

The Commission further believes that the waiver of certain listing fees in connection with transfers to the NYSE from NYSE Alternext US after the closing of the Merger is consistent with the Act. The Commission notes that an issuer seeking to transfer to the Exchange has already paid initial listing fees to another national securities exchange when it became a publicly traded company. The Commission also notes that the Exchange does not expect the loss of initial listing fees to be material and has stated that the fee waiver will not affect the Exchange's ability to finance its regulatory activities. In addition, after the calendar year of the transfer of the issuer's security, the Exchange would assess annual fees and listing of additional shares fees from these issuers. Further, the Exchange believes that there will be lower burdens and costs associated with its review of issuers transferring from another national securities exchange and in conducting ongoing compliance activities with respect to such companies. The Commission notes that NYSE has stated that review of transfers from NYSE Alternext US will be less costly than for an unaffiliated entity, as the same regulatory staff on Amex (that will have been absorbed by NYSE Regulation) will have conducted a substantial review of an Amex company that NYSE Regulation will be able to rely upon as a baseline in qualifying the company for listing on the Exchange and in conducting ongoing compliance activities with respect to any such company. Therefore, the Commission believes it is not inequitable or unfair to provide for a waiver of initial and annual fees for a limited period of time after the merger is consummated. Notwithstanding this, the Commission expects that a full and independent review of compliance with the listing standards will be conducted for any company seeking to take advantage of the fee waiver, just as for any company that applies for listing on the Exchange. Further, the Commission expects the Exchange to maintain its commitment to resources to its regulatory oversight of the listing process and its ongoing compliance review of listed companies under its regulatory program.

Based on the above, the Commission believes the proposed listing fees and listing fee waivers do not constitute an inequitable allocation of reasonable dues, fees, and other charges under Section 6(b)(4) of the Act,<sup>15</sup> do not permit unfair discrimination between issuers under Section 6(b)(5) of the

Act,<sup>16</sup> and are otherwise consistent with the requirements of the Act.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change (SR-NYSE-2008-56) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58601; File No. SR-NYSE-2008-74]

#### Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change To Enable the Exchange To Waive Annual Listing Fees for Securities Transferring From the Amex or NYSE Arca, Inc.

September 19, 2008.

#### I. Introduction

On August 4, 2008, the New York Stock Exchange LLC ("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 waive annual listing fees for securities transferring to NYSE from the American Stock Exchange LLC ("Amex") or NYSE Arca, Inc. ("NYSE Arca"). The proposed rule change was published in the **Federal Register** on August 15, 2008.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

The Exchange proposes to amend Section 902.02 of the Manual to provide that, with retroactive effect from January 1, 2008, for issuers that transfer their primary class of common stock from Amex to the Exchange, there shall be no annual fee for the remainder of the calendar year in which the transfer occurs for the transferred common stock and any other class of securities of a company listed on the Amex. This

proposed rule change (i) is conditioned on the consummation of NYSE Euronext's acquisition of the Amex (the "Merger"),<sup>4</sup> (ii) will not take effect until the date of consummation of the Merger, and (iii) will be of no further effect if the closing of the Merger does not take place by March 31, 2009. The amendment also provides that companies transferring the listing of their primary class of common stock from NYSE Arca to the Exchange (with respect to which the Exchange already waives annual fees for the first part year, pursuant to Section 902.02 of the Manual) will not be charged the prorated annual fee in the first year of listing for any other class of securities that is transferred in connection with the transfer of the common stock.

#### A. Securities Transferring From Amex

The Exchange proposes to amend Section 902.02 of the Manual to grant companies transferring the listing of their primary class of common shares and any other class of securities to the Exchange from the Amex a waiver of the prorated annual listing fee that would normally be payable in connection with the first partial calendar year of listing on the Exchange. As noted in its proposal, the Exchange believes this is appropriate because companies transferring to the Exchange from the Amex will already have paid annual continued listing fees to the Amex for the calendar year in which they transfer. The Exchange further stated that since some companies may choose to transfer from the Amex to the Exchange in advance of the consummation of the acquisition, and such companies will be making their transfer decisions in expectation of the Merger, the Exchange believes that they should not be penalized for transferring before the closing date. Consequently, the Exchange believes that it is appropriate to apply the fee waiver retroactively to all companies that transfer to the Exchange from the Amex during the portion of the year in which the Merger is consummated prior to such consummation.

In its proposal, the Exchange stated that this fee waiver is not unfairly discriminatory and does not constitute an inequitable allocation of fees, in particular because, after the Merger, NYSE Regulation, Inc. ("NYSE

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> 15 U.S.C. 78s(b)(2).

<sup>18</sup> 17 CFR 200.30-3(a)(12).

<sup>15</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. 58311 (August 5, 2008), 73 FR 47994.

