

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change, as amended, has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>17</sup> and Rule 19b-4(f)(2)<sup>18</sup> thereunder, because it establishes or changes a due, fee, or other charge applicable only to a member imposed by the Exchange. Accordingly, the proposal will take effect upon filing with the Commission. At any time within 60 days of the filing of such proposed rule change the Commission may summarily abrogate such 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 furtherance of the purposes of the Act.<sup>19</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, as amended, 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-NSX-2006-14 on the subject line.

#### *Paper comments:*

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

All submissions should refer to File Number SR-NSX-2006-14. 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. 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-NSX-2006-14 and should be submitted on or before December 13, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>20</sup>

**Nancy M. Morris,**  
*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54767; File No. SR-NYSE-2004-69]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change and Amendment No. 1 Thereto To Establish Rules for the Trading of Unregistered Corporate Debt Securities

November 16, 2006.

#### I. Introduction

On December 3, 2004, the New York Stock Exchange LLC (f/k/a New York Stock Exchange, Inc.) ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to establish rules for the trading of unlisted debt securities on the Exchange's Automated Bond System ("ABS"). In connection with this proposed rule change, NYSE submitted an application for a Commission exemption pursuant to Section 36 of the Exchange Act<sup>3</sup> that would permit its members, brokers, and dealers to trade

certain unregistered corporate debt securities on ABS.<sup>4</sup> On March 15, 2005, NYSE filed Amendment No. 1 to the proposed rule change.<sup>5</sup> The proposal, as amended, was published for comment in the **Federal Register** on July 15, 2005.<sup>6</sup> The Commission received 19 comments from 16 different commenters on the NYSE Exemption Request and/or the proposed rule change. On October 18, 2005, the Exchange filed an initial response to the comment letters.<sup>7</sup> On September 22, 2006, the Exchange filed a second response to the comment letters.<sup>8</sup> This order approves the proposed rule change, as amended.<sup>9</sup>

#### II. Description of the Proposal

Currently, bond trading is conducted on the Exchange through ABS, an electronic trading system that provides subscribers with access to screens that display the order "book" in each bond being traded. Subscribers can enter orders which, if not immediately executed, would be displayed in the book according to price-time priority. NYSE disseminates quotation and last-sale information to market data vendors via the Exchange's dedicated bond quote line.

A corporate debt security may be listed and traded on the Exchange if it meets the standards set forth in NYSE Listed Company Manual Section 102.03 (for debt securities of domestic issuers<sup>10</sup>) or Section 103.05 (for debt securities of non-U.S. issuers), both of which require that the debt issue has an aggregate market value or principal amount of no less than \$5 million, and that (a) the issuer of the debt security (or an entity that directly or indirectly owns a majority interest in, or is under common control with, such issuer) has equity securities listed on the Exchange;

<sup>4</sup> See Securities Exchange Act Release No. 51998 (July 8, 2005), 70 FR 40748 (July 14, 2005) (File No. S7-06-05) ("NYSE Exemption Request").

<sup>5</sup> Amendment No. 1 replaced and superseded the original filing in its entirety.

<sup>6</sup> See Securities Exchange Act Release No. 51999 (July 8, 2005), 70 FR 41067.

<sup>7</sup> See letter from Mary Yeager, Assistant Secretary, NYSE, to Jonathan G. Katz, Secretary, Commission, dated October 18, 2005 ("NYSE Response Letter 1").

<sup>8</sup> See letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy Morris, Secretary, Commission, dated September 22, 2006 ("NYSE Response Letter 2").

<sup>9</sup> In a separate action, the Commission today also is approving the NYSE Exemption Request. See Securities Exchange Act Release No. 54766 (November 16, 2006) (File No. S7-06-05) ("Section 36 Exemption Order").

<sup>10</sup> An issuer incorporated or otherwise organized outside the United States would be treated as a domestic issuer under NYSE's bond listing standards only if it is excepted from the definition of "foreign private issuer" as set forth in Rule 3b-4 under the Exchange Act, 17 CFR 240.3b-4.

<sup>17</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>18</sup> 17 CFR 240.19b-4(f)(2).

<sup>19</sup> 15 U.S.C. 78s(b)(3)(C). For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposal, the Commission considers the period to commence on November 13, 2006, the date on which the Exchange submitted Amendment No. 1.

<sup>20</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.

<sup>3</sup> 15 U.S.C. 78mm.

