

an inequitable allocation of fees. The Commission notes that the Exchange has represented that after consummation of the Merger, the annual fee revenue paid by companies to the Amex prior to the Merger will be available to NYSE Regulation to finance its regulatory activities in relation to Amex-listed companies, regardless of whether such companies remain on NYSE Alternext US or have chosen to transfer their listing to the NYSE at some point during the year either before or after the Merger. Since the retroactive effect is conditioned on consummation of the Merger, the fee waiver recognizes that these regulatory efficiencies will only occur upon that event.

The Commission also notes that the fee waiver is for a limited time, applicable to the remainder of the calendar year in which the transfer occurs. Annual fees for both Amex and NYSE Arca transfers will continue to be assessed after the initial pro-rated annual fee waiver. The limited period of the fee waiver helps to ensure that that NYSE will have adequate fees to continue compliance and oversight of its listing program.

In summary, based on the reasons set forth above, including NYSE's assertions that (i) the same regulatory staff on both Amex (that will have been absorbed by NYSE Regulation) and NYSE Regulation will have conducted a substantial review of an Amex or NYSE Arca company that NYSE Regulation will be able to rely upon as a baseline in qualifying the company for both listing on the Exchange and in conducting ongoing compliance activities with respect to any such company; and (ii) the retroactive effect for Amex transfers will only occur if the Merger is consummated, the Commission believes it is not inequitable or unfair to provide for a waiver of annual fees for a limited period of time. The Commission expects, and the Exchange has represented, that a rigorous and independent review of compliance with the listing standards will be conducted for any company seeking to take advantage of the fee waiver, just as for any company that lists on the Exchange. In addition, the Commission expects the Exchange to maintain its commitment of resources to its regulatory oversight of the listing process and its ongoing compliance review of listed companies under its regulatory program.

Based on the above, the Commission believes the proposed fee waiver does not constitute an inequitable allocation of reasonable dues, fees, and other charges under Section 6(b)(4) of the

Act,<sup>8</sup> does not permit unfair discrimination between issuers under Section 6(b)(5) of the Act,<sup>9</sup> and is otherwise consistent with the requirements of the Act.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (SR–NYSE–2008–74) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58596; File No. SR–NYSEArca–2008–98]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc., Amending NYSE Arca Equities Rule 7.35 Governing Auctions

September 19, 2008.

Pursuant to section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b–4 thereunder,<sup>3</sup> notice is hereby given that, on September 15, 2008, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared 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

The Exchange proposes to amend NYSE Arca Equities Rule 7.35(c) and (e) to permit the Exchange to conduct a Market Order Auction and a Closing Auction in all exchange listed “Derivative Securities Products” as defined by NYSE Arca Equities Rule 7.34(a)(4)(A).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30–3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b–4.

#### 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 self-regulatory organization 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 those 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 parts 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 amend NYSE Arca Equities Rule 7.35(c) and (e) to permit the Exchange to conduct a Market Order Auction and a Closing Auction in all exchange listed “Derivative Securities Products” as defined by NYSE Arca Equities Rule 7.34(a)(4)(A).

Currently NYSE Arca Equities Rule 7.35(c) states that the Exchange will conduct a Market Order Auction in (i) exchange-listed securities for which the Corporation is the primary market; (ii) all exchange-listed exchange traded funds; and (iii) NYSE listed securities subject to a sub-penny trading condition. Similarly, NYSE Arca Equities Rule 7.35(e) states that the Exchange will conduct a Closing Auction in (i) exchange-listed securities for which the Corporation is the primary market; (ii) all exchange-listed exchange traded funds; and (iii) NYSE listed securities subject to a sub-penny trading condition. The Exchange proposes to expand subpart (ii) in both Rules by replacing the term “exchange-listed exchange traded funds” with the term “exchange-listed Derivative Securities Products” as that term is defined in NYSE Arca Equities Rule 7.34(a)(4)(A).

The Exchange believes this rule change will foster increased liquidity by expanding the type of securities eligible for Market Order and Closing auctions. This proposed amendment is also consistent with Rules 4752 and 4754 of the Nasdaq Stock Market, L.L.C. (“Nasdaq”), which do not limit the securities or products that may be traded in the opening and closing auctions.

###### 2. Statutory Basis

The proposed rule change is consistent with section 6(b) of the Act

in general, and furthers the objectives of section 6(b)(5) 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. This proposed rule change will foster increased liquidity by expanding the type of securities eligible for Market Order and Closing auctions.

#### *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*

No written comments were solicited or received with respect to the proposed rule change.

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

The proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act<sup>4</sup> and Rule 19b-4(f)(6) thereunder<sup>5</sup> because the foregoing proposed rule: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.<sup>6</sup> The Exchange notes that this filing does not propose any new policies or provisions that are unique or unproven, and is consistent with Nasdaq Rules 4752 and 4754.

The Exchange has asked the Commission to waive the 30-day operative delay and designate the proposed rule change as operative upon filing. The Commission hereby grants

the Exchange's request.<sup>7</sup> The Commission believes that such action is consistent with the protection of investors and the public interest because the Exchange's proposal is similar to that of another exchange that was previously approved by the Commission.<sup>8</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 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-NYSEArca-2008-98 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File Number SR-NYSEArca-2008-98. 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, 100 F Street, NE., Washington, DC 20549, 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 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 publicly available. All submissions should refer to File Number SR-NYSEArca-2008-98 and should be submitted on or before October 17, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-58598; File No. SR-NYSEArca-2008-78]

### **Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change To Waive Annual Fees for Securities Transferring to NYSE Arca From NYSE Alternext US**

September 19, 2008.

#### **I. Introduction**

On July 23, 2008, NYSE Arca, Inc. ("NYSE Arca" 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 waive annual listing fees for securities transferring to NYSE Arca from NYSE Alternext US after the closing of the purchase of the American Stock Exchange LLC ("Amex") by NYSE Euronext (the "Merger").<sup>3</sup> The proposed rule change was published in the **Federal Register** on August 11, 2008.<sup>4</sup>

<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.

<sup>3</sup> NYSE Euronext, the ultimate parent company of the Exchange, has agreed to acquire the Amex pursuant to an Agreement and Plan of Merger, dated as of January 17, 2008. After the closing of the Merger, the Amex will be renamed NYSE Alternext US LLC.

<sup>4</sup> See Securities Exchange Act Release No. 58297 (August 4, 2008), 73 FR 46683.

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

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

<sup>6</sup> In addition, Rule 19b-4(f)(6)(iii) requires the self-regulatory organization to give the Commission notice of its intent to file the proposed rule change, along with a brief description and text of 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. NYSE Arca has satisfied this requirement.

<sup>7</sup> For purposes only of waiving the operative delay for 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>8</sup> See Securities Exchange Act Release No. 54155 (July 14, 2006), 71 FR 41291 (July 20, 2006) (SR-NASDAQ-2006-001) (approving, among other things, Nasdaq Rules 4752 and 4754.)