

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61067; File No. SR-NYSE-2009-89)

November 25, 2009

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change as Modified by Amendment No. 1 to Amend Certain Corporate Governance Requirements

I. Introduction

On August 26, 2009, 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 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend certain of the Exchange’s corporate governance requirements for listed companies. NYSE filed Amendment No. 1 to the proposed rule change on September 10, 2009. The proposal was published for comment in the Federal Register on September 17, 2009.<sup>3</sup> The Commission received two comment letters on the proposal.<sup>4</sup> This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend Section 303A of its Listed Company Manual (“Manual”), which comprises the Exchange’s corporate governance standards for listed companies, and to eliminate current Section 307.00, regarding related party transactions.<sup>5</sup> The changes, which would take effect on January 1, 2010, include the following:

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

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

<sup>3</sup> See Securities Exchange Act Release No. 60653 (September 11, 2009), 74 FR 47831 (September 17, 2009), 74 FR 48615 (September 23, 2009) (“Notice”).

<sup>4</sup> See letters to Elizabeth M. Murphy, Secretary, Commission, from Dorothy M. Donohue, Senior Associate Counsel, Investment Company Institute, dated October 8, 2009, and from Davis Polk & Wardwell LLP, dated October 9, 2009 (“Davis Polk Letter”).

<sup>5</sup> The Exchange states that current Section 307 is duplicative of Section 314. Under the proposal, current Section 303A.14 would be re-designated as Section 307.

A. Corporate Governance Disclosures

1. Disclosures Required by Regulation S-K under the Act

Section 303A of the Manual currently requires a listed company to disclose the identity of its independent directors, the basis upon which its board may determine that a director is independent, and – if it is a controlled company – any exemptions from the independence requirements upon which it has relied. Disclosures relating to the same aspects of a company’s corporate governance are now required by Item 407 of the Commission’s Regulation S-K.<sup>6</sup> The proposal would eliminate each of the Exchange’s requirements that is similar to a requirement of Item 407, and incorporate directly into Section 303A the applicable requirement of Item 407.<sup>7</sup>

2. Disclosures Regarding Required Website Postings

A listed company is required by the NYSE standards to post the charters of its audit, compensation, and nominating/corporate governance committees, its corporate governance guidelines, and its code of business conduct and ethics on the company’s website, and to state in its proxy statement or annual report that these documents are so posted. The proposal would add that the listed company’s website address must be included,<sup>8</sup> but would delete the current requirement for the company to state that the documents are available in print to any shareholder who requests them.

3. Other Required Disclosures

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<sup>6</sup> 17 CFR 229.407.

<sup>7</sup> Section 303A also revises the requirements relating to reports by a company’s audit and compensation committees that are required by the Commission and are to be included in the company’s annual proxy statement or annual report. The proposed rule change would amend these requirements to reference the disclosures required by Item 407.

<sup>8</sup> The proposal also would reorganize the website posting requirements in the rule text. Further, Section 303A.07 would state expressly that closed-end funds are not subject to the requirement to post their audit committee charters, consistent with current practice.

Section 303A currently also requires various other disclosures to be made in the company's proxy statement or annual report.<sup>9</sup> The Exchange proposes to allow a company alternatively to make these disclosures on its website.<sup>10</sup> If a company chooses to do so, it would be required to disclose this in its proxy statement or annual report and provide the website address.

Section 303A.11 of the Manual currently requires a foreign private issuer to disclose any significant ways in which its corporate governance practices differ from those required of domestic companies under NYSE listing standards. Under the proposal, a foreign private issuer that is required to file an annual report on Form 20-F with the Commission would be required to include the statement of significant differences in that annual report.

The proposal also would eliminate the requirement in Section 303A.12(a) that a listed company disclose in its annual report (or on Form 10-K if the company does not prepare an annual report to shareholders) that its chief executive officer ("CEO") filed the certification regarding corporate governance required by the Exchange, and that the company complied with Commission certification requirements regarding public disclosure. The Exchange proposes to revise Section 303A.12(b) to provide that the CEO of a listed company must notify the Exchange in writing after any executive officer of the company becomes aware of any non-compliance with Section 303A, as opposed to requiring notification in the event of material non-compliance as provided by the current rule.

