31)

July 9, 2010

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing of Amendment Nos. 2 and 3, and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment Nos. 1, 2, and 3 Thereto, to Adopt as a Pilot Program a New Rule Series for the Trading of Securities Listed on the Nasdaq Stock Market Pursuant to Unlisted Trading Privileges, and Amending Existing NYSE Amex Equities Rules as Needed to Accommodate the Trading of Nasdaq-Listed Securities on the Exchange

I. Introduction

On March 26, 2010, NYSE Amex LLC (“Exchange” or “NYSE Amex”) 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: (1) adopt, as a pilot program, a new NYSE Amex Equities Rule Series (Rules 500 – 525) for the trading of securities listed on the Nasdaq Stock Market (“Nasdaq”) pursuant to unlisted trading privileges (“UTP”); and (2) amend existing NYSE Amex Equities rules to accommodate the trading of Nasdaq-listed securities on the Exchange. Subsequently, on April 6, 2010, NYSE Amex filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published in the Federal Register on April 19, 2010.<sup>3</sup> The Commission received no comments on the proposal. On June 21, 2010, NYSE Amex filed Amendment No. 2 to the proposed rule change. On July 9, 2010, NYSE Amex filed Amendment No. 3 to the proposed rule change. This order provides notice of filing of Amendment Nos. 2 and 3, and grants accelerated approval to the proposed rule change, as modified by Amendment Nos. 1, 2, and 3.

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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> See Securities Exchange Act Release No. 61890 (April 12, 2010), 75 FR 20401 (“Notice”).

## II. Description of the Proposal

### A. Overview

The Exchange proposes to adopt, as a pilot program, a new NYSE Amex Equities Rule Series to specifically govern the trading of any security listed on the Nasdaq that (1) is designated as an “eligible security” under 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 Privilege Basis, as amended (“UTP Plan”); and (2) has been admitted to dealings on the Exchange pursuant to UTP in accordance with Section 12(f) of the Act<sup>4</sup> (collectively, “Nasdaq Securities”). The Exchange proposes to trade Nasdaq Securities on the same systems and facilities it uses to trade its listed securities in accordance with the same trading rules, subject to certain exceptions:

- There will not be an opening or closing auction for Nasdaq Securities traded on the Exchange. Trading in Nasdaq Securities will open on a quote at 9:30 a.m. and will close at 4:00 p.m., or immediately thereafter under certain circumstances, using the last sale on the Exchange as the Closing Price.
- “Good ‘til Canceled” (“GTC”) Orders and “Stop” Orders for Nasdaq Securities will be modified to provide that any GTC or Stop Orders that are unexecuted at the close of trading will be treated as Day Orders and canceled. In addition, the Exchange will not accept limit or market “At the Close” (“MOC/LOC”), “At the Opening” (“OPG”), “Closing Offset” (“CO”) or “Good ‘til Cross” (“GTX”) Orders for the trading of Nasdaq Securities. All other order types will be accepted.
- Each Nasdaq Security will be assigned one Designated Market Maker (“DMM”) Unit, though the allocation process will be streamlined to follow the approach used by the Exchange for Supplemental Liquidity Providers (“SLPs”).
- For those Nasdaq Securities in which it is registered, a DMM Unit will be responsible for the affirmative obligation of maintaining a fair and orderly market in accordance with Exchange rules, subject to an enhanced quoting requirement and a phased-in implementation of Depth Guidelines and Price Participation Points (“PPPs”) to enable the Exchange to collect trading data adequate to calculate such guidelines.

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

- Trading in Nasdaq Securities will be subject to rules that are substantially similar to FINRA's "Manning Rule," rather than Rule 92 – NYSE Amex Equities.
- The Exchange's audit trail rules, including Rules 123- and 132B- NYSE Amex Equities, will apply to the trading of Nasdaq Securities on the Exchange, except that those members and member organizations that are also FINRA members and subject to FINRA's Rule 7400 Series ("Order Audit Trail System" or "OATS") will be exempt from Rules 123- and 132B- NYSE Amex Equities.

NYSE Amex will trade Nasdaq-listed equities and any other Nasdaq-listed security that trades like an equity security (e.g., rights, warrants), and will also trade one Nasdaq-listed exchange traded fund ("ETF"), the Invesco PowerShares QQQ™ Exchange Traded Fund ("QQQs").

The Exchange intends to implement trading of Nasdaq Securities using a phased-in approach, and to expand the program to eventually include all securities listed on Nasdaq. The Exchange proposes that this pilot program commence on the date the Commission approves the proposed rule change, and that it continue until the earlier of the Commission's approval to make such pilot program permanent or September 30, 2010.

#### B. Applicability and Trading Hours

Trading of Nasdaq Securities on the Exchange shall be governed by existing NYSE Amex Equities rules, as well as the new Rule 500 Series. To the extent the existing rules conflict with the Rule 500 Series, the Rule 500 series will control.

Pursuant to proposed Rule 502, the Exchange will trade Nasdaq Securities during regular trading hours in accordance with existing Rule 51. The Exchange also will permit Nasdaq Securities to trade in the Exchange's "Off-Hours Trading Facility." Due to modifications to the opening and closing for Nasdaq Securities, a member or member organization will not be permitted to make any bid, offer, or transaction for a Nasdaq Security on Exchange systems, or

route an order for a Nasdaq Security to another market center from Exchange systems, before 9:30 a.m. or after the close of the Off-Hours Trading session.

C. Assignment of Nasdaq Securities to DMMs and SLPs

The Exchange proposes to trade Nasdaq Securities within the existing DMM and SLP framework used to trade its listed securities. The Exchange will create a “Nasdaq Securities Liaison Committee,” consisting of NYSE Euronext employees of the Operations and U.S. Markets Divisions,<sup>5</sup> which will be responsible for reviewing and admitting Nasdaq Securities for trading on the Exchange. After admitting a Nasdaq Security to dealings on the Exchange, the Nasdaq Securities Liaison Committee also will assign the security to a DMM Unit and one or more SLPs.<sup>6</sup> No more than one DMM Unit will be assigned to any Nasdaq Security, and a member organization will not be permitted to be registered as both the DMM Unit and an SLP for the same Nasdaq Security. In its discretion, the Nasdaq Securities Liaison Committee also may reassign one or more Nasdaq Securities to a different DMM Unit or to a different SLP or SLPs.

Existing Exchange DMM Units will be automatically eligible for the assignment of Nasdaq Securities, so long as they qualify in accordance with Rules 98- and 103B(II)- NYSE Amex Equities, and proposed Rule 504(b) – NYSE Amex Equities.<sup>7</sup>

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<sup>5</sup> A representative of NYSE Regulation Inc. (“NYSE”) would act as an ad hoc member of the Committee.

<sup>6</sup> See proposed NYSE Amex Equities Rule 501.

<sup>7</sup> The Exchange proposes to amend Rules 98(b)(2) (definition of “DMM unit”) and 98(b)(15) (definition of “Related products”) -NYSE Amex Equities to accommodate the trading of Nasdaq Securities on the Exchange.

