3. Applicants request an order under section 17(d) and rule 17d–1 to permit the proposed expense sharing arrangements. Applicants state that participation by the Top-Tier Funds, the Underlying Funds and Forward Management in the proposed expense sharing arrangements is consistent with the provisions, policies and purposes of the Act, and that the terms of the Special Servicing Agreement and the conditions set forth below will ensure that no participant will participate on a basis less advantageous than that of other participants.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. No Fund will enter into a Special Servicing Agreement unless the Special Servicing Agreement: (a) Precisely describes the services provided to the Top-Tier Funds and the Underlying Fund Payments; (b) provides that no affiliated person of the Top-Tier Funds, or affiliated person of such person, will receive, directly or indirectly, any portion of the Underlying Fund Payments, except for bona fide transfer agent services approved by the Board of the Underlying Fund, including a majority of the Independent Trustees; (c) provides that the Underlying Fund Payments may not exceed the amount of actual expenses incurred by the Top-Tier Funds; (d) provides that, in instances where transfer agent expenses are calculated based on a fixed fee per account, no Underlying Fund will reimburse transfer agent expenses of a Top-Tier Fund, including sub-accounting expenses and other out-of-pocket expenses, at a rate in excess of the average per account transfer agent expenses of the Underlying Fund, including sub-accounting expenses and other out-of-pocket expenses, expressed as a basis point charge (for purposes of calculating the Underlying Fund's average per account transfer agent expense, the Top-Tier Fund's investment in the Underlying Fund will be excluded); and (e) has been approved by the Fund's Board, including a majority of the Independent Trustees, as being in the best interests of the Fund and its shareholders and not involving overreaching on the part of any person concerned.

2. In approving a Special Servicing Agreement, the Board of an Underlying Fund will consider, without limitation: (a) The reasons for the Underlying Fund's entering into the Special Servicing Agreement; (b) information quantifying the Underlying Fund Benefits; (c) the extent to which investors in the Top-Tier Fund could have purchased shares of the Underlying Fund; (d) the extent to which an investment in the Top-Tier Fund represents or would represent a consolidation of accounts in the Underlying Funds, through exchanges or otherwise, or a reduction in the rate of increase in the number of accounts in the Underlying Funds; (e) the extent to which the expense ratio of the Underlying Fund was reduced following investment in the Underlying Fund by the Top-Tier Fund and the reasonably foreseeable effects of the investment by the Top-Tier Fund on the Underlying Fund's expense ratio; (f) the reasonably foreseeable effects of participation in the Special Servicing Agreement on the Underlying Fund's expense ratio; and (g) any conflicts of interest that Forward Management, any affiliated person of Forward Management, or any other affiliated person of the Underlying Fund may have relating to the Underlying Fund's participation in the Special Servicing Agreement.

3. Prior to approving a Special Servicing Agreement on behalf of an Underlying Fund, the Board of the Underlying Fund, including a majority of the Independent Trustees, will determine that: (a) The Underlying Fund Payments under the Special Servicing Agreement are expenses that the Underlying Fund would have incurred if the shareholders of the Top-Tier Fund had instead purchased shares of the Underlying Fund through the same broker-dealer or other financial intermediary; (b) the amount of the Underlying Fund Payments is less than the amount of Underlying Fund Benefits; and (c) by entering into the Special Servicing Agreement, the Underlying Fund is not engaging, directly or indirectly, in financing any activity which is primarily intended to result in the sale of shares issued by the Underlying Fund.

4. In approving a Special Servicing Agreement, the Board of a Fund will request and evaluate, and Forward Management will furnish, such information as may reasonably be necessary to evaluate the terms of the Special Servicing Agreement and the factors set forth in condition 2 above, and make the determinations set forth in conditions 1 and 3 above.

5. Approval by the Fund's Board, including a majority of the Independent Trustees, in accordance with conditions 1 through 4 above, will be required at least annually after the Fund's entering into a Special Servicing Agreement and prior to any material amendment to a Special Servicing Agreement.

6. To the extent Underlying Fund Payments are treated, in whole or in part, as a class expense of an Underlying Fund, or are used to pay a class-based expense of a Top-Tier Fund, conditions 1 through 5 above must be met with respect to each class of a Fund as well as the Fund as a whole.