B. Transition Periods for Newly-Listed Companies

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<sup>9</sup> These disclosures concern contributions by the listed company to tax exempt organizations; executive sessions of non-management or independent directors; communication with the presiding director or the non-management or independent directors; and simultaneous service of an audit committee member on the audit committees of more than three public companies.

<sup>10</sup> The proposed rule change would further provide that, if a listed company makes a required Section 303A disclosure in its proxy statement or annual report filed with the Commission, it may incorporate such disclosure by reference from another document that is filed with the Commission to the extent permitted by applicable Commission rules.

By way of background, NYSE’s rules incorporate by reference Rule 10A-3 under the Act,<sup>11</sup> which requires a listed company to have an audit committee composed solely of independent directors. Rule 10A-3 permits a company listing in conjunction with an initial public offering (“IPO”) to phase in compliance with this requirement. Under Rule 10A-3, all but one member of the audit committee may be exempt from the independence requirements of the rule for ninety days from the date of effectiveness of the issuer’s registration statement under Section 12 of the Act or the issuer’s registration statement under the Securities Act of 1933 covering the issuer’s initial public offering (“IPO”) of securities to be listed by the issuer, and a minority of the members of the committee may be exempt from the independence requirements of Rule 10A-3 for one year.<sup>12</sup>

The Exchange’s rules require that the nominating and compensation committees of a listed company also be composed solely of independent directors. However, companies listing in conjunction with an IPO are permitted a transition period for these committees to be composed solely of independent directors that is similar to that permitted by Rule 10A-3 for audit committees: at least one independent director member at the time of listing, a majority of independent director members within ninety days of listing, and a fully independent committee within one year.<sup>13</sup> The proposal would adjust this transition schedule to allow the first independent director member to be appointed by the earlier of the date that the IPO closes or five business days from the listing date, rather than on the listing date.<sup>14</sup>

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<sup>11</sup> 17 CFR 240.10A-3.

<sup>12</sup> 17 CFR 240.10A-3(b)(1)(iv)(A).

<sup>13</sup> The proposed rule change would define the “listing date” for purposes of the phase-in periods in this section generally as the date the company’s securities first trade on the Exchange.

<sup>14</sup> The ninety-day and one-year periods for the phase-in of the NYSE independence requirements for these two committees – as well as the one-year deadline for a company to satisfy the

The proposed rule change would allow a similar phase-in period for a company listing in conjunction with a spin-off or a carve-out transaction. In such transactions, there would need to be one independent director member on both the nominating and compensation committees by the date the transaction closes, at least a majority of independent director members on each committee within ninety days of the listing date, and fully independent committees within one year of the listing date. A company listing upon emergence from bankruptcy, for which the NYSE rules already provide a similar phase-in period, would continue to be required to have one independent director by the date of listing, as under the current rule. The same phase-in would be specified for a company that ceases to qualify as a controlled company and thereby loses its exemption from the independence requirements for these committees, but the first independent director member would be required to be in place for the nominating and compensation committees by the date the company's status changes.

The NYSE also proposes to allow a company listing in conjunction with an IPO or a spin-off or carve-out transaction a phase-in period with respect to the provision in Section 303A.07(a) which requires a company to have a minimum of three members on its audit committee. Such companies would be required to have at least one member on their audit committees by the listing date, at least two members within ninety days of the listing date, and at least three members within one year of the listing date.<sup>15</sup> This phase-in of the minimum size requirement would not be

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Exchange's requirement that a listed company have a majority of independent directors on its board – would begin from the date of listing.

<sup>15</sup> As noted above, all the members of the audit committee must be independent as of the listing date unless a phase-in is permitted pursuant to Rule 10A-3. Thus, although NYSE rules would permit a phase-in of the number of members on the audit committee, all those members would still need to be independent (unless the company is allowed a phase-in of the Rule 10A-3 independence requirements). For example, a company listing in conjunction with a spin-off might have only two members on the audit committee on the date the transaction closes (and

available to a company emerging from bankruptcy or a company ceasing to qualify as a controlled company. Such companies would still be required to have a minimum of three members on their audit committees from the date of listing on the NYSE or the date of the status change, as applicable.

