

### III. Summary of Comment Received

The Commission received one comment letter to the proposed rule change.<sup>18</sup> The commenter supported prompt implementation of the proposal and commented specifically on the proposed changes to NYSE Rule 431(e). The NYSE, however, deleted this proposed paragraph in Amendment No. 3, and determined to proceed with the proposed rule change addressing amendments to NYSE Rules 325 and 326 only. No specific comments were received with respect to the proposed amendments to these rules.

### IV. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change and comment letter and finds that the proposed rule change is consistent with the requirements of Section 6(b)(5)<sup>19</sup> of the Exchange Act, which requires that the rules of the Exchange be 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.<sup>20</sup>

The Commission believes that the proposed amendments are consistent with the requirements of Section 6(b)(5) of the Act in that they align the language in Rules 325 and 326 to reflect the Commission amendments to Rule 15c3-1 with regard to the alternative method of computing net capital for broker-dealers and they incorporate the CFTC rule amendments for NYSE member firms registered as futures commission merchants.

NYSE has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of Amendment No. 3 in the **Federal Register**. The Commission notes that the proposal, as modified by Amendment Nos. 1 and 2, was published for notice and comment,<sup>21</sup> and that the Commission received one comment letter.<sup>22</sup> In Amendment No. 3, NYSE made proposed changes to NYSE Rules 325 and 326 to make conforming changes to CFTC early warning requirements for futures commission merchants and determined not to proceed with

amendments to Rule 431(e).<sup>23</sup> Accordingly, the Commission does not believe that Amendment No. 3 raises any new or novel issues. Based on the above, the Commission finds good cause to accelerate approval of the proposed rule change, as amended.

### V. 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-NYSE-2005-03 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-2005-03. 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.

### VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>24</sup> that the proposed rule change (SR-NYSE-2005-03), as amended, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>25</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55555; File No. SR-NYSE-2007-09]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change as Modified by Amendments No. 1 and 2 Thereto Relating to Rule 18 (Compensation in Relation to System Failure)

March 29, 2007.

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 January 26, 2007, 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, II, and III below, which Items have been substantially prepared by the Exchange. The Exchange filed Amendments No. 1 and 2 to the proposal on February 1, 2007, and March 28, 2007, respectively. The Commission is publishing this notice to solicit comment on the proposed rule change, as amended, from interested persons.

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

The Exchange is proposing to adopt Rule 18, "Compensation in Relation to Exchange System Failure," which will provide a form of compensation to member organizations when a loss is sustained in relation to an Exchange system failure. The Exchange further proposes to amend Rule 134 ("Differences and Omissions-Cleared Transactions ("QTs")) to require that profits equal to or greater than \$5,000 gained in relation to an Exchange system failure be remitted to the Exchange to be included in funds available for distribution pursuant to proposed Rule 18.

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

<sup>18</sup> See *supra* note 5.

<sup>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> In approving the proposed rule change, as amended, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>21</sup> See *supra* note 4.

<sup>22</sup> See *supra* note 5.

<sup>23</sup> The CFTC rules became effective on September 30, 2004. See 69 FR 49784 (Aug. 12, 2004).

<sup>24</sup> 15 U.S.C. 78s(b)(2).

<sup>25</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.

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, NYSE 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 is a self-regulatory organization ("SRO") as that term is defined under the Act.<sup>3</sup> In its capacity as a SRO the Exchange functions as a quasi-governmental authority and is therefore entitled to immunity from lawsuits.<sup>4</sup> NYSE Rule 17 provides that the "Exchange shall not be liable for any damages sustained by a member, allied member or member organization growing out of the use or enjoyment by such member, allied member or member organization of the facilities afforded by the Exchange, except as provided in the rules."

The Exchange proposes to adopt Rule 18, "Compensation in Relation to Exchange System Failure," in order to establish a procedure to compensate member organizations in relation to Exchange system failures. The Exchange recognizes that the current industry practice of exchanges that function as SROs is to provide a form of compensation for losses sustained in relation to the use of the company's systems. As such, the Exchange seeks to adopt NYSE Rule 18 in order to conform to current industry practice.

