

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulation thereunder applicable to a national securities exchange.<sup>14</sup> In particular, the Commission finds that the proposed rule change is consistent with Sections 6(b)(6) and 6(b)(7) of the Act<sup>15</sup> in that it provides a fair procedure for the discipline of members and persons associated with members. The Commission further finds that the proposed rule change provides NYSE Alternext US with the ability to comply, and with the authority to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules or regulations thereunder, or the rules of NYSE Alternext US.

### Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-Amex-2008-64), be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-23314 Filed 10-2-08; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58673; File Nos. SR-Amex-2008-62 and SR-NYSE-2008-60]

### Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Amendment No. 4 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendments No. 1 and 4 Thereto, Relating to the Acquisition of the Amex by NYSE Euronext; Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval to a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Acquisition of the Amex by NYSE Euronext

September 29, 2008.

#### I. Introduction

On July 23, 2008, American Stock Exchange LLC, a Delaware limited liability company ("Amex"), 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 in connection with the acquisition of Amex by NYSE Euronext, a Delaware Corporation ("NYSE Euronext"). On July 30, 2008, Amex filed Amendment No. 1 to the proposed rule change. On August 7, 2008, the proposed rule change, as amended, was published for comment in the **Federal Register**.<sup>3</sup> Amex filed Amendment No. 2 to the proposed rule change on September 3, 2008, and withdrew Amendment No. 2 on September 4, 2008. Amex filed Amendment No. 3 on September 4, 2008, and withdrew Amendment No. 3 on September 5, 2008. Amex filed Amendment No. 4 on September 5, 2008.<sup>4</sup> The Commission

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

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

<sup>3</sup> See Securities Exchange Act Release No. 58284 (August 1, 2008), 73 FR 46086 ("Amex Notice").

<sup>4</sup> In Amendment No. 4, Amex: (1) Made several technical, non-substantive clarifying changes to the proposed NYSE Alternext US LLC rules; (2) amended the proposed NYSE Alternext US LLC rules to provide for other Amex proposed rule changes that have been approved since this proposal was filed; (3) modified the description of Arca Securities, LLC ("Arca Securities") to include, among other things, a representation that, with respect to its oversight of Arca Securities, which will be an affiliated member of NYSE Alternext US LLC after the Mergers and Related Transactions (as described herein), NYSE Regulation, Inc. ("NYSE Regulation") has agreed with Amex that it will provide a report to NYSE Alternext US LLC's Chief Regulatory Officer on a quarterly basis that: (a) Quantifies all open alerts (of which NYSE Regulation is aware) that identify Arca Securities as a participant that has potentially violated NYSE Alternext US LLC or Commission rules and (b)

received no comments on the proposed rule change. This order provides notice of filing of Amendment No. 4 to the proposed rule change, and grants accelerated approval to the proposed rule change, as modified by Amendments No. 1 and 4.

On July 23, 2008, the New York Stock Exchange LLC ("NYSE"), a New York limited liability company, filed with the Commission, pursuant to Section 19(b)(1) of the Act<sup>5</sup> and Rule 19b-4 thereunder,<sup>6</sup> a proposed rule change in connection with the acquisition of Amex by NYSE Euronext. On July 30, 2008, the NYSE filed Amendment No. 1 to the proposed rule change. On August 7, 2008, the proposed rule change, as amended, was published for comment in the **Federal Register**.<sup>7</sup> The Commission received no comments on the proposed rule change. This order grants approval to the proposed rule change, as modified by Amendment No. 1.

#### II. Background

On January 17, 2008, NYSE Euronext, Amex, Amex's parent companies (The Amex Membership Corporation ("MC") and its direct wholly-owned subsidiary, AMC Acquisition Sub, Inc.), and several other entities created by NYSE Euronext and Amex in connection with the Mergers entered into an agreement ("Merger Agreement") to effect a series of mergers ("Mergers") as a result of which the successor to Amex, to be renamed "NYSE Alternext US LLC" ("NYSE Alternext US"), will become a

quantifies the number of all open investigations that identify Arca Securities as a participant that has potentially violated NYSE Alternext US LLC or Commission rules; (4) revised the rule filing to reflect that the parties to a multi-party regulatory services agreement (as described herein) have been modified to include NYSE Alternext US LLC, NYSE Group, Inc., NYSE Regulation, and Financial Industry Regulatory Authority ("FINRA"); (5) revised the rule filing to reflect a change to the Mergers and Related Transactions, which will not affect the final outcome of the Mergers and Related Transactions (as described herein) through which NYSE Alternext US LLC will become a subsidiary of NYSE Euronext; and (6) clarified that Arca Securities will not provide "outbound" routing services for NYSE Alternext US LLC until the relocation of the NYSE Alternext US LLC equities and options trading facilities to the NYSE trading floor or the electronic trading platform of NYSE or NYSE Arca, Inc., as applicable, and that, at a later time, NYSE Alternext US LLC will submit a separate rule filing to the Commission seeking approval to provide such outbound routing services to NYSE Alternext US LLC.

<sup>5</sup> 15 U.S.C. 78s(b)(1).

<sup>6</sup> 17 CFR 240.19b-4.

<sup>7</sup> See Securities Exchange Act Release No. 58285 (August 1, 2008), 73 FR 46117 (SR-NYSE-2008-60) ("NYSE Notice").

<sup>14</sup> In approving the proposal, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>15</sup> 15 U.S.C. 78f(b)(6) and 15 U.S.C. 78f(b)(7).

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

U.S. Regulated Subsidiary<sup>8</sup> of NYSE Euronext. The Board of Governors of Amex (“Amex Board”) approved the proposed rule change on May 21, 2008. In addition, the Mergers were approved by the requisite vote of MC members at the special meeting of MC members held on June 17, 2008. Immediately following the Mergers, NYSE Euronext plans to effectuate certain related transactions, as a result of which NYSE Alternext US will become a direct wholly-owned subsidiary of NYSE Group, Inc. (“NYSE Group”), the wholly-owned subsidiary of NYSE Euronext (“Related Transactions”).<sup>9</sup>

Upon completion of the Mergers and the Related Transactions, NYSE Alternext US will continue operating as a national securities exchange registered under Section 6 of the Act.<sup>10</sup> Following the Mergers and the Related Transactions, NYSE Euronext (and NYSE Group) will be the owner of three self-regulatory organizations (“SROs”): the NYSE; NYSE Arca, Inc. (“NYSE Arca”); and NYSE Alternext US.

Currently, all Regular Members and Options Principal Members<sup>11</sup> of Amex also have a membership interest in MC, a New York not-for-profit members-owned corporation which owns directly or indirectly 100% of Amex. The Mergers will have the effect of separating the right to trade on NYSE Alternext US from ownership in MC. Pursuant to the terms of the Merger Agreement, persons owning MC memberships prior to the Mergers will receive shares of the common stock of NYSE Euronext and cash in lieu of fractional shares, if applicable.<sup>12</sup> As described more fully below, following the Mergers, all trading rights on Amex appurtenant to MC memberships existing prior to the Mergers will be cancelled and physical and electronic access to NYSE Alternext US trading facilities will be made available to individuals and organizations through temporary trading permits (“86 Trinity Permits”) offered by NYSE Alternext US.<sup>13</sup>

Amex filed a proposed rule change to permit the Mergers and the Related Transactions and to accommodate the transformation of Amex from a wholly-owned subsidiary of MC<sup>14</sup> into an indirect wholly-owned subsidiary of NYSE Euronext and a direct wholly-owned subsidiary of NYSE Group. Amex proposes to adopt the NYSE Alternext US Operating Agreement, to eliminate the Amex Constitution,<sup>15</sup> and to amend the Amex Rules, which would become the NYSE Alternext US Rules, as described more fully below.<sup>16</sup> In general, the proposed changes are designed to facilitate the Mergers and Related Transactions and to conform the governance of NYSE Alternext US to that of the NYSE. Amex also is using this opportunity to make several other changes to its governing documents and rules to update language and make other minor changes that are not directly related to the proposed Mergers or Related Transactions.<sup>17</sup> The proposed rule change will become operative upon completion of the Mergers and the Related Transactions.

In addition, the NYSE filed a proposed rule change to amend certain organizational documents of NYSE Euronext, NYSE Group, and NYSE Regulation; the Trust Agreement of the NYSE Group Trust I (“Trust Agreement”);<sup>18</sup> the Independence Policy of NYSE Euronext (“NYSE Euronext Independence Policy”); and

Alternext US anticipates replacing 86 Trinity Permits with equity trading licenses and options trading permits. NYSE Alternext US would have to file a proposed rule change to replace the 86 Trinity Permits with equity trading licenses and options trading permits.

<sup>14</sup> For a discussion of the current governance structure of MC and Amex, see Securities Exchange Act Release Nos. 50057 (July 22, 2004), 69 FR 45091 (July 28, 2004) (SR-Amex-2004-50) (notice of filing of proposed rule change relating to the NASD’s sale of its interest in Amex to MC) and 50927 (December 23, 2004), 69 FR 78486 (December 30, 2004) (SR-Amex-2004-50) (order approving proposed rule change relating to the NASD’s sale of its interest in Amex to MC) (“Amex Order”).

<sup>15</sup> Amex proposes to include relevant provisions of the Amex Constitution in the NYSE Alternext US Operating Agreement or the NYSE Alternext US Rules, as applicable.

<sup>16</sup> Amex also proposes, in connection with the Mergers, to eliminate the undertakings made by Amex to the Commission in connection with a proposed rule change in 2004. See Amex Order, *supra* note 14.

<sup>17</sup> For example, certain obsolete rules, including the rules relating the Intermarket Trading System Plan and certain rules which have been replaced by Auction and Electronic Market Integration Rules are proposed to be deleted. See Amex Notice, *supra* note 3, 73 FR at 46095.

<sup>18</sup> See Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120) (order approving combination between NYSE Group, Inc. and Euronext N.V.) (“NYSE/Euronext Order”) for a description of the Trust Agreement.

the NYSE Rules. The proposed changes, among other things, will make applicable to NYSE Alternext U.S. certain provisions of the organizational documents, the Trust Agreement, and the NYSE Euronext Independence Policy that are designed to maintain the independence of each NYSE Euronext SRO subsidiary’s self-regulatory function, enable each such SRO to operate in a manner that complies with the federal securities laws, and facilitate each such SRO’s ability and the ability of the Commission to fulfill their regulatory and oversight obligations under the Act.<sup>19</sup>

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>20</sup> In particular, the Commission finds that the proposed rule changes are consistent with: (1) Section 6(b)(1) of the Act,<sup>21</sup> which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act; (2) Section 6(b)(3) of the Act,<sup>22</sup> which requires that the rules of a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer (the “fair representation requirement”); and (3) Section 6(b)(5) of the Act,<sup>23</sup> in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices; 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.

As noted above, the Mergers and the Related Transactions will result in NYSE Euronext (and NYSE Group)

<sup>19</sup> See NYSE Notice, *supra* note 7. In addition, the NYSE also is making certain other changes to the NYSE Euronext Independence Policy, as discussed below in Section III.G.