NYSE proposes new rules for companies previously registered pursuant to Section 12(g) of the Act<sup>16</sup> that list on the Exchange. Such companies would be required to have a majority independent board within one year of the listing date. Their nominating and compensation committees would be required to have at least one independent member by the listing date, a majority of independent members within ninety days, and fully independent members within a year of the listing date. Only independent directors would be permitted on the audit committee during the transition period (unless an exemption is available under Rule 10A-3), but a phase-in would be permitted with respect to the committee size requirement: at least one independent director member as of the date of listing, two independent director members within ninety days of the listing date, and three independent director members within one year of the listing date.

A foreign private issuer is permitted to follow its home country practice in lieu of certain NYSE corporate governance standards for domestic listed companies. The proposed rule change would set forth a transition period for a foreign issuer that determines that it no longer qualifies as a foreign private issuer. The provision references Rule 3b-4 under the Act,<sup>17</sup> which enables a foreign private issuer to test its status once a year on the last business day of its second fiscal

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could have as few as one). However, both those members would still be required to be independent (assuming the company is ineligible for a phase-in of the Rule 10A-3 independence requirements).

<sup>16</sup> 15 U.S.C. 78I(g).

<sup>17</sup> 17 CFR 240.3b-4.

quarter (“Determination Date”), and requires a foreign private issuer to comply with the reporting requirements and use the forms prescribed for domestic companies beginning on the first day of the fiscal year following the Determination Date.

In addition, under Section 303A.08 of the NYSE standards, which concerns shareholder approval of equity compensation plans, a company that ceases to be a foreign private issuer would be granted a limited transition period with respect to discretionary plans and formula plans that were in place prior to the date that its status changed. A shareholder-approved formula plan could continue to be used after the end of the transition period if it is amended to provide for a term of ten years or less from the later of the date of its original adoption or its most recent shareholder approval. A formula plan could be used without shareholder approval if the grants after the date of the status change are made only from the shares available immediately before the Determination Date.

Finally, pursuant to language proposed in various sections of the Introduction to Section 303A.00, the proposal would permit the various types of newly-listed companies to comply with requirements for listed companies to post certain documents on their websites (discussed above) by the same date they are required, respectively, to have at least one independent director member on their nominating and compensation committees.

#### C. Other Proposed Revisions

The following section describes several of the other, more substantive changes included in the proposal:

The Introduction to Section 303A would include Section 303A.08, “Shareholder Approval of Equity Compensation Plans” in the list of sections with which closed end funds must comply.<sup>18</sup>

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<sup>18</sup> The Exchange states that the omission of this section in the current rule was an oversight.

Securities listed under Section 703.22 of the Manual (“Equity Index-Linked Securities, Commodity-Linked Securities and Currency-Linked Securities”) would be included among the securities to which Section 303A does not apply (except as otherwise provided by Rule 10A-3 under the Act).

Controlled companies, which are exempt from certain requirements, currently are defined as companies of which more than 50% of the voting power is held by an individual, a group, or another company. The definition would be revised to make clear that the 50% criterion relates specifically to voting power for the election of directors. The proposal also would clarify that references to a “listed company” or “company” in the provisions relating to director independence include, in addition to any parent or subsidiary in a consolidated group with the listed company, any such other company as is relevant to any determination under the applicable independence standards of Section 303A.02(b).

The proposal would allow companies to hold regular executive sessions of independent directors as an alternative to the sessions of non-management directors currently required. A company would be required to enable all interested parties, not only shareholders, to communicate concerns regarding the company to these non-management or independent directors.

The Exchange proposes to add language to rule commentary in Section 303A.07 regarding audit committees to make clear that, if a closed-end fund chooses to voluntarily include a "Management's Discussion of Fund Performance" in its Form N-CSR, its audit committee is required to meet to review and discuss it. The Exchange also proposes to clarify that telephonic conference calls constitute meetings if allowed by applicable corporate law.

Section 303A.10, requiring a listed company to disclose to shareholders any waiver from its code of business conduct and ethics that is granted to an executive officer or director, would be

amended to specify that the disclosure must be made within four business days of the determination by the company to grant the waiver, through a press release, website disclosure, or the filing of a current report on Form 8-K with the Commission.