#### a. Claims for Compensation

Pursuant to the proposed rule, an Exchange system failure is defined as a malfunction of the Exchange's physical equipment, devices, and/or programming which results in an incorrect execution or no execution of an order that was received in Exchange systems. Misuse of Exchange systems

and delays in order processing as a result of large volume or other capacity issues, commonly known as "queuing," are not considered Exchange system failures.

In order for a member organization to be eligible to receive payment for a claim, it must incur a net loss equal to or greater than \$5,000. That is, the loss must total \$5,000 after any profits received in relation to the same incident are subtracted. Claims must be submitted on a per incident basis. Member organizations are not permitted to aggregate losses incurred as a result of more than one system failure in order to satisfy the \$5,000 minimum claim requirement.

In addition to the minimum claim requirement, member organizations are required to informally notify the Exchange's Division of Floor Operations of a suspected Exchange system failure by the opening of the next business day following an incident. Formal written notice of the suspected Exchange system failure must be provided to the Exchange's Division of Floor Operations no later than end of the third business day after the incident.

Once in receipt of a claim, the Exchange's Division of Floor Operations will verify that: (i) A valid order was accepted into Exchange's systems; and (ii) an Exchange system failure occurred during the execution or handling of that order. If all of the criteria for submitting a claim have been met, the claim will be qualified for processing with all other eligible claims at the end of the calendar month in which the incident occurred.

#### b. Exchange Funds Available for Claims

Pursuant to proposed Rule 18, the Exchange will allot \$500,000 each calendar month ("Monthly Allotment") to be used for payments to member organizations that qualify for compensation under the Rule. The Monthly Allotment constitutes the initial amount to be contributed by the Exchange to provide compensation in relation to Exchange system failures for each calendar month regardless of the total dollar amount of claims eligible for payment. The Monthly Allotments do not aggregate, and except as set forth below, the Monthly Allotment for each calendar month is \$500,000. In the event that less than \$250,000 of the Monthly Allotment is paid out for a given calendar month, \$50,000 of that month's remaining Monthly Allotment ("Supplemental Allotment") will be added to a supplemental fund available for payment in subsequent calendar months. For example, if during the first full calendar month of operating under proposed NYSE Rule 18, the total

amount paid to member organizations is \$100,000, leaving \$400,000 remaining from the original Monthly Allotment, the following month, the Exchange will allot the Monthly Allotment of \$500,000 and an additional \$50,000 will be carried over from the previous calendar month's remaining balance for a total of \$550,000 eligible for payment to member organizations in the second calendar month.

This Supplemental Allotment will only be used to pay claims after the Monthly Allotment is exhausted. If claims are satisfied by the Monthly Allotment, the Supplemental Allotment, or any unused portion thereof, will be carried forward every month. Every month that does not pay out more than \$250,000 of the Monthly Allotment will result in a Supplemental Allotment to the subsequent Monthly Allotment as described above. If in any calendar month the amount of funds required to pay eligible claims of member organizations is equal to or exceeds \$250,000 of the Monthly Allotment, no Supplemental Allotment will be added to the Monthly Allotment for the subsequent calendar month.

The Exchange shall determine what, if any, maximum dollar amount may accrue over time as part of the Supplemental Allotment. Any and all Exchange determinations as to a maximum dollar amount that may accrue over time as part of the Supplemental Allotment shall be formally reflected in the text of Rule 18. In addition, after a few years of Rule 18's implementation, Exchange management intends to review both the maximum dollar amount, if any, which may be accrued as part of the Supplemental Allotment and the Monthly Allotment to determine whether they are appropriate. The Exchange understands that it would be required to file a proposed rule change should Exchange management determine to establish or change any maximum dollar amount for the Supplement Allotment or to modify the amount of the Monthly Allotment.<sup>5</sup>

#### c. Other Funds Available for Payment of Claims

In addition to the Monthly Allotment and Supplemental Allotment, the Exchange proposes to amend Exchange Rule 134.40 to provide that any error transactions in a member organization's account in relation to an Exchange system failure which results in a profit

<sup>3</sup> See 15 U.S.C. 78c(a)(26).