<sup>20</sup> In approving these proposed rule changes, the Commission has considered the proposed rules’ impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>21</sup> 15 U.S.C. 78f(b)(1).

<sup>22</sup> 15 U.S.C. 78f(b)(3).

<sup>23</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> The term “U.S. Regulated Subsidiary” is defined in Article VII, Section 7.3(G) of the NYSE Euronext Bylaws.

<sup>9</sup> See Amex Notice, *supra* note 3, and Amendment No. 4 to the Amex Notice, *supra* note 4, for a more detailed description of the Mergers and the Related Transactions.

<sup>10</sup> 15 U.S.C. 78f.

<sup>11</sup> Amex allied members and associate members are not members of MC and therefore have trading rights on Amex but not voting rights in MC.

<sup>12</sup> See Amex Notice, *supra* note 3, for a more detailed description of the consideration that persons owning MC memberships will receive in connection with the Mergers.

<sup>13</sup> See *infra* Section III.C.2. for discussion of these temporary trading permits. At a later time, NYSE

owning another SRO, NYSE Alternext US. The Commission believes that the ownership of NYSE Alternext US by the same public holding company that owns the NYSE and NYSE Arca would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>24</sup> Further, the Commission does not believe that the ownership by one holding company of three U.S. exchanges presents any adverse competitive implications in the current marketplace. The Commission notes that it has previously approved proposals in which a holding company owns multiple SROs.<sup>25</sup> The Commission's experience to date with the issues raised by the ownership by a holding company of one or more SROs has not presented any concerns that have not been addressed, for example, by Commission approved measures at the holding company level that are designed to protect the independence of each SRO.

The Commission believes that the current market for cash equity and standardized options trading venues is highly competitive. Existing exchanges face significant competition from other exchanges and non-exchange entities, such as alternative trading systems, that trade the same or similar financial instruments.<sup>26</sup> In addition, there have been new entrants to the market. In this regard, the Nasdaq Options Market recently commenced the trading of standardized options contracts, the Commission in 2004 approved proposed rule changes to establish the Boston Options Exchange Facility of the Boston Stock Exchange, Inc. and the Commission in 2000 approved the registration of the International Securities Exchange, LLC ("ISE") to trade standardized options contracts.<sup>27</sup>

<sup>24</sup> 15 U.S.C. 78f(b)(8).

<sup>25</sup> See, e.g., Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.) ("NYSE/Arca Order"). See also Securities Exchange Act Release Nos. 58324 (August 7, 2008) (SR-BSE-2008-02; SR-BSE-2008-23; SR-BSE-2008-25; SR-BSECC-2008-01) (approving the acquisition of Boston Stock Exchange, Inc. by The NASDAQ OMX Group, Inc.) ("BSE Order"), and 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31) (approving the acquisition of Philadelphia Stock Exchange, Inc. by The NASDAQ OMX Group, Inc.) ("Phlx Order").

<sup>26</sup> See, e.g., Securities Exchange Act Release No. 58092 (July 3, 2008), 73 FR 40144, 40144 (July 11, 2008) (where the Commission recognized that "[n]ational securities exchanges registered under Section 6(a) of the Act face increased competitive pressures from entities that trade the same or similar financial instruments \* \* \*").

<sup>27</sup> See Securities Exchange Act Release Nos. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-

Further, the Chicago Board Options Exchange, Incorporated and ISE a few years ago commenced trading of cash equity securities.<sup>28</sup> In addition, another entity has recently applied and received approval for exchange registration, which provides evidence that such entity determined there are benefits in starting a new exchange to compete in the marketplace.<sup>29</sup> Accordingly, the Commission finds that Amex's and NYSE's proposed rule changes are consistent with Section 6(b)(8), which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission will continue to monitor holding companies' ownership of multiple SROs for compliance with the Act, the rules and regulations thereunder, as well as the SROs' own rules.

#### A. Changes in Control of NYSE Alternext US; Ownership and Voting Limits

The NYSE Alternext US Operating Agreement will provide that NYSE Group, which will be the sole member of NYSE Alternext US, may not transfer or assign its limited liability company interest in NYSE Alternext US in whole or in part, to any person or entity, unless such transfer or assignment shall be filed with and approved by the Commission under Section 19 of the Act and the rules promulgated thereunder.<sup>30</sup>

2007-080) (order approving a proposed rule change relating to, among other things, the establishment and operation of the NADAQ Options Market) ("NOM Approval Order"); 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (SR-BSE-2002-15) (order approving trading rules for BOX); 49067 (January 13, 2004), 69 FR 2761 (January 20, 2004) (SR-BSE-2003-19) (order approving the Operating Agreement for BOX); and 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10-127) (order approving the International Securities Exchange LLC's application for registration as a national securities exchange) ("ISE Exchange Registration Order").

<sup>28</sup> See Securities Exchange Act Release Nos. 55389 (March 2, 2007), 72 FR 10575 (March 8, 2007) (order approving the establishment of CBOE Stock Exchange, LLC); 55392 (March 2, 2007), 72 FR 10572 (March 8, 2007) (order approving trading rules for non-option securities trading on CBOE Stock Exchange, LLC); 54528 (September 28, 2006), 71 FR 58650 (October 4, 2006) (order approving rules governing ISE's electronic trading system for equities).

<sup>29</sup> See Securities Exchange Act Release Nos. 57322 (February 13, 2008), 73 FR 9370 (February 20, 2008) (File No. 10-182) (notice of filing of application and Amendment No. 1 thereto by BATS Exchange, Inc. for registration as a national securities exchange) and 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (Findings, Opinion, and Order of the Commission approving BATS Exchange, Inc.'s application for registration as a national securities exchange) ("BATS Order").

<sup>30</sup> See Section 3.03 of the proposed NYSE Alternext US Operating Agreement. Under current Amex rules, any sale, issuance, transfer or other

In addition, the Second Amended and Restated Certificate of Incorporation of NYSE Group ("NYSE Group Charter") provides that NYSE Euronext, as the owner of all the issued and outstanding shares of stock of NYSE Group, may not transfer or assign its ownership interest in NYSE Group, in whole or in part, to any person or entity, unless such transfer or assignment shall be filed with and approved by the Commission under Section 19 of the Exchange Act and the rules promulgated thereunder.<sup>31</sup>

The Amended and Restated Certificate of Incorporation of NYSE Euronext ("NYSE Euronext Charter"), in turn, imposes limits on direct and indirect changes in control, which are designed to prevent any shareholder from exercising undue control over the operation of its SRO subsidiaries and to ensure that its SRO subsidiaries and the Commission are able to carry out their regulatory responsibilities under the Act.<sup>32</sup> Specifically, no person (either alone or together with its related persons) is entitled to vote or cause the voting of shares of stock of NYSE Euronext beneficially owned by such person or its related persons, in person or by proxy or through any voting agreement or other arrangement, to the extent that such shares represent in the aggregate more than 10% of the then outstanding votes entitled to be cast on such matter. No person (either alone or together with its related persons) may acquire the ability to vote more than 10% of the then outstanding votes

disposition of any equity security of Amex, including any LLC interest, is subject to prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act and the rules promulgated thereunder. See Section 9.3 of the Amended and Restated Amex Limited Liability Company Agreement and Amex Order, *supra* note 14. In addition, any sale, issuance, transfer or other disposition of any equity interest in MC or AMC Acquisition Sub, Inc. other than the sale or transfer of seats or membership interests in MC, is subject to prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act and the rules promulgated thereunder. See Section 7(c) of the Second Restated Certificate of Incorporation of MC and Amex Order, *supra* note 14.

<sup>31</sup> See Article IV, Section 4 of the proposed NYSE Group Charter.

<sup>32</sup> See Article V of the NYSE Euronext Charter and NYSE/Euronext Order, *supra* note 18. The Commission notes that the NYSE Group Charter also includes similar ownership and voting limits. However, such limitations are not applicable so long as NYSE Euronext and NYSE Group Trust I collectively own all of the capital stock of NYSE Group. Instead, for so long as NYSE Group is a wholly owned subsidiary of NYSE Euronext, or as provided for in the Trust Agreement, there will be no transfer of the shares of NYSE Group held by NYSE Euronext without the approval of the Commission. If NYSE Group ceases to be wholly owned by NYSE Euronext or the Trust, the voting and ownership limitations in the NYSE Group Charter will apply. *Id.*

entitled to be cast on any such matter by virtue of agreements or arrangements entered into with other persons not to vote shares of NYSE Euronext's outstanding capital stock.<sup>33</sup> In addition, no person (either alone or together with its related persons) may at any time beneficially own shares of stock of NYSE Euronext representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter.<sup>34</sup> These limits will flow through to NYSE Alternext US by virtue of the fact that NYSE Alternext US will be a wholly-owned subsidiary of NYSE Group, which in turn is wholly-owned by NYSE Euronext.<sup>35</sup>

Further, the current NYSE Euronext Charter provides that for so long as NYSE Euronext directly or indirectly controls the NYSE, NYSE Market Inc. ("NYSE Market"), NYSE Arca, NYSE Arca Equities, Inc. ("NYSE Arca Equities") or any facility of NYSE Arca, the NYSE Euronext board of directors cannot waive the voting and ownership limits above the 20% threshold for any person if such person or its related persons is a member or member organization of the NYSE, an ETP Holder of NYSE Arca Equities, or an OTP Holder or an OTP Firm of NYSE Arca.<sup>36</sup> These ownership and voting limits as they apply to members of the NYSE and NYSE Arca will be extended to include members of NYSE Alternext US through changes to the Amended and Restated Bylaws of NYSE Euronext

<sup>33</sup> See NYSE/Euronext Order, *supra* note 18 and NYSE Euronext Charter, Article V, Section 1(A). Pursuant to the NYSE Euronext Charter, NYSE Euronext shall disregard any such votes purported to be cast in excess of these limitations.

<sup>34</sup> See NYSE/Euronext Order, *supra* note 18, and NYSE Euronext Charter, Article V, Section 2(A). In the event that a person, either alone or together with its related persons, beneficially owns shares of stock of NYSE Euronext in excess of the 20% threshold, such person and its related persons will be obligated to sell promptly, and NYSE Euronext will be obligated to purchase promptly, to the extent that funds are legally available for such purchase, that number of shares necessary to reduce the ownership level of such person and its related persons to below the permitted threshold, after taking into account that such repurchased shares will become treasury shares and will no longer be deemed to be outstanding. See NYSE Euronext Charter, Article V, Section 2(D).

<sup>35</sup> Further, solely for the purposes of the definition of "related person" in the NYSE Euronext Charter, which incorporates in certain respects the definition of "member" and "member organization" as defined in the rules of the NYSE, the NYSE is amending (1) the definition of "member" in its rules to include any "member" (as defined in Section 3(a)(3)(A)(i) of the Act) of NYSE Alternext US, and (2) the definition of "Member Organization" in its rules to include any "member" (as defined in Section 3(a)(3)(A)(ii), 3(a)(3)(A)(iii) and 3(a)(3)(A)(iv) of the Act) of NYSE Alternext US. See NYSE Notice, *supra* note 7.