The Exchange intends to admit the QQQ to trading, and has proposed a set of special requirements governing the assignment of the QQQs and its component securities.<sup>8</sup>

D. Integration of NYSE Amex-Listed Securities and Nasdaq Securities at Posts on the Trading Floor

The Exchange anticipates that some DMM Units currently registered on the NYSE will seek to register as DMM Units on the Exchange to trade Nasdaq Securities. Under Exchange rules, all current NYSE members and member organizations are deemed members and member organizations of the Exchange, and DMM Units are automatically granted an NYSE Amex Equities trading license.<sup>9</sup> An NYSE DMM Unit that wishes to trade Nasdaq Securities and that is not already registered as a DMM Unit on the Exchange will need to register as such with the Exchange to ensure proper tracking and systems configuration. Similarly, each DMM will need to register with the Exchange to confirm that it meets all applicable registration requirements and to ensure proper tracking and systems set-up. In addition, an NYSE DMM Unit seeking to register as a DMM Unit on the Exchange will also need to advise FINRA, so that FINRA can assess whether such registration triggers different and/or additional financial and operational requirements, including but not limited to those pertaining to net capital.

Proposed Rules 103B(IX) and 504(d) – NYSE Amex Equities will require that Nasdaq Securities be allocated for trading, and DMM Units shall trade such securities, only at panels exclusively designated for trading listed and/or Nasdaq Securities on the Exchange.

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<sup>8</sup> See proposed Rule 504 – NYSE Amex Equities. The Exchange stated that it will review proposed Rule 504 – NYSE Amex Equities and the provisions governing the allocation of the QQQs and its component securities if the Exchange's share of the market for the Nasdaq Securities it trades exceeds 10% of the consolidated Tape C aggregate average daily trading volume. See *id.*, 75 FR at 20405.

<sup>9</sup> See Rules 2.10- and 2.20- NYSE Amex Equities.

Exchange-listed equities securities currently trade on Posts 1 and 2 on the Trading Floor. However, there are not enough panels on those posts to accommodate the trading of additional hundreds of Nasdaq Securities. To accommodate the trading of Nasdaq Securities, the Exchange needs to trade Exchange-listed and Nasdaq Securities on additional posts. Therefore, the Exchange proposes to amend Rule 103B – NYSE Amex Equities to permit Exchange-listed securities and securities admitted to dealings on the Exchange on a UTP basis to trade on posts throughout the Trading Floor. To prevent any confusion that could arise among members trading both NYSE-listed and Exchange-listed or traded securities, which trade under different rules, proposed Rule 103B(IX) would provide that Exchange-listed and/or traded (i.e. Nasdaq Securities) securities shall be assigned only to panels designated for the trading of such securities.

A DMM Unit that is registered to trade NYSE- and Exchange-listed securities, as well as Nasdaq Securities, could trade all such securities at the same post. However, a DMM Unit staff person would not be permitted to simultaneously trade both NYSE and NYSE Amex/Nasdaq securities, and the DMM Unit would need to commit staff to trade NYSE-listed securities separate from staff committed to trade Exchange-listed or traded securities at any given time during the trading day. However, intraday staff moves between panels would be permitted.

#### E. Security Allocation and Reallocation

Rule 103B - NYSE Amex Equities prescribes the criteria and procedures for the allocation and/or reallocation of NYSE Amex-listed equities securities to registered and qualified DMM Units. In particular, part IX of the rule currently provides that Exchange-listed equity securities must be allocated to posts on the Trading Floor that are exclusively designated for the trading of NYSE Amex securities.

F. Assignments to SLPs

An Exchange member or member organization may apply to be an SLP in Nasdaq Securities and will be eligible for the assignment of Nasdaq Securities once it registers and qualifies as an SLP in accordance with Rule 107B - NYSE Amex Equities. As with NYSE-registered DMMs and DMM Units, an NYSE-registered SLP is automatically deemed a member organization of NYSE Amex Equities under Rule 2.10 - NYSE Amex Equities. An NYSE-registered SLP that wishes to trade Nasdaq Securities as an NYSE Amex SLP must register with and be approved by the Exchange as an SLP in accordance with all applicable NYSE Amex Equities Rules.

The Nasdaq Securities Liaison Committee will assign one or more SLPs to Nasdaq Securities for trading on the Exchange. A member organization cannot be both the DMM Unit and an SLP for the same Nasdaq Security. If an SLP withdraws from its status as an SLP, its Nasdaq Securities will be reassigned to a different SLP(s) in accordance with Rule 107B – NYSE Amex Equities.

G. Units of Trading; Bids and Offers; Dissemination of Quotations; Priority

Proposed Rule 506 - NYSE Amex Equities prescribes the basic unit of trading for Nasdaq Securities, and addresses some requirements for bids and offers, the dissemination of quotations, and priority and parity of executions of Nasdaq Securities. Nasdaq Securities will be traded almost exactly as the Exchange's listed securities.<sup>10</sup>

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<sup>10</sup> See Notice, supra note 3, 75 FR at 20405-06, for a detailed discussion of the trading rules applicable to Nasdaq Securities.

## H. Openings and Closings

The Exchange will not conduct an opening or closing auction in Nasdaq Securities.

Instead, NYSE Amex will open trading on a quote at 9:30 a.m. and close on the last sale on the Exchange at 4:00 p.m.

### 1. Openings

Under proposed Rule 508(a), trading in each Nasdaq Security will open at 9:30 a.m. or as soon thereafter as possible, or at such other time as may be specified by the Exchange, based on a quote published by the DMM Unit assigned to the security. Because Nasdaq Securities will open on a quote, DMM Units will not be permitted or required to provide pre-opening or opening indications as prescribed by Rules 15- and 123D- NYSE Amex Equities. In addition, because the Exchange will not conduct an opening auction for Nasdaq Securities, DMM Units will not be permitted or required to hold or represent orders for Nasdaq Securities pursuant to Rule 115A.20 – NYSE Amex Equities. Orders for Nasdaq Securities shall not be accepted by the Exchange, and will be systemically blocked, before trading opens on any business day.<sup>11</sup>

### 2. Closings

Under Rule 508(b), trading in Nasdaq Securities will not close based on a closing auction, but will instead close at the end of the regular trading session at 4:00 p.m., or at such

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<sup>11</sup> The Exchange has filed a proposed rule change to incorporate the receipt and execution of odd-lot interest into the round lot market (“trading-in-shares”) and to decommission the use of the odd-lot system. See Securities Exchange Act Release No. 62303 (June 16, 2010), 75 FR 35865 (June 23, 2010) (SR-NYSEAmex-2010-53). However, until the implementation of trading-in-shares by the Exchange, odd-lot orders in Nasdaq Securities that are received by the Exchange prior to the opening of trading in those securities on the Exchange will be held and will not be executed until the first round-lot transaction in each particular security. See section II.U infra. Open odd-lot orders may be cancelled by the entering firm at any time.



other time as may be specified by the Exchange. Except for “aggregate-price orders”<sup>12</sup> or “closing-price orders” entered to offset an error entered in the “Off-Hours Trading Facility” in accordance with proposed Rule 511 – NYSE Amex Equities, orders for Nasdaq Securities will not be accepted by the Exchange after the regular trading session on any business day.<sup>13</sup>

The “Closing Price” for a Nasdaq Security will be the price of its last sale on the Exchange at or prior to the close of regular trading at 4:00 p.m.<sup>14</sup> Orders for Nasdaq Securities that are unexecuted at the close of trading at 4:00 p.m. shall be cancelled.

