

2008–102), as modified by Amendment No. 2, be, and it hereby is, approved on a five month pilot basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>38</sup>

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

[FR Doc. E9–6398 Filed 3–23–09; 8:45 am]

BILLING CODE 8010–01–P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59591; File No. SR–NSX–2009–01]

### Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NSX Fee Schedule To Implement a Program To Award Rebates for Liquidity Adding Zero Display Orders and Clarify the Definition of “Liquidity Adding Average Daily Volume”

March 17, 2009.

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> notice is hereby given that on February 27, 2009, National Stock Exchange, Inc. filed with the Securities and Exchange Commission (“Commission”) the proposed rule change, as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

National Stock Exchange, Inc. (“NSX”<sup>®</sup> or “Exchange”) is proposing to amend the Fee and Rebate Schedule (the “Fee Schedule”) issued pursuant to Exchange Rule 16.1(c) in order to (i) provide a rebate for adding liquidity in Zero Display Orders at one dollar or above in the Automatic Execution Mode of order interaction in the event that certain volume thresholds are achieved, (ii) provide a rebate for adding liquidity in Zero Display Orders at one dollar or above in the Order Delivery Mode of order interaction in the event that certain volume thresholds are achieved,<sup>3</sup> and (iii) clarify the definition

of “Liquidity Adding Average Daily Volume” to account for partial calendar months.

The text of the proposed rule change is available on the Exchange’s Web site at <http://www.nsx.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange 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 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

With this rule change, the Exchange is proposing to provide a liquidity provider rebate for Zero Display (or “Dark”) Orders<sup>4</sup> entered in each of the Automatic Execution Mode of order interaction (“AutoEx”) and the Order Delivery Mode of order interaction (“Order Delivery” or “O/D”).<sup>5</sup> In each case, the rebates apply only to securities priced one dollar and higher, and only after certain volume thresholds are achieved.

###### AutoEx Liquidity Adding Zero Display Order Rebate

For securities trading at one dollar or higher in AutoEx, this rule change proposes to provide a progressively higher rebate applicable to shares executed as liquidity providing Zero Display Orders of ETP Holders who achieve both a “Liquidity Adding Average Daily Volume” (“Liquidity Adding ADV”) of at least 50,000 and, in the same period, achieve “Total Average Daily Trading Volumes” (“Total ADV”)

Delivery Mode. The rebate on displayed orders will be the same as the rebate contained in this proposed rule change. Telephone conversation on March 12, 2009 between Richard Holley III, Senior Special Counsel, Division of Trading and Markets (“Division”), Commission; David Michehl, Special Counsel, Division, Commission; Sara Hawkins, Special Counsel, Division, Commission; James Yong, Chief Regulatory Officer, NSX; and Phil Pinc, Vice President and Counsel, NSX.

<sup>4</sup> As specified in Rule 11.11(c)(2)(A).

<sup>5</sup> The Exchange’s two modes of order interaction are described in NSX Rule 11.13(b).

of 1 million,<sup>6</sup> 15 million<sup>7</sup> and 30 million<sup>8</sup> shares (any such rebate hereinafter referred to as an “AutoEx Liquidity Adding Zero Display Order Rebate”).

An ETP Holder needs to achieve two volume eligibility thresholds before receiving the proposed AutoEx Liquidity Adding Zero Display Order Rebate. First, an ETP Holder must achieve at least 50,000 shares of Liquidity Adding ADV in the applicable time period. Liquidity Adding ADV means, with respect to an ETP Holder, “the number of shares such ETP Holder has executed as a liquidity provider on average per trading day (excluding partial trading days and securities under one dollar) across all tapes on NSX for the calendar month (or partial month, as applicable) in which the executions occurred” (see the Explanatory Endnotes to the Fee Schedule). Second, and only after the first threshold is met, an ETP Holder must achieve a Total ADV of at least 1 million shares. Total ADV means, with respect to an ETP Holder, “the number of shares such ETP Holder has executed as a liquidity provider, liquidity taker and router of executed trades on average per trading day (excluding partial trading days and securities under one dollar) across all tapes on NSX for the calendar month (or partial month, as applicable) in which the executions occurred” (see the Explanatory Endnotes to the Fee Schedule). If both the foregoing eligibility thresholds are achieved, an ETP Holder will be entitled to progressively higher rebates (\$0.0022, \$0.0023 and \$0.0025) on its shares executed in AutoEx as liquidity adding Zero Display Orders depending on the Total ADV volumes achieved (at least 1 million but less than 15 million, at least 15 million but less than 30 million, and at least 30 million, respectively).