<sup>36</sup> See NYSE Euronext Charter, Article V, Sections 1(C)(3) and 2(C)(4).

("NYSE Euronext Bylaws").<sup>37</sup> Specifically, the NYSE Euronext Bylaws will provide that, subject to its fiduciary obligations under applicable law, for so long as NYSE Euronext directly or indirectly controls NYSE Alternext US, the board of directors of NYSE Euronext shall not adopt any resolution to: (1) Approve the exercise of voting rights in excess of 20% of the then outstanding votes entitled to be cast on such matter unless the Board of Directors of NYSE Euronext determines that neither such person nor any of its related persons (as defined in the NYSE Euronext Charter) is a member (as defined in Section 3(a)(3)(A) of the Exchange Act)<sup>38</sup> of NYSE Alternext US (a "NYSE Alternext US Member");<sup>39</sup> and (2) approve the entering into of an agreement, plan or other arrangement under circumstances that would result in shares of stock of NYSE Euronext that would be subject to such agreement, plan or other arrangement not being voted on any matter, or the withholding of any proxy relating thereto, where the effect of such agreement, plan or other arrangement would be to enable any person, either alone or together with its related persons, to vote, possess the right to vote or cause the voting of shares of stock of NYSE Euronext that would exceed 20% of the then outstanding votes entitled to be cast on such matter (assuming that all shares of stock of NYSE Euronext that are subject to such agreement, plan or other arrangement are not outstanding votes entitled to be cast on such matter), unless the Board of Directors of NYSE Euronext determines that neither such person nor any of its related persons is an NYSE Alternext US Member. Further, the NYSE Euronext Bylaws will provide that, for so long as NYSE Euronext directly or indirectly controls NYSE Alternext US, the Board of Directors of NYSE Euronext will not approve ownership of NYSE Euronext capital stock in excess of 20%, unless the Board of Directors of NYSE Euronext determines that neither such person, nor any of its related persons, is a NYSE Alternext US Member.

The Commission finds that the proposed changes to NYSE Euronext Bylaws and the proposed restrictions on transfer and assignment of NYSE Group's limited liability company

<sup>37</sup> Similar changes are being made to the NYSE Group Charter. See NYSE Notice, *supra* note 7.

<sup>38</sup> 15 U.S.C. 78c(a)(3)(A).

<sup>39</sup> Any such person that is a "related person" (as defined in the NYSE Euronext Charter) of such NYSE Alternext Member will also be deemed to be a "NYSE Alternext Member" for the purposes of the NYSE Euronext Bylaws, as the context may require. See NYSE Euronext Bylaws, Section 10.12(A)(1).

interest in NYSE Alternext US, together with the existing restrictions on transfer and assignment of NYSE Euronext's ownership interest in NYSE Group and the existing ownership and voting limitations in NYSE Euronext's Certificate, are designed to prevent any person or entity from exercising undue control over the operation of NYSE Alternext US. These proposed changes are also designed to ensure that NYSE Alternext US and the Commission are able to carry out their regulatory obligations under the Act and thereby minimize the potential that a person or entity could improperly interfere with or restrict the ability of the Commission or NYSE Alternext US to effectively carry out their respective regulatory oversight responsibilities under the Act.

### B. Management of NYSE Alternext US

#### 1. Relationship Between NYSE Alternext US, NYSE Euronext and NYSE Group; Jurisdiction Over NYSE Euronext and NYSE Group

After the Mergers and the Related Transactions, NYSE Alternext US will become an indirect wholly-owned subsidiary of NYSE Euronext and a direct wholly-owned subsidiary of NYSE Group. Although these entities are not SROs and, therefore, will not themselves carry out regulatory functions, their activities with respect to the operation of NYSE Alternext US must be consistent with, and not interfere with, NYSE Alternext US's self-regulatory obligations. Proposed changes to the NYSE Euronext Bylaws, the NYSE Group Charter, the Second Amended and Restated Bylaws of NYSE Group ("NYSE Group Bylaws"), and the Trust Agreement will make applicable to NYSE Alternext US<sup>40</sup> certain provisions of NYSE Euronext and NYSE Group organizational documents, and provisions of the Trust Agreement, that are designed to maintain the independence of NYSE Alternext US's self-regulatory function, enable NYSE Alternext US to operate in a manner that complies with the federal securities laws, and facilitate NYSE Alternext US's ability and the ability of the Commission to fulfill their regulatory and oversight obligations under the Act.<sup>41</sup>

<sup>40</sup> The definitions of U.S. Regulated Subsidiaries in the NYSE Euronext Bylaws and Regulated Subsidiaries in the NYSE Group Charter will be amended to include NYSE Alternext US.

<sup>41</sup> Provisions of the organizational documents of NYSE Euronext, NYSE Group, and NYSE Regulation, the Trust Agreement, and the NYSE Euronext Independence Policy will be rules of NYSE Alternext U.S. because they are stated policies, practice, or interpretations of NYSE Alternext US, as defined in Rule 19b-4 under the

In particular, the NYSE Euronext Bylaws and NYSE Group Charter will specify, as applicable, that NYSE Euronext and NYSE Group and their respective officers, directors and employees whose principal place of business and residence is outside of the United States shall be deemed to irrevocably submit to the jurisdiction of the United States federal courts and the Commission for the purposes of any suit, action, or proceeding pursuant to the United States federal securities laws and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of the NYSE Alternext US.<sup>42</sup> Further, NYSE Euronext and NYSE Group have agreed to provide the Commission with access to their books and records.<sup>43</sup> NYSE Euronext and NYSE Group also agreed to keep confidential non-public information relating to the self-regulatory function<sup>44</sup> of NYSE Alternext US and not to use such information for any commercial purposes.<sup>45</sup> In addition, the NYSE Euronext and NYSE Group Boards, as

Act. Accordingly, Amex filed with the Commission the NYSE Euronext Charter, the NYSE Euronext Bylaws, the NYSE Group Charter, the NYSE Group Bylaws, the NYSE Euronext Independence Policy, the Third Amended and Restated Bylaws of NYSE Regulation (“NYSE Regulation Bylaws”), and the Trust Agreement and Amendment No. 1 to the Trust Agreement.

<sup>42</sup> See Section 7.1 of proposed NYSE Euronext Bylaws and Article IX of proposed NYSE Group Charter. See also Section 5.4 of the Trust Agreement.

<sup>43</sup> See Sections 8.3 and 8.4 of proposed NYSE Euronext Bylaws and Article X of proposed NYSE Group Charter. For so long as the NYSE Euronext (or NYSE Group, as applicable) directly or indirectly control NYSE Alternext US, their books, records, premises, officers, directors and employees shall be deemed to be those of NYSE Alternext US for purposes of and subject to oversight pursuant to the Act. See Section 8.4 of proposed NYSE Euronext Bylaws and Article X of proposed NYSE Group Charter. See also Section 6.2(a) of the Trust Agreement.

<sup>44</sup> This requirement to keep confidential non-public information relating to the self-regulatory function shall not limit the Commission’s ability to access and examine such information or limit the ability of directors, officers, or employees of NYSE Euronext and NYSE Group from disclosing such information to the Commission. See Section 8.1(A) of proposed NYSE Euronext Bylaws and Article X of the proposed NYSE Group Charter. Holding companies with SRO subsidiaries have undertaken similar commitments. See, e.g., Securities Exchange Act Release No. 56955 (December 13, 2007), 72 FR 71979, 71983 (December 19, 2007) (SR–ISE–2007–101) (order approving the acquisition of International Securities Exchange, LLC’s parent, International Securities Exchange Holdings, Inc., by Eurex Frankfurt AG) and Phlx Order, *supra* note 24 at 73 FR 42878. See also Section 6.1(a) of the Trust Agreement and Amendment No. 1 to the Trust Agreement.

<sup>45</sup> See Section 8.1 of the proposed NYSE Euronext Bylaws and Article X of the proposed NYSE Group Charter. See also Section 6.1(a) of the Trust Agreement and Amendment No. 1 to the Trust Agreement.

well as their officers and employees are required to give due regard to the preservation of the independence of NYSE Alternext US’s self-regulatory function.<sup>46</sup> Similarly, the NYSE Euronext and NYSE Group Boards would be required to take into consideration the ability of NYSE Alternext U.S. to carry out its responsibilities under the Act.<sup>47</sup> Finally, the NYSE Euronext Bylaws, NYSE Group Charter, and NYSE Group Bylaws require that for so long as NYSE Euronext (and NYSE Group, as applicable) controls NYSE Alternext US, any amendment to or repeal of the NYSE Euronext Charter or NYSE Euronext Bylaws (and NYSE Group Charter or NYSE Group Bylaws, as applicable) must either be (i) filed with or filed with and approved by the Commission under Section 19 of the Act<sup>48</sup> and the rules promulgated thereunder, or (ii) submitted to the boards of directors of the NYSE, NYSE Market, NYSE Regulation, NYSE Arca, NYSE Arca Equities and NYSE Alternext US or the boards of directors of their successors, and if any or all of such boards of directors shall determine that such amendment or repeal must be filed with or filed with and approved by the Commission under Section 19 of the Act<sup>49</sup> and the rules promulgated thereunder before such amendment or repeal may be effectuated, then such amendment or repeal shall not be effectuated until filed with or filed with and approved by the Commission, as the case may be.<sup>50</sup>

The Commission believes that the NYSE Euronext Bylaws, the NYSE Group Charter, the NYSE Group Bylaws, and the Trust Agreement as amended to accommodate the Mergers and Related Transactions, are designed to facilitate NYSE Alternext US’s ability to fulfill its self-regulatory obligations and are, therefore, consistent with the Act. In particular, the Commission believes these changes are consistent with Section 6(b)(1) of the Act,<sup>51</sup> which requires, among other things, that a

<sup>46</sup> See Section 9.4 of the proposed NYSE Euronext Bylaws and Article XI of the proposed NYSE Group Charter. See also Section 5.1(b) of the Trust Agreement.

<sup>47</sup> See Section 3.15 of the proposed NYSE Euronext Bylaws and Article V of the proposed NYSE Group Charter. See also Section 5.1(a)(i) of the Trust Agreement.

<sup>48</sup> 15 U.S.C. 78s.

<sup>49</sup> *Id.*

<sup>50</sup> See Sections 10.10 and 10.13 of the proposed NYSE Euronext Bylaws, Article XII of the proposed NYSE Group Charter, and Section 7.9 of the proposed NYSE Group Bylaws. See also Section 8.2 of the Trust Agreement and Amendment No. 1 to the Trust Agreement.