When the market for a Nasdaq Security is slow at the close of trading because of a gap quote situation, the DMM Unit must execute the final trade in the security in a manner consistent with a fair and orderly market, with reference to the trading characteristics of the security at issue, including its price, average daily trading volume (“ADTV”), average volatility, the prior sale of the security on the Exchange, and the closing price on the UTP Listing Market.<sup>15</sup> To ensure this, Floor Governor approval is required to close a Nasdaq Security that is “slow.” In such circumstances, the DMM will pair off liquidity to the extent available, and then execute a final trade at or immediately after the close that will set the Closing Price. All residual marketable interest for that security received prior to the close of trading shall first be executed at the Closing Price and then all unexecuted interest for the security shall be cancelled.

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<sup>12</sup> The Exchange is proposing to amend the definition of “aggregate-price order” under Rule 900 – NYSE Amex Equities to accommodate trading Nasdaq Securities in the Off-Hours Trading Facility.

<sup>13</sup> These terms are defined under Rule 900 – NYSE Amex Equities.

<sup>14</sup> See Rules 502- and 508– NYSE Amex Equities. See also proposed Rule 501 – NYSE Amex Equities.

<sup>15</sup> Under proposed Rule 501 – NYSE Amex Equities, the Exchange defines the term “UTP Listing Market” to have the same meaning as the term “Listing Market,” as defined under the “UTP Plan” (also defined therein).

If an extreme order imbalance at or near the close of the regular trading session could result in a Closing Price dislocation, the procedures of Rule 123C(9) – NYSE Amex Equities, which permit the Exchange to temporarily suspend the hours of operation for the solicitation and entry of orders into Exchange systems, shall apply. However, because the Exchange will not conduct a closing auction in Nasdaq Securities, no other procedures of Rule 123C – NYSE Amex Equities shall apply to trading in Nasdaq Securities.

The proposed modifications to the opening and closing of the trading of Nasdaq Securities require corresponding modifications to the “GTC” and “Stop” order types. Specifically, GTC Orders and unelected Stop Orders for Nasdaq Securities that are not fully executed at the close of the regular trading session shall be treated as Day Orders and shall be cancelled; they will not remain on the Exchange’s systems overnight. In addition, because the Exchange will not conduct either an opening or closing auction in Nasdaq Securities, the Exchange will not accept MOC/LOC, OPG, CO, or GTX Orders for Nasdaq Securities. All other order types noted in Rule 13 – NYSE Amex Equities will be permitted for the trading of Nasdaq Securities.<sup>16</sup>

#### I. Dealings of DMM Units and SLPs

As noted above, the Exchange proposes to trade Nasdaq Securities using the same DMM/SLP framework as currently used for its listed securities.

##### 1. DMM Units

DMM Units registered to trade Nasdaq Securities on the Exchange will be required to fulfill their responsibilities and duties for those securities in accordance with all applicable

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<sup>16</sup> See proposed Rule 501 – NYSE Amex Equities.

Exchange rules and requirements (“DMM rules”),<sup>17</sup> subject to two modifications. First, in lieu of the tiered quoting requirement (5% and 10%) currently in place for listed securities under Rule 104(a)(1)(A) – NYSE Amex Equities, proposed Rule 509(a)(1) requires a DMM Unit to have a bid or offer at the national best bid or national best offer (“inside”) in each assigned Nasdaq Security an average of at least 10% of the time, or more, during the regular business hours of the Exchange for each calendar month.<sup>18</sup> Second, pursuant to Rules 104(f)(ii)- and (iii)- NYSE Amex Equities, a DMM Unit is responsible for maintaining price continuity with reasonable depth for its registered Nasdaq Securities, in accordance with Depth Guidelines to be published by the Exchange. However, to give the Exchange time to phase-in appropriate Depth Guidelines and PPPs, these provisions will not be operative until 18 weeks after the approval of the proposed rule change by the Commission.<sup>19</sup>

As is the case with listed securities, a DMM Unit also will be responsible for facilitating openings, reopenings, and closings for each of the Nasdaq Securities in which it is registered, in accordance with applicable NYSE Amex Equities rules, including the procedures of proposed Rules 508- and 515- NYSE Amex Equities.<sup>20</sup> A DMM Unit also will be responsible for

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<sup>17</sup> The term “DMM rules” is defined in Rule 98 – NYSE Amex Equities.

<sup>18</sup> Credit will be given for executions for the liquidity provided by the DMM Unit. Reserve or other hidden orders entered by the DMM Unit will not be included in the inside quote calculations.

<sup>19</sup> The Exchange believes that a phased-in approach is appropriate so that Depth Guidelines and PPPs may be calculated based on actual trading data of Nasdaq Securities on the Exchange. Accordingly, following implementation and roll-out of the pilot program, NYSE Amex would collect and analyze 60 days of trade data and would then implement these guidelines for trading Nasdaq Securities on the Exchange within 30 calendar days. The 18-week phase-in period contemplates a two-week period to roll out the pilot program.

<sup>20</sup> However, because proposed rules do not provide for opening and closing auctions in Nasdaq Securities, DMMs would not be responsible for facilitating openings and closings. The Exchange has represented that, if it were to amend its rules to provide for

facilitating trading when the market is “slow” (such as during a gap quote)<sup>21</sup> and helping to close Nasdaq Securities that are subject to an imbalance. Other obligations would apply, including providing contra side liquidity as needed for the execution of odd-lot orders in Nasdaq Securities, meeting stabilization and re-entry requirements, and complying with the net capital requirements under the Act and Rules 103.20-, 4110-, and 4120- NYSE Amex Equities.

The DMM would be the sole market maker on the Exchange in its registered Nasdaq Securities. The Exchange believes that, because it would retain obligations that other market participants, both on the Exchange and in other markets, do not have, a DMM Unit should retain the benefits of parity and liquidity incentives, as well as the ability to use the Capital Commitment Schedule (“CCS”),<sup>22</sup> when trading Nasdaq Securities.<sup>23</sup>

In addition, other provisions of existing Exchange rules related to DMM responsibilities and obligations would be modified:

- DMMs will not be required to obtain Floor Official approval prior to engaging as a dealer in transactions for Nasdaq Securities that fall under Rule 79A.20 – NYSE Amex Equities.

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openings and closing in Nasdaq Securities, a DMM would be responsible for facilitating openings and closings in its assigned securities.

<sup>21</sup> A DMM Unit facilitates trading in slow markets by either conducting an auction or trading out of the slow market to resume a “fast” (i.e. quote-protected) market. It does not mean, however, that a DMM Unit must participate on the contra-side of the market when it is slow.

<sup>22</sup> See Rule 1000(d) – NYSE Amex Equities.

<sup>23</sup> The Exchange has stated that it will submit a separate fee filing detailing the rebate structure for trading Nasdaq Securities at a later date. The Exchange has represented that, although the price levels will likely differ from the rebate in place for trading in listed equities, the structure will be similar—specifically, that rebates will be paid to DMMs, SLPs, and other members (including Floor brokers) who provide liquidity on the Exchange. Telephone conversation between Jason Harman, Consultant, NYSE Amex, and Nathan Saunders, Special Counsel, Division of Trading and Markets, Commission, on June 9, 2010.

