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Dated: February 14, 2008.

**Nancy M. Morris,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Securities Act of 1933, Release No. 8893/February 13, 2008; Securities Exchange Act of 1934, Release No. 57319/February 13, 2008]

### Order Regarding Review of FASB Accounting Support Fee for 2008 Under Section 109 of the Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley Act of 2002 (the "Act") provides that the Securities and Exchange Commission (the "Commission") may recognize, as generally accepted for purposes of the securities laws, any accounting principles established by a standard setting body that meets certain criteria. Consequently, Section 109 of the Act provides that all of the budget of such a standard setting body shall be payable from an annual accounting support fee assessed and collected against each issuer, as may be necessary or appropriate to pay for the budget and provide for the expenses of the standard setting body, and to provide for an independent, stable source of funding, subject to review by the Commission. Under Section 109(f) of the Act, the amount of fees collected for a fiscal year shall not exceed the "recoverable budget expenses" of the standard setting body. Section 109(h) amends Section 13(b)(2) of the Securities Exchange Act of 1934 to require issuers to pay the allocable share of a reasonable annual accounting support fee or fees, determined in accordance with Section 109 of the Act.

On April 25, 2003, the Commission issued a policy statement concluding that the Financial Accounting Standards Board ("FASB") and its parent organization, the Financial Accounting Foundation ("FAF"), satisfied the criteria for an accounting standard-setting body under the Act, and recognizing the FASB's financial accounting and reporting standards as "generally accepted" under Section 108 of the Act.<sup>1</sup> As a consequence of that recognition, the Commission undertook a review of the FASB's accounting support fee for calendar year 2008. In connection with its review, the

Commission also reviewed the budget for the FAF and the FASB for calendar year 2008.

Section 109 of the Act also provides that the standard setting body can have additional sources of revenue for its activities, such as earnings from sales of publications, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual or perceived independence of the standard setter. In this regard, the Commission also considered the interrelation of the operating budgets of the FAF, the FASB and the Governmental Accounting Standards Board ("GASB"), the FASB's sister organization, which sets accounting standards used by state and local government entities. The Commission has been advised by the FAF that neither the FAF, the FASB nor the GASB accept contributions from the accounting profession.

After its review, the Commission determined that the 2008 annual accounting support fee for the FASB is consistent with Section 109 of the Act. Accordingly,

*It is ordered*, pursuant to Section 109 of the Act, that the FASB may act in accordance with this determination of the Commission.

By the Commission.

**Nancy M. Morris,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57323; File No. SR-NYSE-2008-09]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, and Amendment No. 1 Thereto, To Permit the Exchange To Modify or Cancel Clearly Erroneous Trades

February 13, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 28, 2007, 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 prepared substantially by NYSE.

On February 8, 2008, NYSE submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> NYSE filed the proposed rule change as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>4</sup> and Rule 19b-4(f)(6) thereunder,<sup>5</sup> which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments 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 proposes to adopt new Rule 128 on an interim, six month basis, to permit the Exchange to cancel or adjust clearly erroneous executions if they arise out of the use or operation of any quotation, execution or communication system owned or operated by the Exchange, including those executions that occur in the event of a system disruption, system malfunction or equipment changeover.

The text of the proposed rule change is available at <http://www.nyse.com>, the principal office of NYSE, and 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. NYSE 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 NYSE proposes a new rule to provide the Exchange with the authority to cancel or adjust clearly erroneous trades of securities executed on or through the systems and facilities of the NYSE. Currently, Rule 128B (Publication of Changes, Corrections, Cancellations or Omissions and Verifications of Transactions) permits the NYSE to cancel a trade when all

<sup>3</sup> In Amendment No. 1, the Exchange made technical and clarifying revisions to the purpose section and Exhibit 1 of the filing and amended the text of new Rule 128 to allow a request for review of a clearly erroneous execution to be made in person on the Floor of the Exchange.

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

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

<sup>1</sup> Financial Reporting Release No. 70.

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

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

parties agree, such as when the execution in question was erroneous and a Floor Official concurs in the cancellation. However, such action cannot be taken if one or both parties to the trade do not agree to cancel the trade. Additionally, the Exchange has no authority, on its own initiative, to cancel or adjust an execution when such execution is clearly erroneous.

