

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59282; File No. SR-NYSE-2008-119)

January 22, 2009

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment No. 1, to Establish Trading Rules for the New York Block Exchange

I. Introduction

On November 13, 2008, the New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt Exchange Rule 1600 governing the New York Block Exchange ("NYBX"), an electronic facility for the posting and trading of undisplayed orders. The proposed rule change was published for comment in the Federal Register on November 24, 2008.<sup>3</sup> The Exchange filed Amendment No. 1 on January 22, 2009. The Commission received no comments on the proposal. This notice and order provides notice of filing of Amendment No. 1 and grants accelerated approval to the proposed rule change, as modified by Amendment No. 1.

II. Background

A. General

The NYBX facility will offer NYSE members and member organizations a means for posting and executing undisplayed orders. It is designed to facilitate trading in block-sized orders, although orders submitted to NYBX can be as small as one round lot. These orders

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

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

would not be displayed to the public or NYSE members. Only NYSE-listed securities will trade in NYBX. All NYSE members and member organizations are automatically eligible to access NYBX, although they must complete a connectivity authorization process. A non-member who wishes to access the NYBX facility may do so as a "Sponsored Participant" pursuant to NYSE Rule 123B.

Trading in the facility will occur only when trading is occurring on the Exchange.<sup>4</sup> However, orders submitted to the facility will not participate in any openings, re-openings, or closings on the Exchange, or in any trades resulting from a liquidity refreshment point or a gap quote situation.<sup>5</sup> Trading on the facility will be halted or suspended whenever the NYSE halts or suspends trading in a particular security.<sup>6</sup>

In a separate action today, the Commission is also approving a proposed rule change by NYSE relating to the corporate governance of the NYBX facility.<sup>7</sup>

#### B. Order Entry and Order Parameters

Users may transmit orders to NYBX by means of an electronic interface. The facility can be accessed through an electronic FIX application or an Internet-based, password-protected order-entry application. Orders can be entered, canceled, and replaced from 3:30 a.m. ET until

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<sup>3</sup> Securities Exchange Act Release No. 58969 (November 24, 2008), 73 FR 71050 ("Notice").

<sup>4</sup> NYSE's regular trading hours are 9:30 a.m. Eastern Time ("ET") to 4:00 p.m. ET. If the Exchange closes for business at a time other than 4:00 p.m., NYBX will close at the same time. See proposed NYSE Rule 1600(a)(2).

<sup>5</sup> See e-mail from Bob Hill, Senior Vice President, NYSE Euronext, to Michael Gaw, Assistant Director, Division of Trading and Markets, Commission (January 21, 2009).

<sup>6</sup> See proposed NYSE Rule 1600(g)(1).

<sup>7</sup> See Securities Exchange Act Release No. 59281 (January 22, 2009) (SR-NYSE-2008-120).

the close of the regular hours of the Exchange on any day that the Exchange is open for business. The facility will support a variety of order types – including limit, midpoint, and pegging orders – but not market orders.<sup>8</sup> An order may be pegged, for example, to the national best bid or best offer ("NBBO") or to the NBBO plus or minus the Exchange's minimum price variation.<sup>9</sup> The facility will accept day orders, which expire at the end of the regular trading session on the day of entry, and "Good til a Specified Time" orders, which are available for execution until a specified time. Unless otherwise specified, the facility will treat all incoming orders as day orders.

For an order priced equal to or greater than \$1.00, the minimum quoting increment in the facility is one penny (\$0.01).<sup>10</sup> For an order priced less than \$1.00, the minimum quoting increment is one-tenth of a penny (\$0.001).<sup>11</sup> When there is an odd-increment spread, a midpoint execution on the facility will occur in a smaller increment (\$x.xx5 if above \$1.00, \$0.xxx5 if below \$1.00).<sup>12</sup> The facility will reject any pegging order priced below \$1.00.<sup>13</sup>

The facility will accept orders with round lots and partial round lots.<sup>14</sup> Orders that are initially submitted with an odd-lot size would be rejected. However, if the execution of an NYBX order results in an odd-lot remainder, that remainder would not be canceled and would continue to be processed by the facility.