- Notwithstanding the prescriptions of Rule 36.30 – NYSE Amex Equities governing communications to and from the DMM Unit post on the Trading Floor, an individual DMM registered in an ETF may use a telephone connection or order entry terminal at the DMM Unit's post to enter a proprietary order in the ETF in another market center, in a component security of such ETF, or in an option or futures contract related to such ETF, and may use the post telephone to obtain public market information with respect to such ETF, options, futures, or component securities. If the order in the component security of the ETF is to be executed on the Exchange, the order must be entered and executed in compliance with Rule 112 – NYSE Amex Equities and Rule 11a2-2(T) under the Act, and must be entered only for the purpose of creating a bona fide hedge for a position in the ETF. The Exchange is proposing to add this provision to permit DMM Units registered in an ETF to execute more efficiently hedging transactions for the security.<sup>24</sup>

## 2. SLPs

An SLP registered in one or more Nasdaq Securities must fulfill its responsibilities and duties for those securities in accordance with all applicable Exchange rules, including, but not limited to, Rule 107B – NYSE Amex Equities. The SLP quoting requirements for Nasdaq Securities shall be the same as for securities listed on the Exchange.

### J. Derivative Securities Products

The Exchange also proposes some specific additional provisions that will apply to ETFs that are “new derivative securities products” traded pursuant to Rule 19b-4(e) under the Act.<sup>25</sup>

For each such ETF, the Exchange must file a Form 19b-4(e) with the Commission. In addition, the Exchange will distribute an information circular prior to the commencement of trading in each such product that generally includes the same information as contained in the information circular provided by the UTP Listing Market for the product, including: (a) the special risks of trading the new product; (b) the Exchange rules that will apply to the new product, including Rule

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<sup>24</sup> The Exchange modeled this provision after a provision in NYSE Rule 36.30. See Securities Exchange Act Release No. 44616 (July 30, 2001), 66 FR 40761 (August 3, 2001) (SR-NYSE-2001-08) (order approving amendments to NYSE Rule 36.30).

<sup>25</sup> 17 CFR 240.19b-4(e).

405– NYSE Amex Equities; (c) information about the dissemination of the value of the underlying assets or indexes; and (d) the risks of trading outside of the regular trading session for the product due to the lack of calculation or dissemination of the value of the underlying assets or index, the intra-day indicative value, or a similar value.

Members and member organizations that trade these ETFs will be subject to the prospectus delivery requirements of the Securities Act of 1933, unless the product is the subject of an order by the Commission exempting the product from certain prospectus delivery requirements under Section 24(d) of the Investment Company Act of 1940 or the product is not otherwise subject to prospectus delivery requirements under the Securities Act of 1933. As a result, members and member organizations will be required to provide all purchasers of such an ETF with a written description of the terms and characteristics of the product at the time confirmation of the first transaction in the product is delivered to the purchaser. In addition, members and member organizations will be required to include a written description with any sales material relating to the product that they provide to customers or the public. Any other written materials provided by a member or member organization to customers or the public making specific reference to the ETF as an investment vehicle must include a statement that such materials are available.

Members or member organizations carrying omnibus accounts for non-members will be required to inform non-members that execution of an order to purchase an ETF for the omnibus account will be deemed to constitute agreement by the non-member to make such written description available to its customers on the same terms as are directly applicable to members and member organizations under this Rule. Upon request of a customer, a member or member organization shall also provide a prospectus for the particular product.

To accommodate the trading of ETFs that qualify under this rule, the Exchange also proposes additional requirements for trading halts. If a temporary interruption occurs in the calculation or wide dissemination of the intraday indicative value, the value of the underlying index, portfolio or instrument, or similar value of a product and the UTP Listing Market halts trading in the product, the Exchange, upon notification by the UTP Listing Market of such halt due to such temporary interruption, shall also immediately halt trading in that product.

If the interruption in the calculation or wide dissemination of the intraday indicative value, the value of the underlying index, portfolio or instrument, or similar value continues as of the commencement of trading on the Exchange on the next business day, the Exchange shall not commence trading of the product on that day. If the interruption in the calculation or wide dissemination of the intraday indicative value, the value of the underlying index, portfolio or instrument, or similar value continues, the Exchange may resume trading in the product only if calculation and wide dissemination of the intraday indicative value, the value of the underlying index, portfolio or instrument, or similar value resumes or trading in the product resumes on the UTP Listing Market.

For an ETF where a net asset value or disclosed portfolio is disseminated, the Exchange will immediately halt trading in such product upon notification by the UTP Listing Market that the net asset value or disclosed portfolio is not being disseminated to all market participants at the same time. The Exchange may resume trading in the product only when dissemination of the net asset value or disclosed portfolio to all market participants at the same time resumes or trading in the product resumes on the UTP Listing Market.

In addition, the Exchange will enter into a comprehensive surveillance sharing agreement with any market trading components of the index or portfolio on which the product is based to the

same extent as the UTP Listing Market's rules require the UTP Listing Market to enter into a comprehensive surveillance sharing agreement with such markets.

K. Off-Hours Trading

The Exchange proposes to amend the definition of "aggregate-price order" under Rule 900 – NYSE Amex Equities to accommodate trading of Nasdaq Securities in the Off-Hours Trading Facility. Nasdaq Securities will be accepted by the Exchange's Off-Hours Trading Facility as part of an aggregate-price order, or as a closing-price order entered to offset a transaction made in error, as those terms are defined under Rule 900 – NYSE Amex Equities.

L. LRPs

In its original proposal, the Exchange proposed to modify the rules developed for its primary market to add values used to calculate LRPs for Nasdaq Securities traded on the Exchange. However, in Amendment No. 3, NYSE Arca revised the proposal to provide that LRPs would not apply to Nasdaq Securities.

M. Trading Ahead of Customer Limit Orders and Customer Market Orders

Proposed Rules 513- and 514- NYSE Amex Equities prescribe limits on proprietary trading by a member or member organization holding an unexecuted customer order in a Nasdaq Security. Generally, that member or member organization would not be permitted to execute a proprietary trade for that security at a price that would satisfy the customer's order without executing the customer's order at that price. These rules are based on substantially similar existing FINRA rules and interpretations that prohibit trading ahead of customer orders.<sup>26</sup>

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<sup>26</sup> See FINRA/NASD Interpretive Material (IM) 2110-2 (Trading Ahead of Customer Limit Order) and FINRA/NASD Rule 2111 (Trading Ahead of Customer Market Orders).



#### N. Trading Halts

Generally, as prescribed in proposed Rule 515 – NYSE Amex Equities, the Exchange will follow all applicable NYSE Amex Equities Rules governing halts or suspensions, for both regulatory and/or non-regulatory purposes, of the trading of Nasdaq Securities on the Exchange, including Rules 51-, 80B-, 80C-, 123D-, and 510- NYSE Amex Equities.