Most other national securities exchanges have some version of a clearly erroneous execution rule, and the NYSE is currently in discussions with the Commission to adopt a robust and market-appropriate rule of its own. In the interim, however, the Exchange lacks the authority to cancel or adjust executions of securities in situations where there has been a clearly erroneous trade.

In an era of interconnected markets and highly sophisticated electronic trading, the NYSE's inability to cancel or adjust trades presents a risk to the integrity of the equities markets and all related markets. This is because a clearly erroneous order will likely be executed on multiple exchanges, not just the NYSE, but whereas trades executed on other markets will be subject to cancellation and/or adjustment through the enforcement of those markets' clearly erroneous execution rules, trades executed on the NYSE will stand. This would render an unequal result in plainly identical circumstances.

To address this gap in otherwise analogous trading situations, the NYSE proposes to adopt an interim rule based on a clearly erroneous trade rule used by NYSE Arca, Inc.<sup>6</sup> The proposed NYSE rule would sunset after six months (subject to renewal by application to the Commission), which will give the NYSE and Commission staff an opportunity to develop a more robust and market-appropriate clearly erroneous execution rule, without risking the integrity of the market in the interim.

#### Description of the Proposed Rule

The proposed rule sets forth the process through which the Exchange may review certain executions and declare them null and void or otherwise modify their terms. The rule contemplates primarily two scenarios: (i) Clearly erroneous trades, which are trades where one element of the trade (side of the market, size of the trade, price of the trade, or security symbol) is obviously incorrect and needs to be corrected; and (ii) trades resulting from

extraordinary market conditions or other circumstances in which the cancellation of the trades is necessary in order to maintain a fair and orderly market or to protect the public interest.

Among other things, the proposed rule authorizes the NYSE to receive complaints from market participants requesting designated officers of the Exchange to review the terms of the execution and creates a process by which the parties to the trade and the Exchange can conduct the review and determine whether to nullify or modify the execution in question if it is found to be clearly erroneous. Requests for review of a clearly erroneous execution by an officer of the Exchange may be made via telephone, facsimile, e-mail or in person on the Floor of the Exchange.

In the event the designated officer of the Exchange determines that the transaction in dispute is clearly erroneous, the officer is authorized to declare the transaction null and void or modify one or more of the terms of the transaction to achieve an equitable rectification of the error placing the parties in the same position, or as close as possible to the same position in which they would have been, had the error not occurred.

The proposed rule also provides that the NYSE may, on its own initiative, review trades that it believes are clearly erroneous, and may cancel or modify such trades if necessary to protect the integrity of the markets or the public interest. Such trades may take place in connection with a malfunction or disruption of any systems, electronic communications, and trading facilities of the Exchange, or in connection with extraordinary market conditions or other circumstances. The Exchange believes that errors due to these types of conditions warrant a review irrespective of whether an Exchange member or member organization complains. Moreover, such reviews are consistent with standard industry practices.<sup>7</sup>

Under the circumstances described above, the provision allows the designated reviewing officer, on his or her own motion, to review these transactions and declare such transactions arising out of the use or operation of such facilities during such period null and void or modify the terms of these transactions if the officer determines that the transactions are clearly erroneous, or that such actions are necessary for the maintenance of a fair and orderly market or for the protection of investors and the public interest. Absent extraordinary circumstances, action by the officer

must be taken within 30 minutes of detection of the erroneous transaction, in accordance with the procedures set out in the rule.

#### Appeal Process

The proposed rule permits a party affected by the NYSE's decision to cancel or modify a clearly erroneous trade to request an appeal to the Clearly Erroneous Execution Panel ("CEE Panel") to review the determination, and sets out the process for doing so. The members of the CEE Panel are the NYSE Chief Regulatory Officer ("CRO"), or the CRO's designee,<sup>8</sup> and representatives from two members or member organizations.<sup>9</sup>

The procedures for both the initial decision and the appeal reflect a balance between giving the parties adequate time to respond to the decision, and the need for market certainty that a trade either will or won't stand. Thus, for example, requests for an appeal must be made via facsimile or e-mail within 30 minutes after the party requesting the appeal is given notification of the initial determination, after which the CEE Panel will review the information and make a final determination to either affirm or overturn or modify the action taken by the Officer. All final determinations made by the CEE Panel are without prejudice to the rights of the parties to the transaction to submit their dispute to arbitration. In order to discourage frivolous or abusive use of the appeal process, the Exchange will assess a \$500.00 fee against the Exchange member or member organization that initiated the request for appeal if the outcome of the appeal is to uphold the initial decision of the Exchange officer.