(b) an issuer of equity securities listed on the Exchange has guaranteed the debt security; or (c) at least one of three criteria is met relating to the rating of the debt security or certain related debt securities.<sup>11</sup> In addition, a convertible debt security may be listed under NYSE Listed Company Manual Sections 102.03 or 103.05 only if the underlying equity security is subject to real-time last sale reporting in the United States. Alternatively, a debt security can trade on NYSE without a listing relationship if it is an “exempted security” (as defined in Section 3(a)(12) of the Exchange Act<sup>12</sup>).

Section 12(a) of the Exchange Act<sup>13</sup> provides that it shall be unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange. Section 12(b) of the Exchange Act<sup>14</sup> sets forth the information an issuer is required to submit for a security to be registered on a national securities exchange.

In this filing, the Exchange has proposed to establish NYSE Rules 1400 and 1401 in connection with the NYSE Exemption Request. Rule 1400 would incorporate the terms of the Commission’s Section 36 Exemption Order into the Exchange’s rules. Under Rule 1400, the debt securities eligible to be traded on the Exchange without being listed on the Exchange would include any unlisted note, bond, debenture, or evidence of indebtedness that is statutorily exempt from the registration requirements of Section 12(b) of the Exchange Act or is eligible to be traded absent Section 12(b) registration pursuant to the Section 36 Exemption Order. Securities eligible to be traded pursuant to the Section 36 Exemption Order would include debt securities that meet the NYSE Listing Standards of NYSE Listed Company Manual Sections 102.03 or 103.05, but would exclude convertible debt securities, which are equity securities under Section 3(a)(11) of the Exchange Act.<sup>15</sup>

<sup>11</sup> Debt securities meeting the requirements of NYSE Listed Company Manual Sections 703.19 (“Other Securities”) or 703.21 (“Equity-Linked Debt Securities”) currently also may be listed and traded on the Exchange.

<sup>12</sup> 15 U.S.C. 78c(a)(12).

<sup>13</sup> 15 U.S.C. 78f(a).

<sup>14</sup> 15 U.S.C. 78f(b).

<sup>15</sup> See 15 U.S.C. 78c(a)(11). Debt securities meeting the listing requirements of NYSE Listed Company Manual Sections 703.19 or 703.21, while not eligible to be traded pursuant to the Section 36 Exemption Order, would continue to be eligible to be listed and traded on the Exchange.

NYSE Rule 1401 would set forth additional criteria for an unregistered debt security to be traded on the Exchange. Rule 1401 would require of each “traded” debt security an outstanding aggregate market value or principal amount of no less than \$10 million on the date trading commences<sup>16</sup> and \$1 million for continued inclusion for trading on the Exchange.<sup>17</sup> Rule 1401 also would allow the Exchange to suspend trading of a debt security if, among other things, the issuer declares bankruptcy, the Exchange receives advice that the debt securities are without value, or the issuer of the debt securities or its management engages in operations which, in the opinion of the Exchange, are contrary to the public interest. Rule 1401 also provides that the Exchange would promptly suspend trading in a debt security if the security no longer qualified as an exempted security or no longer met the criteria set forth in the Commission’s Section 36 Exemption Order.

NYSE intends to identify outstanding debt securities that it currently does not list as well as newly issued debt securities that would satisfy the requirements of Rules 1400 and 1401, and to notify its members and member organizations, through ticker notices and postings on the Exchange’s Web site, that such unlisted debt securities are eligible to be traded on the Exchange. In addition, NYSE intends to identify debt securities currently listed on the Exchange that meet the criteria set forth in Rules 1400 and 1401 and thus would be eligible for trading on an unlisted basis. In such cases, NYSE would inform the issuer that its debt securities could be delisted but traded on the Exchange on an unlisted basis.<sup>18</sup> An issuer could elect not to have its debt securities delisted; such securities would have to continue to meet the applicable listing standards.<sup>19</sup> Any security not satisfying the requirements of Rules 1400 and 1401 could trade on the Exchange provided it meets the applicable listing standards.<sup>20</sup>

<sup>16</sup> NYSE would employ two existing corporate bond issuedatabases that provide issue market size information to review for compliance with this criterion.

<sup>17</sup> To monitor the \$1 million threshold, NYSE would utilize Xcitek, LLC (“Xcitek”), a third-party vendor, to monitor corporate actions such as partial redemptions, defaults, and tender offers. NYSE has represented that it would monitor the prices of bonds in the event that an issuer defaults or is facing potential bankruptcy and would monitor the media for warnings of possible difficulties in addition to ratings downgrades.