For purposes of clarity, if an ETP Holder fails to achieve Liquidity Adding ADV of at least 50,000 shares, or fails to achieve Total ADV of at least 1 million shares, in the same month (or partial month, as applicable), then no AutoEx Liquidity Adding Zero Display Order Rebate applies. In addition, for purposes of calculating an ETP Holder’s Total ADV, all such ETP Holder’s orders

<sup>6</sup> The first tier is \$0.0022 per share (applicable to shares executed in AutoEx which added liquidity as Zero Display Orders), where Total ADV is greater than or equal to 1 million and less than 15 million.

<sup>7</sup> The second tier is \$0.0023 per share (applicable to shares executed in AutoEx which added liquidity as Zero Display Orders), where Total ADV is greater than or equal to 15 million and less than 30 million.

<sup>8</sup> The third tier is \$0.0025 per share (applicable to shares executed in AutoEx which added liquidity as Zero Display Orders), where Total ADV is greater than or equal to 30 million.

<sup>38</sup> 17 CFR 200.30–3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> The Exchange has represented that it will submit a similar proposed rule change to adopt a corresponding rebate for displayed orders in Order

executed at NSX or executed after routing through NSX in the given time frame are counted, regardless of whether such orders are displayed or undisplayed, executed in AutoEx or O/D, or are liquidity providing or taking. Finally, the AutoEx Liquidity Adding Zero Display Order Rebate applies only to those shares that are the subject of the ETP Holder's liquidity adding Zero Display Orders executed in AutoEx (*i.e.*, the rebate does not apply to all shares which constitute Total ADV, nor to non-Zero Display Order shares that add liquidity, nor to liquidity providing Zero Display Order

shares in O/D). These details are set forth in an explanatory endnote to the Fee Schedule.

The measurement period for calculating the AutoEx Liquidity Adding Zero Display Order Rebate is generally the calendar month. However, and as further discussed below, in the event a pricing or rebate program utilizing this definition is implemented, modified or discontinued on other than month's end, the period of measurement used to determine "average daily volume" with respect to the rebate (as in the definition of Liquidity Adding ADV, Total ADV and elsewhere on the

Fee Schedule) shall be that partial month during which the program's terms are in effect.

Examples of AutoEx Liquidity Adding Zero Display Order Rebate<sup>9</sup>

The following illustrates application of the AutoEx Liquidity Adding Zero Display Order Rebate. In a given calendar month (or other applicable period), the following ETP Holders achieve the following average daily volumes of executed shares (in each case, counting only securities priced at one dollar or higher and excluding partial trading days):

ETP Holder	1	2	3	4	5	6	7	8 (First Threshold in AutoEx)	9 (Second Threshold in AutoEx)
	AutoEx Displayed Liquidity Adding	AutoEx Zero Display Liquidity Adding	AutoEx Displayed Liquidity Taking	AutoEx Zero Display Liquidity Taking	O/D Displayed Liquidity Adding	O/D Zero Display Liquidity Adding	Routed Away	Liquidity Adding ADV (sum of columns 1, 2, 5 and 6)	Total ADV (sum of columns 1, 2, 3, 4, 5, 6 and 7)
A .....	30,000	30,000	30,000	30,000	30,000	30,000	30,000	120,000	210,000

ETP Holder A will not receive an AutoEx Liquidity Adding Zero Display Order Rebate. Although ETP Holder A has a Liquidity Adding ADV of 120,000 (column 8, which surpasses the

Liquidity Adding ADV eligibility threshold of 50,000), ETP Holder A fails to satisfy the second eligibility requirement (ETP Holder A's Total ADV of 210,000 (column 9) falls short of the

minimum Total ADV of at least 1 million necessary to obtain the first tier of the rebate).