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<sup>8</sup> See proposed NYSE Rules 1600(c)(2) and 1600(c)(3)(A).

<sup>9</sup> See NYSE Rule 62 (describing the minimum price variation).

<sup>10</sup> See proposed NYSE Rule 1600(d)(2)(A).

<sup>11</sup> See proposed NYSE Rule 1600(d)(2)(B).

<sup>12</sup> See proposed NYSE Rule 1600(d)(3)-(4).

<sup>13</sup> See proposed NYSE Rule 1600(d)(2)(C).

<sup>14</sup> See proposed NYSE Rule 1600(c)(4).

Orders submitted to the NYBX facility may include a "Minimum Trading Volume" ("MTV") parameter, which is designed to prevent an execution unless the resulting fill would be of at least the designated size.<sup>15</sup> The facility would not initiate the execution of an order unless the MTV is met at the time the order is evaluated for execution. If no MTV is designated, an order would be treated as if the MTV is zero. The facility would act upon market information available to it at the time an order is entered into the facility, taking a "snapshot" of the market. Contraside orders resting in the Display Book (whether displayed or non-displayed) and contraside orders in the facility would automatically be considered for MTV purposes. In addition, the system default would be to include protected quotations of automated trading centers for MTV purposes, although an MTV could not be met solely by protected bids or offers. A user could elect to have protected bids and offers of automated trading centers excluded for MTV purposes. Therefore, if an NYBX order is marketable against a protected bid or offer displayed by an away market but not against any order in the facility or on the Display Book, the facility would not route the order to the away market to seek an execution (even if the NYBX order's MTV were met by the size of the protected bid or offer). Regardless of an order's MTV designation, the facility would always route to away markets as necessary to comply with Rule 611 of Regulation NMS.<sup>16</sup> The facility would not consider for MTV purposes any marketable interest on an away market that is priced inferior to that market's protected quotation.

The MTV designation does not guarantee that a user would receive the full size of the MTV from any resulting execution(s). For example, when the MTV of an NYBX order is met, the facility might route parts of that order to the Display Book or to one or more away markets

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<sup>15</sup> See proposed NYSE Rules 1600(b)(2)(E) and 1600(c)(3)(B)(ii).

<sup>16</sup> 17 CFR 242.611.

for execution. Those contraside orders might be executed or canceled before the NYBX order can access them.

C. Priority, Execution, and Relationship to the Display Book

All orders entered into the NYBX facility are prioritized in order of price, then time.<sup>17</sup> In addition, execution is conditioned on all applicable MTVs being met.

The NYBX facility and the Display Book, the Exchange's principal facility for the trading of equity securities, are separate electronic systems. When it receives an order, the NYBX facility will check for contraside interest on the facility, the Display Book (both displayed and undisplayed orders), and away markets to ascertain whether to attempt to execute the order.<sup>18</sup> Where an NYBX order is marketable against eligible contraside liquidity and its MTV is met, the facility will attempt to execute that order against the eligible contraside liquidity at the order's limit price or better. If there is eligible contraside liquidity in the facility at a better price than any liquidity on the Display Book, the order will attempt to execute in the facility until it is exhausted, expired, or canceled back to the user pursuant to its time-in-force conditions, or until that contraside liquidity in the facility is exhausted.<sup>19</sup> If eligible contraside liquidity is available on the Display Book, an order would be sent to the Display Book to attempt to execute against that liquidity. NYBX orders that are routed to the Display Book will be prioritized and executed pursuant to NYSE Rule 72.

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<sup>17</sup> See proposed NYSE Rule 1600(d)(1)(A).

<sup>18</sup> The facility would route orders to the Display Book or to away markets as necessary via the NYSE Routing Broker. See NYSE Rule 17(b) (describing operation of the Routing Broker).

<sup>19</sup> If the prices of two NYBX orders are crossed, the execution will occur at the price of the order that is nearest to or at the midpoint of the NBBO. See proposed NYSE Rule 1600(d)(1)(C)(vi).