<sup>18</sup> See NYSE Response Letter 2 at 1.

<sup>19</sup> See *id.*

<sup>20</sup> Debt securities would remain eligible for listing and trading on the Exchange under NYSE Listed

### III. Summary of Comments and NYSE’s Response

As noted above, the Commission received 19 comments from 16 different commenters related to the proposed NYSE Exemption Request and/or the proposed rule change.<sup>21</sup> Thirteen of the commenters strongly urged the Commission to grant the Section 36 exemption and approve the proposed rule change.<sup>22</sup> The commenters generally asserted that allowing unregistered corporate bonds to trade on NYSE would lead to increased efficiency, transparency, liquidity, and competition in the debt markets. Three other commenters—NASD, Nasdaq, and the BMA—expressed some support for NYSE’s proposal but also raised certain concerns.<sup>23</sup>

#### A. Bond Market Supervision and Fragmentation Issues

NASD argued generally that Commission approval of NYSE’s proposal “could undermine the

Company Manual Sections 102.03, 103.05, 703.19, and 703.21.

<sup>21</sup> See comments from Dennis J. Lehr, dated July 18, 2005 (“Lehr Letter”); Howard M. Friedman, Compliance and Operations Officer, Easton & Co., dated July 19, 2005 (“Easton Letter”); Michele C. David, Vice President & Assistant General Counsel, The Bond Market Association (“BMA”), dated July 26, 2005; Robyn Greene, Esq., dated August 4, 2005 (“Greene Letter”); William T. Dolan, dated August 5, 2005 (“Dolan Letter”); Donald G. Dueweke, dated August 9, 2005 (“Dueweke Letter”); Denis P. Kelleher, CEO, Wall Street Access, dated August 9, 2005 (“Wall Street Access Letter”); Joseph P. Riveiro, Manager, Corporate Bond Department, InvestecUS, Inc., dated August 9, 2005 (“InvestecUS Letter”); Lynnette Kelly Hotchkiss, Senior Vice President and Associate General Counsel, BMA, dated August 15, 2005 (“BMA Letter 2”); David Russell, Jr., Managing Director, Cove Hill Advisory Services, Inc., dated August 15, 2005 (“Cove Hill Letter”); Thomas Peterffy, Chairman, and David M. Battan, Vice President and General Counsel, Interactive Brokers LLC, dated August 19, 2005 (“Interactive Brokers Letter”); Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, National Association of Securities Dealers, Inc. (“NASD”), dated September 7, 2005 (“NASD Letter”); Fred Siesel, dated June 2, 2006 (“Siesel Letter 1”); Ron Klein, Chairman and CEO, General Associates, Inc., dated July 2, 2006 (“General Associates Letter 1”); Michael N. Castle, Member of the U.S. House of Representatives, dated August 22, 2006 (“Castle Letter”); Joan Conley, Senior Vice President, The Nasdaq Stock Market, Inc., dated September 6, 2006 (“Nasdaq Letter”); Fred Siesel, dated September 14, 2006 (“Siesel Letter 2”); Cate Long, Multiple-Markets, dated October 12, 2006 (“Multiple-Markets Letter”); and Ron Klein, Chairman and CEO, General Associates, Inc., dated October 16, 2006 (“General Associates Letter 2”).

<sup>22</sup> See Lehr Letter, Easton Letter, Greene Letter, Dolan Letter, Dueweke Letter, Wall Street Access Letter, InvestecUS Letter, Cove Hill Letter, Interactive Brokers Letter, Siesel Letter 1, General Associates Letter 1, Castle Letter, Siesel Letter 2, Multiple-Markets Letter, and General Associates Letter 2.

<sup>23</sup> See NASD Letter, Nasdaq Letter, and BMA Letter 2.