ETP Holder	1	2	3	4	5	6	7	8 (First Threshold in AutoEx)	9 (Second Threshold in AutoEx)
	AutoEx Displayed Liquidity Adding	AutoEx Zero Display Liquidity Adding	AutoEx Displayed Liquidity Taking	AutoEx Zero Display Liquidity Taking	O/D Displayed Liquidity Adding	O/D Zero Display Liquidity Adding	Routed Away	Liquidity Adding ADV (sum of columns 1, 2, 5 and 6)	Total ADV (sum of columns 1, 2, 3, 4, 5, 6 and 7)
B .....	920,000	30,000	30,000	30,000	30,000	30,000	30,000	1,010,000	1,100,000

ETP Holder B will receive an AutoEx Liquidity Adding Zero Display Order Rebate. ETP Holder B has surpassed both the Liquidity Adding ADV eligibility threshold (with 1,010,000 shares) and the Total ADV eligibility threshold (with 1,100,000 shares). ETP

Holder B's AutoEx Liquidity Adding Zero Display Order Rebate for the given period will equal the number of full trading days in the measurement period multiplied by 30,000 (column 2, the daily average number of shares which were executed in AutoEx as liquidity

providing Zero Display Orders) multiplied by \$0.0022 (the first rebate tier for which ETP Holder B is eligible based on Total ADV of at least 1 million and less than 15 million).

ETP Holder	1	2	3	4	5	6	7	8 (First Threshold in AutoEx)	9 (Second Threshold in AutoEx)
	AutoEx Displayed Liquidity Adding	AutoEx Zero Display Liquidity Adding	AutoEx Displayed Liquidity Taking	AutoEx Zero Display Liquidity Taking	O/D Displayed Liquidity Adding	O/D Zero Display Liquidity Adding	Routed Away	Liquidity Adding ADV (sum of columns 1, 2, 5 and 6)	Total ADV (sum of columns 1, 2, 3, 4, 5, 6 and 7)
C .....	30,000	920,000	30,000	30,000	30,000	30,000	30,000	1,010,000	1,100,000

<sup>9</sup> These examples are for illustrative purposes in respect of the calculation of the AutoEx Liquidity Adding Zero Display Order Rebate only, and do not

take into account, nor illustrate, the rebates and/or fees applicable to displayed orders that add liquidity, orders that take liquidity, Zero Display

Orders that add liquidity in O/D and orders routed away.

ETP Holder C will receive an AutoEx Liquidity Adding Zero Display Order Rebate. ETP Holder C has surpassed both the Liquidity Adding ADV eligibility threshold (with 1,010,000 shares) and the Total ADV eligibility threshold (with 1,100,000 shares). ETP

Holder C's AutoEx Liquidity Adding Zero Display Order Rebate for the given period will equal the number of full trading days in the measurement period multiplied by 920,000 (column 2, the daily average number of shares which were executed in AutoEx as liquidity

providing Zero Display Orders) multiplied by \$0.0022 (the first rebate tier for which ETP Holder C is eligible based on Total ADV of at least 1 million and less than 15 million).

ETP Holder	1	2	3	4	5	6	7	8 (First Threshold in AutoEx)	9 (Second Threshold in AutoEx)
	AutoEx Displayed Liquidity Adding (million)	AutoEx Zero Display Liquidity Adding (million)	AutoEx Displayed Liquidity Taking	AutoEx Zero Display Liquidity Taking	O/D Displayed Liquidity Adding (million)	O/D Zero Display Liquidity Adding (million)	Routed Away	Liquidity Adding ADV (sum of columns 1, 2, 5 and 6) (million)	Total ADV (sum of columns 1, 2, 3, 4, 5, 6 and 7)
D .....	1	1	30,000	30,000	10	10	30,000	22	22,090,000

ETP Holder D will receive an AutoEx Liquidity Adding Zero Display Order Rebate. ETP Holder D has surpassed both the Liquidity Adding ADV eligibility threshold (with 22 million shares) and the Total ADV eligibility threshold (with 22,090,000 shares). ETP

Holder D's AutoEx Liquidity Adding Zero Display Order Rebate for the given period will equal the number of full trading days in the measurement period multiplied by 1 million (column 2, the daily average number of shares which were executed in AutoEx as liquidity

providing Zero Display Orders) multiplied by \$0.0023 (the second rebate tier for which ETP Holder D is eligible based on Total ADV of at least 15 million and less than 30 million).

