

Sections 703.01(A) and 903.02 to require that companies indicate in the Subsequent Listing Application whether shareholder approval is required with respect to the issuance being listed pursuant to Sections 303A.08 or 312.03 and, if required, the date such shareholder approval was obtained.

### III. Comments

The Commission received one comment letter on the proposed rule change.<sup>10</sup> Astoria Financial Corporation, an NYSE-listed company, stated that, "concerns recently raised by certain shareholders and other market participants regarding the use of treasury shares to circumvent shareholder approval rules for transactions which result in a change of control have merit." However, Astoria thought that the proposal should provide some mechanism to exempt the issuance of treasury shares related to equity compensation plans previously approved by shareholders.

The Exchange responded to Astoria's comment letter.<sup>11</sup> NYSE explained that the treasury stock exception, currently available under Section 312.03, is not available with respect to equity compensation plans. Shareholder approval requirements for equity compensation plans are set forth in Section 303A.08 of the Listed Company Manual. Under that provision of the Listed Company Manual, the definition of the term "equity compensation plan" clearly states that the definition encompasses the delivery of either newly issued or treasury shares. As a result, the Exchange stated that the proposed elimination of the treasury stock exception under Section 312.03 does not impact equity compensation plans.

### IV. Discussion

After careful review, the Commission 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 and, in particular, with the requirements of Section 6(b) of the Act.<sup>12</sup> Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act<sup>13</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; and is not designed to permit unfair discrimination between issuers.

The Commission believes that, with respect to NYSE-listed companies, the proposed rule change will reduce the potential for significant dilution without shareholder approval. The Commission believes that the necessity of shareholder approval of a transaction should be governed by the substantive nature of the transaction, not the status or type of shares used in the transaction. In this regard, the proposed rule change should promote greater shareholder input in control transactions and other corporate actions resulting in issuances of stock involving NYSE-listed companies. The proposed changes to Section 312.03 and 312.04 will also make these provisions consistent with the Exchange's elimination of the treasury share exception from the Exchange's equity compensation plan approval rules.<sup>14</sup>

With respect to the proposed change in Section 312.03(b), to clarify that the rule covers issuances that are part of a "a series of related transactions, the Commission believes this change is beneficial as it is designed to ensure that the overall substance of a transaction or series of transactions indicates the necessity of shareholder approval. In particular, the Commission believes that this change ensures that companies cannot avoid the shareholder approval requirements by simply issuing stock in a piecemeal fashion to avoid the requirements of the rule and makes Section 312.03(b) consistent with the requirements of Section 312.03(c). With respect to the proposed changes in Sections 703.01(A) and 903.02, which, in general, require that listed companies notify the Exchange in writing in advance of an issuance, state whether shareholder approval is required and, if so, when it was obtained, and indicate such information in any Subsequent Listing Application, the Commission believes these changes are reasonable as

they will facilitate the Exchange's monitoring of listed companies for compliance with the revised shareholder approval rules. The Commission also believes that the Exchange's clarification of the term "market value" is consistent the protection of investors as it ensures that the most recent closing price, and not an average price, is used in situations where reference is made to the market value of an issuer's securities. This change should provide certainty as to what price is being used when determining market value. Finally, the Exchange has provided for a transition period for companies that execute a binding contract with respect to the issuance of common stock prior to the date that is five business days after the date that the Commission noticed the proposed rule change in the **Federal Register**. The Commission believes that this transition period is a reasonable way to provide listed companies with guidance as to on-going transactions and sufficient notice of the proposed rule change.

### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>15</sup> that the proposed rule change (SR-NYSE-2006-30), as amended by Amendment Nos. 1 and 2, be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-54985; File No. SR-NYSE-2006-113]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Moratorium on the Qualification and Registration of New Registered Competitive Market Makers and New Competitive Traders, Governed by Rules 107A and 110, Respectively, for an Additional Six Months

December 21, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

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

<sup>16</sup> 17 CFR 200.30-3(a)(12).

<sup>10</sup> Astoria Letter, *supra* note 6.

<sup>11</sup> See Letter to Nancy M. Morris, Secretary, Commission, from Mary Yeager, Assistant Secretary, NYSE, dated December 4, 2006 ("NYSE Response Letter").

<sup>12</sup> 15 U.S.C. 78f(b). In approving this proposal, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> See Equity Compensation Plan Release, *supra* note 8. With respect to the sole commenter on the proposed rule change, the Commission agrees with the Exchange that the treasury share exception being eliminated by the NYSE's proposed changes in Section 312.03 is currently not available with respect to shareholder approval of equity compensation plans as set forth in Section 303A.08. As the Exchange's response notes, the existing definition of "equity compensation plan" in Section 303A.08 encompasses the delivery of either newly issued or treasury shares. As a result, the proposed elimination of the treasury stock exception does not have any effect on the shareholder approval requirements for equity compensation plans.