In addition, the Exchange will halt or suspend trading in a Nasdaq Security when trading in that security has been halted or suspended by the UTP Listing Market for regulatory reasons in accordance with its rules and/or the UTP Plan. The Exchange will also halt or suspend trading in a Nasdaq Security when the authority under which the security trades on the Exchange or the UTP Listing Market has been revoked. This can occur when the Nasdaq Security is no longer designated as an “eligible security” pursuant to the UTP Plan or is no longer listed by the UTP Listing Market. Also, if the Exchange has removed a Nasdaq Security from dealings, trading will be halted or suspended.

If trading of a Nasdaq Security is halted or suspended pursuant to proposed Rule 515 – NYSE Amex Equities, trading of the affected security on the Exchange will resume in accordance with the procedures of applicable NYSE Amex Equities rules, including Rule 508 – NYSE Amex Equities, the rules of the UTP Listing Market, and/or the UTP Plan. Any orders for a Nasdaq Security that are unexecuted at the time trading is halted on the Exchange shall be cancelled, and the Exchange shall not accept any new orders for the affected security for the duration of the halt.

#### O. Reporting and Recordkeeping

Under the Exchange’s current rules, members and member organizations are required to record and maintain certain details of an order in an electronic order tracking system (“OTS”).

Additionally, members and member organizations that act as Floor brokers must record and maintain certain details of an order in the Exchange's Front-End System Capture ("FESC"). Currently, most of the Exchange's members and member organizations are FINRA members, and FINRA requires that any order in a Nasdaq-listed security by a member be reported to OATS, regardless of where the order is executed. According to the Exchange, although OATS, OTS, and FESC contain substantially the same order information, the data are in different formats and the systems are not directly compatible.

To overcome this technical obstacle, the Exchange proposed Rule 516 – NYSE Amex Equities. This rule would exempt Exchange members or member organizations that are also FINRA members and subject to OATS reporting<sup>27</sup> from the requirements of Rules 123- and 132B- NYSE Amex Equities. This provision is designed to assist dual NYSE Amex/FINRA members and member organizations that intend to enter and/or execute orders in Nasdaq Securities on both the Exchange and other markets.

For dual NYSE Amex/FINRA members, FINRA's OATS rules will apply to an order in a Nasdaq Security up to when it is routed to the Exchange. At that point, if the order is transmitted to a Floor broker via an Exchange system, the Exchange's OTS and FESC requirements will apply to the order and capture its subsequent handling and execution on the Exchange.<sup>28</sup> All Exchange-only, non-FINRA members or member organizations will be subject to the

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<sup>27</sup> See FINRA Rule 7400 ("Order Audit Trail System").

<sup>28</sup> The Exchange has sought and received interpretive guidance from FINRA that FINRA Rule 7440(c)(6) exempts from FINRA's OATS requirements those orders in Nasdaq Securities received by a Floor broker that are first routed to the Exchange through Exchange systems, such as the Common Customer Gateway. See Letter from Brant K. Brown, Associate General Counsel, FINRA, to Claudia Crowley, NYSE Regulation, Inc., dated May 21, 2010 (filed with the Commission as Exhibit 3 to Partial Amendment No. 2 to SR-NYSE-2010-31, dated June 21, 2010).

Exchange's OTS and FESC requirements exclusively throughout the handling of an order for a Nasdaq Security.

The Exchange proposes to amend Rules 123-, 132B-, 342-, and 351- NYSE Amex Equities, which require members and member organizations to provide any trading information requested by the Exchange, to specify that they apply to both securities listed on the Exchange and securities "traded" on the Exchange, which include Nasdaq Securities.

P. Clearance and Settlement

Under proposed Rule 518 – NYSE Amex Equities, members and member organizations that conduct transactions involving Nasdaq Securities on the Exchange will be required to comply with all applicable NYSE Amex Equities rules related to clearance and settlement of such transactions.

Q. Limitation of Liability

The Exchange will be relying on data feeds from the UTP Listing Market for the trading of Nasdaq Securities. As a result, the Exchange proposes to include a specific provision limiting liability for any loss, damage, claim, or expense arising from any inaccuracy, error, delay, or omission of any data regarding Nasdaq Securities, including, but not limited to, the collection, calculation, compilation, reporting, or dissemination of any Nasdaq Security Information, as defined in Rule 522 – NYSE Amex Equities, except as provided in Rules 17- and 18- NYSE Amex Equities. In addition, the Exchange also expressly disclaims making any express or implied warranties with respect to any Nasdaq Security, any Nasdaq Security Information, or the underlying index, portfolio, or instrument that is the basis for determining the component securities of an ETF.

R. Jurisdiction

Rule 2A(b) - NYSE Amex Equities currently provides that the Exchange has jurisdiction to approve listings applications for securities admitted to dealings on the Exchange and may also suspend or remove such securities from trading. The Exchange proposes to amend this rule to include the admission of Nasdaq Securities to dealings on the Exchange on a UTP basis.

S. Proposed amendments to Non-NYSE Amex Equities Rule 476A

The Exchange proposes to amend Non-NYSE Amex Equities Rule 476A Part 1A to include certain of the proposed NYSE Amex Equities Rule 500 Series in the Exchange's Minor Rule Violation Plan ("MRVP"). Included are:

- Rule 502 – NYSE Amex Equities prohibition on making a bid, offer, or transaction, or routing an order, for a Nasdaq Security on or from Exchange systems before 9:30 a.m. or after the close of the Off-Hours Trading session.
- Rule 504(b)(5) – NYSE Amex Equities requirement for a DMM Unit registered in a Nasdaq Security that is an ETF to report the listed concentration measures.
- Rule 504(b)(6) – NYSE Amex Equities requirement to commit staff for the trading of NYSE-listed securities separate from that for the trading of Exchange-listed securities and/or Nasdaq Securities and prohibition on trading NYSE-listed securities together with Exchange-listed securities and/or Nasdaq Securities at the same time.
- Rule 508(a)(2) – NYSE Amex Equities requirement for a DMM Unit to open trading in Nasdaq Securities at 9:30 a.m. or as soon thereafter as possible.
- Rule 508(b)(2) – NYSE Amex Equities requirements for closing a Nasdaq Security in a manual or slow market.
- Rule 509(a) – NYSE Amex Equities requirements for DMM Units.
- Rule 509(b) – NYSE Amex Equities requirements for DMM communications from the Floor.
- Rule 510(c) – NYSE Amex Equities requirements for dissemination and distribution of information for Nasdaq Securities that are derivative securities products.

- Rule 516 – NYSE Amex Equities requirements for reporting and recordkeeping of transactions in Nasdaq Securities.
- Rule 518 – NYSE Amex Equities requirements for clearance and settlement of transactions in Nasdaq Securities.

Violations of these Rules will be subject to the fine schedule in Rule 476A.<sup>29</sup>

T. Amendment No. 2

In Amendment No. 2, the Exchange eliminated proposed Rules 513- and 514- NYSE Amex Equities, regarding prohibitions on proprietary trading ahead of customer orders, from the proposed MRVP. Also in Amendment No. 2, the Exchange clarified that it has received interpretive guidance from FINRA regarding OATS recording and reporting obligations for Exchange Floor brokers.<sup>30</sup>

U. Amendment No. 3

In Amendment No. 3, the Exchange revised the proposal to: (1) clarify that, until the implementation of its “trading-in-shares,” odd-lot orders in Nasdaq Securities that are received by the Exchange prior to the opening of trading in those securities on the Exchange will be held and will not be executed until the first round-lot transaction in each particular security; and (2) clarifying that trading in Nasdaq Securities will reopen following a trading halt, suspension, or pause in the same manner that trading opens at the beginning of the trading day (*i.e.*, the DMM Unit publishes a quote); (3) amend proposed Rule 509(a) – NYSE Amex Equities to correct a drafting error, and clarify that a DMM Unit must maintain a continuous two-sided quote with reasonable size; (4) delay implementation of the certain provisions concerning PPPs; (5) remove

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<sup>29</sup> For individuals, first offenses may be charged \$500, second offenses may be charged \$1,000, and subsequent offenses may be charged \$2,500. For member firms, first offenses may be charged \$1,000, second offenses may be charged \$2,500, and subsequent offenses may be charged \$5,000.