In all cases, the facility would not effect an execution except as permitted by Rule 611 of Regulation NMS. Thus, if the execution of an NYBX order would trade through a protected bid or offer of an automated trading center, the facility would route the applicable size of the order to the automated trading center to attempt to execute against that protected bid or offer.

If an order submitted to the facility cannot immediately be executed, it would remain on the NYBX book pursuant to its time-in-force conditions. As new orders are submitted to the facility or the Display Book, or the NBBO changes, the NYBX facility will re-evaluate whether the booked order is marketable and whether any applicable MTV is met. If so, the facility would attempt to execute the order, routing parts of the order to the Display Book or to away markets as necessary.

Orders in the Display Book, whether displayed or undisplayed, have priority over orders in the facility at the same price. Therefore, no trade could take place in the facility until all equal- or better-priced orders in the Display Book had been executed (or canceled), subject to any applicable MTV being met. Although, as noted above, the NYBX facility will monitor orders resting in the Display Book and route orders to the Display Book as appropriate, the Display Book will not monitor the undisplayed orders resting in the NYBX facility. Thus, marketable orders entered into the Display Book would execute without regard to any undisplayed orders that may be resting in the NYBX facility. In effect, submitting an order to the NYBX facility is equivalent to submitting an undisplayed order to the Exchange with the conditions that it not execute against any market or marketable limit orders submitted to the Display Book, and that it not execute unless any applicable MTV is met.<sup>20</sup>

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<sup>20</sup> In addition, as noted above, NYBX orders will not participate in any openings, closings, or re-openings, or in any trades resulting from a liquidity refreshment point or a gap

Where an NYBX order executes in part but is not exhausted, the unfilled portion of the order (the "residual order") would be held in the facility where it would attempt to execute against later-submitted eligible contraside liquidity until the residual order is exhausted, expired, or canceled.<sup>21</sup> If the residual order is larger than the original MTV of the order, the original MTV would remain on the order. If the residual order is smaller than the original MTV, the facility would modify the MTV to equal the size of the residual order. A residual order maintains its original time stamp unless it is modified. If a user modifies the price, size, side, MTV, or time-in-force condition of a residual order, it would be considered a newly submitted order and receive a new time stamp.<sup>22</sup>

D. Clearance and Settlement

Details of each trade occurring in the facility will be automatically compared and matched by the Exchange, and locked-in trades will be submitted to the National Securities Clearing Corporation ("NSCC") for clearance and settlement.<sup>23</sup> NYBX transaction reports will not reveal contraparty and clearing firm identities, except under the following circumstances: (1) for regulatory purposes or to comply with an order of a court or arbitrator; and (2) if NSCC will

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quote situation. NYSE has represented that it will disclose to users of the NYBX facility the implied conditions of NYBX orders. See Amendment No. 1.

<sup>21</sup> See proposed NYSE Rules 1600(d)(1)(C) and 1600(d)(1)(D).

<sup>22</sup> Similarly, a pegging order that is repriced with a change in the NBBO also would lose its original priority and go behind previously submitted orders in the NYBX queue at the new price. See proposed NYSE Rule 1600(d)(1)(A)(ii).

<sup>23</sup> See proposed NYSE Rule 1600(e)(1). NYBX executions will be compared through the Regional Interface Organization Online process ("RIO Online"). RIO Online is NYSE Arca's internal processing interface that sends order execution information to DTCC. RIO Online gathers the trades that are executed on any given day, places the trades into the appropriate message format and sends them to DTCC. RIO Online provides a record of all trades that were sent to DTCC. RIO Online is also used to manage any approved trade corrections.

not act on behalf of a member or its clearing firm.<sup>24</sup> The trade reports that NSCC will receive from the facility will contain the identities of the parties to the trade – thus enabling NSCC to conduct its risk management functions and settle trades between the appropriate parties – but will contain an indicator noting that the trade is anonymous. On the contract sheets that NSCC issues to its participants, NSCC will substitute "ANON" for the acronym of each counterparty.