<sup>51</sup> 15 U.S.C. 78f(b)(1).

national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

Under Section 20(a) of the Act<sup>52</sup> any person with a controlling interest in NYSE Alternext US would be jointly and severally liable with and to the same extent that NYSE Alternext US is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act<sup>53</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C of the Act<sup>54</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

## 2. Governance of NYSE Alternext US

Following the Mergers and the Related Transactions, the governance structure of NYSE Alternext US will be substantially similar to that of the NYSE. The Board of Directors of NYSE Alternext US (“NYSE Alternext US Board”) will be composed of a number of directors as determined by NYSE Group from time to time, as sole owner of NYSE Alternext US. In addition, the NYSE Alternext US Board will be composed as follows: (i) a majority of the directors of the NYSE Alternext US Board will be US Persons<sup>55</sup> who are members of the NYSE Euronext board and who are independent under the NYSE Euronext Independence Policy<sup>56</sup>

<sup>52</sup> 15 U.S.C. 78t(a).

<sup>53</sup> 15 U.S.C. 78t(e).

<sup>54</sup> 15 U.S.C. 78u–3.

<sup>55</sup> A “US Person” shall mean, as of the date of his or her most recent election or appointment as a director any person whose domicile as of such date is and for the immediately preceding 24 months shall have been the United States. See Section 2.03 of the proposed NYSE Alternext US Operating Agreement.

<sup>56</sup> See the proposed NYSE Euronext Independence Policy. See also Section 3.4 of the proposed NYSE Euronext Bylaws for the independence requirements of the board of directors of NYSE Euronext. Generally, a director will not be independent if the director has a relationship with or an interest in NYSE Euronext or its subsidiaries; a member of the NYSE or NYSE

(each a "NYSE Euronext Independent Director"); and (ii) at least twenty percent of the directors will be persons who are not members of the board of directors of NYSE Euronext and who do not need to be independent under the NYSE Euronext Independence Policy ("Non-Affiliated Directors").<sup>57</sup>

NYSE Group will appoint or elect as Non-Affiliated Directors the candidates nominated by the nominating and governance committee of NYSE Euronext ("NYSE Euronext NGC") (such candidates the "Non-Affiliated Director candidates").<sup>58</sup> The NYSE Euronext NGC will be obligated to designate as Non-Affiliated Director candidates the persons recommended by the newly established Director Candidate Recommendation Committee of NYSE Alternext US ("NYSE Alternext US DCRC");<sup>59</sup> provided, however, if there are candidates who have received a

Arca; or an issuer listed on the NYSE or NYSE Arca. These independence policy provisions are being expanded to equally apply to NYSE Alternext US and its members and issuers. See NYSE Notice, *supra* note 7.

<sup>57</sup> For purposes of calculation of the minimum number of Non-Affiliated Directors, if twenty percent of the directors is not a whole number, such number of directors to be nominated and selected by NYSE Alternext US members will be rounded up to the next whole number. See Section 2.03 of the proposed NYSE Alternext US Operating Agreement.

Directors of NYSE Alternext US will serve for one-year terms and will hold office until their successors are elected. There will be no limit on the number of terms a director may serve on the NYSE Alternext US Board. The Commission finds one-year terms consistent with the Act and notes that establishing one-year terms for directors is consistent with other proposals previously approved by the Commission. See Phlx Order *supra* note 25. Further, the Commission notes that the Commission approved one-year terms for both NYSE Euronext and NYSE Group boards. See NYSE/Euronext Order, *supra* note 18, and NYSE/Arca Order, *supra* note 25.

<sup>58</sup> See Section 2.03(a)(iii) of the proposed NYSE Alternext US Operating Agreement.

<sup>59</sup> *Id.* On an annual basis, the NYSE Alternext US Board will appoint the NYSE Alternext US DCRC composed of individuals who are: (i) associated with a member organization that engages in a business involving substantial direct contact with securities customers, (ii) associated with a member organization and registered as a specialist and spend a substantial part of their time on the NYSE Alternext US trading floor, (iii) associated with a member organization and spend a majority of their time on the NYSE Alternext US trading floor and have as a substantial part of their business the execution of transactions on the NYSE Alternext US trading floor for other than their own account or the account of their member organization, but are not registered as a specialist, or (iv) associated with a member organization and spend a majority of their time on the NYSE Alternext US trading floor and have as a substantial part of their business the execution of transactions on the NYSE Alternext US trading floor for their own account or the account of their member organization, but are not registered as a specialist. The NYSE Alternext US Board will appoint such individuals after appropriate consultation with representatives of member organizations. See Section 2.03 of the proposed NYSE Alternext US Operating Agreement.

plurality of the votes cast by the NYSE Alternext US members pursuant to the petition process described below in this section, the NYSE Euronext NGC will be obligated to designate such candidates as Non-Affiliated Director candidates.<sup>60</sup>

The Non-Affiliated Director candidates that the NYSE Alternext US DCRC recommends to the NYSE Euronext NGC will be announced to NYSE Alternext US member organizations. Within two weeks after the announcement, NYSE Alternext US members may nominate candidates for Non-Affiliated Director by written petition filed with NYSE Alternext US. A valid petition must be, among other things, endorsed by at least 10 percent of the signatures eligible to endorse a candidate.<sup>61</sup> The eligibility of any Non-Affiliated Director candidate nominated in any such petition will be determined by the NYSE Euronext NGC, in its sole discretion.

If no petitions are submitted within two weeks after the dissemination of the report of the NYSE Euronext NGC, the NYSE Euronext NGC will nominate the candidates for Non-Affiliated Directors that the NYSE Alternext US DCRC initially recommended. If one or more valid petitions are submitted, NYSE Alternext US members will be allowed to vote on the entire group of potential candidates. Each member organization will have one vote per trading license or permit held by it.<sup>62</sup> The persons with the highest number of votes will be the candidates recommended to the NYSE Euronext NGC.

Amex has represented that immediately following the Mergers and the Related Transactions, the NYSE Alternext US Board will have five directors, one of which will be a Non-Affiliated Director selected by NYSE Group from among the six Industry Governors serving on the Amex Board

<sup>60</sup> See Sections 2.03(a)(iii)-(v) of the proposed NYSE Alternext US Operating Agreement.

<sup>61</sup> Each member organization in good standing shall be entitled to one signature for each trading license or permit held by it. No trading license or permit holder, either alone or together with its affiliates may account for more than 50 percent of the signatures endorsing a particular candidate, and any signatures of such trading license or permit holder, either alone or together with its affiliates, in excess of such 50 percent limitation shall be disregarded. See Section 2.03 of the proposed NYSE Alternext US Operating Agreement.

<sup>62</sup> No trading license or permit holder, either alone or together with its affiliates, may account for more than 20 percent of the votes cast for a particular candidate, and any votes cast by such trading license or permit holder, either alone or together with its affiliates, in excess of such 20 percent limitation will be disregarded. See Section 2.03(a)(5) of the NYSE Alternext US Operating Agreement. See Section 2.03(a)(V) of the proposed NYSE Alternext US Operating Agreement.

immediately prior to the Mergers.<sup>63</sup> The initial directors on the NYSE Alternext US Board will serve one-year terms until their successors are duly elected.<sup>64</sup>

The NYSE Alternext US Board may create one or more committees composed of NYSE Alternext US directors.<sup>65</sup> As with the NYSE and NYSE Arca (as well as other NYSE Euronext subsidiaries except NYSE Regulation), Amex expects that the committees of the NYSE Euronext board of directors will perform for NYSE Alternext US the board committee functions relating to audit, governance, and compensation.<sup>66</sup> The NYSE Alternext US Board also may create committees composed in whole or part of individuals who are not directors.<sup>67</sup> Amex proposes that the day-to-day business of NYSE Alternext US be managed by the officers of NYSE Alternext US, appointed by, and subject to the direction of, the NYSE Alternext US Board.<sup>68</sup> NYSE Alternext US will have such officers as its Board may deem advisable.<sup>69</sup> For so long as NYSE Euronext directly or indirectly owns all of the equity interest of NYSE Group and NYSE Group holds 100 percent of the limited liability company interest of NYSE Alternext US, the Chief Executive Officer ("CEO") of NYSE Alternext US will be a US Person.<sup>70</sup>

The Commission finds that the proposed governance structure of NYSE Alternext US is consistent with the Act, and in particular that the proposed composition of the NYSE Alternext US Board is consistent with Section 6(b)(1) of the Act, which requires, among other things, that a national securities exchange be organized to carry out the purposes of the Act and comply with the requirements of the Act. The Commission previously has stated its belief that the inclusion of public, non-

<sup>63</sup> See Amex Notice, *supra* note 3, 73 FR at 46090.

<sup>64</sup> See Amex Notice, *supra* note 3, 73 FR at 46080.

<sup>65</sup> See Section 2.03(h) of the proposed NYSE Alternext US Operating Agreement.

<sup>66</sup> Each of these NYSE Euronext committees is composed solely of directors meeting the independence requirements of NYSE Euronext. See NYSE/Euronext Order, *supra* note 32.

<sup>67</sup> For example, Amex notes that it currently anticipates that NYSE Alternext US will retain the Committee on Securities, but will not retain the Committee for Appointment and Approval of Supplemental Registered Options Traders and Remote Registered Options Traders, each a non-board committee of Amex. The Exchange, along with NYSE Euronext, is currently evaluating whether other non-board committees of Amex should be retained by NYSE Alternext US and what changes to the NYSE Alternext US rules such decision may require. See Amex Notice, *supra* note 3, 73 FR at 46091.

<sup>68</sup> See Amex Notice, *supra* note 3, 73 FR 46091.

<sup>69</sup> *Id.*

<sup>70</sup> See Section 2.04 of the proposed NYSE Alternext US Operating Agreement.



industry representatives on exchange oversight bodies is critical to an exchange's ability to protect the public interest.<sup>71</sup> Further, public representatives help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. The Commission believes that public directors can provide unique, unbiased perspectives, which should enhance the ability of the NYSE Alternext US Board to address issues in a non-discriminatory fashion and foster the integrity of NYSE Alternext US. The Commission also finds that the composition of the NYSE Alternext US Board will satisfy Section 6(b)(3) of the Act,<sup>72</sup> which requires that one or more directors be representative of issuers and investors and not be associated with a member of the exchange or with a broker or dealer.