<sup>30</sup> See supra note 28.

the application of LRPs to trading in Nasdaq Securities; (6) add new Rule 508(a)(3) – NYSE Amex Equities to the Exchange’s MRVP under Rule 476A; (7) incorporate new Rule 80C – NYSE Amex Equities, which governs trading pauses, into proposed Rule 515 – NYSE Amex Equities; and (8) provide that DMMs do not need Floor Official approval for trading halts of Nasdaq Securities under Rule 123D – NYSE Amex Equities.

### III. Discussion and Commission’s Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>31</sup> In particular, the Commission finds that the proposed rule change is consistent with: (1) Section 6(b)(5) of the Act,<sup>32</sup> in that it is designed 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; (2) Section 11A(a)(1) of the Act,<sup>33</sup> in that it seeks to ensure the economically efficient execution of securities transactions and fair competition among brokers and dealers and among exchange markets; and (3) Section 12(f) of the Act,<sup>34</sup> which governs the trading of securities pursuant to UTP consistent with the maintenance of fair and orderly markets, the protection of investors and the public interest, and the impact of extending the existing markets for such securities.

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<sup>31</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. See 15 U.S.C. 78c(f).

<sup>32</sup> 15 U.S.C. 78f(b)(5).

<sup>33</sup> 15 U.S.C. 78k-1(a)(1).

<sup>34</sup> 15 U.S.C. 78l(f).

Under this proposal, Nasdaq Securities will trade on the Exchange pursuant to rules governing the trading of Exchange-listed securities that previously have been approved by the Commission.<sup>35</sup> NYSE Amex is making certain minor modifications to the operation of these rules, and adding certain new rules, to accommodate the trading of Nasdaq Securities on a UTP basis. The Commission is approving all of these modifications and additions described in the proposed rule change, although only certain aspects of the proposal are highlighted in the following discussion.

A. Benefits and Obligations of Market Makers

In its approval of NYSE's new market model pilot program, the Commission recognized that the participation of market makers in exchange markets may benefit public customers by promoting more liquid and efficient trading, and that an exchange may legitimately confer benefits on market participants willing to accept substantial responsibilities to contribute to market quality.<sup>36</sup> While the rules of an exchange may confer special or unique benefits to certain types of participants, they also must ensure, among other things, that investors and the public interest are protected.<sup>37</sup> In addition, such rewards must not be disproportionate to the services provided.<sup>38</sup>

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<sup>35</sup> See Securities Exchange Act Releases No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex-2008-63) and 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR-NYSEALTR-2008-10).

<sup>36</sup> See Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379, 64388 (October 29, 2008) (SR-NYSE-2008-46).

<sup>37</sup> See 15 U.S.C. 78f(b)(5).

<sup>38</sup> See Securities Exchange Act Release No. 58092 (July 3, 2008), 73 FR 40144, 40148 (July 11, 2008) ("Market makers can play an important role in providing liquidity to the market, and an exchange can appropriately reward them for that as well as the services they provide to the exchange's market, so long as the rewards are not disproportionate to the services provided.") (citation omitted).

In considering NYSE Amex’s proposal to permit trading of Nasdaq Securities on a UTP basis based on the new market model trading rules used by NYSE and NYSE Amex for their listed equity securities, we have considered whether the rewards granted to DMMs in Nasdaq Securities are commensurate with their obligations. The proposed obligations and benefits of DMMs in Nasdaq Securities closely track those applicable to DMMs in listed equities, which the Commission has approved on a pilot basis. Proposed Rule 509 – NYSE Amex Equities requires a DMM Unit registered in one or more Nasdaq Securities to comply with all rules that govern DMM conduct or trading (subject to a few modifications, discussed below), including Rule 104 – NYSE Amex Equities (“Dealings and Responsibilities of DMMs”), which sets forth the obligations of DMMs for Exchange-listed securities. Thus, a DMM in Nasdaq Securities would have an affirmative obligation to engage in a course of dealings for its own account to assist in the maintenance of a fair and orderly market insofar as reasonably practicable.<sup>39</sup> In addition, a DMM in Nasdaq Securities would be required to facilitate trading (including supplying liquidity as needed), during re-openings following a trading halt, when a “gap” quote procedure is being used, and when a manual block trade is being executed.<sup>40</sup> Similarly, pursuant to Proposed Rule 509 – NYSE Amex Equities, the rules which grant benefits, such as parity with Floor broker and customer interest<sup>41</sup> and the CCS, to DMMs would be applicable to DMMs in Nasdaq Securities.

As discussed above,<sup>42</sup> the obligations proposed for DMMs in Nasdaq Securities are slightly different than those that apply to Exchange DMMs and NYSE DMMs in listed securities. First, in lieu of the tiered quoting requirement (5% and 10%) currently in place for DMMs in

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<sup>39</sup> See Rule 104(a) – NYSE Amex Equities.

<sup>40</sup> See Rule 104(a)(2), (4), and (5) – NYSE Amex Equities.

<sup>41</sup> See Rule 72(c) – NYSE Amex Equities.

<sup>42</sup> See supra notes 18-19 and accompanying text.



listed securities, DMMs in Nasdaq Securities would be required to maintain a bid or offer at the NBB or NBO in each assigned Nasdaq Security an average of at least 10% of the time during the regular business hours of the Exchange for each calendar month. As clarified in Amendment No. 3, DMM Units will be required to maintain a continuous two-sided quote with reasonable size in their registered Nasdaq Securities. Second, Depth Guidelines and PPPs, which serve as guidelines that identify the price at or before which a DMM Unit is expected to re-enter the market after effecting a Conditional Transaction,<sup>43</sup> similar to those applicable to listed securities on NYSE Amex,<sup>44</sup> would apply to DMMs in Nasdaq Securities, but would not be operative until 18 weeks after the approval of the proposed rule change by the Commission in order to give the Exchange time to develop and phase in appropriate guidelines for Nasdaq Securities. Finally, because the proposed rules do not provide for opening and closing auctions in Nasdaq Securities, DMMs in Nasdaq Securities would not be responsible for facilitating openings and closings, as DMMs in listed equities are.<sup>45</sup>

After careful consideration, the Commission finds that the proposed rules relating to DMM benefits and duties in trading Nasdaq Securities on the Exchange pursuant to UTP are consistent with the Act. We note that this proposal is very similar to the previously-approved new market model pilot program currently operated by NYSE and NYSE Amex in listed securities (particularly with respect to DMM obligations and benefits).<sup>46</sup> In addition, like the

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<sup>43</sup> The term “Conditional Transaction” is defined under Rule 104(h)(i) as “a DMM’s transaction in a security that establishes or increases a position and reaches across the market to trade as the contra-side to the Exchange published bid or offer.”