E. Recordkeeping

Users of the facility will be required to comply with all relevant rules of the Exchange and Commission in relation to reports and records of transactions.<sup>25</sup> Such rules include, but are not limited to, NYSE Rules 132B (Order Tracking Requirements), 342 (Supervision), and 440 (Books and Records), and Section 17 of the Exchange Act<sup>26</sup> and Rules 17a-3, 17a-4, and 17a-6 thereunder.<sup>27</sup> The Exchange will retain the identity of each user that executes an anonymous transaction on the facility, thus enabling the user to satisfy its recordkeeping obligations under Exchange Act Rules 17a-3(a)(1) and 17a-4(a).<sup>28</sup>

F. Limitations on the Use of the Facility

Designated Market Maker ("DMMs") and Registered Competitive Market Makers ("RCMMs") on the floor of the Exchange may not submit orders to the NYBX facility.<sup>29</sup> The off-floor unit of a DMM or RMM may submit orders to the facility if it has policies and

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<sup>24</sup> See proposed NYSE Rule 1600(e)(2)-(3).

<sup>25</sup> See proposed NYSE Rule 1600(i).

<sup>26</sup> See 15 U.S.C. 78q.

<sup>27</sup> 17 CFR 240.17a-3, 240.17a-4, and 240.17a-6.

<sup>28</sup> 17 CFR 240.17a-3(a)(1) and 240.17a-4(a).

<sup>29</sup> See proposed NYSE Rule 1600(h).

procedures that are designed to prohibit inappropriate sharing of information between the floor personnel and the off-floor personnel.<sup>30</sup>

In addition, NYSE has proposed certain restrictions on entering orders into the facility designed to promote compliance with Section 11(a) of the Exchange Act.<sup>31</sup> A member may not enter an order into the facility from the floor of the Exchange when such order is for its own account, the account of an associated person, or an account over which it or an associated person exercises investment discretion.<sup>32</sup> Also, a member on the floor may not have an order entered into the facility by sending it to an off-floor facility for entry. However, a member may submit a proprietary or customer order to the facility from off the floor of the Exchange.

#### G. NYBX-Only Trades

A trade that results from the execution of two NYBX orders (an "NYBX-Only Trade") will print with a special modifier ("N.X") to identify it as occurring outside the Display Book.<sup>33</sup> The same "N.X" modifier is also used to identify executions in MatchPoint, which is a separate trading facility of the Exchange that matches non-displayed orders.<sup>34</sup> A trade that results from an NYBX order that is routed to the Display Book and executes against one or more Display Book orders will print as a regular-way NYSE trade ("N").

The Exchange proposes to amend certain of its rules that apply to or take account of executions on the Display Book by carving out NYBX-Only Trades from their scope. Thus, for

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<sup>30</sup> See proposed NYSE Rule 1600(h)(A)

<sup>31</sup> 15 U.S.C. 78k(a). Section 11(a) provides that a member of an exchange may not trade for its own account on that exchange unless an exemption applies.

<sup>32</sup> See proposed NYSE Rule 1600(h)(B).

<sup>33</sup> See proposed NYSE Rule 1600(f).

<sup>34</sup> See NYSE Rule 1500. NYBX orders will not interact with MatchPoint orders, and vice versa.

example, a trade effected in the NYBX facility would not be deemed the "last different round lot price" for purposes of NYSE Rule 100, which relates to executions of odd-lot orders. NYSE believes that a DMM, who takes the contraside for all executions of odd-lot orders in its securities, could be inappropriately disadvantaged if it were required to execute at last different round lot prices that included the prices of NYBX-Only Trades. In this situation, the DMM would be bound as the contraside of odd-lot orders up to the size of the print in the NYBX facility even though it would have no knowledge of the size of the orders that made up the print. NYSE also has argued that, because a DMM has market re-entry obligations for stabilization purposes, such obligations should not apply to NYBX-Only Trades, as the DMM will have no information about orders within NYBX.