ETP Holder	1	2	3	4	5	6	7	8 (First threshold in AutoEx)	9 (Second threshold in AutoEx)
	AutoEx Displayed Liquidity Adding	AutoEx Zero Display Liquidity Adding (million)	AutoEx Displayed Liquidity Taking	AutoEx Zero Display Liquidity Taking	O/D Displayed Liquidity Adding	O/D Zero Display Liquidity Adding (million)	Routed Away	Liquidity Adding ADV (sum of columns 1, 2, 5 and 6) (million)	Total ADV (sum of columns 1, 2, 3, 4, 5, 6 and 7)
E .....	0	10	0	0	0	20	30,000	30	30,030,000

ETP Holder E will receive an AutoEx Liquidity Adding Zero Display Order Rebate. ETP Holder E has surpassed both the Liquidity Adding ADV eligibility threshold (with 30 million shares) and the Total ADV eligibility threshold (with 30,030,000 shares). ETP Holder E's AutoEx Liquidity Adding Zero Display Order Rebate for the given period will equal the number of full trading days in the measurement period multiplied by 10 million (column 2, the daily average number of shares which were executed in AutoEx as liquidity providing Zero Display Orders) multiplied by \$0.0025 (the third rebate tier for which ETP Holder E is eligible based on Total ADV of at least 30 million).

who achieve an average daily volume of shares executed as Zero Display Orders in O/D ("Liquidity Adding ADV (O/D Dark)") of 1 million,<sup>10</sup> 10 million<sup>11</sup> and 20 million<sup>12</sup> shares will receive rebates of \$0.0008, \$0.0010 and \$0.0012, respectively, with respect to such shares (any such rebate hereinafter referred to as an "O/D Liquidity Adding Zero Display Order Rebate"). Liquidity Adding ADV (O/D Dark) means, with respect to an ETP Holder, "the number of Zero Display Order shares such ETP Holder has executed as a liquidity provider on average per trading day

(excluding partial trading days and securities under one dollar) across all tapes in O/D mode for the calendar month (or partial month, as applicable) in which the executions occurred" (see the Explanatory Endnotes to the Fee Schedule).

For purposes of clarity, if an ETP Holder fails to achieve Liquidity Adding ADV (O/D Dark) of at least 1 million shares in a given month (or partial month, as applicable), then no O/D Liquidity Adding Zero Display Order Rebate applies. In addition, for purposes of calculating an ETP Holder's Liquidity Adding ADV (O/D Dark), only such ETP Holder's liquidity adding Zero Display Orders executed in O/D in the given time frame are counted. Finally, the O/D Liquidity Adding Zero Display Order Rebate applies only to those shares of an ETP Holder executed in O/D as liquidity adding Zero Display Orders (i.e., the rebate does not apply to shares of non-Zero Display (i.e., displayed) Orders that add liquidity in O/D, nor to shares of liquidity providing Zero Display Orders in AutoEx). These

Order Delivery Liquidity Adding Zero Display Order Rebate

For securities trading at one dollar or higher in O/D mode, this rule change also proposes to provide a progressively higher rebate applicable to shares executed as liquidity providing Zero Display Orders in O/D. ETP Holders

<sup>10</sup> The first tier is \$0.0008 per share, applicable to shares executed in O/D which added liquidity as Zero Display Orders, where the number of such shares is greater than or equal to 1 million and less than 10 million.

<sup>11</sup> The second tier is \$0.0010 per share, applicable to shares executed in O/D which added liquidity as Zero Display Orders, where the number of such shares is greater than or equal to 10 million and less than 20 million.

<sup>12</sup> The third tier is \$0.0012 per share, applicable to shares executed in O/D which added liquidity as Zero Display Orders, where the number of such shares is greater than or equal to 20 million.

details are set forth in an explanatory endnote to the Fee Schedule.

Like other calculations of “average daily volume” in the Fee Schedule, the measurement period for calculating the O/D Liquidity Adding Zero Display Order Rebate is generally the calendar month. However, and as further discussed below, in the event a pricing or rebate program utilizing this definition is implemented, modified or discontinued on other than month’s

end, the period of measurement used to determine “average daily volume” with respect to the rebate (as used in the definition of Liquidity Adding ADV (O/D Dark) and elsewhere on the Fee Schedule) shall be that partial month during which the program’s terms are in effect.