<sup>44</sup> See Rules 104(f)(ii) – and (iii) – NYSE Amex Equities.

<sup>45</sup> However, the Exchange has represented that, if it were to amend its rules to provide for openings and closing in Nasdaq Securities, a DMM would be responsible for facilitating openings and closings in its assigned securities.

<sup>46</sup> See Securities Exchange Act Release No. 58845, supra note 36, at 64387-89.

new market model, this proposal is subject to a pilot program scheduled to end on September 30, 2010. Finally, the Commission believes that differences between the proposed rules for DMMs in Nasdaq Securities and those in effect for listed securities on NYSE and NYSE Amex are reasonable and consistent with the Act. While DMMs are not responsible for opening and closing auctions, the DMM quoting obligation is 10% in all securities, compared to 5% in more active securities and 10% in less active securities for DMMs in listed equities. Moreover, we note that the quoting obligation for Nasdaq Securities would apply to each assigned Nasdaq Security, rather than to the aggregated average of all the DMM's more-active or all the DMM's less-active assigned securities, as is the case for DMMs in listed securities. Finally, the delay in providing depth guidelines and implementing PPPs will allow the Exchange to obtain trading data for Nasdaq Securities to determine where the those levels should be set, and appears to be of reasonable duration. In light of the foregoing, the Commission believes that the proposed rules regarding DMM benefits and obligations are consistent with the Act.

B. Nasdaq Securities Assignments

1. DMMs and SLP Assignments

The Exchange's Nasdaq Securities Liaison Committee will assign Nasdaq Securities to DMM Units for trading on the Exchange. No more than one DMM Unit will be assigned to any Nasdaq Security and a member organization will not be permitted to be registered as both the DMM Unit and an SLP for the same Nasdaq Security. Existing NYSE Amex Equities DMM Units will be automatically eligible for the assignment of Nasdaq Securities, so long as they qualify in accordance with the applicable NYSE Amex Equities rules.<sup>47</sup>

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<sup>47</sup> See supra note 7 and accompanying text.

The Nasdaq Securities Liaison Committee will assign one or more SLPs to Nasdaq Securities for trading on the Exchange. NYSE Amex Equities members and member organizations may apply to be SLPs in Nasdaq Securities and will be eligible for the assignment of Nasdaq Securities in accordance with applicable NYSE Amex Equities Rules.<sup>48</sup> Like their counterparts in listed equities, SLPs in Nasdaq Securities will not be required to have a presence on the Trading Floor, and most will operate remotely. Therefore, the Exchange has concluded that the limitations in place regarding assignment of ETFs and their component securities to DMM Units<sup>49</sup> are unnecessary for SLPs.

The Commission finds that this aspect of the proposal is consistent with the Act. These proposed rules are substantially similar to existing rules for the assignment of securities to DMMs and SLPs in listed equities on NYSE and NYSE Amex that we have previously approved.<sup>50</sup>

## 2. QQQ and Component Securities

As part of this proposed rule change, NYSE Amex proposes requirements governing the assignment of the QQQs and its component securities.<sup>51</sup> Under proposed Rule 504 – NYSE Amex Equities, a DMM Unit may be registered in both the QQQs and a component security or securities provided that, at the time of assignment, no single component in which the DMM Unit is registered exceeds 10% of the index or portfolio underlying the QQQs, and all components in which the DMM Unit is registered do not in the aggregate exceed 20% of the index or portfolio

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<sup>48</sup> See Notice, supra note 3, 75 FR at 20405.

<sup>49</sup> See proposed Rule 504(b)(5) – NYSE Amex Equities.

<sup>50</sup> See, e.g., Securities Exchange Act Releases No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46); and 58877 (October 29, 2008), 73 FR 65904 (November 6, 2008) (SR-NYSE-2008-108).

<sup>51</sup> See Notice, supra note 3, 75 FR at 20403-05.

underlying the QQQs.<sup>52</sup> The Exchange will review its rules governing the allocation of the QQQs and component securities in the event that its market share of the Nasdaq Securities that it trades exceeds 10% of the consolidated Tape C aggregate average daily trading volume for these securities. In addition, the Exchange will also require the DMM Unit to have policies and procedures to detect and deter violations of the Act including manipulation, front-running, and wash sales.<sup>53</sup>

The Commission finds that the proposal relating to the assignment of QQQs and its component securities is consistent with Section 6(b)(5) of the Act.<sup>54</sup> The Commission notes that the current proposal applies to only one ETF, the QQQs, which the Exchange has represented meets the composition and concentration measures to be classified as a broad-based ETF.<sup>55</sup> The Commission believes that, when the securities underlying an ETF consist of a number of liquid and well-capitalized stocks, the likelihood that a market participant will be able to manipulate the

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<sup>52</sup> Proposed Rule 504 – NYSE Amex Equities also requires the DMM Unit registered in the QQQs to calculate, monitor, and report these components and percentages on a monthly basis. If these levels are exceeded, the DMM Unit will be required to report this to the Exchange as soon as possible. The Exchange also represented that it will calculate and monitor these levels and report them to the Nasdaq Liaison Committee. See Notice, supra note 3, 75 FR at 20403.

<sup>53</sup> With respect to the potential for wash sales, the Exchange has represented that virtually all DMM interest is entered through its algorithmic trading system (“SAPI”), and that the SAPI prevents trading interest of the DMM Unit from executing against its own quotes or its other trading interest on the Exchange. While a DMM Unit could enter a proprietary order in one of its assigned securities through a system other than the SAPI, DMM Units are required to have policies and procedures in place that are reasonably designed to prevent violations of Exchange rules and the federal securities laws, including the prohibition on wash sales pursuant to Section 9 of the Act, 15 U.S.C. 78i.

<sup>54</sup> 15 U.S.C. 78f(b)(5).

<sup>55</sup> The Commission has previously approved side-by-side trading and integrated market-making for broad-based ETFs and related options, in part because the individual components of broad-based ETFs are sufficiently liquid and well-capitalized, and the composition of the ETF as a whole does not focus on one security or group of securities. See Securities Exchange Act Release No. 46213 (July 16, 2002), 67 FR 48232 (July 23, 2002) (SR-Amex-2002-21).

price of the ETF is reduced. In addition, the Commission notes that the Exchange will require the DMM Unit in the QQQs to implement policies and procedures to detect and deter inappropriate access to information about pending block trades from other business units of the DMM in the component securities, potential front-running, manipulation, intentional wash sales, and of other violations of Section 9 of the Act.<sup>56</sup> The Commission also notes that the DMM will be required to conduct surveillance to detect patterns of trading that are indicative of these violations.

C. Trading Posts for Nasdaq Securities

The Exchange proposes to amend Rule 103B – NYSE Amex Equities to permit Exchange-listed securities and Nasdaq Securities to trade on posts throughout the Trading Floor. Under the proposed rule, a DMM Unit that is registered to trade NYSE and NYSE Amex-listed securities, as well as Nasdaq Securities, could trade all these securities at the same post. However, NYSE Amex-listed and/or traded securities, such as Nasdaq Securities, would be assigned to specific panels. The DMM Unit would be required to commit staff to trade NYSE-listed securities that are separate from the staff committed to trade NYSE Amex-listed or traded securities at any time during the trading day. The Commission believes that these arrangements are reasonable and consistent with the Act.