#### H. Amendment No. 1

In Amendment No. 1, the Exchange deleted the proposed carve-out relating to NYSE Rule 15A (Order Protection Rule). The Exchange believes that this carve-out is "not necessary to ensure the effective operation of the NYBX Facility." In addition, the Exchange represented that it would publish an informational memorandum for its members describing the NYBX facility and how orders entered into NYBX will interact with orders entered into the Display Book. The memorandum will describe, among other things, the implied trading conditions of the NYBX trading platform. Finally, the Exchange in Amendment No. 1 made certain technical, non-substantive changes to the proposed rule text. The text of Amendment No. 1 is available from the Exchange's Web site (<http://www.nyx.com>), the Exchange's principal office, and the Commission's Public Reference Room.

### III. Discussion

#### A. Generally

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>35</sup> In particular, the Commission believes that the proposed rule change is consistent with Section 6(b)(1) of the Exchange Act,<sup>36</sup> which requires a national securities exchange, among other things, to be so organized to carry out the purposes of the Exchange Act. The Commission further believes that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,<sup>37</sup> which requires, among other things, that an exchange have rules designed to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; 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. Moreover, the Commission believes that the proposed rule change is consistent with Section 11A(a)(1)(C) of the Exchange Act,<sup>38</sup> in which Congress found that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure, among other things, economically efficient execution of securities transactions and the practicability of brokers executing investors' orders in the best market. The ability to post undisplayed interest to the NYBX facility will provide

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<sup>35</sup> In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>36</sup> 15 U.S.C. 78f(b)(1)

<sup>37</sup> 15 U.S.C. 78f(b)(5).

<sup>38</sup> 15 U.S.C. 78k-1(a)(1)(C).

additional opportunities for block-sized orders, in particular, to interact with both displayed interest (on the Display Book and away markets) and undisplayed interest (in the facility and the Display Book). The MTV designation permits order senders to limit information leakage and the resulting market impact. A user selecting a large MTV could choose to execute only when significant contraside interest can be identified by the NYBX facility. A user selecting a smaller MTV could choose to obtain a series of more rapid partial executions while accepting a greater risk that market participants could infer the existence of the user's order before achieving a meaningful amount of executed volume. This functionality appears reasonably designed to give brokers additional opportunities to execute investors' orders in the best market and to promote the efficient execution of securities transactions, particularly transactions of block size.

B. Relationship of NYBX Facility to the Exchange

The Commission believes that the Exchange's rules of execution priority as they relate to the interaction of orders between the NYBX facility and the Display Book, the Exchange's main trading facility, are consistent with the Exchange Act. The Commission notes, however, that the two facilities do not constitute a completely integrated liquidity pool. For example, orders submitted to the NYBX facility would not participate in any openings, closings, or re-openings on the Exchange, or in any trades resulting from a liquidity refreshment point or gap quote. Furthermore, by submitting an order to the NYBX facility rather than to the Display Book, the order sender is electing not to interact with certain marketable order flow that may be submitted to the Display Book. For example, while an order resting in the NYBX facility could interact with resting orders in the Display Book, it could not interact with marketable orders entered into the Display Book or participate in openings, closings, re-openings, and certain other discrete events. Orders that are marketable against interest in the Display Book when they are submitted

would interact only with contraside interest in the Display Book (or be routed to access one or more protected quotations).

The Commission believes that the Exchange's manner of operating the NYBX facility in relation to the Display Book is consistent with the Exchange Act. The NYBX facility appears reasonably designed to permit members' orders, particularly large ones, to interact with each other and with certain orders in the Display Book, while preserving members' ability to limit information leakage and consequent market impact with respect to such orders. The Exchange would route these orders to away markets as necessary to avoid trade-throughs of protected quotations. The Exchange also would route these orders to interact with any displayed or undisplayed interest resting in the Display Book so long as any applicable MTV is met. Although orders entered into the NYBX facility would not interact with marketable orders entered into the Display Book, participate in certain discrete NYSE trading events, or execute unless any applicable MTV is met, the Commission has previously approved the use of discretionary orders that are undisplayed and that elect to interact only with certain kinds of order flow or if certain conditions are met. The Commission concludes, therefore, that it is consistent with the Exchange Act for the Exchange to offer its members this discretion over the display and execution of orders submitted to the NYBX facility.

