

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54998; File No. SR-NYSE-2006-98]

### Self-Regulatory Organizations; New York Stock Exchange LLC.; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Thereto, Regarding the Amendment of NYSE Rule 300 Relating to Trading Licenses and the Deletion of NYSE Rule 300T

December 21, 2006.

#### I. Introduction

On November 3, 2006, 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 amend NYSE Rule 300 to eliminate the modified Dutch auction process for the pricing and issuance of annual trading licenses and to impose a fixed, annual price of \$50,000 for trading licenses issued for calendar year 2007. The Exchange also proposed to increase the fee relating to the approval of any new member or pre-qualified substitute, as well as to delete NYSE Rule 300T that pertained only to the initial issuance of trading licenses for calendar year 2006. The proposed rule change was published for comment in the **Federal Register** on November 14, 2006.<sup>3</sup>

The Commission received three comments on the proposed rule change.<sup>4</sup> On November 28, 2006, NYSE submitted Amendment No. 1 to the proposed rule change. In Amendment No. 1, the Exchange proposed to remove the deposit and termination fee requirements associated with the issuance of trading licenses. On December 18, 2006, NYSE filed a response to two of the comment letters ("NYSE Response").

This order approves the proposed rule change. Simultaneously, the Commission provides notice of filing of Amendment No. 1 and grants

accelerated approval of Amendment No. 1.

#### II. Summary of Comments and NYSE's Response

The Commission received three letters from two commenters on the proposed rule change.<sup>5</sup> Both commenters objected to the proposed fixed fee and favored retaining the Dutch auction process for pricing trading licenses. The Lipari Letter asserted that the 2006 trading license fee should be the reference point for an auction to establish the price of the trading licenses for 2007. The Lipari Letter noted that, because price discovery is a feature of trading on the floor of NYSE, it should also be employed in the pricing of trading licenses.

The First Peake Letter argued that, in the commenter's view, the value of a NYSE floor trading license has diminished as a result of the Exchange's merger with Archipelago Holdings, Inc. ("Archipelago"). The commenter further argued that a reduced presence of firms on the NYSE floor might further reduce the demand for trading licenses, particularly as Regulation NMS is implemented. The First Peake Letter also contended that the NYSE is in a quasi-monopolistic position on account of its market share and that the proposal is anticompetitive. The Second Peake Letter commented on the Commission's approval process with respect to the proposed rule change.

In response to the Lipari Letter and the First Peake Letter, the Exchange noted that the proposal to eliminate the Dutch auction process was made in response to comments it received from many of its member organizations about the undesirability of using this auction process to price trading licenses. The Exchange noted that the price for trading licenses for 2006 was \$49,290 (not \$42,290, as was stated in the Lipari Letter). The Exchange asserted that the proposed fixed trading license price of \$50,000 for 2007 represents a minimal, incremental increase over the trading license price for 2006. The Exchange also argued that, when the effects of inflation are taken into account, the \$50,000 trading license price for 2007 is actually lower than the 2006 trading license price.

The Exchange disagreed with the Lipari Letter's assertion that the Exchange is incapable of setting a fair price because of profit motives. The Exchange pointed out that it has other valuable sources of revenue from activity on the Exchange and that imposing an unreasonably high trading

license price would likely reduce access to, and activity on, its trading facilities, thus diminishing the overall profitability of the Exchange.

In response to the First Peake Letter, the Exchange noted that the trading license application process for the 2007 trading licenses, which is already in progress, has demonstrated a robust demand for trading licenses at the proposed fixed price of \$50,000. The Exchange noted that the reduction in physical presence on its floor is attributable to the roll-out of its Hybrid-Market initiative, which enables electronic execution on the Exchange. The Exchange asserted that, in the event that the price of access to its market (in this case \$50,000 for a trading license) is too high or unfair, market participants have demonstrated their ability to use other venues for order execution.

#### III. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change, the comment letters, and the NYSE's response to the comments, and finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange<sup>6</sup> and, in particular, the requirements of Section 6(b)(4) of the Act.<sup>7</sup> Section 6(b)(4) requires, among other things, that the rules of an exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and users and other persons using its facilities. The Commission believes that the Exchange's proposal to eliminate the annual Dutch auction process to determine the price of trading licenses and to establish a fixed fee of \$50,000 per trading license is reasonable. In the Commission's view, the fixed fee removes uncertainty in the process for establishing the price of trading licenses and helps to simplify the process for the issuance of trading licenses. While both commenters on the proposal believe that the Dutch auction process is a fairer means of establishing the price for trading licenses for members, the Commission notes that the Exchange has stated that the proposed rule change was based on comments it received from many of its member organizations about the undesirability of the Dutch auction process. The Exchange also stated that moving to a fixed price would simplify the process

<sup>6</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<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. 54713 (November 6, 2006), 71 FR 66359.

<sup>4</sup> November 28, 2006 letter from Junius W. Peake, Professor, University of Northern Colorado ("First Peake Letter"); December 5, 2006 letter from Frank Lipari, President, and Andrew W. Strobel, Chief Compliance Officer, Lipari Partners, Inc. ("Lipari Letter"); and December 18, 2006 letter from Junius W. Peake, Professor, University of Northern Colorado ("Second Peake Letter").

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

for member organizations to obtain trading licenses.

The Commission also believes that the increased fee for the approval of any new member or pre-qualified substitute is reasonable. The Exchange has represented that the new fee is necessary to defray the administrative expenses associated with this process and that it is equivalent to the fee for transfers of memberships charged by the Exchange prior to its merger with Archipelago. The Commission also believes that the proposals to eliminate the deposit fee and termination fee requirements associated with the issuance of trading licenses and to remove NYSE Rule 300T are appropriate.

The Commission finds good cause for approving Amendment No. 1 before the 30th day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment No. 1 would eliminate the deposit and termination fee requirements associated with the purchase of trading licenses. Because the changes set forth in Amendment No. 1 involve a reduction in fees and do not appear to raise any issues of regulatory concern, the Commission finds good cause for accelerating approval of Amendment No. 1.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the Amendment No. 1 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-NYSE-2006-98 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-NYSE-2006-98. 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 NYSE. 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-NYSE-2006-98 and should be submitted on or before January 19, 2007.

#### V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>8</sup> that the proposed rule change (SR-NYSE-2006-98) be, and it hereby is, approved, and that Amendment No. 1 to the proposed rule change be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Florence E. Harmon,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 55003; File No. SR-NYSE-2006-109]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Relating to NYSE Regulation, Inc. Policies Regarding Exercise of Power to Fine NYSE Member Organizations and Use of Money Collected as Fines

December 22, 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 December 6, 2006, the New York Stock Exchange LLC ("Exchange" or "NYSE") 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 substantially 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

NYSE Regulation, Inc. ("NYSE Regulation") proposed to adopt internal procedures to assure the proper exercise by NYSE Regulation of its power to fine member organizations of the Exchange and the proper use by NYSE Regulation of the funds so collected. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://www.nyse.com>.

#### 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

In conversation with the staff of the Commission, prior to Commission approval of rule changes related to the merger of the New York Stock Exchange, Inc. with Archipelago Holdings, Inc., the Exchange undertook to subsequently file with the Commission a proposed rule change regarding NYSE Regulation's use of fines collected from member organizations following disciplinary action by NYSE Regulation against such member organizations.<sup>3</sup>

The purpose of this proposed rule change is to provide increased transparency regarding the processes which NYSE Regulation has in place to insure that the power of the Exchange,

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> 17 CFR 200.30-3(a)(12); 17 CFR 200.30-3(a)(44).

<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. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77), at note 231 ("Approval Order").