D. Limits on Proprietary Trading By Members Holding Unexecuted Orders in Nasdaq Securities

Proposed Rules 513- and 514- NYSE Amex Equities provide that a member firm handling an unexecuted customer order in a Nasdaq Security may not execute a proprietary trade for that security at a price that would satisfy the customer's order, without executing the

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<sup>56</sup> Such policies and procedures will have to meet the requirements of Rule 98-NYSE Amex Equities. See Notice, *supra* note 3, 75 FR at 20405 n.16.

customer's order at that price. The Commission believes that these proposed rules appear reasonably designed to protect customer orders, and thus should benefit investors and the public interest. These rules are substantially similar to existing FINRA rules and interpretations that prohibit trading ahead of customer orders,<sup>57</sup> and thus are consistent with the Act.

#### E. Reporting and Recordkeeping

The Commission finds that the proposed audit trail requirements are consistent with the Act. Generally, the proposed rules subject members and member organizations trading Nasdaq Securities on the Exchange to the Exchange's audit trail requirements.

Most of the Exchange's members and member organizations also are FINRA members. FINRA requires all trades in Nasdaq-listed securities by its members, regardless of the market, to be reported to OATS. Some members and member organizations may wish to enter and/or execute orders in Nasdaq Securities on both the Exchange and other markets, which would require them to comply with the Exchange's audit trail requirements and OATS. Additionally, because Nasdaq-listed securities have not previously traded on the Exchange, some members and member organizations, particularly Floor brokers that have previously only conducted transactions in Exchange-listed securities, do not have OATS-compliant systems and procedures.

Proposed Rule 516-NYSE Amex Equities eliminates duplicative reporting by exempting from the Exchange's audit trail provisions a member or member organization that is a FINRA member subject to OATS reporting. This exception is designed to spare members and member organizations that wish to trade Nasdaq Securities on multiple markets (including the Exchange)

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<sup>57</sup> See FINRA/NASD Interpretive Material (IM) 2110-2 (Trading Ahead of Customer Limit Order) and FINRA/NASD Rule 2111 (Trading Ahead of Customer Market Orders).

the unnecessary expense and/or delay associated with converting to OATS-compliant systems.<sup>58</sup> Notwithstanding that exception, a Floor broker that receives an order in a Nasdaq Security from another member must comply with the Exchange's audit trail requirements, regardless of FINRA membership status and the applicability of an OATS reporting obligation. The Exchange has represented that it will have full access to a complete audit trail and there will be no gap in regulatory oversight.<sup>59</sup>

#### F. Trading of New Derivative Securities Products

The Exchange's proposed rules governing the trading of new derivative securities products pursuant to Rule 19b-4(e) under the Act<sup>60</sup> are based on similar rules adopted by other national securities exchanges.<sup>61</sup> The Commission believes that proposed Rule 510(d) – NYSE Amex Equities is reasonably designed to prevent trading in new derivative securities products when transparency is impaired. In addition, proposed Rule 510(e) – NYSE Amex Equities requires that the Exchange enter into a comprehensive surveillance sharing agreement (“CSSA”) with markets trading components of the index or portfolio on which the new derivative securities product is based to the same extent as the listing exchange's rules require the listing market to

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<sup>58</sup> The Exchange states that, although OATS contains substantially the same order information as the Exchange's electronic order tracking system (“OTS”) and the Exchange's Front-End System Capture (“FESC”), OATS data are in a different format from the data recorded by OTS and FESC, and the systems are not directly compatible. See Notice, *supra* note 3, 75 FR at 20410-11.

<sup>59</sup> See Notice, *supra* note 3, 75 FR at 20411.

<sup>60</sup> 17 CFR 240.19b-4(e).

<sup>61</sup> See, e.g., Securities Exchange Act Release No. 57448 (March 6, 2008), 73 FR 13597 (March 13, 2008) (SR-NSX-2008-05) (order approving NSX Rule 15.9); Securities Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009) (SR-Nasdaq-2009-018) (notice of filing and immediate effectiveness for Nasdaq Rule 5740).

enter into a CSSA with such markets. This provision should assist the Exchange in fulfilling its regulatory obligations under Section 19(g)(1) of the Act.<sup>62</sup>

G. Additions to the MRVP

The Commission further finds that the proposal is consistent with Sections 6(b)(1) and 6(b)(6) of the Act,<sup>63</sup> which require that the rules of an exchange enforce compliance with, and provide appropriate discipline for, violations of Commission and Exchange rules. These proposed changes to the MRVP should strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities as a self-regulatory organization in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation. Therefore, the Commission finds that the proposal is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Act, as required by Rule 19d-1(c)(2) under the Act,<sup>64</sup> which governs minor rule violation plans.

In approving this proposed rule change, the Commission in no way minimizes the importance of compliance with Exchange rules and all other rules subject to the imposition of fines under the MRVP. The Commission believes that the violation of any self-regulatory organization's rules, as well as Commission rules, is a serious matter. However, the MRVP provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Commission expects that the Exchange will continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine of more or less than the recommended amount is appropriate for a violation under the MRVP or

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<sup>62</sup> 15 U.S.C. 78s(g)(1).

<sup>63</sup> 15 U.S.C. 78f(b)(1) and 78f(b)(6).

<sup>64</sup> 17 CFR 240.19d-1(c)(2).



whether a violation requires formal disciplinary action under NYSE Amex Rule 476.

#### H. Accelerated Approval

Amendment No. 2 did not materially alter the proposal, which had already undergone a full notice period, during which no comments were received. In Amendment No. 2, the Exchange revised the proposal to remove two rules from the Exchange's MRVP, and provided clarification on FINRA's guidance regarding the OATS recording and recordkeeping obligations for NYSE Amex Floor brokers. In Amendment No. 3, the Exchange revised the proposal to provide that LRPs would not be used for trading in Nasdaq Securities, and made certain minor changes to the proposal that do not raise material issues. The Commission finds that good cause exists, consistent with Section 19(b) of the Act,<sup>65</sup> for approving the proposed rule change, as modified by Amendment Nos. 1, 2, and 3 prior to the thirtieth day after publication of notice of filing of Amendment Nos. 2 and No. 3 in the Federal Register.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment Nos. 2 and No. 3, including whether those amendments are 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-NYSEAmex-2010-31 on the subject line.

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<sup>65</sup> 15 U.S.C. 78s(b).

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAmex-2010-31. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office 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-NYSEAmex-2010-31 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>66</sup> and Rule 19d-1(c)(2) under the Act,<sup>67</sup> that the proposed rule change, as modified by Amendment Nos. 1, 2 and 3 thereto (SR-NYSEAmex-2010-31), be, and it hereby is, approved and declared effective.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>68</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>66</sup> 15 U.S.C. 78s(b)(2).

<sup>67</sup> 17 CFR 240.19d-1(c)(2).

<sup>68</sup> 17 CFR 200.30-3(a)(12) and 200.30-3(a)(44).