<sup>4</sup> See *DL Capital Group, LLC v. Nasdaq Stock Market, Inc.*, 409 F.3d 93, 99 (2d Cir. 2005); *D'Alessio v. New York Stock Exchange, Inc.*, 258 F.3d 93, 104-05 (2d Cir. 2001).

<sup>5</sup> Telephone conversation between Deanna Logan, Director, Office of the General Counsel, NYSE, and Nathan Saunders, Special Counsel, Division of Market Regulation ("Division"), Commission, on March 29, 2007.

equal to or greater than \$5,000 must be remitted to the Exchange ("Profit Contribution"). Profit Contributions will be added to the Monthly Allotment and any Supplemental Allotment.

Currently, pursuant to Exchange Rule 134.40, member organizations must report certain profits to the Exchange, but are not required to remit any part thereof to the Exchange. The Exchange proposes to amend Rule 134.40 to require that profits equal to or greater than \$5,000 gained in relation to an Exchange system failure be remitted to the Exchange in order to be applied to payments to member organizations pursuant to proposed NYSE Rule 18.

The Profit Contribution will operate similarly to the Supplemental Allotment in that it will only be used for payments after all other funds are exhausted (*i.e.*, Monthly Allotment and any Supplemental Allotment). In the event that the payments to member organizations are satisfied by the Monthly Allotment and any Supplemental Allotment, then the Profit Contribution will carry over each subsequent calendar month until required for the payments of eligible claims.

#### d. Compensation Payments to Claimants

In order to review qualified claims and administer payments, the Exchange will establish a panel consisting of three (3) Floor Governor and three (3) Exchange employees (the "Compensation Review Panel"). The Compensation Review Panel will meet and review all the claims that are submitted for a calendar month in order to determine: (i) If each claim satisfies all the criteria for payment; and (ii) the amount to be paid on the claim ("approved claims").

As part of its determination, the Compensation Review Panel must review the actions of the member organization and its employees before and after the error occurred in order to determine if any of the claimant's actions contributed to the loss sustained. The Compensation Review Panel may increase or reduce the amount deemed eligible for payment as a result of its review. All decisions by the Compensation Review Panel are final.

The determinations of the Compensation Review Panel will be by majority vote. In the event of deadlock, all relevant information about the claim will be sent to the Chief Executive Officer of the Exchange ("CEO") or the President or his or her designee who will make a final determination. Like the determinations of the Compensation

Review Panel, all the determinations of the CEO are final.

Once each claim is reviewed and the amount to be paid on each approved claim is decided, the Compensation Review Panel will total the dollar amount of all approved claims for the calendar month under review. If the total dollar amount of approved claims is less than the Monthly Allotment, then the claims will be paid to the claimants in full. If the total amount of approved claims exceeds the Monthly Allotment, then any Supplemental Allotment and/or Profit Contribution will be added to the Monthly Allotment in order to satisfy approved claims. In the event that the approved claims for a month exceed the sum of the Monthly Allotment, the Supplemental Allotment (if any), and the Profit Contribution (if any), then the approved claims will be paid out to member organizations based upon the proportion that each eligible claim bears to the total amount of all approved claims.

#### e. Retroactivity of Proposed Rule 18

The Exchange further requests to have proposed NYSE Rule 18 function retroactively. Specifically, the Exchange seeks to allow member organizations to submit claims to the Exchange for any alleged Exchange system failures that occurred between September 1, 2006 and the date of Commission approval of the proposed rule. After Commission approval, all other claims must be submitted as prescribed by the rule. The Monthly Allotment will be set aside for each calendar month in the period for which Rule 18 is retroactively effective.<sup>6</sup> However, the Supplemental Allotment and Profit Contribution provisions of the rule will not be retroactive, but will begin to accrue the month after Commission approval of proposed Rule 18 in accordance with provisions governing those funds.