The fair representation requirement in Section 6(b)(3) of the Act is intended to give members a voice in the selection of the exchange's directors and the administration of its affairs. The Commission finds that the requirement that at least twenty percent of the NYSE Alternext US Directors be Non-Affiliated Directors, and the process for selecting such Non-Affiliated Directors, are designed to ensure the fair representation of NYSE Alternext US members on the NYSE Alternext US Board. The Commission believes that the method for selecting the Non-Affiliated Directors allows members to have a voice in NYSE Alternext US's use of its self-regulatory authority. As detailed above, the NYSE Alternext US DCRC is composed solely of persons associated with NYSE Alternext US members and is selected after appropriate consultation with NYSE Alternext US members. In addition, the proposed NYSE Alternext US Operating Agreement includes a process by which members can directly petition and vote for representation on the NYSE Alternext US Board. The Commission therefore finds that the process for selecting the Non-Affiliated Directors to the NYSE Alternext US Board is

consistent with Section 6(b)(3) of the Act.<sup>73</sup> The Commission notes that this approach is also consistent with the NYSE's processes for nomination and election of directors on the NYSE board.<sup>74</sup>

### C. NYSE Alternext US Rules

#### 1. Floor Officials, Senior Floor Officials, Exchange Officials and Senior Supervisory Officer

The Floor Officials, Senior Floor Officials, and Exchange Officials in place at Amex immediately prior to the Mergers<sup>75</sup> will continue in such capacity for the period prior to the planned relocation of the NYSE Alternext US equities and options trading facilities to the NYSE trading floor or the electronic trading platform of the NYSE or NYSE Arca, as applicable.<sup>76</sup> Currently, Rule 21 provides that each governor of Amex that spends a substantial part of his time on the floor of Amex shall serve as a Senior Floor Official, and that additional Senior Floor Officials may be appointed<sup>77</sup> from among the Exchange Officials that spend a substantial part of their time on the floor.<sup>78</sup> In addition, the Vice Chairman of the Board currently serves as the Senior Supervisory Officer on the floor of Amex (if the Vice

Chairman does not spend a substantial part of his time on the floor, one of the governors serving as a Senior Floor Official shall be designated as the Senior Supervisory Officer by the Chairman of the Board, subject to the approval of the Board). Rule 21 also provides that Exchange Officials that spend a substantial part of their time on the floor shall be appointed as Floor Officials; further, such other persons that are familiar with the floor may be appointed as Floor Officials.<sup>79</sup>

Amex proposes to amend Rule 21 to reflect the fact that the NYSE Alternext US Board will not have a category of directors who are required to spend a substantial portion of their time on the trading floor. Any director that spends a substantial part of his time on the floor shall still serve as a Senior Floor Official, and one of these directors will be appointed as the Senior Supervisory Officer (rather than the Vice-Chairman of Amex). However, if there is no director that spends a substantial part of his time on the floor, one of the Senior Floor Officials will be appointed as the Senior Supervisory Officer (thus, an Exchange Official that spends a substantial part of his time on the floor will be appointed as the Senior Supervisory Officer). Rule 21, as amended, also will allow qualified NYSE Alternext US employees who spend a substantial portion of their time on the trading floor to be appointed to serve as Floor Officials. Further, the CEO or Chief Regulatory Officer ("CRO") (or their respective designee), rather than the Chairman of Amex, will be responsible for appointing such officials and making other appointments under the rule (subject to the other requirements of the rule).

Amex also is proposing to amend Rule 21 and other rules referencing Floor Governors to reflect the elimination of that category of member on the Amex Board. Amex proposes that Senior Floor Officials replace the Floor Governors in most cases when the reference to Floor Governor relates to the approval or review of activities on the trading floor and the chairing of certain committees (e.g., the Performance and Allocation committees). In situations where a rule calls upon the Floor Governors to advise the CEO of Amex in connection with floor facilities and administration, Amex proposes that the Senior Supervisory Officer replace the Floor Governors.

<sup>79</sup> Such appointments are made by the Chairman (or the CEO, if delegated by the Chairman), subject to the approval of the Board.

<sup>73</sup> *Id.*

<sup>74</sup> See Sec. 2.03 of the Second Amended and Restated Agreement of New York Stock Exchange LLC ("NYSE Operating Agreement"). See also NYSE/Arca Order, *supra* note 25, and NYSE/Euronext Order, *supra* note 18.

<sup>75</sup> Amex Rule 22 describes the authority and responsibilities of Floor Officials, Senior Floor Officials, and the Senior Supervisory Officer, which responsibilities are to generally promote fair and orderly operations on the floor of Amex.

<sup>76</sup> NYSE Alternext US intends to relocate the NYSE Alternext US cash equities and options trading facilities to the NYSE trading floor or the electronic trading platform of NYSE or NYSE Arca, as applicable. The Exchange has filed a proposed rule change to implement the relocation of the trading of cash equities to the facilities of the NYSE. See Securities Exchange Act Release No. 58265 (July 30, 2008), 73 FR 46075 (August 7, 2008) (SR-Amex-2008-63). NYSE Alternext US will file a separate proposed rule change with the Commission relating to the relocation of the trading of standardized options.

<sup>77</sup> Such appointment is made by the Chairman of the Board (or the CEO, if delegated by the Chairman), subject to the approval of the Board, and in consultation with the Senior Supervisory Officer.

<sup>78</sup> Exchange Officials are members of Amex, and individuals employed by or associated with a member organization in a senior capacity, that are appointed by the Chairman of Amex (or the CEO, if delegated by the Chairman), subject to the approval of the Board and after seeking the advice of members. See Section 3 of Article II of the Amex Constitution. This provision is proposed to be added to Rule 21, except that the CEO (or his designee), or the Chief Regulatory Officer (or his designee), will appoint the Exchange Officials, subject to the approval of the Board and after consultation with members. See proposed NYSE Alternext US Rule 21(d).

<sup>71</sup> See Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998). See also BATS Order, *supra* note 28, 73 FR at 49498; NYSE/Arca Order, *supra* note 25, 71 FR at 11261, n.121 and accompanying text; Securities Exchange Act Release Nos. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131) ("Nasdaq Exchange Registration Order") at 3553, n.54 and accompanying text; and 44442 (June 18, 2001), 66 FR 33733, n.13 and accompanying text (June 25, 2001) (SR-PCX-01-03).

<sup>72</sup> 15 U.S.C. 78f(b)(3).

The Commission finds that these changes are consistent with the Act, including Section 6(b)(1) of the Act,<sup>80</sup> which requires, among other things, that a national securities exchange be organized to carry out the purposes of the Act and comply with the requirements of the Act. Amex stated that a Senior Floor Official has the same authority and responsibilities as a Floor Governor with respect to matters that arise on the Floor and require review or action by a Floor Governor or Senior Floor Official,<sup>81</sup> and that therefore, these changes do not expand the authority or responsibilities of Senior Floor Officials. Moreover, allowing qualified NYSE Alternext US employees to serve as Floor Officials would broaden the pool of experienced individuals who can participate in and supervise unusual trading situations on the floor. The Commission notes that recently the NYSE has filed an immediately effective rule change permitting the appointment of qualified NYSE employees to act as Floor Governors.<sup>82</sup>

## 2. 86 Trinity Permits; Access to NYSE Alternext US

Following the Mergers, all trading rights appurtenant to either Regular Memberships or Options Principal Members existing immediately prior to the Mergers will be cancelled.<sup>83</sup> Physical and electronic access to NYSE Alternext US's trading facilities will be made available to individuals and organizations that obtain an 86 Trinity Permit.<sup>84</sup> 86 Trinity Permits will be made available by NYSE Alternext US to persons and entities that apply and meet certain specified requirements.<sup>85</sup> 86 Trinity Permits will allow the holders to trade products currently

traded on Amex, including cash equities and options.<sup>86</sup>

To ensure continuity of trading following the Mergers, persons and entities who were authorized to trade on Amex prior to the Mergers, including (i) owners, lessees or nominees of Regular Memberships or OPMs, (ii) limited trading permit holders, and (iii) associate members, will be deemed to have satisfied applicable requirements necessary to receive an 86 Trinity Permit. 86 Trinity Permits will authorize owners, lessees or nominees of Regular Memberships or OPMs, limited trading permit holders and associate members who were authorized to trade on Amex prior to the Mergers, to trade the products which they were previously authorized to trade and, subject to meeting the qualifications currently in place for trading products which they previously were not authorized to trade, to trade such other products.

Because 86 Trinity Permits will be made available to all persons authorized to trade on Amex prior to the Mergers (such persons will be deemed to have satisfied the applicable requirements), as well as to other persons that meet such requirements, and because such requirements will be the same as the current requirements for membership in the Amex rules, the Commission finds that proposed procedures for NYSE Alternext US making available 86 Trinity Permits will provide fair access to NYSE Alternext US and are consistent with the Act and in particular with Sections 6(b)(2) and 6(b)(5) of the Act.<sup>87</sup>

## 3. Disciplinary Proceedings

Amex is proposing to replace current Rule 345, the Rules of Procedures in Disciplinary Matters, and the disciplinary provisions in the Amex Constitution with proposed NYSE Alternext US Rules 475, 476 and 477.<sup>88</sup>

<sup>86</sup> *Id.* At a later time, NYSE Alternext US anticipates replacing 86 Trinity Permits with equity trading licenses and options trading permits. See Amex Notice, *supra* note 3, 73 FR 46088. NYSE Alternext US intends to relocate the NYSE Alternext US equities and options trading facilities to the NYSE trading floor or the electronic trading platform of NYSE or NYSE Arca, as applicable. *Id.* Amex has filed a proposed rule change to implement the relocation of the trading of equities to the facilities of the NYSE. See Securities Exchange Act Release No. 58265 (July 30, 2008), 73 FR 46075 (August 7, 2008) (SR-Amex-2008-63). NYSE Alternext US will file a separate proposed rule change with the Commission relating to the relocation of the trading of standardized options. See Amex Notice, *supra* note 3, 73 FR at 46088.

<sup>87</sup> 15 U.S.C. 78f(b)(2) and 15 U.S.C. 78f(b)(5).

<sup>88</sup> Amex Rule 345, the Rules of Procedure in Disciplinary Matters and the disciplinary rules in the current Amex Constitution ("Legacy Disciplinary Procedural Rules") will continue to

These new rules are substantially identical to the disciplinary rules of the NYSE with certain changes necessary to apply such rules to NYSE Alternext US and to reflect the application of the current American Stock Exchange Sanctions Guidelines.

Under proposed NYSE Alternext US Rules 476 and 477, initial disciplinary hearings will be held before a Hearing Panel that will be composed of at least three persons: A Hearing Officer,<sup>89</sup> and at least two members of the Hearing Board, at least one of whom shall be engaged in securities activities differing from that of the respondent or, if retired, was so engaged in differing activities at the time of retirement. In any disciplinary proceeding involving activities on the floor, no more than one of the persons serving on the Hearing Panel shall be or, if retired, shall have been, active on the floor. A Hearing Panel can include only one retired person.<sup>90</sup>

Any review of a disciplinary decision shall be conducted by the NYSE Alternext US Board or the NYSE Regulation Committee, in the sole discretion of the NYSE Alternext US Board. Upon review, and with the advice of the NYSE Regulation Committee, the NYSE Alternext US Board, by the affirmative vote of a majority of the NYSE Alternext US

apply to pending disciplinary cases which have been formally commenced at or prior to the time of the consummation of the Mergers and Related Transactions. See Securities Exchange Act Release No. 58286 (August 1, 2008), 73 FR 46097 (August 7, 2008) (notice of SR-Amex-2008-64), which proposed rule change the Commission is approving today. See Securities Exchange Release No. 58678.