(“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 13, 2006, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange.<sup>3</sup> The Exchange has designated the proposed rule change as constituting a “non-controversial” rule change under Section 19(b)(3)(A)(iii) of the Act,<sup>4</sup> and Rule 19b-4(f)(6) thereunder,<sup>5</sup> which renders the proposal 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 NYSE proposes to extend for six months the moratorium related to the qualification and registration of Registered Competitive Market Makers (“RCMMs”) pursuant to Exchange Rule 107A and Competitive Traders (“CTs”) pursuant to Exchange Rule 110. The text of the proposed rule change is available on the NYSE’s Web site (<http://www.nyse.com>), at the NYSE’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. 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**

The Exchange proposes to extend for six months the current moratorium related to the qualification and registration of RCMMs pursuant to Exchange Rule 107A and CTs pursuant to Exchange Rule 110.

On September 22, 2005, the Exchange filed SR-2005-63<sup>6</sup> (“Filing 2005-63”) with the Commission proposing to implement a moratorium on the qualification and registration of new RCMMs and CTs in order to allow the Exchange an opportunity to review the viability of RCMMs and CTs in the NYSE HYBRID MARKET<sup>SM</sup> (“Hybrid Market”).<sup>7</sup>

Subsequent to the submission of Filing 2005-63, the Exchange filed SR-NYSE-2006-11<sup>8</sup> (“Filing 2006-11”) proposing to modify the moratorium and grant RCMM firms the ability to replace a RCMM who relinquishes his or her registration and ceases to conduct business as a RCMM during the moratorium, with a newly qualified and registered RCMM. The moratorium does not restrict RCMMs from joining any RCMM firm or becoming or remaining an independent RCMM. Neither does the moratorium restrict any RCMM firm from hiring any existing RCMMs.

Subsequently, the Exchange extended the moratorium, as amended, in order to allow the Exchange to continue its review during the phasing in of the Hybrid Market for an additional six months until on or about December 31, 2006.<sup>9</sup>

The Exchange now proposes to extend the moratorium, as amended, for an additional six months in order to include in its review, data from the full operation of the Hybrid Market with respect to RCMMs and CTs that can only be obtained when the remainder of the third phase and the fourth phase of the Hybrid Market are implemented in the beginning of 2007. This data will allow the Exchange to make a more informed decision as to the viability of RCMMs and CTs in the Hybrid Market. As such, the Exchange believes an

additional six-month extension of the moratorium is necessary.

The Exchange will issue an Information Memo announcing the extension of the moratorium. The review is currently estimated to be completed on or about June 29, 2007.

##### **2. Statutory Basis**

The Exchange believes that the basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)<sup>10</sup> that an exchange have rules that are 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. The moratorium gives the Exchange time to fully study the future viability of RCMMs and CTs in order to improve the market. The proposed rule change is a six month extension of the RCMM and CT moratorium implemented in Filing 2005-63 and modified in Filing 2006-11.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### *C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup>

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). Pursuant to Rule 19b-4(f)(6)(iii) under the Act, the Exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change,

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

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

<sup>3</sup> Certain technical corrections were made throughout the discussion of the proposed rule change pursuant to a conversation with NYSE staff. Telephone conversation between Jean Walsh, Principal Rule Counsel, NYSE, and Sara Gillis, Attorney, Division of Market Regulation, Commission, on December 18, 2006.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>5</sup> 17 CFR 240.19b-4(f)(6).

<sup>6</sup> See Securities Exchange Act Release No. 52648 (October 21, 2005), 70 FR 62155 (October 28, 2005) (SR-NYSE-2005-63).

<sup>7</sup> See Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR-NYSE-2004-05).

<sup>8</sup> See Securities Exchange Act Release No. 53549 (March 24, 2006), 71 FR 16388 (March 31, 2006) (SR-NYSE-2006-11).

<sup>9</sup> See Securities Exchange Act Release No. 54140 (July 13, 2006), 71 FR 41491 (July 21, 2006) (SR-NYSE-2006-48).

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>13</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>14</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The NYSE has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the moratorium to continue without interruption so that the Exchange may have additional time to fully study the future viability of RCMMs and CTs in the Hybrid Market. For these reasons, the Commission designates that the proposed rule change become operative immediately.<sup>15</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the 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.

#### 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-NYSE-2006-113 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.

at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has requested that the Commission waive the 5-day pre-filing notice requirement. The Commission has determined to waive this requirement.

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>15</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

All submissions should refer to File Number SR-NYSE-2006-113. 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 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-NYSE-2006-113 and should be submitted on or before January 24, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>16</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55004; File No. SR-NYSEArca-2006-33]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Trade the iShares® S&P Europe 350 Index Fund Pursuant to Unlisted Trading Privileges

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 October 18, 2006, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the

<sup>16</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.

Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, through its wholly-owned subsidiary NYSE Arca Equities, Inc. ("NYSE Arca Equities"), proposes to trade shares ("Shares") of the iShares S&P Europe 350 Index Fund ("Fund") (Symbol: IEV) pursuant to unlisted trading privileges ("UTP") based on NYSE Arca Equities Rule 5.2(j)(3).

The text of the proposed rule change is available on the Exchange's Web site (<http://www.nysearca.com>), at the principal office of the Exchange, 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 III 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

The Exchange is proposing to trade the Shares pursuant to UTP. The Fund seeks investment results that correspond generally to the price and yield performance, before fees and expenses, of the Standard & Poor's Europe 350 Index ("Index"). The Index measures the performance of the stocks of leading companies in the following countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. The market capitalization of constituent companies is adjusted to reflect only those stocks