7. Each Fund will maintain and preserve the Board's findings and determinations set forth in conditions 1 and 3 above, and the information and considerations on which they were based, for the duration of the Special Servicing Agreement, and for a period not less than six years thereafter, the first two years in an easily accessible place.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–4875 Filed 3–6–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59486; File No. SR–NYSE–2009–16]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend NYSE Rule 17 To Address Issues Related to Vendor Liability and To Make Amendments and Conforming Changes to NYSE Rule 18

March 2, 2009.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on February 17, 2009, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) [4] of the Act and Rule 19b–4(f)(6) thereunder,[5] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(6).

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

The Exchange proposes to amend NYSE Rule 17 (''Use of Exchange Facilities'') to address issues related to vendor liability. The Exchange also seeks to make amendments and conforming changes to NYSE Rule 18 (''Compensation in Relation to Exchange System Failure''). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Rule 17 (''Use of Exchange Facilities'') to address issues related to vendor liability. Specifically, the proposed rule would require that member organizations that have trading losses due to malfunctions of third-party systems provided by the Exchange submit such losses to the Exchange's compensation fund prior to pursuing legal remedies against the vendors that provided these third-party systems.[6]

The Exchange also seeks to make amendments and conforming changes to NYSE Rule 18 (''Compensation in Relation to Exchange System Failure''). Specifically, the Exchange seeks to include in the definition of ''Exchange system failure'' the malfunction of a third-party system or technology provided by the Exchange, *i.e.*, vendor and/or subcontractor systems and to codify a net loss requirement for members or member organizations that seek compensation for losses sustained from an Exchange system failure.

The Exchange notes that parallel changes are proposed to be made to the rules of the NYSE Alternext Exchange (formerly the American Stock Exchange).[7]

Background

On July 10, 2008, the Exchange amended NYSE Rule 17 (''Rule Amendment'') to provide, among other things, that its vendors and/or its subcontractors of electronic systems, services or facilities (''third-party vendors'') would not be liable for any loss sustained by a member or member organization arising from use of the third-party vendors.[8] The amended rule further required members and member organizations to indemnify the Exchange and its vendors and/or subcontractors and set forth certain provisions that the Exchange could include in contracts connected to a member or member organization's use of any electronic systems, services or facilities provided by the third-party vendors.

The impetus behind this amendment stemmed from exchanges' increased reliance on third-party vendors to provide additional systems or services. The use of third-party vendors enables exchanges to increase their capacity to deliver faster and more efficient trading tools to market, with the ultimate beneficiaries being the investing public. In order for the Exchange to remain competitive and remove impediments to, and perfect the mechanism of, a free and open market, the Exchange relies on third-party vendor services to play a significant role in timely providing systems and tools to Exchange members that assist the Exchange in achieving its goals and remain competitive.

In recognition of the fact that Exchange-maintained systems co-exist with, and are often indistinguishable from, vendor-maintained systems that the Exchange provides access to as a conduit, the Exchange filed the Rule Amendment, implementing a vendor liability disclaimer that indemnified the Exchange and third-party vendors from any damages sustained by a member or member organization growing out of the use or enjoyment thereof by the member or member organization, as well as from any and all judgments, damages, costs, or losses of any kind (including reasonable attorneys' fees and expenses), as a result of any claim, action, or proceeding that arose out of or relates to the member or member organization's use of such electronic system, service, or facility.

After the immediately effectiveness filing, the Exchange received feedback on the rule from its members and customer constituencies. Based on that feedback, the Exchange recognized the risk presented to members and member organizations with regard to requiring members and member organizations to indemnify the Exchange vendors and its subcontractors. The Exchange therefore rescinded the vendor liability provisions of NYSE Rule 17 (in particular, paragraph (b) of the amended rule), thereby reverting the rule to its original content prior to the effectiveness of SR–NYSE–2008–55 [*sic*].[9]

The Exchange now re-proposes to amend NYSE Rule 17 and 18 to create a proposed rule that addresses issues of liability for all parties concerned.

Proposed Amendments

Currently, NYSE Rule 17 provides that the Exchange shall not be liable for any damages sustained by a member or member organization growing out of the use or enjoyment of the facilities afforded by the Exchange, except as provided in NYSE Rule 18. Currently, NYSE Rule 18 affords members and member organizations the recourse to seek compensation for losses sustained by an Exchange system failure.[10]

As noted previously, the Exchange increasingly offers member organizations access to certain systems and technologies that are supplied by third-party vendors and delivered via Exchange systems (*e.g.*, the Exchange delivers broker algorithms to brokers on the broker handheld device). These third-party products are designed to enhance the member organizations' ability to execute trades efficiently. Notably, the Exchange is acting primarily as a facilitator between the vendor and the Exchange member using the service. Use of these vendor-supplied services is not required, and Exchange members can perform their respective jobs without using these third-party vendor services. If a member wishes to use such a service, however,

[6] *See* E-mail from Jennifer D. Kim, Counsel, Office of the General Counsel, Exchange, to Michou H.M. Nguyen, Special Counsel, Division of Trading and Markets, Commission, on March 2, 2009 (''March 2nd E-mail'').