Examples of Order Delivery Liquidity Adding Zero Display Order Rebate<sup>13</sup>

The<sup>14</sup> following charts (which are the same charts as set forth above with

respect to illustrations of the AutoEx Liquidity Adding Zero Display Order Rebate) may be used to illustrate application of the O/D Liquidity Adding Zero Display Order Rebate. In a given calendar month (or other applicable period), the following ETP Holders achieve the following average daily volumes of executed shares (in each case, counting only securities priced at one dollar or higher and excluding partial trading days):

ETP Holder	1	2	3	4	5	6 (Threshold in O/D)	7	8	9
	AutoEx Displayed Liquidity Adding	AutoEx Zero Display Liquidity Adding	AutoEx Displayed Liquidity Taking	AutoEx Zero Display Liquidity Taking	O/D Displayed Liquidity Adding	Liquidity Adding ADV (O/D Dark) <sup>14</sup>	Routed Away	Liquidity Adding ADV (sum of columns 1, 2, 5 and 6)	Total ADV (sum of columns 1, 2, 3, 4, 5, 6 and 7)
A .....	30,000	30,000	30,000	30,000	30,000	30,000	30,000	120,000	210,000
B .....	920,000	30,000	30,000	30,000	30,000	30,000	30,000	1,010,000	1,100,000
C .....	30,000	920,000	30,000	30,000	30,000	30,000	30,000	1,010,000	1,100,000

ETP Holder A will not receive an O/D Liquidity Adding Zero Display Order Rebate. ETP Holder A fails to satisfy the eligibility requirement (ETP Holder A’s

Liquidity Adding ADV (O/D Dark) of 30,000 (column 6) falls short of the first rebate tier of at least 1 million). ETP Holder B and ETP Holder C similarly

fail to achieve the first tier of the O/D Liquidity Adding Zero Display Order Rebate.

ETP Holder	1	2	3	4	5	6 (Threshold in O/D)	7	8	9
	AutoEx Displayed Liquidity Adding (million)	AutoEx Zero Display Liquidity Adding (million)	AutoEx Displayed Liquidity Taking	AutoEx Zero Display Liquidity Taking	O/D Displayed Liquidity Adding (million)	Liquidity Adding ADV (O/D Dark) (million)	Routed Away	Liquidity Adding ADV (sum of columns 1, 2, 5 and 6) (million)	Total ADV (sum of columns 1, 2, 3, 4, 5, 6 and 7)
D .....	1	1	30,000	30,000	10	10	30,000	22	22,090,000

ETP Holder D will receive an O/D Liquidity Adding Zero Display Order Rebate. ETP Holder D’s Liquidity Adding ADV (O/D Dark) of 10 million meets the second tier of the rebate.

Accordingly, ETP Holder D’s O/D Liquidity Adding Zero Display Order Rebate for the given period will equal the number of full trading days in the measurement period multiplied by 10

million multiplied by \$0.0010 (the second rebate tier for which ETP Holder D is eligible based on Liquidity Adding ADV (O/D Dark) of at least 10 million and less than 20 million).

ETP Holder	1	2	3	4	5	6 (Threshold in O/D)	7	8	9
	AutoEx Displayed Liquidity Adding	AutoEx Zero Display Liquidity Adding (million)	AutoEx Displayed Liquidity Taking	AutoEx Zero Display Liquidity Taking	O/D Displayed Liquidity Adding	Liquidity Adding ADV (O/D Dark) (million)	Routed Away	Liquidity Adding ADV (sum of columns 1, 2, 5 and 6) (million)	Total ADV (sum of columns 1, 2, 3, 4, 5, 6 and 7)
E .....	0	10	0	0	0	20	30,000	30	30,030,000

ETP Holder E will receive an O/D Liquidity Adding Zero Display Order Rebate. ETP Holder E has achieved the

third tier of the Liquidity Adding ADV (O/D Dark) eligibility threshold (with 20 million shares). Accordingly, ETP

Holder E’s O/D Liquidity Adding Zero Display Order Rebate for the given period will equal the number of full

<sup>13</sup> As in the examples of the AutoEx Liquidity Adding Zero Display Order Rebate, these examples merely illustrate the calculation of the rebates for Zero Display Orders that Add Liquidity in Order Delivery. They do not calculate, nor show, the

rebates and fees applicable to displayed orders that add liquidity, Zero Display Orders that add liquidity in AutoEx, orders that take liquidity, or fees for routing.

