

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.)

The Commission received no comments on the proposal. This order approves the proposed rule change.

## II. Description of the Proposal

The Exchange proposes that securities transferring to NYSE Arca from NYSE Alternext US after the closing of the Merger will not be charged any prorated annual fee for the remainder of the year in which the Merger takes place. The fee waiver in the preceding sentence will be of no further effect if the closing of the Merger does not take place by March 31, 2009.

The Exchange believes this proposed fee waiver does not render the allocation of its listing fees inequitable or unfairly discriminatory, in particular because, after the Merger, NYSE Regulation, Inc. ("NYSE Regulation") will perform listed company regulation for both the Exchange and NYSE Alternext US, including a substantial review of companies upon original listing. The Exchange notes that many of the regulatory staff who currently perform initial and continued listing reviews at the Amex will become employees of NYSE Regulation at the time of the Merger and will continue to perform the same duties with respect to NYSE Alternext US securities after the Merger. The Exchange represents that securities transferring from NYSE Alternext US will be subjected to the same rigorous regulatory review as any other securities with respect to which an application for listing is made to the Exchange. However, the Exchange expects that, on average, the review of securities transferring from NYSE Alternext US to the Exchange will be less costly than the review of a transfer from an unaffiliated market, as the Amex listing regulatory staff that will have been absorbed by NYSE Regulation will already have performed a substantial review of any NYSE Alternext US-listed issuer, and NYSE Regulation will be able to rely on that prior work as a baseline in qualifying the issuer for listing on the Exchange and in conducting ongoing compliance activities with respect to any such issuer. In support of its proposal, the Exchange also notes that transferring issuers would have already paid annual continued listing fees to the Amex for the calendar year in which the transfer took place.

## III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the

requirements of section 6(b) of the Act and the rules and regulations thereunder. Specifically, the Commission finds that the proposal is consistent with sections 6(b)(4)<sup>5</sup> and 6(b)(5) of the Act,<sup>6</sup> which require that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities, and are designed, among other things, 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, to protect investors and the public interest, and to not permit unfair discrimination between customers, issuers, brokers, or dealers.<sup>7</sup>

National securities exchanges traditionally assess annual listing fees on listed companies at the beginning of the calendar year. When a company transfers to another marketplace, such annual fees are typically pro-rated by the new market for the remainder of the calendar year. Annual fees aid a listed market in, among other things, conducting its regulatory responsibilities to ensure compliance by listed companies with continued listing standards and other regulatory requirements. The Commission notes that an Amex issuer seeking to transfer to the Exchange has already paid annual continued listing fees to another national securities exchange for the calendar year in which it transferred. Further, the Commission recognizes that subsequent to the consummation of the Merger, both Amex as NYSE Alternext US and NYSE Arca will be under the same common ownership. The Commission also notes that the Exchange anticipates the review of securities transferring from NYSE Alternext US to be less costly than the review of a transfer from an unaffiliated market, because Amex listing regulatory staff that will be part of NYSE Regulation will continue to perform both initial and continued listing reviews. However, 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. 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.

In summary, for the reasons set forth above, including NYSE Arca's assertion that the same regulatory staff on Amex (that will have been absorbed by NYSE Regulation) will have conducted a substantial review of an Amex company that NYSE Regulation will be able to rely upon as a baseline in qualifying the company for listing on the Exchange and in conducting ongoing compliance activities with respect to any such company, the Commission believes it is not inequitable or unfair to provide for a waiver of annual fees for a limited period of time after the merger is consummated.

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-NYSEArca-2008-78) 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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<sup>5</sup> 15 U.S.C. 78f(b)(4).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<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).