Commission's original goal of increasing transparency in the corporate bond market." <sup>24</sup> NASD asserted that, by being permitted to trade unregistered debt securities, the Exchange would be establishing an "execution facility in the [over-the-counter ("OTC")] market." <sup>25</sup> Based on that assertion, NASD argued that "transactions in unlisted bonds that are effected through ABS must be subject to NASD's statutorily mandated oversight as the OTC market regulator under Section 15A of the Exchange Act." <sup>26</sup> NASD further argued that "a robust consolidated inter-market audit trail \* \* \* [is necessary] \* \* \* to ensure that the broader corporate bond market is effectively regulated without fragmentation" <sup>27</sup> and that, "[i]f significant corporate bond transaction data is disseminated by the NYSE, investors will be confronted with two unconsolidated corporate bond 'tapes.'" <sup>28</sup> Nasdaq also expressed the view that having one regulator in the corporate bond market ensures appropriate and non-duplicative regulation of that market. <sup>29</sup>

With respect to transaction reporting, the BMA noted that, read literally, NASD's rules governing the Trade Reporting and Compliance Engine ("TRACE"), to which NASD members must report transactions in TRACE-eligible securities, would apply to trades in unregistered debt securities on ABS. <sup>30</sup> The BMA stated that dual reporting of the same trades would be unnecessary and unduly burdensome. <sup>31</sup> Another commenter, Multiple-Markets, argued that a combined trade reporting system would be beneficial to investors. <sup>32</sup>

In its response letter, NYSE rejected NASD's assertion that trading of unregistered debt securities would render ABS an OTC facility subject to NASD oversight. <sup>33</sup> NYSE argued that, if trading of unregistered securities on ABS were OTC activity, its members would not need a Section 36 exemption to trade such securities on the Exchange in the first place. <sup>34</sup> With respect to concerns relating to investor confusion that may arise as a result of unconsolidated market data, NYSE responded that it believed vendors would consolidate the data in response

to customer demand. <sup>35</sup> In response to the concerns regarding uncoordinated regulation, NYSE stated that it would be amenable to coordinating regulation with NASD. <sup>36</sup> NYSE agreed with the BMA's view that the Exchange's members should not be required to report ABS trades to TRACE. <sup>37</sup>

### B. Competition Issues

The BMA raised various interrelated competition issues. For example, the BMA asserted that, by trading unregistered debt securities, the Exchange would be "acting as a broker" and "competing with other brokers that also offer trading in the [same] debt securities." <sup>38</sup> While not objecting to NYSE's "acting as broker," the BMA claimed that this arrangement could give NYSE "a variety of competitive advantages over the brokers with which it will be competing" due to the Exchange's status as a self-regulatory organization ("SRO") that regulates many of those brokers. <sup>39</sup> The BMA also expressed concern that broker-dealers could be forced to become NYSE members or to acquire NYSE trading rights to have access to liquidity in unregistered debt securities that would trade on ABS. <sup>40</sup> The BMA also questioned the Exchange's ownership of ABS quotation and trading data and argued that, at a minimum, "any fees imposed by the NYSE on the provision of such data must be reasonable and that the NYSE should not benefit from data ownership rights that are superior to its competitors." <sup>41</sup>

NYSE refuted the BMA's assertion that the Exchange would be acting as a broker, noting that it "neither makes recommendations regarding the purchase or sale of securities nor acts as agent for any person or entity in connection with purchases or sales through ABS." <sup>42</sup> NYSE added that all activity on the Exchange occurs pursuant to rules that must be established pursuant to the procedural requirements of Section 19(b) of the Exchange Act and meet the substantive requirements of Section 6(b) of the

Exchange Act. <sup>43</sup> NYSE noted in particular that any fees for accessing ABS trade data must comply with Section 6(b)(4) of the Exchange Act, <sup>44</sup> which requires the Exchange to allocate charges equitably among members, issuers, and other persons using the Exchange's facilities. <sup>45</sup> The Exchange concluded that its status as an SRO conveyed no inappropriate competitive advantage in trading unregistered debt securities on ABS. <sup>46</sup>

Nasdaq and the BMA also raised issues relating to inter-exchange competition. Nasdaq argued that "[t]he NYSE-proposed requirement that ABS securities be limited to issuers with at least one class of equity listed on the NYSE may place a substantial barrier to the trading of ABS issues by other competing exchanges that lack an equity listing relationship with the debt issuer." <sup>47</sup> Similarly, the BMA expressed concern that any Commission action not result in a "grant of monopoly trading privileges to the NYSE." <sup>48</sup> The BMA also asked whether the Commission intends to grant other exchanges the ability to trade, on an unlisted basis, debt securities of issuers whose equity securities were listed on other exchanges. <sup>49</sup>

One commenter, Multiple-Markets, expressed concern that the Exchange's proposed use of a single third-party vendor, Xcitek, to supply NYSE with information about corporate bonds and their issuers, would give Xcitek an unfair advantage over competing vendors. <sup>50</sup> Multiple-Markets also argued that debt securities trading pursuant to the Exchange's proposal should be rated by at least two nationally recognized statistical rating organizations ("NRSROs") before being admitted to trading on the Exchange on an unlisted basis, and the withdrawal of such ratings should result in a suspension of trading. <sup>51</sup>

### C. Blue Sky Issues

Finally, the BMA expressed concern that debt securities delisted pursuant to the Exchange's proposal and shifted to "traded" status could lose their "blue sky exemption." <sup>52</sup> To address this

<sup>35</sup> See *id.* at 6.