<sup>14</sup> This column is the same as column 6 in the previous chart of examples of the AutoEx Liquidity Adding Zero Display Order Rebate which bore the header “O/D Zero Display Liquidity Adding”.

trading days in the measurement period multiplied by 20 million multiplied by \$0.0012.

#### Definition of “Liquidity Adding ADV” Modified To Allow for Partial Calendar Months

The current rule filing also proposes to modify the definition of “Liquidity Adding ADV” to provide additional clarity if the Exchange makes modifications to its fee and rebate program effective on other than month end. Prior to the proposed rule change, “Liquidity Adding ADV” is defined as, with respect to an ETP Holder, “the number of shares such ETP Holder has executed as a liquidity provider on average per trading day (excluding partial trading days and securities under one dollar) across all tapes on NSX for the calendar month in which the executions occurred” (see Explanatory Endnotes to the Fee Schedule). For business reasons from time to time the Exchange may determine to modify or discontinue its Fee Schedule on other than month end. The proposed rule change is intended to clarify the Exchange’s ability to respond to changing business necessities through modification of its pricing model without implementing changes to the Fee Schedule that relate to Liquidity Adding ADV only on month’s end.<sup>15</sup> Accordingly, in order to clarify how “Liquidity Adding ADV” is determined for any period, the proposed rule change adds the parenthetical clause “(or partial month, as applicable)” after the words “for the calendar month” in the definition of Liquidity Adding ADV, and also adds an additional explanatory endnote to the Fee Schedule which addresses partial month calculations (see Explanatory Endnotes to the Fee Schedule). These changes clarify that the Exchange will calculate Liquidity Adding ADV on less than a calendar month basis if necessary due to

<sup>15</sup> A mid-month modification to the Fee Schedule could have either a negative or a positive impact on an ETP Holder based on fluctuations in the volume of its order flow to the Exchange over the course of a calendar month. A mid-month modification or discontinuation may potentially negatively impact an ETP Holder, if any, whose volume tends to increase during the course of the calendar month such that, but for the discontinuation or modification of the Fee Schedule mid-month, the ETP Holder would have achieved cheaper liquidity taking fees based on achievement of the Liquidity Adding ADV threshold of 50,000 shares. Conversely, a mid-month modification or discontinuation may potentially positively impact an ETP Holder, if any, whose volume tends to decrease during the course of the calendar month such that, but for the discontinuation or modification of the Fee Schedule mid-month, the ETP Holder would not have achieved cheaper liquidity taking fees based on achievement of the Liquidity Adding ADV threshold of 50,000 shares.

modification or discontinuation of one or more features utilizing that definition in the Fee Schedule. This exception is likewise included in the proposed definition of other “average daily volume” calculations in the proposed Fee Schedule, namely in the definitions of “Total ADV” and Liquidity Adding ADV (O/D Dark”).

#### Rationale

The Exchange has determined that these changes are necessary to increase the volume of Zero Display Order in order to increase the revenue of the Exchange and to adequately fund its regulatory and general business functions. In addition, the modification to the definition of Liquidity Adding ADV is necessary to enhance the Exchange’s flexibility to commence, modify and discontinue fee pricing programs utilizing that definition on dates other than calendar month end. The proposed modifications are reasonable and equitably allocated to those ETP Holders that opt to provide and take liquidity in displayed orders and Zero Display Orders, and is not discriminatory because ETP Holders are free to elect whether or not to send displayed orders or Zero Display Orders via O/D Mode or AutoEx, and as a liquidity provider or liquidity taker. ETP Holders are further free to elect what volumes to send to the Exchange during the course of a calculation measurement period. Based upon the information above, the Exchange believes that the proposed rule change is consistent with the protection of investors and the public interest.

#### Operative Date and Notice

The Exchange intends to make the proposed credit and rebate structure effective on filing of this proposed rule for trading on March 2, 2009. Pursuant to Exchange Rule 16.1(c), the Exchange will “provide ETP Holders with notice of all relevant dues, fees, assessments and charges of the Exchange” through the issuance of a Regulatory Circular of the changes to the Fee Schedule and will post a copy of the rule filing on the Exchange’s Web site (<http://www.nsx.com>).

