

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

Margaret H. McFarland,

Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50940; File No. SR-Amex-2004-102]

### Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to Transaction Fees in Connection With the iShares® FTSE/Xinhua China 25 Index Fund

December 28, 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 December 13, 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 December 23, 2004, the Exchange 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.

#### 1. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to revise transaction fees for specialists and registered options traders (“ROTs”) in connection with transactions in the iShares® FTSE/Xinhua China 25 Index Fund (“FTSE/Xinhua Fund”). The text of the proposed rule change is available at the office of The Secretary, Amex, and at the Commission.

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

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

<sup>3</sup> In Amendment No. 1, the Exchange: (1) Specified that the trading of the iShares® FTSE/Xinhua China 25 Index Fund commenced on the Exchange on December 20, 2004; (2) clarified that the proposed transaction fee with respect to the iShares® FTSE/Xinhua China 25 Index Fund is not changing; (3) made clarifying changes to the statement of the purpose of the proposed license fee; and (4) made technical changes to the proposed rule text. The Commission notes that Exhibit 4 of Amendment No. 1 included marked additions to the Amex Exchange Traded Funds and Trust Issued Receipts Fee Schedule that had already been indicated in the original proposal.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The proposed rule change sets forth the manner in which the Exchange will charge transaction fees for the FTSE/Xinhua Fund. The Amex launched the trading of the FTSE/Xinhua Fund on December 20, 2004.<sup>4</sup> Transaction charges for specialists, ROTs, broker-dealers and customers in connection with the FTSE/Xinhua Fund would be billed at current rates existing for exchange traded funds (“ETFs”) without unreimbursed fees to a third party as set forth in Item #7 to the Exchange’s Equity Fee Schedule and Section 1 of the Amex Exchange Traded Funds and Trust Issued Receipts Fee Schedule. Accordingly, specialists would be charged a transaction fee of \$.0033 per share (\$.33 per 100 shares), capped at \$300 per trade (90,909 shares) while ROTs would be charged a transaction fee of \$.0036 per share (\$.36 per 100 shares), capped at \$300 per trade (83,333 shares). Transaction charges for specialists would be capped at \$400,000 per month per specialist unit. Off-floor orders (*i.e.*, customer and broker-dealer) would be charged a transaction fee of \$.006 per share (\$.60 per 100 shares), capped at \$100 per trade (16,667 shares). These fees are not changing.

In addition to the transaction charges set forth above, the Exchange would charge specialists and ROTs a license fee of \$0.06 per 100 shares in connection with transactions in shares of the FTSE/Xinhua Fund. Thus, the total proposed fee for transactions in shares of the FTSE/Xinhua Fund is: (1) For specialists, \$.0039 per share (\$.39 per 100 shares), capped at \$300 per trade (76,923 shares); (2) for ROTs,

\$.0042 per share (\$.42 per 100 shares), capped at \$300 per trade (71,428 shares); and (3) for customers and brokers-dealers, \$.006 per share (\$.60 per 100 shares), capped at \$100 per trade (16,667 shares).

The purpose of the proposed license fee is for the Exchange to recoup its costs in connection with the index license fee for the trading of shares of the FTSE/Xinhua Fund. The proposed licensing fee will be collected on every transaction of the FTSE/Xinhua Fund in which the specialist or ROT is a party. The Exchange believes that requiring the payment of a per contract licensing fee by those specialists units and ROTs that are the beneficiaries of the Exchange’s index license agreements is justified and consistent with the rules of the Exchange. In addition, passing along the license fee (on a per contract basis) to the specialist allocated to the FTSE/Xinhua Fund and those ROTs trading such product is efficient and consistent with the intent of the Exchange to pass on its non-reimbursed costs to those market participants that are the beneficiaries.

The Exchange notes that in recent years it has increased a number of member fees to better align Exchange fees with the actual cost of delivering services and reduce Exchange subsidies of such services.<sup>5</sup> Implementation of this proposal is consistent with the reduction and/or elimination of these subsidies.

The Exchange submits that the proposed license fee is intended to recoup the costs associated with the trading of the FTSE/Xinhua Fund. The Exchange will monitor the revenue generated in connection with the FTSE/Xinhua Fund license fee. In the event the revenue generated is greater than the Exchange’s cost to the index provider, the Exchange will seek to rebate the difference back to the affected specialists and ROTs. The Amex believes that this fee will help to allocate to those specialists and ROTs transacting in FTSE/Xinhua Fund shares a fair share of the related costs of offering such ETFs. Accordingly, the Exchange believes that the proposed fee is reasonable.

###### 2. Statutory Basis

The proposed fee change is consistent with section 6(b)(4) of the Act<sup>6</sup> regarding the equitable allocation of reasonable dues, fees, and other charges

<sup>5</sup> See Securities Exchange Act Release Nos. 45360 (January 29, 2002), 67 FR 5626 (February 6, 2002) (SR-Amex-2001-102) and 44286 (May 9, 2001), 66 FR 27187 (May 16, 2001) (SR-Amex-2001-22).

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

<sup>4</sup> See Securities Exchange Act Release No. 50800 (December 6, 2004), 69 FR 72228 (December 13, 2004) (SR-Amex-2004-85).

among Exchange members and other persons using Exchange facilities.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The proposed rule change will impose no burden on competition.

#### *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**

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act<sup>7</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder<sup>8</sup> because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of December 23, 2004, the Commission may summarily abrogate such proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the purposes of the Act.<sup>9</sup>

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Amex-2004-102 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-2004-102. 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 Room, 450 Fifth Street, NW., Washington, DC 20549. Copies of such 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-Amex-2004-102 and should be submitted on or before January 26, 2005.

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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### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-50930; File No. SR-NASD-2004-182]

#### **Self-Regulatory Organizations, National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change Regarding Minor Modifications to the Nasdaq Opening Process for Nasdaq-Listed Stocks**

December 27, 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 December 13, 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 and II below, which items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as "non-controversial" under section 19(b)(3)(A)<sup>3</sup> of the Act and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposed rule change 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 is filing a proposed rule change to modify the process for calculating the Nasdaq Official Opening Price ("NOOP"). There is no new proposed rule language for this proposal.

#### **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 previously proposed to create two new voluntary opening processes—the Modified Opening Process and the Nasdaq Opening Cross—that together constitute the beginning of the trading day for all Nasdaq-listed securities. The Commission approved that proposal on September 16, 2004.<sup>5</sup> Nasdaq has

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

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> Securities Exchange Act Release No. 50405 (September 16, 2004) 69 FR 57118 (September 23, 2004) (approving SR-NASD-2004-071). The Commission notes that Nasdaq made minor amendments to the Modified Opening Process and the Nasdaq Opening Cross as of October 12, 2004, which were not reflected in this filing. The Commission has made changes to the filing to correct this oversight. See Securities Exchange Act

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

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

<sup>9</sup> For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C), the Commission considers that period to have commenced on December 23, 2004, the date the Exchange filed Amendment No. 1 to the proposed rule change.

<sup>10</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.