<sup>89</sup> The Chairman of NYSE Alternext US, subject to the approval of the NYSE Alternext US Board, shall designate a Chief Hearing Officer and one or more other Hearing Officers who shall have no duties or functions relating to the investigation or preparation of disciplinary matters and who shall be appointed annually and shall serve as Hearing Officers at the pleasure of the NYSE Alternext US Board. An individual cannot be a Hearing Officer (including the Chief Hearing Officer) if he or she is, or within the last three years was, a member, allied member, or registered or non-registered employee of a member or member organization. See Amex Notice, *supra* note 3, and proposed NYSE Alternext US Rule 475(b).

<sup>90</sup> The members of the Hearing Board will be appointed by the Chairman of NYSE Alternext US subject to the approval of the NYSE Alternext US Board. The Hearing Board will be composed of such number of members and allied members of NYSE Alternext US who are not members of the NYSE Alternext US Board, and registered employees and non-registered employees of members and member organizations, and such other persons as set forth in the rules as the Chairman shall deem necessary. Former members, allied members, or registered and non-registered employees of members and member organizations who have retired from the securities industry can be appointed to the Hearing Board within five years of their retirement. The members of the Hearing Board shall be appointed annually and shall serve at the pleasure of the NYSE Alternext US Board. *Id.*

<sup>80</sup> 15 U.S.C. 78f(b)(1).

<sup>81</sup> See current Amex Rule 21(a).

<sup>82</sup> See Securities Exchange Act Release No. 57627 (April 4, 2008), 73 FR 19919 (April 11, 2008) (SR-NYSE-2008-19). Under the NYSE rules, Floor Governors are more senior than Floor Officials, and are authorized to take any action that a Floor Official can take. See *id.* and NYSE Rule 46.

<sup>83</sup> See Amex Notice, *supra* note 3, 73 FR at 46088 and 46094. In addition, the lessees will cease to have any trading rights under any applicable leases. *Id.*

<sup>84</sup> NYSE Alternext US anticipates replacing 86 Trinity Permits with equity trading licenses and options trading permits at a later date following a proposed rule change filed with the Commission. See Amex Notice, *supra* note 3, 73 FR at 46088, and proposed NYSE Alternext US Rules 350 and 353.

<sup>85</sup> The requirements for 86 Trinity Permits will be the same as the current requirements for memberships in the Amex Rules and such requirements may be satisfied by persons or entities that were not previously authorized to trade on Amex immediately prior to the Mergers. See Amex Notice, *supra* note 3, 73 FR 46088, and proposed NYSE Alternext US Rule 353.



Board then in office, may sustain any determination or penalty imposed, or both, may modify or reverse any such determination, and may increase, decrease, or eliminate any such penalty, or impose any penalty permitted under the provisions of proposed NYSE Alternext US Rule 476. Unless the NYSE Alternext US Board otherwise specifically directs, the determination and penalty, if any, of the NYSE Alternext US Board after review shall be final and conclusive subject to the provisions for review of the Act.

The NYSE Regulation Committee referenced in the proposed NYSE Alternext US rules is the NYSE Regulation Committee for Review. The NYSE Regulation Bylaws currently provide for the creation of a Committee for Review that is charged with performing certain functions with respect to the NYSE, including hearing appeals for disciplinary decisions.<sup>91</sup> Following the Mergers and Related Transactions, the Committee for Review will also hear disciplinary appeals for NYSE Alternext US.<sup>92</sup> In connection therewith, the NYSE Regulation Bylaws are being amended to provide that the Committee for Review will be expanded to include at least four individuals who are associated with member organizations of NYSE Alternext US. These new members of the Committee for Review must include at least one of each of the following:

- An individual associated with a member organization of NYSE Alternext US that engages in a business involving substantial direct contact with securities customers;
- An individual associated with a member organization of NYSE Alternext US that is registered as a specialist and spends a substantial part of his or her time on the trading floor of NYSE Alternext US;

<sup>91</sup> The Committee for Review is currently composed of (i) directors of NYSE Regulation and (ii) at least three non-director committee members associated with member organizations of the NYSE, at least one of whom is associated with a member organization of the NYSE that engages in a business involving substantial direct contact with securities customers, at least one of whom is associated with a member organization of the NYSE and registered as a specialist and spends a substantial part of his or her time on the trading floor of NYSE Market and at least one of whom is associated with a member organization of the NYSE and spends a majority of his time on the trading floor of NYSE Market and has as a substantial part of his business the execution of transactions on the trading floor of NYSE Market for other than his own account or the account of his member organization, but is not registered as a specialist.

<sup>92</sup> Reviews of delisting determinations will be heard by the same NYSE Alternext US committee as has been reviewing such matters prior to the Mergers. See NYSE Notice, *supra* note 7.

- An individual associated with a member organization of NYSE Alternext US not registered as a specialist that spends a majority of his or her time on the trading floor of NYSE Alternext US and has as a substantial part of his business the execution of transactions on the trading floor of NYSE Alternext US for other than his or her own account or the account of his NYSE Alternext US member organization; and

- An individual associated with a NYSE Alternext US Member Organization not registered as a specialist that spends a majority of his or her time on the trading floor of NYSE Alternext US and has as a substantial part of his or her business the execution of transactions on the trading floor of NYSE Alternext US for his own account or the account of his or her NYSE Alternext US Member Organization.

The Commission finds that the changes proposed to the disciplinary procedures are consistent with the Act, in particular Sections 6(b)(6) and 6(b)(7) of the Act.<sup>93</sup> The Commission believes that NYSE Alternext US rules will provide due process for members and member organizations involved in any disciplinary proceeding, including notice of alleged wrongdoing, an opportunity for a hearing, and avenues for appeal to the NYSE Alternext Board in appropriate circumstances. The Commission therefore believes that the proposed rules will provide fair procedures for the disciplining of members and persons associated with members, and will provide NYSE Alternext US with the ability to comply, and with the authority to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of NYSE Alternext US.<sup>94</sup> The Commission also finds that NYSE Alternext US's disciplinary rules are consistent with the fair representation requirements of Section 6(b)(3) of the Act<sup>95</sup> because NYSE Alternext US members will be represented on the disciplinary panels and the Committee for Review.

#### *D. Affiliations Between NYSE Alternext US and Its Members*

##### 1. Limitations on Affiliation

Amex proposes to adopt proposed NYSE Alternext US General and Floor Rule 1(a), which provides that, without prior Commission approval, NYSE Alternext US or any entity with which it is affiliated shall not, directly or

indirectly, acquire or maintain an ownership interest in a member organization. In addition, a member organization shall not be or become an affiliate of NYSE Alternext US, or an affiliate of any affiliate of NYSE Alternext US.<sup>96</sup> This rule is substantially similar to current NYSE Rule 2B, which was initially approved by the Commission in connection with the reorganization of the NYSE to be a wholly-owned subsidiary of NYSE Group.<sup>97</sup>

The Commission is concerned about potential for unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests that could exist if an exchange were to otherwise become affiliated with one of its members, as well as the potential for unfair competitive advantage that the affiliated member could have by virtue of informational or operational advantages, or the ability to receive preferential treatment.<sup>98</sup> The Commission believes that proposed NYSE Alternext US General and Floor Rule 1(a) is designed to mitigate these concerns and is consistent with the Act, particularly with Section 6(b)(1),<sup>99</sup> which requires an exchange to be so organized and have the capacity to carry out the purposes of the Act.

##### 2. Exception to Limitation on Affiliation Between NYSE Alternext US and Its Members

NYSE Euronext currently owns a broker-dealer, Arca Securities that is also a member organization of Amex. After the closing of the Mergers and Related Transactions, NYSE Euronext's ownership of NYSE Alternext US and Arca Securities would cause Arca Securities to be an affiliate of NYSE Alternext US, and, absent prior Commission approval, would violate the provisions in proposed NYSE Alternext US General and Floor Rule 1(a) that prohibit: (i) NYSE Alternext US or any

<sup>96</sup> Proposed NYSE Alternext US General and Floor Rule 1(a) also provides that it does not prohibit a member organization from acquiring or holding an equity interest in NYSE Euronext that is permitted by the ownership limitations contained in the NYSE Euronext Charter.

<sup>97</sup> See NYSE/Arca Order, *supra* note 25. NYSE Rule 2B was later amended to reflect that NYSE Group became a wholly-owned subsidiary of NYSE Euronext. See also NYSE/Euronext Order, *supra* note 18, and Amendment No. 4 to the Amex Notice, *supra* note 4.

<sup>98</sup> See, e.g., Securities Exchange Act Release No. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members) ("Nasdaq/Member Affiliation Rule") and NYSE/Arca Order, *supra* note 25.

<sup>99</sup> 15 U.S.C. 78f(b)(1).

<sup>93</sup> 15 U.S.C. 78f(b)(6) and 15 U.S.C. 78f(b)(7).

<sup>94</sup> See Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

<sup>95</sup> 15 U.S.C. 78f(b)(3).

entity with which it is affiliated from maintaining an ownership interest in a member organization; and (ii) a NYSE Alternext US member organization from being affiliated with NYSE Alternext US.

Arca Securities operates as a facility of each of NYSE and NYSE Arca that provides outbound routing from each exchange to other market centers, including Amex, subject to certain conditions.<sup>100</sup> Consequently, the operation of Arca Securities in this capacity is subject, respectively, to NYSE and NYSE Arca oversight, as well as Commission oversight. NYSE and NYSE Arca are each responsible for ensuring that Arca Securities is operated consistent with Section 6 of the Act and their respective rules. In addition, NYSE and NYSE Arca, respectively, must file with the Commission rule changes and fees relating to Arca Securities. Use of Arca Securities outbound routing function is available to NYSE and NYSE Arca members, respectively. Use of Arca Securities' routing function by such members is optional. Arca Securities is a member of an SRO unaffiliated with NYSE or NYSE Arca, respectively, which serves as its primary regulator.<sup>101</sup>

Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders,<sup>102</sup> Amex requests that the Commission approve NYSE Alternext US's affiliation with Arca Securities following the Mergers and Related Transactions, subject to the following conditions and limitations:

- First, Amex states that NYSE, FINRA, and NYSE Alternext US will enter into an agreement pursuant to Rule 17d-2 under the Act.<sup>103</sup> If approved, pursuant to this agreement, FINRA will be allocated regulatory responsibilities to review Arca Securities' compliance with certain NYSE Alternext US Rules.<sup>104</sup> Alternatively, if this agreement has not become effective as of the time of the Mergers and Related Transactions, FINRA will nevertheless review Arca

Securities' compliance with certain NYSE Alternext US Rules pursuant to the New Multi-Party FINRA Regulatory Services Agreement.<sup>105</sup> NYSE Alternext US, however, would retain ultimate responsibility for enforcing its rules with respect to Arca Securities.