<sup>4</sup> NYSE Euronext, the ultimate parent company of the Exchange, has agreed to acquire the Amex pursuant to an Agreement and Plan of Merger, dated as of January 17, 2008. The members of the Amex voted to approve the transaction on June 17, 2008. No vote of the NYSE Euronext shareholders is required. After the closing of the Merger, the Amex will be renamed NYSE Alternext US LLC.

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

Regulation") will perform listed company regulation for both the Exchange and Amex, including a substantial review of companies upon original listing. Many of the regulatory staff who currently perform initial and continued listing reviews at the Amex will become employees of NYSE Regulation at the time of the Merger and will continue to perform the same duties with respect to Amex companies after the Merger. Companies transferring from Amex will be subjected to the same rigorous regulatory review as any other applicant for listing on the Exchange. However, the Exchange expects that, on average, the review of companies transferring from Amex to the Exchange will be less costly than the review of a transfer from an unaffiliated market, because the Amex listing regulatory staff that will have been absorbed by NYSE Regulation will already have performed a substantial review of any Amex listed company and NYSE Regulation will be able to rely on that prior work as a baseline in qualifying the company for listing on the Exchange and in conducting ongoing compliance activities with respect to those companies.

The Exchange also believes that waiving, subject to consummation of the Merger, the prorated annual fees applicable to any Amex security transferred to the NYSE prior to the Merger is not unfairly discriminatory or an inequitable allocation of fees. In its proposal, the Exchange stated that the proposed fee waiver will not impact its ability to devote the same level of resources to its oversight of the companies that benefit from the waiver as it does for other listed companies or, more generally, impact its resource commitment to its regulatory oversight of the listing process or its regulatory programs. The Exchange notes that, after consummation of the Merger, the annual fee revenue paid by companies to the Amex prior to the Merger will be available to NYSE Regulation to finance its regulatory activities in relation to Amex-listed companies, regardless of whether such companies remain on NYSE Alternext US or have chosen to transfer their listing to the NYSE at some point during the year either before or after the Merger. The Exchange asserted that therefore collecting annual fees from companies upon transfer from the Amex to the NYSE would constitute a double billing of those companies for the regulatory expenses incurred by NYSE Regulation in relation to those companies during the year of transfer.

### *B. Securities Transferring From NYSE Arca*

Section 902.02 of the Manual currently provides that any company transferring the listing of its primary class of common equity securities from NYSE Arca to the Exchange will not be charged any annual fees in connection with the first partial year of listing on the Exchange. The Exchange proposes to extend the NYSE Arca annual fee waiver to the prorated annual fees that would otherwise be payable with respect to any other class of securities that an issuer is transferring to the Exchange from NYSE Arca in conjunction with its transfer of its common stock, for the remainder of the calendar year in which the transfer occurs. The Exchange believes this waiver is appropriate in light of the fact that the Exchange and NYSE Arca share a common parent and, without the waiver, NYSE Euronext would be collecting two separate annual fees in relation to such securities. In addition, the same staff from NYSE Regulation are responsible for compliance review of all securities listed on both markets and their prior experience with any securities transferring from NYSE Arca will significantly lessen the burden and costs associated with continued compliance review of those securities once they have been transferred to the NYSE. Specifically, the Exchange believes that the proposed fee waiver will not impact its ability to devote the same level of resources to its oversight of the companies that benefit from the waiver as it does for other listed companies or, more generally, impact its resource commitment to its regulatory oversight of the listing process or its regulatory programs.

### **III. Discussion**

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 and, in particular, the requirements of Section 6(b) of the Act and the rules and regulations thereunder. Specifically, the Commission finds that the proposal is consistent with Sections 6(b)(4)<sup>5</sup> and 6(b)(5) of the Act,<sup>6</sup> which require that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities, and are designed, among other things, 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, to protect investors and the public interest, and to not permit unfair discrimination between customers, issuers, brokers, or dealers.<sup>7</sup>

National securities exchanges traditionally assess annual listing fees on listed companies at the beginning of the calendar year. When a company transfers to another marketplace, such annual fees are typically pro-rated by the new market for the remainder of the calendar year. Annual fees aid a listed market in, among other things, conducting its regulatory responsibilities to ensure compliance by listed companies with continued listing standards and other regulatory requirements. The Commission has carefully examined the fee waiver in light of NYSE's ongoing regulatory responsibilities as to the transferred companies and, for the reasons set forth below, has determined that the proposed limited annual fee waiver is consistent with the Act.

The Commission notes that an Amex or NYSE Arca issuer seeking to transfer to the Exchange has already paid annual continued listing fees to another national securities exchange for the calendar year in which it transferred. Further, the Commission recognizes that subsequent to the consummation of the Merger, both Amex as NYSE Alternext US, NYSE Arca, and NYSE will be under the same common ownership. The Commission also notes that the Exchange anticipates the review of securities transferring from Amex to be less costly than the review of a transfer from an unaffiliated market, because Amex listing regulatory staff that will be part of NYSE Regulation will continue to perform both initial and continued listing reviews. In addition, the Commission notes that the same staff from NYSE Regulation are responsible for compliance review of all securities listed on both NYSE and NYSE Arca, and the Exchange asserted that this will significantly lessen the burden and costs associated with continued compliance review of NYSE Arca transfers.