[7] *See* SR–NYSEALTR–2009–13 (filed February 17, 2009).

[8] *See* Securities Exchange Act Release No. 58137 (July 10, 2008), 73 FR 41145 (July 17, 2008) (SR–NYSE–2008–55). The amendments to NYSE Rule 17 were based on American Stock Exchange (''Amex'') Rule 60.

[9] *See* Securities Exchange Act No. 58850 (October 24, 2008), 73 FR 64998 (October 31, 2008) (SR–NYSE–2008–107).

[10] An ''Exchange system failure'' is defined by NYSE Rule 18 as ''a malfunction of the Exchange's physical equipment, devices and/or programming which results in an incorrect execution or an order or no execution of an order that was received in Exchange systems.''

the Exchange works with the vendor and the member to connect the member and to deliver the service from the vendor to the user. The Exchange also simplifies the negotiation process, in that a member does not need to separately negotiate with the vendor to receive the service. Because the services are supplied and supported by a third-party vendor, however, they are not explicitly ''systems or facilities of the Exchange.'' [11]

Currently, NYSE Rules 17 and 18 do not address the issue of a member or member organization that sustains a loss arising from the malfunction of non-core systems or technology supplied by third-party vendors for use by member organizations.[12] In light of the increased availability of third-party technology to provide additional facilities or services to the Exchange, the Exchange proposes to amend NYSE Rules 17 and 18 to address third-party vendor liability, third-party vendor system malfunction and the avenue of recourse for members and member organizations as a result of this third-party vendor system malfunction.

In connection with member or member organization use of any third-party vendors provided by the Exchange to members for the conduct of their business on the Exchange, the Exchange proposes that NYSE Rule 17 provide that the Exchange shall not be liable for any damages sustained by a member, allied member or member organization growing out of the use or enjoyment by such member, allied member or member organization of a third-party electronic system, service, or facility provided by the Exchange, except as provided in NYSE Rule 18.

The Exchange further proposes that members or member organizations that sustain a loss from the use of these third-party vendors provided by the Exchange may seek compensation from the Exchange for their losses in the same way they seek compensation for an Exchange system failure. Specifically, NYSE Rule 18 would permit members or member organizations to file a claim with the Exchange for losses caused by the third-party vendor's malfunction.

In the event that claims arising out of the use of these third-party vendor systems cannot be fully satisfied because the aggregated claims exceed the funds available for such payment as set forth in NYSE Rule 18, the aggrieved member or member organization would not be precluded from bringing a claim against the third-party vendor directly for the balance of the loss amount.

The Exchange also seeks to make a conforming amendment to NYSE Rule 18 to include in the definition of an Exchange system failure ''any malfunction of any third-party vendor provided by the Exchange that result in an incorrect execution of an order or no execution of an order that was received in Exchange systems.''

Finally, the Exchange seeks to codify its existing policy regarding the netting of losses prior to submitting claims under NYSE Rule 18. Specifically, the Exchange is codifying its understanding that if members and member organizations retain profits from a system malfunction, then they are required to net these profits against their losses from the same malfunction before submitting any claims under NYSE Rule 18.[13]

For example, a broker enters orders for Customer #1 and Customer #2. As a result of a system malfunction, Customer #1 derives a profit that would have occurred but for the malfunction and Customer #2 derives a loss. The broker passes along the gain to Customer #1, and files a claim with the Exchange with respect to Customer #2's loss. The broker would not be required to net the gain against the loss.

Brokers are required to offer profitable errors to their customers; in certain circumstances, however, customers may decline to take the error in which case the error position is retained by the brokers.[14] If Customer #1 declines to accept the profit, as is the customer's option, then the broker would retain the profit and must net is against the loss incurred on behalf of Customer #2.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Section 6(b)(5) of the Act,[16] in particular, in that it is designed 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. The Exchange believes that the proposed rule change promotes just and equitable principles of trade and protects investors and the public interest because it creates a mechanism that adequately addresses issues of liability for all parties concerned.