- Second, NYSE Regulation will monitor Arca Securities for compliance with NYSE Alternext US's trading rules, and will collect and maintain certain related information.<sup>106</sup>

- Third, Amex states that NYSE Regulation has agreed with Amex that it will provide a report to NYSE Alternext US's CRO, on a quarterly basis, that: (i) Quantifies all alerts (of which NYSE Regulation is aware) that identify Arca Securities as a participant that has potentially violated NYSE Alternext US or Commission rules, and (ii) quantifies the number of all investigations that identify Arca Securities as a participant that has potentially violated NYSE Alternext US or Commission rules.<sup>107</sup>

- Fourth, Amex proposes a rule that will require NYSE Euronext, as the holding company owning both NYSE Alternext US and Arca Securities, to establish and maintain procedures and internal controls reasonably designed to ensure that Arca Securities does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to the NYSE Alternext US systems as a result of its affiliation with NYSE Alternext US, until such information is available generally to similarly situated members of NYSE Alternext US in connection with the provision of inbound order routing to NYSE Alternext US.<sup>108</sup>

- Fifth, Amex proposes that routing from Arca Securities to NYSE Alternext US, in Arca Securities' capacity as a facility of NYSE and NYSE Arca, be authorized for a pilot period of twelve months.<sup>109</sup>

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members

raises potential conflicts of interest, and the potential for unfair competitive advantage.<sup>110</sup> Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, for the reasons discussed below, the Commission believes that it is consistent with the Act to permit NYSE Euronext, which will be an affiliate of NYSE Alternext US upon the closing of the Mergers, to continue to own Arca Securities, subject to the conditions proposed by Amex. As described above, the Commission also believes that it is consistent with the Act for Arca Securities to become an affiliate of NYSE Alternext US following the closing of the Mergers and Related Transactions, for the limited purpose of providing routing to NYSE Alternext US from the NYSE and NYSE Arca, subject to the conditions described above.<sup>111</sup>

Amex has proposed five conditions applicable to Arca Securities routing activities, which are enumerated above. The Commission believes that these conditions mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that FINRA's oversight of Arca Securities,<sup>112</sup> combined with NYSE Regulation's monitoring of Arca Securities' compliance with NYSE Alternext US's trading rules and quarterly reporting to NYSE Alternext US's CRO, will help to protect the independence of NYSE Alternext US's regulatory responsibilities with respect to Arca Securities. The Commission also believes that proposed NYSE Alternext US General and Floor Rule 1(b)<sup>113</sup> is designed to ensure that Arca Securities cannot use any information advantage it may have because of its affiliation with NYSE Alternext US. Furthermore, the Commission believes that Amex's proposal to use Arca Securities for inbound routing from NYSE and NYSE Arca, on a pilot basis, will provide NYSE Alternext US and the Commission an opportunity to assess the impact of any conflicts of interest from allowing an affiliated member of NYSE Alternext US to route orders

<sup>105</sup> See *infra* text accompanying note 117.

<sup>106</sup> Specifically, NYSE Regulation "will collect and maintain the following information of which NYSE Regulation staff becomes aware—namely, all alerts, complaints, investigations and enforcement actions where Arca Securities (in its capacity as a facility of NYSE Arca or the NYSE, routing orders to NYSE Alternext US) is identified as a participant that has potentially violated NYSE Alternext US or applicable Commission rules—in an easily accessible manner so as to facilitate any review conducted by the Commission's Office of Compliance Inspections and Examination." See Amex Notice, *supra* note 3, at 46094.

<sup>107</sup> See Amendment No. 4 to the Amex Notice, *supra* note 4.

<sup>108</sup> See proposed NYSE Alternext US General and Floor Rule 1(b).

<sup>109</sup> See Amex Notice, *supra* note 3.

<sup>100</sup> See Amex Notice, *supra* note 3, at notes 53–58 and accompanying text, and Amendment No. 4 to the Amex Notice, *supra* note 4.

<sup>101</sup> *Id.*

<sup>102</sup> See Amex Notice, *supra* note 3, at notes 59 and 61 and accompanying text, and Amendment No. 4 to the Amex Notice, *supra* note 4.

<sup>103</sup> The Commission notes that this 17d-2 agreement is subject to public notice and comment and prior Commission approval before it can become effective.

<sup>104</sup> Amex also states that Arca Securities is subject to independent oversight by FINRA, its Designated Examining Authority, for compliance with financial responsibility requirements.

<sup>110</sup> See, e.g., Nasdaq/Member Affiliation Rule, *supra* note 98 and NYSE/Arca Order, *supra* note 25.

<sup>111</sup> See *supra* notes 100 to 109 and accompanying text.

<sup>112</sup> This oversight will be accomplished either through the 17d-2 agreement among NYSE, FINRA and NYSE Alternext, see *supra* note 103, or through New Multi-Party FINRA RSA, see *infra* text accompanying note 117.

<sup>113</sup> See *supra* note 108 and accompanying text.

inbound to NYSE Alternext US and whether such affiliation provides an unfair competitive advantage.<sup>114</sup>

#### E. Regulation of NYSE Alternext US

Under the Act, an exchange must be organized and have the capacity to carry out the purposes of the Act.<sup>115</sup> Specifically, an exchange must be able to enforce compliance by its members and persons associated with its members with federal securities laws and the rules of the exchange.<sup>116</sup>

Amex has proposed several measures designed to ensure that NYSE Alternext US can meet its obligations under the Act and that its regulatory functions are independent of its market operations and other commercial interests. First, NYSE Alternext US will enter into a regulatory contract with NYSE Regulation (“NYSE Regulation RSA”), under which NYSE Alternext US will contract with NYSE Regulation to perform all of NYSE Alternext US’s regulatory functions on NYSE Alternext US’s behalf. However, FINRA may perform some of the regulatory functions contracted out to NYSE Regulation pursuant to a separate multi-party regulatory services agreement by and among NYSE Regulation, NYSE Group, FINRA, and NYSE Alternext US (“New Multi-Party FINRA RSA”).<sup>117</sup> Notwithstanding these regulatory contracts, NYSE Alternext US will retain ultimate legal responsibility for the regulation of its members and its market. NYSE Alternext US also will retain the authority to direct NYSE Regulation, FINRA, or any other SRO that provides regulatory services to take any action necessary to fulfill NYSE Alternext US’s statutory and self-regulatory obligations.<sup>118</sup> In addition, the NYSE Alternext US Board will appoint a CRO, who will be an officer of NYSE Alternext US and will report

directly to the NYSE Alternext US Board.<sup>119</sup>

Finally, NYSE Euronext has agreed to provide adequate funding to NYSE Regulation to conduct its regulatory activities with respect to NYSE, NYSE Arca and, from and after closing of the transaction, NYSE Alternext US.<sup>120</sup> In addition, NYSE Alternext US will not use any regulatory fees, fines or penalties collected by NYSE Regulation for commercial purposes.<sup>121</sup>

The Commission finds that Amex’s proposed regulatory structure is consistent with the Act, including Section 6(b)(1) of the Act,<sup>122</sup> which requires, among other things, that a national securities exchange be organized to carry out the purposes of the Act and comply with the requirements of the Act. The Commission believes that it is consistent with the Act to allow NYSE Alternext US to contract with NYSE Regulation and FINRA to perform its regulatory functions, including its examination, enforcement, and disciplinary functions.<sup>123</sup> These functions are fundamental elements to a regulatory program, and constitute core self-regulatory functions. It is essential to the public interest and the protection of investors that these functions are carried out in an exemplary manner, and the Commission believes that NYSE Regulation and FINRA have the expertise and experience to perform these functions on behalf of NYSE Alternext US.<sup>124</sup>

At the same time, NYSE Alternext US, unless relieved by the Commission of its responsibility,<sup>125</sup> is obligated as an SRO to enforce compliance with the securities laws and its rules and has primary liability for self-regulatory

failures. The Commission believes that Amex’s proposal to appoint a CRO reporting to the NYSE Alternext US Board will further NYSE Alternext US’s ability to satisfy these self-regulatory obligations consistent with Section 6(b)(1) of the Act.<sup>126</sup> NYSE Regulation and FINRA will be performing regulatory functions on NYSE Alternext US’s behalf pursuant to a contract. In performing these functions, NYSE Regulation and FINRA may bear liability for causing or aiding and abetting the failure of NYSE Alternext US to satisfy its regulatory obligations.<sup>127</sup>

The Commission notes that upon the consummation of the Mergers and the Related Transactions, NYSE Alternext US will no longer have a Regulatory Oversight Committee (“ROC”). Instead, NYSE Alternext US will contract with NYSE Regulation to perform all of its regulatory functions. The Commission believes that it is consistent with the Act for NYSE Alternext US to eliminate its ROC and instead contract with NYSE Regulation to perform its regulatory functions because the governance of NYSE Regulation will provide a comparable level of independence that a ROC would provide. In particular, all directors on the board of NYSE Regulation (other than its CEO) are, and will be, required to be independent of management of NYSE Euronext and its subsidiaries, as well as of NYSE, NYSE Arca, and NYSE Alternext US members and listed companies. In addition, a majority of the members of the NYSE Regulation board must be directors that are not also directors of NYSE Euronext.<sup>128</sup>

Finally, the Commission believes that NYSE Euronext’s commitment to provide adequate funding to NYSE Regulation to conduct its regulatory activities is designed to ensure that NYSE Alternext US can perform its obligations under the Act.

#### F. Undertakings

Amex requests to be relieved from the undertakings adopted by the Amex Board on December 4, 2004 and approved by the Commission as part of an Amex proposed rule change filed

<sup>114</sup> This approval is only for Arca Securities to route orders to NYSE Alternext US in its capacity as a facility of the NYSE or NYSE Arca, subject to the conditions discussed herein. See *supra* note 100 and accompanying text. This approval does not include Arca Securities providing outbound routing functions from NYSE Alternext US to other markets.

<sup>115</sup> See Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

<sup>116</sup> *Id.*

<sup>117</sup> See proposed NYSE Alternext US Rule 1(b) and Amendment No. 4 to the Amex Notice, *supra* note 4. In effect, FINRA will be a “sub-contractor” for some of the regulatory functions that would otherwise be performed by NYSE Regulation. Pursuant to the applicable provisions of the Freedom of Information Act, 5 U.S.C. 552, and Commission regulations thereunder, 17 CFR 200.83, Amex has requested confidential treatment for the NYSE Regulation RSA and the New Multi-Party FINRA RSA.

<sup>118</sup> See proposed NYSE Alternext US Rule 1B.

<sup>119</sup> See Amex Notice, *supra* note 3.

<sup>120</sup> *Id.*, 73 FR at 46095.

<sup>121</sup> See Section 4.05 of the proposed NYSE Alternext US Operating Agreement.

<sup>122</sup> 15 U.S.C. 78f(b)(1).

<sup>123</sup> See, e.g., Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (“Regulation ATS Release”). See also Securities Exchange Act Release 50122 (July 29, 2004), 69 FR 47962 (August 6, 2004) (SR-Amex-2004-32) (order approving rule that allowed Amex to contract with another SRO for regulatory services) (“Amex Regulatory Services Approval Order”); NOM Approval Order, *supra* note 27; and Nasdaq Exchange Registration Order, *supra* note 71.