The Commission further believes that the application of the waiver to companies transferring to the NYSE from Amex prior to the Merger, occurring only upon consummation of the Merger, is not unfairly discriminatory and does not constitute

<sup>7</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>5</sup> 15 USC. 78f(b)(4).

<sup>6</sup> 15 USC. 78f(b)(5).

an inequitable allocation of fees. The Commission notes that the Exchange has represented that after consummation of the Merger, the annual fee revenue paid by companies to the Amex prior to the Merger will be available to NYSE Regulation to finance its regulatory activities in relation to Amex-listed companies, regardless of whether such companies remain on NYSE Alternext US or have chosen to transfer their listing to the NYSE at some point during the year either before or after the Merger. Since the retroactive effect is conditioned on consummation of the Merger, the fee waiver recognizes that these regulatory efficiencies will only occur upon that event.

The Commission also notes that the fee waiver is for a limited time, applicable to the remainder of the calendar year in which the transfer occurs. Annual fees for both Amex and NYSE Arca transfers will continue to be assessed after the initial pro-rated annual fee waiver. The limited period of the fee waiver helps to ensure that that NYSE will have adequate fees to continue compliance and oversight of its listing program.

In summary, based on the reasons set forth above, including NYSE's assertions that (i) the same regulatory staff on both Amex (that will have been absorbed by NYSE Regulation) and NYSE Regulation will have conducted a substantial review of an Amex or NYSE Arca company that NYSE Regulation will be able to rely upon as a baseline in qualifying the company for both listing on the Exchange and in conducting ongoing compliance activities with respect to any such company; and (ii) the retroactive effect for Amex transfers will only occur if the Merger is consummated, the Commission believes it is not inequitable or unfair to provide for a waiver of annual fees for a limited period of time. The Commission expects, and the Exchange has represented, that a rigorous and independent review of compliance with the listing standards will be conducted for any company seeking to take advantage of the fee waiver, just as for any company that lists on the Exchange. In addition, the Commission expects the Exchange to maintain its commitment of resources to its regulatory oversight of the listing process and its ongoing compliance review of listed companies under its regulatory program.

Based on the above, the Commission believes the proposed fee waiver does not constitute an inequitable allocation of reasonable dues, fees, and other charges under Section 6(b)(4) of the

Act,<sup>8</sup> does not permit unfair discrimination between issuers under Section 6(b)(5) of the Act,<sup>9</sup> and is otherwise consistent with the requirements of the Act.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (SR–NYSE–2008–74) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58596; File No. SR–NYSEArca–2008–98]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc., Amending NYSE Arca Equities Rule 7.35 Governing Auctions

September 19, 2008.

Pursuant to section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b–4 thereunder,<sup>3</sup> notice is hereby given that, on September 15, 2008, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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

The Exchange proposes to amend NYSE Arca Equities Rule 7.35(c) and (e) to permit the Exchange to conduct a Market Order Auction and a Closing Auction in all exchange listed “Derivative Securities Products” as defined by NYSE Arca Equities Rule 7.34(a)(4)(A).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30–3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b–4.

#### 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 self-regulatory organization 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 those 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 parts of such statements.

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

###### 1. Purpose

The Exchange proposes to amend NYSE Arca Equities Rule 7.35(c) and (e) to permit the Exchange to conduct a Market Order Auction and a Closing Auction in all exchange listed “Derivative Securities Products” as defined by NYSE Arca Equities Rule 7.34(a)(4)(A).

Currently NYSE Arca Equities Rule 7.35(c) states that the Exchange will conduct a Market Order Auction in (i) exchange-listed securities for which the Corporation is the primary market; (ii) all exchange-listed exchange traded funds; and (iii) NYSE listed securities subject to a sub-penny trading condition. Similarly, NYSE Arca Equities Rule 7.35(e) states that the Exchange will conduct a Closing Auction in (i) exchange-listed securities for which the Corporation is the primary market; (ii) all exchange-listed exchange traded funds; and (iii) NYSE listed securities subject to a sub-penny trading condition. The Exchange proposes to expand subpart (ii) in both Rules by replacing the term “exchange-listed exchange traded funds” with the term “exchange-listed Derivative Securities Products” as that term is defined in NYSE Arca Equities Rule 7.34(a)(4)(A).

The Exchange believes this rule change will foster increased liquidity by expanding the type of securities eligible for Market Order and Closing auctions. This proposed amendment is also consistent with Rules 4752 and 4754 of the Nasdaq Stock Market, L.L.C. (“Nasdaq”), which do not limit the securities or products that may be traded in the opening and closing auctions.

###### 2. Statutory Basis

The proposed rule change is consistent with section 6(b) of the Act