<sup>36</sup> See *id.* In this regard, NASD and NYSE are in the process of negotiating a data-sharing agreement wherein, among other things, NYSE will agree to provide NASD certain information related to transactions in unlisted TRACE-eligible bonds traded on NYSE. In turn, NASD intends to consolidate this information into the computer database housing NASD's audit trail.

<sup>37</sup> See *id.* at 2.

<sup>38</sup> BMA Letter 2 at 2.

<sup>39</sup> *Id.*

<sup>40</sup> See *id.* at 4–5.

<sup>41</sup> *Id.* at 4.

<sup>42</sup> NYSE Response Letter 1 at 2.

<sup>43</sup> See *id.*

<sup>44</sup> 15 U.S.C. 78f(b)(4).

<sup>45</sup> See *id.* at 4.

<sup>46</sup> See *id.*

<sup>47</sup> Nasdaq Letter at 2.

<sup>48</sup> BMA Letter 2 at 6.

<sup>49</sup> See *id.* at 5.

<sup>50</sup> See Multiple-Markets Letter at 5–6.

<sup>51</sup> See *id.* at 5.

<sup>52</sup> See BMA Letter 2 at 6. Under Section 18 of the Securities Act of 1933, 15 U.S.C. 77r, certain securities are exempt from state registration requirements or "blue sky laws," including those

<sup>24</sup> NASD Letter at 7.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.* at 3–4.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> *Id.* at 7.

<sup>29</sup> See Nasdaq Letter at 2.

<sup>30</sup> See BMA Letter 2 at 3.

<sup>31</sup> See *id.*

<sup>32</sup> See Multiple-Markets Letter at 3.

<sup>33</sup> See NYSE Response Letter 1 at 5–6.

<sup>34</sup> See *id.* at 5.

concern, NYSE represented that it would contact in writing all issuers of currently listed debt to highlight the issue and provide such issuers the option of maintaining their listed status.<sup>53</sup>

#### IV. Discussion

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>54</sup> In particular, the Commission believes that the proposal is consistent with the provisions of Section 6(b)(5) of the Exchange Act,<sup>55</sup> which requires, among other things, that a national securities exchange's rules be designed to prevent fraudulent and manipulative acts and practices; 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.

The Commission believes that NYSE Rule 1400 is reasonably designed to implement the terms and conditions of the Commission's Section 36 Exemption Order into the Exchange's rules. The Commission also believes that Rule 1401's qualitative and quantitative criteria for initial and continued inclusion for trading on the Exchange are reasonable and consistent with the Exchange Act. These criteria are similar to those in existing NYSE rules that govern the listing of debt securities on the Exchange and have previously been approved by the Commission.<sup>56</sup>

The Commission has carefully considered the comments received and believes that none of the commenters raised any issue that should preclude approval of this proposal. The Commission agrees with the Exchange's view that trading unregistered debt

securities on the Exchange would not result in an OTC facility that must, as such, be subject to NASD oversight. Such trading will be effected by NYSE members, pursuant to NYSE rules, and using systems owned and operated by NYSE.

NASD expressed concerns that market fragmentation might be exacerbated as a result of approval of this filing and the NYSE Exemption Request. Nasdaq also expressed the view that the corporate bond market would be better served by a single regulator. In addition, Multiple-Markets argued that a combined trade reporting system would be beneficial to investors. The Commission does not believe that these commenters' broad anticipatory concerns should preclude approval of NYSE's proposal. The Commission, however, will continue to monitor the growth of intermarket competition in the corporate bond markets and, in the event market fragmentation becomes a concern, will consider appropriate means to address the consolidation of market information for corporate bonds.