The Exchange also proposes to amend certain NYSE rules to exclude transactions that occur solely within the NYBX facility from the operation of the traditional NYSE market. For example, certain responsibilities of the Exchange's DMMs and RCMMs are keyed off the last sale on the Exchange. Under this proposal, an NYBX-Only Trade would not be deemed a last sale for purposes of those rules. In addition, stop orders and stop-stock provisions of the Exchange rules would not be triggered by NYSE-Only Trades. The Commission does not

believe that the Exchange Act requires NYSE's rules to treat Display Book trades and NYBX-Only Trades the same for all purposes, and that excluding NYBX-Only Trades as triggering events for certain Exchange rules is broadly within the Exchange's discretion. The Commission concludes, therefore, that these exclusions for NYBX-Only Trades are consistent with the Exchange Act.

C. Trading Ahead of Customer Orders

Because orders in the NYBX facility could be executed at the midpoint of the NBBO, it is possible that an NYSE member would trade ahead of a held customer order by less than \$0.01 (i.e., \$ 0.005). If an NYBX order executes at the midpoint of the NBBO and results in a member or member organization's trading ahead of a held customer order at the same price, NYSE Rule 92 (Limitations on Member's Trading Because of Customers' Orders) may be implicated. Rule 92(a) generally restricts a member or member organization from entering a proprietary order while in possession of a customer order. Rule 92(b) through (d) provides several exceptions to the general restrictions of Rule 92(a).<sup>39</sup> The Exchange has stated that all users will be expected to comply with Rule 92(a) when trading on the NYBX facility unless such trading falls within an applicable exception in NYSE Rule 92(b) through (d).

D. Section 11(a) of the Exchange Act

Section 11(a) of the Exchange Act prohibits a member of a national securities exchange from effecting a transaction on that exchange for its own account, the account of an associated person, or an account over which it or its associated persons exercises discretion (each a

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<sup>39</sup> See NYSE Information Memo 2001-33 (October 8, 2001); Securities Exchange Act Release No. 44139 (March 30, 2001), 66 FR 18339 (April 6, 2001) (SR-NYSE-94-34).

"Covered Account") unless an exemption applies.<sup>40</sup> Rule 11a2-2(T) under the Exchange Act,<sup>41</sup> known as the "effect versus execute" rule, provides exchange members with one exemption from the Section 11(a) prohibition. To comply with Rule 11a2-2(T)'s conditions, a member: (1) must transmit the order from off the exchange floor; (2) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution; (3) may not be affiliated with the executing member; and (4) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction without express written consent from the person authorized to transact business for the account in accordance with the rule. The Exchange believes that orders entered into the NYBX facility from off the floor will comply with these provisions of Rule 11a2-2(T).

Off-Floor Transmission. The requirement in Rule 11a2-2(T) for orders to be transmitted from off the exchange floor reflects Congress' intent that Section 11(a) should operate to put member money managers and non-member money managers on the same footing for purposes of their transactions for Covered Accounts. In considering other automated systems, the Commission and the staff have stated that the off-floor transmission requirement would be met if a Covered Account order is transmitted from off the floor directly to the exchange floor by electronic means.<sup>42</sup> Orders will be electronically entered into the NYBX facility from on and off

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<sup>40</sup> 15 U.S.C. 78k(a).

<sup>41</sup> 17 CFR 240.11a2-2(T).