#### Trade Nullification and Price Adjustment for Securities Admitted to Unlisted Trading Privileges on the NYSE ("UTP") That Are the Subject of Initial Public Offerings ("IPOs")

Pursuant to Rule 12f-2 under the Act,<sup>10</sup> the Exchange may extend unlisted trading privileges to a security that is the subject of an initial public offering when at least one transaction in the subject security has been effected on the national securities exchange or

<sup>8</sup> The Exchange represents that a designee of the CRO will be an employee of the Exchange, working closely with and reporting directly to the CRO. The Exchange notes that NYSE Arca Equities Rule 7.10 designates a CEE Panel to independently make appeals decisions and also to overturn or modify actions taken by the Exchange. See NYSE Arca Equities Rule 7.10(c)(2).

<sup>9</sup> The Exchange shall designate at least 10 member or member organization representatives to be called upon to serve on the CEE Panel.

<sup>10</sup> 17 CFR 240.12f-2.

<sup>6</sup> See NYSE Arca Equities Rule 7.10 (Clearly Erroneous Executions).

<sup>7</sup> See, e.g., Nasdaq Rule 11890(b).

association upon which the security is listed and the transaction has been reported pursuant to an effective transaction reporting plan. The proposed rule provides the Exchange with authority to nullify trades and adjust prices for securities that are the subject of initial public offerings. The Exchange believes that a separate provision is appropriate because the Exchange's intent is always to adjust the price of an opening trade on the Exchange if it is away from the price the issue opens on the listing market. Thus, if the price of the trade is either \$1.00 or 10% away from the opening price on the listing market, the trade would be automatically adjusted to the opening price. In such circumstances, the designated reviewing officer shall declare the opening transaction null or adjust the transaction price to the opening price on the listed exchange or association. Clearly erroneous executions of subsequent trades in the subject security will be reviewed in the same manner as those subject to the general guidelines. Consistent with the clearly erroneous executions rule set forth in the proposed rule, this provision also provides an immediate appeal process for determinations.

## 2. Statutory Basis

The proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>11</sup> in general, and with Section (b)(5) of the Act,<sup>12</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, 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. NYSE believes the proposed rule would place the NYSE on an equal footing with other national securities exchanges. This will promote the integrity of the market and protect the public interest, since it would permit all exchanges to cancel or adjust clearly erroneous trades when such trades occur, rather than canceling them on all other markets, but leaving them standing on only one market.

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

NYSE 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 foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>13</sup> and Rule 19b-4(f)(6) thereunder.<sup>14</sup>

NYSE has requested that the Commission waive the 30-day operative delay. The Commission notes that the proposed rule is based on a rule that has been previously approved by the Commission.<sup>15</sup> The Commission believes that waiving the 30-day operative delay will allow the Exchange to immediately and timely cancel or adjust trades that it determines to be clearly erroneous under Rule 128. The Commission believes that the addition of this clearly erroneous trade rule is consistent with the protection of investors and the public interest. The Commission hereby designates the proposal as operative upon filing.<sup>16</sup>

At any time within 60 days of the filing of the 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.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change 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 Commission has determined to waive the five-day pre-filing period in this case.

<sup>15</sup> See *supra* note 6.

<sup>16</sup> For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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 No. SR-NYSE-2008-09 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File Number SR-NYSE-2008-09. 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 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, on official business days between the hours of 10 a.m. and 3 p.m. 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-2008-09 and should be submitted on or before March 12, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

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

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

<sup>11</sup> 15 U.S.C. 78f.

<sup>12</sup> 15 U.S.C. 78f(b)(5).