The BMA noted that current NASD rules would require transactions in unregistered bonds effected on the Exchange to be reported to TRACE.<sup>57</sup> However, NASD recently filed a proposed rule change with the Commission to amend its rules to provide that transactions in TRACE-eligible securities<sup>58</sup> executed on NYSE pursuant to the Section 36 Exemption Order would be exempt from TRACE reporting for a two-year pilot period. In a separate action, the Commission today is approving that NASD proposal.<sup>59</sup> Therefore, transactions in unregistered corporate debt securities on NYSE will not have to be double-reported to TRACE.

Commenters also raised various competitive issues with NYSE's proposal. The BMA claimed that NYSE's ability to sell trade data would give it "a significant competitive advantage," and broker-dealers "will be required to pay significant additional charges to obtain information for which they are currently already paying TRACE."<sup>60</sup> The BMA observed that many broker-dealers that trade corporate debt securities OTC are not currently members of NYSE, and argued that Commission approval of this proposal "could effectively force those firms to become members of the NYSE or to

acquire NYSE trading rights."<sup>61</sup> Finally, the BMA opined that "there has historically been a conflict between an exchange's role as a financial intermediary and its role as a regulator of financial intermediaries."<sup>62</sup> Nasdaq argued that limiting NYSE's proposal only to corporate debt securities issued by an entity having an equity security listed on the Exchange "may place a substantial barrier to the trading of ABS issues by other competing exchanges that lack an equity listing relationship with the debt issuer."<sup>63</sup> Similarly, the BMA questioned whether, and under what conditions, the Commission would permit other exchanges to trade unregistered corporate debt securities.<sup>64</sup>

The Commission finds that NYSE's proposal is consistent with Section 6(b)(8) of the Exchange Act,<sup>65</sup> which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Exchange Act sets out a comprehensive regulatory scheme for exchanges. Among other things, any fees charged by an exchange for market data on trades executed on its facilities must be fair and reasonable, not unreasonably discriminatory, and equitably allocated among its members and other persons using its facilities.<sup>66</sup> While an exchange is entitled to limit participation to those persons who have qualified for membership, the Exchange Act permits denials of membership only for specific legitimate reasons.<sup>67</sup> The Commission, among other things, oversees exchanges to ensure that they are enforcing their rules in a manner consistent with the Exchange Act and that any changes to an exchange's rules are consistent with the Exchange Act. The Commission concludes that the commenters have raised no competitive issue that would preclude approval of this proposal. The Commission believes that NYSE's entry into this segment of the corporate bond market is broadly pro-competitive and in the public interest.

The Commission does not believe that the Section 36 Exemption Order gives NYSE an unfair competitive advantage over other exchanges. Other exchanges may petition the Commission for similar relief that would permit their members to trade unregistered debt securities on exchange facilities subject to the

that are listed, or authorized for listing, on certain national securities exchanges and securities of the same issuer that are equal in seniority or senior to such securities.

<sup>53</sup> See NYSE Response Letter 2 at 1.

<sup>54</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>55</sup> 15 U.S.C. 78f(b)(5).

<sup>56</sup> See e.g., Securities Exchange Act Release No. 34019 (May 5, 1994), 59 FR 24765 (May 12, 1994) (SR-NYSE-93-49) (approving changes to NYSE bond listing standards). NYSE currently permits only debt securities with an outstanding market value or principal amount of at least \$5 million to be listed on the Exchange and suspends the trading of listed debt securities when the outstanding market value or principal amount falls below \$1 million. See Sections 102.03 and 703.06 of the NYSE Listed Company Manual, respectively.

<sup>57</sup> See NASD Rule 6220.

<sup>58</sup> See NASD Rule 6210(a).

<sup>59</sup> See Securities Exchange Act Release No. 54768 (November 16, 2006) (notice of filing and accelerated approval of SR-NASD-2006-110).

<sup>60</sup> BMA Letter 2 at 3.

<sup>61</sup> *Id.* at 5.

<sup>62</sup> *Id.* at 4.

<sup>63</sup> Nasdaq Letter at 2.

<sup>64</sup> See BMA Letter 2 at 5-6.

<sup>65</sup> 15 U.S.C. 78f(b)(8).

<sup>66</sup> See 15 U.S.C. 78f(b)(4).

<sup>67</sup> See 15 U.S.C. 78f(c).

conditions imposed by the Commission in NYSE's case.