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

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange received feedback from its constituents raising concerns about the possible risk presented to members and member organizations with regard to the provisions of NYSE Rule 17 that require members and member organizations to indemnify Exchange vendors and the subcontractors of vendors. Specifically, constituents expressed concern that the NYSE rule could have an adverse effect on their businesses in the event of a system malfunction that resulted in financial losses, since the prior rule not only limited their abilities to pursue legal action against the vendors, but also required the member organizations themselves to indemnify vendors for losses. They noted in addition that, as filed, the prior rule did not permit member organizations to seek compensation through the NYSE's Rule 18 process for losses caused by vendors and therefore felt that the limitation on liability was unduly burdensome. This rule proposal is submitted in light of

[11] Exchange services that are outsourced to third-party vendors but that are part of the sore functionality of NYSE systems are considered ''systems and facilities of the Exchange'' even though they are not physically provided by the Exchange. By contrast, additional services provided to members and member organizations by a third-party vendor that aren ot part of the core functionality of the NYSE's systems and not required to function as a member or member organization are not considered ''systems and facilities of the Exchange.'' As a result, any malfunction of those additional services would constitute a third-party vendor system malfunction, not an Exchange malfunction.

[12] The third-party vendors directly provide their services to the member or member organization. Therefore, the customers are aware that they are using an Exchange system, which is provided directly by the Exchange, or a third-party vendor system, that also has direct contact with the customer.

[13] Related system malfunctions that occur repeatedly over the course of the trading day will constitute one system malfunction for purposes of determining the aggregation of customer claims resulting from that system malfunction. Distinct and separate malfunctions that originate from different system failures are considered unrelated malfunctions and are treated as separate system malfunctions.

A member organization that sustains such loss is required to give oral notice by the market opening on the next business day following the system failure and written notice by the end of the third business day following the system failure (T+3).

[14] Customers may decline to take the gains for varied reasons. For example, if the cost to the customer of processing the error is greater than the amount of the error, the customer will likely tell the broker to keep the error.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

these comments received in response to NYSE's filing, SR–NYSE–2008–55.[17]

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

The proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act.[18] The Exchange asserts that the proposed rule change (i) will not significantly affect the protection of investors or the public interest, (ii) will not impose any significant burden on competition, and (iii) by its terms, will not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest.[19]

The Exchange believes that the instant filing is non-controversial. The Commission has approved a third-party vendor liability provision that was filed by the American Stock Exchange which required members and member organizations to indemnify the Exchange and its vendors and/or subcontractors and provided that such vendor and its subcontractors shall not be liable to the member or member organization for any damages sustained by a member or member organization from use of these third-party vendor systems.[20] The Exchange submits that its proposed rule change is less expansive that Amex Rule 60—AEMI and affords a member or member organization the ability to recover from a loss sustained by use of a third-party vendor system. The proposed rule change offers its members and member organizations two layers of recourse in the event of a third-party vendor system malfunction, *i.e.*, filing a claim pursuant to NYSE Rule 18 and then filing a claim directly against the third-party vendor for any remaining balance of the loss amount. Therefore, the Exchange submits that this proposed rule filing, in light of the more restrictive vendor liability disclaimer rules previously approved by the Commission, is non-controversial.

The Exchange proposes this rule amendment in light of feedback from its member and customer constituencies. Accordingly, the Exchange submits that this proposed amendment is non-controversial and reflects the public interest.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2009–16 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSE–2009–16. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2009–16 and should be submitted on or before March 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–4874 Filed 3–6–09; 8:45 am]

BILLING CODE 8011–01–P

[17] *See* March 2nd E-mail, *supra* note 6.

[18] 15 U.S.C. 78s(b)(3)(A).

[19] In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement. 17 CFR 240.19b–4(f)(6)(iii).

[20] Amex Rule 60—AEMI (''Vendor Liability Disclaimer''). AEMI (''Auction & Electronic Market Integration'') System was Amex's Hybrid Market Structure for equities and exchange-traded funds prior to the merger with NYSE.

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59491; File No. SR–NYSE–2009–20]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Extending a Temporary Equity Transaction Fee for Shares Executed on the NYSE MatchPoint SM System, Effective March 1, 2009 Until April 30, 2009

March 3, 2009.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on February 26, 2009, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''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.

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

The Exchange proposes to extend a temporary equity transaction fee for shares executed on the NYSE MatchPoint SM (''NYSE MatchPoint'' or ''MatchPoint'') system, effective March 1, 2009 until April 30, 2009. The Exchange will charge each member organization using the MatchPoint system a per share fee scaled to the

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.