<sup>42</sup> See Securities Exchange Act Release No. 57058 (December 28, 2007), 73 FR 903 (January 4, 2008) (approving MatchPoint) ("MatchPoint Order") at 908, note 54. See Securities Exchange Act Release Nos. 54552 (September 29, 2006), 71 FR 59546 (October 10, 2006) (order approving proposed rule change of the American Stock Exchange ("Amex") to establish new hybrid market); 29237 (May 31, 1991) (regarding NYSE's Off-Hours Trading Facility); and 15533 (January 29, 1979) ("1979 Release"), 44

the floor of the Exchange; however, a member is not permitted to enter an order into the NYBX facility from the floor of the Exchange when such order is for a Covered Account.<sup>43</sup> Similarly, a member on the floor may not enter into the facility an order sent to it by an affiliated member from off the floor, if the order is for such affiliated member's own account, an account of an associated person, or an account over which it or an associated person exercises investment discretion. Consequently, the Commission believes orders transmitted for execution on the NYBX facility satisfy the off-floor transmission requirement.

Non-Participation in Order Execution. Rule 11a2-2(T) further provides that a member and its associated persons may not participate in the execution of an order once it has been

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FR 6084 (January 31, 1979) (regarding the Amex Post Execution Reporting System, the Amex Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX's Communications and Execution System, and the Phlx's Automated Communications and Execution System). See also letter from Paula R. Jensen, Deputy Chief Counsel, Division of Market Regulation, Commission, to Angelo Evangelou, Senior Attorney, Chicago Board Options Exchange, ("CBOE"), (March 31, 2003) (regarding CBOEdirect system); letter from Paula R. Jensen, Deputy Chief Counsel, Division of Market Regulation, Commission, to Jeffrey P. Burns, Assistant General Counsel, Amex (July 9, 2002) (regarding Amex's auto-ex system for options); letter from Paula R. Jensen, Deputy Chief Counsel, Division of Market Regulation, Commission, to Richard S. Rudolph, Counsel, Philadelphia Stock Exchange ("Phlx") (April 15, 2002) (regarding Phlx's AUTOM System and its automatic execution feature AUTO-X); letter from Paula R. Jensen, Deputy Chief Counsel, Division of Market Regulation, Commission, to Kathryn L. Beck, Senior Vice President, Special Counsel and Antitrust Compliance Officer, Pacific Exchange (October 25, 2001) (regarding Archipelago Exchange); letter from Brandon Becker, Director, Division of Market Regulation, Commission, to George T. Simon, Foley & Lardner (November 30, 1994) (regarding Chicago Match).

<sup>43</sup> See Notice, supra note 3, 73 FR at 71061. The Commission notes that proposed NYSE Rule 1600(h) (Limitations on the Use of the New York Block Exchange) will prohibit a member from entering an order into the NYBX facility from the floor of the Exchange when such order is for a Covered Account. Further, the rule also prohibits a member from having such order entered into the facility by sending it to an off-floor facility for entry. A member with authorized access to the facility may enter only customer orders into the NYBX facility from the floor of the Exchange.

transmitted to the exchange floor.<sup>44</sup> This requirement was included to prevent members with their own brokers on the exchange floor from using those persons to influence or guide their orders' execution. This requirement does not preclude a member from canceling or modifying an order, or from modifying the instructions for executing the order after it has been transmitted to the floor. However, such cancellations or modifications must be transmitted from off the exchange floor.<sup>45</sup>

The Commission has stated that the non-participation requirement is satisfied by an automated system when the member's use of such a system entails relinquishing the ability to influence or guide the execution of a Covered Account order once transmitted into the system.<sup>46</sup> Once an order is entered into the NYBX facility, a member may not participate in, guide, or influence the execution of such order. NYBX orders are sent by electronic means directly into the NYBX facility. A user may enter and cancel an NYBX order any time during the regular trading day of the Exchange. NYSE has represented that matching, trading, and routing of orders are effectuated through an algorithm, which does not permit a user to affect the order or its execution in any way; thus, the member relinquishes all control of an NYBX order when

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<sup>44</sup> See Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (approving ArcaEx as the equities trading facility of PCX Equities). See also MatchPoint Order, *supra* note 42, 73 FR at 908 note 56 and accompanying text.

<sup>45</sup> See MatchPoint Order, *supra* note 42, 73 FR at 908. See also Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978); see also Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (order approving Nasdaq Stock Market LLC's registration as a national securities exchange) ("Nasdaq Exchange Order").