<sup>124</sup> See Amex Regulatory Services Approval Order, *supra* note 123; NOM Approval Order, *supra* note 27 and Nasdaq Exchange Registration Order, *supra* note 71. The Commission notes that the NYSE Regulation RSA and the New Multi-Party FINRA RSA are not before the Commission and, therefore, the Commission is not acting on them.

<sup>125</sup> See Section 17(d)(1) of the Act and Rule 17d-2 thereunder, 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2.

<sup>126</sup> 15 U.S.C. 78f(b)(1).

<sup>127</sup> For example, if failings by FINRA or NYSE Regulation have the effect of leaving NYSE Alternext US in violation of any aspect of NYSE Alternext US’s self-regulatory obligations, NYSE Alternext US would bear direct liability for the violation, while FINRA or NYSE Regulation may bear liability for causing or aiding and abetting the violation. See, e.g., Nasdaq Exchange Registration Order, *supra* note 71, and ISE Exchange Registration Order, *supra* note 26.

<sup>128</sup> See Article III, Section 1 of the proposed Third Amended and Restated Bylaws of NYSE Regulation.

under Section 19 of the Act (“Undertakings”).<sup>129</sup> Section 1 of the Undertakings, among other things, prohibits Amex from terminating its current regulatory services agreement with FINRA (“FINRA RSA”)<sup>130</sup> unless on or prior to the date of such termination, Amex has entered into an alternative arrangement relating to the provision of regulatory services that has been approved by the Commission. Section 2 of the Undertakings requires Amex and its CRO to use reasonable efforts to cause the staff of FINRA responsible for providing services under the FINRA RSA, to periodically confer with staff of the Division of Trading and Markets and the Office of Compliance Inspections and Examinations of the Commission regarding the status of Amex’s regulatory program.<sup>131</sup> Finally, Section 3 of the Undertakings mandates Amex to provide to the Director of the Division of Trading and Markets certain financial statements certified by Amex’s chief financial officer and reviewed by Amex’s independent accountants, together with evidence of such review at specified intervals. Section 3 of the Undertaking also requires the provision of other financial information, including schedules reflecting the available borrowings under each of Amex’s credit facilities and computations of compliance with all financial covenants contained therein, projected cash and working capital trends, and material off-balance sheet liabilities.<sup>132</sup>

The Commission believes it is consistent with the Act for Amex to be relieved from its Undertakings. With respect to Sections 1 and 2 of the Undertakings, the Commission believes that NYSE Alternext US arrangements for contracting out regulatory services through the NYSE Regulation RSA and the New Multi-Party FINRA RSA<sup>133</sup> is comparable to the FINRA RSA and is designed to ensure that NYSE Alternext US regulatory program is conducted in a manner that is consistent with the Act. Further, the Commission finds that it is no longer necessary at this time for Amex to provide certain financial information on a regular basis to the

Director of the Division of Trading and Markets.

#### G. NYSE Euronext Independence Policy

In its proposed rule change, the NYSE proposes to amend the definitions of “member” and “member organization” in the NYSE Euronext Independence Policy to refer to relevant sections of the Act<sup>134</sup> instead of the different rules of the NYSE, NYSE Arca, and NYSE Alternext US. The NYSE also proposes to reduce the “look-back” period with respect to directors’ relationships with members of the NYSE and NYSE Arca (which following the Mergers will apply equally to NYSE Alternext US) from three years to one year. In addition, the NYSE is proposing to delete a restriction stating that a director is not independent if such director is employed by or affiliated with a non-member broker-dealer, thus allowing independent directors of NYSE, NYSE Arca, and NYSE Alternext US to be employed by or affiliated with non-member broker dealers.<sup>135</sup>

The Commission finds that these changes are consistent with the Act. The proposed changes to the definition of “member” and “member organization” will harmonize the use of those terms across all three SROs owned by NYSE Euronext for purposes of determining the independence of NYSE Euronext directors (and the directors of its subsidiary SROs). The Commission believes that a one year “look-back” period, together with the other criteria for determining the independence of NYSE Euronext directors will continue to provide for director independence consistent with the Act.<sup>136</sup> Further, the Commission believes that allowing directors to be affiliated with non-member broker-dealers is consistent with the Act because NYSE Alternext US will not have regulatory oversight over such broker-dealers and thus the member conflicts that the independence requirements are designed to address are not raised.<sup>137</sup>

<sup>134</sup> Member is defined as set forth in Sections 3(a)(3)(A)(i), 3(a)(3)(A)(ii), 3(a)(3)(A)(iii) and 3(a)(3)(A)(iv) of the Act, 15 U.S.C. 78c(a)(3)(A).

<sup>135</sup> NYSE Euronext also proposes some technical changes to the independence policy: (i) The deletion of a provision relating to a transition period for non-US board directors of NYSE Euronext because it is obsolete; and (ii) all references to NYSE, NYSE Arca, and NYSE Alternext US shall mean each of those entities or its successor.

<sup>136</sup> See Independence Policy of the NYSE Euronext Board of Directors, Exhibit 5B to the NYSE Notice, supra note 7.

<sup>137</sup> See e.g., Article II, Sections 2(b) and 3(a) of the bylaws and Paragraph 505 of the certificate of incorporation of the Chicago Stock Exchange, Inc.; Sections 1.1 of the bylaws of the National Stock Exchange, Inc.

#### IV. Accelerated Approval of SR-Amex-2008-62

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>138</sup> for approving the proposal, as modified by Amendment Nos. 1 and 4, prior to the thirtieth day after the date of publication of notice of filing of Amendment No. 4 in the **Federal Register**.<sup>139</sup>

In Amendment No. 4, Amex proposes to reflect those changes to the Amex Rules that had occurred since the filing of the proposed rule change that are necessary to accurately describe the current Amex Rules and show the proposed changes, as applicable. Amex also proposes to make certain clarifying, technical and non-substantive changes to the text of the proposed rule change. Amendment No. 4 also includes a revised description of the parties to the New Multi-Party FINRA RSA, and a revised description of the merger between the current parent companies of Amex.<sup>140</sup> In addition, in Amendment No. 4, Amex modifies its description of Arca Securities to state, among other things, that with respect to its oversight of Arca Securities after the Mergers and Related Transactions, NYSE Regulation has agreed to provide NYSE Alternext US’s CRO quarterly reports related to oversight of Arca Securities, which operates as a facility of each of NYSE and NYSE Arca that will provide outbound routing from each exchange to NYSE Alternext US, subject to certain conditions.<sup>141</sup> As stated above,<sup>142</sup> the Commission believes that such reports, along with other measures, will help to protect the independence of NYSE Alternext US’s regulatory responsibilities with respect to Arca Securities from conflicts of interest that may arise as a result of NYSE Alternext US’s affiliation with Arca Securities. The Commission does not believe that these changes have any substantive impact on the proposed changes.

Accordingly, the Commission finds good cause for approving the Amex’s proposal, as modified by Amendment Nos. 1 and 4, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.

<sup>138</sup> 15 U.S.C. 78s(b)(2).

<sup>139</sup> Pursuant to Section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2), the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission finds good cause for so doing.

<sup>140</sup> As noted *supra* in note 4, this change will not affect the final outcome of the Mergers through which NYSE Alternext US will become a subsidiary of NYSE Euronext.

<sup>141</sup> See *supra*, notes 100 to 109 and accompanying text.

<sup>142</sup> *Id.*

<sup>129</sup> See Amex Order, *supra* note 14.

<sup>130</sup> Amex is currently a party to a regulatory services agreement with FINRA under which FINRA performs market and trade practice surveillance and analysis, financial and operational regulation, options sales practice regulation, enforcement investigations and disciplinary processes and dispute resolution services for Amex.

<sup>131</sup> For more detail on Sections 1 and 2 of the Undertakings, see Amex Order, *supra* note 14.

<sup>132</sup> For more detail on Section 3 of the Undertakings, see Amex Order, *supra* note 14.

<sup>133</sup> See *supra* note 117 and accompanying text, and Amendment No. 4 to the Amex Notice, *supra* note 4.

## V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 4 to File No. SR-Amex-2008-62, including whether Amendment No. 4 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-Amex-2008-62 on the subject line.

### Paper Comments

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

All submissions should refer to File Number SR-Amex-2008-62. 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 Amex. 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-Amex-2008-62 and should be submitted on or before October 24, 2008.

## VI. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule changes are consistent with the Act

and the rules and regulations thereunder applicable to a national securities exchange.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>143</sup> that the proposed rule change (SR-Amex-2008-62), as modified by Amendment Nos. 1 and 4 thereto, be and hereby is approved on an accelerated basis.

*It is therefore further ordered*, pursuant to Section 19(b)(2) of the Act,<sup>144</sup> that the proposed rule change (SR-NYSE-2008-60), as modified by Amendment No. 1 thereto, be and hereby is approved.

Although the Commission's approval of the proposed rule changes of Amex (SR-Amex-2008-62) and NYSE (SR-NYSE-2008-60) is final and the proposed rules are therefore effective, *it is further ordered* that the proposed rule changes will not become operative until the NYSE Regulation RSA and the New Multi-Party FINRA RSA are executed.

By the Commission.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-23313 Filed 10-2-08; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58676; File No. SR-ISE-2008-69]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by International Securities Exchange, LLC Relating to Amending the Fee Schedule

September 29, 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 September 22, 2008, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>143</sup> 15 U.S.C. 78s(b)(2).

<sup>144</sup> 15 U.S.C. 78s(b)(2).

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

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

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

The ISE is proposing to amend its Schedule of Fees with respect to transactions executed in securities reported to Tape B. The text of the proposed rule change is available on the Exchange's Internet Web site at <http://www.ise.com>.

## 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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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

On July 1, 2008, the Exchange adopted a fee structure for transactions in securities priced at or above \$1.00 that are reported to Tape B (hereinafter, referred to as Tape B securities) (excluding both order delivery and MidPoint Match orders) whereby the maker receives a per share rebate of \$0.0017 and the taker fee is \$0.0015 on all Tape B shares.<sup>3</sup> For transactions in securities priced at or above \$1.00 that are reported to Tape A and Tape C (hereinafter referred to as Tape A and Tape C securities), the Exchange applies a tiered rebate structure, averaged across an entire month, whereby the first five million maker shares executed on an average daily volume (ADV) basis receive a rebate of \$0.0032 per share, with an increase in the rebate to \$0.0035 for each maker share executed above five million ADV.

For order delivery orders in securities priced at or above \$1.00, the Exchange provides a rebate of \$0.0015 for maker shares executed in Tape B securities and a rebate of \$0.0027 for maker shares executed in Tape A and Tape C securities. The Exchange is proposing to amend the equity fee schedule to apply equity fees consistently across all

<sup>3</sup> See Securities and Exchange Commission Release No. 58147 (July 11, 2008); 73 FR 41389 (July 18, 2008) (SR-ISE-2008-53) [sic].