#### 2. Statutory Basis

The Exchange's basis under the Act<sup>7</sup> for this proposed rule change is the requirement under Section 6(b)(5)<sup>8</sup> that an Exchange have rules that are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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.

#### 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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

#### 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-2007-09 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-2007-09. 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

<sup>6</sup> Telephone conversation between Deanna Logan, Director, Office of the General Counsel, NYSE, and Nancy Sanow, Assistant Director, and Nathan Saunders, Special Counsel, Division, Commission, on March 7, 2007.

<sup>7</sup> 15 U.S.C. 78a.

<sup>8</sup> 15 U.S.C. 78f(b)(5).

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-2007-09 and should be submitted on or before April 26, 2007.

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. 34-55564; File No. SR-NYSEArca-2007-17]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To Waive Certain Listing Fees for Dually-Listed Issuers Who Delist During 2007

March 30, 2007.

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 March 6, 2007, 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 substantially prepared by the Exchange. The Commission is publishing this

notice to solicit comments on the proposal from interested persons.

#### 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 waive 2007 listing fees for any companies who, as of January 1, 2007, were dually listed on NYSE Arca Equities, on the one hand, and another national securities exchange, on the other hand, and have provided notice by June 30, 2007 to NYSE Arca Equities of their intention to voluntarily withdraw from listing on NYSE Arca. The NYSE Arca schedule of listing fees will be amended to note that, for those issuers dually listed on NYSE Arca Equities on January 1, 2007 and who have given notice by June 30, 2007 to NYSE Arca Equities of their intention to voluntarily withdraw from listing on NYSE Arca (and in fact withdraw during 2007), the 2007 annual listing fees will be waived.

The text of the proposed rule change is available on the Exchange's Web site (<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 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, through NYSE Arca Equities, proposes to waive 2007 listing fees for any companies who, as of January 1, 2007, were dually listed on NYSE Arca Equities, on the one hand, and another national securities exchange, on the other hand, and have provided notice by June 30, 2007 to NYSE Arca Equities of their intention to voluntarily withdraw from listing on NYSE Arca. The NYSE Arca schedule of listing fees will be amended to note that,

for those issuers dually listed on NYSE Arca Equities on January 1, 2007 who have given notice by June 30, 2007 to NYSE Arca Equities of their intention to voluntarily withdraw from listing on NYSE Arca (and in fact withdraw during 2007), the 2007 annual listing fees will be waived.

Effective January 1, 2007, the annual listing fees for all companies listed on NYSE Arca Equities were increased.<sup>3</sup> Many of the issuers still dually listed on NYSE Arca Equities on January 1, 2007 had indicated to the Exchange their intention to voluntarily withdraw from NYSE Arca. However, because of the dually listed issuers' administrative or governance processes, some of these dually listed issuers were unable to complete the withdrawal process before the new fees became effective. In this instance, the Exchange believes that it is appropriate to waive the 2007 listing fees for issuers dually listed on NYSE Arca Equities as of January 1, 2007 who have given notice by June 30, 2007 of their intention to voluntarily withdraw during 2007 and in fact withdraw during 2007.

###### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act<sup>4</sup> in general and furthers the objectives of Section 6(b)(5) of the Act<sup>5</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments, and to perfect the mechanism of, a free and open market and a national market system, and, in general, to protect investors and the public interest.

##### 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

Written comments on the proposed rule change were neither solicited nor received.

<sup>3</sup> See Securities Exchange Act Release No. 54007 (June 16, 2006), 71 FR 36155 (June 23, 2006) (SR-NYSEArca-2006-16).

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

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

<sup>9</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.