<sup>46</sup> See 1979 Release, *supra* note 42; see also, e.g., Securities Exchange Act Release Nos. 54422 (September 11, 2006), 71 FR 54537 (September 15, 2006) (order approving proposed rule change of CBOE to establish a screen based trading system for non-option securities); 51666 (May 9, 2005), 70 FR 25631, 25633 (May 13, 2005) (order approving proposed rule change by International Securities Exchange to establish facilitation, block order, and solicited order mechanisms).

trading commences. The Commission believes that, because a member relinquishes control of an order upon transmission to the facility and will not be able to influence or guide the execution of that order, the non-participation requirement is met with respect to orders that are executed automatically in the facility.

Execution through Unaffiliated Member. Although Rule 11a2-2(T) contemplates having an order executed by an exchange member who is unaffiliated with the member initiating the order, the Commission has recognized that the requirement is not applicable when an automated exchange system is used, if the execution of the order is automatic once it has been transmitted into the system, and if the design of the system ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the system.<sup>47</sup> The Commission has stated that, in such instances, executions obtained through these systems satisfy the independent execution requirement of Rule 11a2-2(T).<sup>48</sup> NYBX orders are sent by electronic means to the NYBX facility. The Exchange has represented that the design of the NYBX facility ensures that members do not possess any special or unique trading advantages in the handling of the orders.

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<sup>47</sup> In considering the operation of an automated execution system operated by an exchange, the Commission has noted that, while there is no independent executing exchange member, the execution of an order is automatic once it has been transmitted into the system. The Commission has stated that, because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, executions obtained through these systems satisfy the independent execution requirement of Rule 11a2-2(T). See 1979 Release, supra note 42; see also MatchPoint Order supra note 42, 73 FR at 908, note 59 and accompanying text; Securities Exchange Act Release No. 49068 (January 13, 2004), 69 FR 2775 (January 20, 2004) (order approving the Boston Options Exchange as an options trading facility of the Boston Stock Exchange).

<sup>48</sup> See 1979 Release, supra note 42; see also e.g., MatchPoint Order, supra note 42; Securities Exchange Act Release No. 54238 (July 28, 2005), 71 FR 44758 (August 7,

Non-Retention of Compensation. The Commission notes that members that intend to rely on Rule 11a2-2(T) in connection with orders submitted to the NYBX facility must comply with the requirements of paragraph (a)(2)(iv) of that rule.

In reliance on NYSE's representations and for the reasons set forth above, the Commission believes that members entering orders into the NYBX facility would satisfy the requirements of Rule 11a2-2(T) under the Exchange Act.

E. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,<sup>49</sup> for approving the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after publication of notice of filing of Amendment No. 1 in the Federal Register. In Amendment No. 1, the Exchange proposes to delete the carve-out relating to NYSE Rule 15A (Order Protection Rule). The Exchange has stated that this carve-out is "not necessary to ensure the effective operation of the NYBX Facility," and elimination of the proposed change to Rule 15A clarifies that the operation of the NYBX facility would not affect the Exchange's obligation to comply with Rule 611 of the Exchange Act. The Exchange also represented that it would disclose to NYBX users the implied conditions on NYBX orders. The other changes made by Amendment No. 1 are technical corrections to the proposed rule text. The rest of the proposed rule text, which has been subject to a full comment period, is unaffected. The Commission

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2006) (order approving proposed rule change of NYSE Arca to establish the OX trading platform); Nasdaq Exchange Order, supra note 45.

<sup>49</sup> 15 U.S.C. 78s(b)(2).

believes, therefore, that good cause exists to approve the proposed rule change, as amended, on an accelerated basis.

#### 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-NYSE-2008-119 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-2008-119. 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 10:00 a.m. and 3:00

p.m. Copies of such filing also will be available for inspection and copying at the principal office of NYSE. 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-2008-119 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>50</sup> that the proposed rule change (SR-NYSE-2008-119), as modified by Amendment No. 1, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>51</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>50</sup> 15 U.S.C. 78s(b)(2).

<sup>51</sup> 17 CFR 200.30-3(a)(12).