The Commission further believes that requiring a debt security that trades pursuant to the proposed rule change to be rated by NRSROs, as Multiple-Markets suggests, is not necessary or appropriate in the public interest, as the decision whether to impose such a requirement is a matter typically left to the business discretion of the individual markets.<sup>68</sup> Similarly, with respect to the commenter's concern about NYSE's proposed use of a third-party data vendor to supply information regarding the actions of corporate bond issuers, selection of a particular vendor is generally within the business judgment of the Exchange.<sup>69</sup>

Finally, the Commission does not believe that there are any blue sky issues that would preclude approval of this proposal. Currently, any security listed on the Exchange is exempt from state blue sky laws. A debt security that is delisted by the Exchange and, instead, traded on an unlisted basis could lose its blue sky exemption. However, NYSE has represented that it would not involuntarily delist the debt security of any issuer (provided that the security otherwise met all applicable listing requirements).<sup>70</sup> Therefore, this proposal will not cause undue hardship for any issuer that relies on the Exchange's listing of its debt security to obtain a blue sky exemption.

## V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Exchange Act,<sup>71</sup> that the proposed rule change (SR-NYSE-2004-69), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>72</sup>

**Nancy M. Morris,**  
Secretary.

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<sup>68</sup> See Multiple-Markets Letter at 5.

<sup>69</sup> See *id.* The Commission notes that it is not sanctioning a particular vendor by approving the proposed rule change.

<sup>70</sup> See NYSE Response Letter 2 at 1.

<sup>71</sup> 15 U.S.C. 78s(b)(2).

<sup>72</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54759; File No. SR-NYSEArca-2006-80]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Procedures for Executing Complex Options Orders in Open Outcry

November 15, 2006.

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 November 3, 2006, NYSE Arca, Inc. ("NYSE Arca" 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. The Exchange has filed the proposal as one effecting a change in an existing order-entry or trading system pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(5) 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

The Exchange proposes to amend NYSE Arca Rule 6.75 concerning the procedures for executing complex options orders in open outcry. The text of the proposed rule change is available on the Exchange's Web site at <http://www.nysearca.com>, at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

#### 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 Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

NYSE Arca Rule 6.75 sets forth the priority and order allocation procedures with respect to orders executed by open outcry. Commentary .01 to NYSE Arca Rule 6.75 sets forth the procedures for executing combination, spread, ratio, and straddle orders (otherwise known as "complex orders") in open outcry. When the Exchange introduced its new electronic trading platform for options, the OX Trading System ("OX"), the Exchange did not amend the open outcry procedures for complex orders.<sup>5</sup> The Exchange is providing clarifying rule amendments to NYSE Arca Rule 6.75 and Commentary .01 to NYSE Arca Rule 6.75 so that the procedures reflect references to the current systems on the floor now that OX is fully implemented.

Specifically, the Exchange wishes to clarify that the "Book" referenced in NYSE Arca Rule 6.75(h)(4) and Commentary .01(b)-(d) to NYSE Arca Rule 6.75 has been phased out and has been replaced by the Consolidated Book of OX.<sup>6</sup> In the past, the "Book" had contained only customer limit orders and was maintained by the floor's Order Book Official. Today, the floor utilizes the Consolidated Book of OX, and, importantly, the Consolidated Book contains not only customer limit orders but also broker-dealer and firm limit orders. Given this more comprehensive representation of orders in the Consolidated Book, the Exchange wishes to clarify how OTP Holders<sup>7</sup> and OTP Firms<sup>8</sup> are to interact with the Consolidated Book when representing a complex order.

When executing a complex order at a net debit or credit, which can be satisfied at the electronically disseminated bids and offers of the series involved in the order, the Floor Broker must determine if there are customer orders in the Consolidated

<sup>5</sup> See Securities Exchange Act Release No. 54238 (July 28, 2006), 71 FR 44758 (August 7, 2006) (SR-NYSEArca-2006-13) (approving establishment of OX platform).

<sup>6</sup> See NYSE Arca Rule 6.1(b)(37). The term "Consolidated Book" means the Exchange's electronic book of limit orders for the accounts of Public Customers and broker-dealers, and Quotes with Size. The term "Quote with Size" means a quotation to buy or sell a specific number of option contracts at a specific price that a Market Maker has entered into PCX Plus through an electronic interface. NYSE Arca Rule 6.1(b)(33).

<sup>7</sup> See NYSE Arca Rule 1.1(g).

<sup>8</sup> See NYSE Arca Rule 1.1(f).

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

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

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

<sup>4</sup> 17 CFR 240.19b-4(f)(5).