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,<sup>16</sup> in general, and Section 6(b)(4) of the Act,<sup>17</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and

other charges among its members and other persons using the facilities of the Exchange. Moreover, the proposed fee and rebate structure is not discriminatory in that all ETP Holders are eligible to submit (or not submit) liquidity adding trades and quotes in O/D Mode or AutoEx in all tapes and as either displayed or undisplayed, and may do so at their discretion in the daily volumes they choose during the course of the measurement period.

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

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

The foregoing rule change has taken effect upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>18</sup> and subparagraph (f)(2) of Rule 19b-4<sup>19</sup> thereunder, because, as provided in (f)(2), it changes “a due, fee or other charge applicable only to a member” (known on the Exchange as an ETP Holder). At any time within sixty (60) days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### IV. Solicitation of Comments

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

##### Electronic Comments

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NSX-2009-01 on the subject line.

<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(4).

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>19</sup> 17 C.F.R. 240.19b-4(f)(2).

*Paper Comments*

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

All submissions should refer to File Number SR-NSX-2009-01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR-NSX-2009-01 and should be submitted on or before April 14, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-6352 Filed 3-23-09; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59581; File No. SR-NYSE-2009-26]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Extending Until June 9, 2009, the Operation of Interim NYSE Rule 128 Which Permits the Exchange To Cancel or Adjust Clearly Erroneous Executions if They Arise Out of the Use or Operation of Any Quotation, Execution or Communication System Owned or Operated by the Exchange, Including Those Executions That Occur in the Event of a System Disruption or System Malfunction

March 16, 2009.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on March 9, 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 and II 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 until June 9, 2009, the operation of interim NYSE Rule 128 ("Clearly Erroneous Executions for NYSE Equities") which permits the Exchange to cancel or adjust clearly erroneous executions if they arise out of the use or operation of any quotation, execution or communication system owned or operated by the Exchange, including those executions that occur in the event of a system disruption or system malfunction.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text

of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

##### 1. Purpose

The Exchange proposes to extend until June 9, 2009, the operation of interim NYSE Rule 128 ("Clearly Erroneous Executions for NYSE Equities") which permits the Exchange to cancel or adjust clearly erroneous executions if they arise out of the use or operation of any quotation, execution or communication system owned or operated by the Exchange, including those executions that occur in the event of a system disruption or system malfunction.

Prior to the implementation of NYSE Rule 128 on January 28, 2008,<sup>4</sup> the NYSE did not have a rule providing the Exchange with the authority to cancel or adjust clearly erroneous trades of securities executed on or through the systems and facilities of the NYSE.

In order for the NYSE to be consistent with other national securities exchanges which have some version of a clearly erroneous execution rule, the Exchange is drafting an amended clearly erroneous rule which will accommodate such other exchanges but will be appropriate for the NYSE market model.

The NYSE notes that the Commission approved an amended clearly erroneous execution rule for Nasdaq in May 2008.<sup>5</sup> On July 28, 2008, the Exchange filed with the SEC a request to extend the operation of interim Rule 128 until October 1, 2008<sup>6</sup> in order to review the provisions of Nasdaq's clearly erroneous rule and to consider integrating similar standards into its own amendment to Rule 128. On October 1, 2008,<sup>7</sup> the Exchange filed with the SEC a further request to extend the operation of interim Rule 128 until January 9, 2009 in order to consider integrating similar standards into the amendment to Rule

<sup>4</sup> See Securities Exchange Act Release No. 57323 (February 13, 2008), 73 FR 9371 (February 20, 2008) (SR-NYSE-2008-09).

<sup>5</sup> See Securities Exchange Act Release No. 57826 (May 15, 2008), 73 FR 29802 (May 22, 2008) (SR-NASDAQ-2007-001).

<sup>6</sup> See Securities Exchange Act Release No. 58328 (August 8, 2008), 73 FR 47247 (August 13, 2008) (SR-NYSE-2008-63).

<sup>7</sup> See Securities Exchange Act Release No. 58732 (October 3, 2008), 73 FR 61183 (October 15, 2008) (SR-NYSE-2008-99).

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

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

<sup>3</sup> 17 CFR 240.19b-4.

<sup>20</sup> 17 CFR 200.30-3(a)(12).