Finally, the Exchange proposes to amend provision (c) of Section 303A.12 (Certification Requirements) to require each listed company to submit an interim Written Affirmation “as and when required by the interim Written Affirmation form specified by the NYSE,” as opposed to “each time a change occurs to the board or any of the committees subject to Section 303A.”

### III. Discussion and Commission Findings

After careful consideration of the proposed rule change and the comments received, the Commission finds that the proposal is consistent with the Act and the rules and regulations promulgated thereunder applicable to a national securities exchange and, in particular, with Section 6(b)(5) of the Act<sup>19</sup> which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; and in general, to protect investors and the public interest. The Commission further believes that the proposal is consistent with Rule 10A-3 under the Act<sup>20</sup> concerning audit committee requirements for listed issuers.

#### Corporate Governance Disclosures

The Commission believes that it is reasonable for NYSE to revise its disclosure provisions in its corporate governance listing standards set forth in Section 303A of the Manual to align with the disclosure requirements of Item 407 of Regulation S-K, and to incorporate such standards by reference in those listing standards so as to reduce burdens on listed companies. The Commission

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<sup>19</sup> 15 U.S.C. 78f(b)(5). In approving the proposal, the Commission has considered the proposed rules' impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>20</sup> 17 CFR 240.10A-3.

notes that, as the Exchange has stated, companies that are deficient in their fulfillment of Item 407 disclosure requirements will be deemed to be out of compliance with the Exchange's rules.

Consequently, the Exchange will be able to take actions against a noncompliant company, ranging from appending a below compliance ("BC") indicator to the company's ticker symbol, issuing a public reprimand letter, and, in appropriate cases, delisting.

In the Commission's view, the proposal improves upon the current rules by stating clearly that a listed company must provide its website address when it discloses in its proxy statement or annual report, as required, that its key committee charters, code of ethics, and corporate governance guidelines are posted on its website. The Commission believes that it is reasonable for the Exchange to allow a company to fulfill its disclosure obligations with respect to these documents by posting them on its website, without having to provide them in print form. Certain of the disclosures required by the Commission's own rules are permitted to be made on a company's website as long as the company's proxy statement makes reference to the information and provides a website address.<sup>21</sup>

As discussed above, the proposal also would allow a company to make certain other Exchange-required disclosures on its website instead of in its proxy statement or annual report, provided that the company states in the proxy statement or annual report that it has done so and provides the website address. The Commission believes that it is reasonable for the Exchange to provide companies with this alternative approach with respect to the specified disclosures. Similarly, the Commission believes that the amendments to the Exchange's listing rules governing disclosure by a foreign private issuer are appropriate.

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<sup>21</sup> See, e.g., Instruction 2 to Item 407 of Regulation S-K. See also Securities Act Release No. 8732A; Securities Exchange Act Release No. 54302A; Investment Company Act Release No. 27444A (August 29, 2006), 71 FR 53158 (September 8, 2006).

### Transition Periods for Newly-Listed Companies

The Commission believes that the proposed amendments relating to the phase-in period for specified companies newly listing on the Exchange (or newly becoming subject to certain corporate governance listing standards as a result of change in status) are reasonable. The proposed rules would permit a phase-in schedule similar to that allowed under the current rules for a company listing in conjunction with an IPO, and would extend such a phase-in schedule appropriately to companies listing in conjunction with spin-off and carve-out transactions, while offering an acceptable minimal tolerance for the special circumstances of each of these types of new listings with respect to the point in time that the standards would begin to apply. The Commission notes that the Exchange's proposal does not make adjustments for compliance with any requirements of Rule 10A-3 under the Act.

The Commission notes that a company listing upon emerging from bankruptcy will still be required to have at least one independent director member on its nominating and compensation committees from the first day of listing (i.e., the day the security first trades on NYSE). A company that has relied on the exemptions available for controlled companies will be required to meet this standard as of the date its status changes.

The proposed rule change also would allow a company listing in conjunction with an IPO, a spin-off, or a carve-out a phase-in period with respect to the NYSE requirement that the audit committee of a listed company have at least three members. In the Commission's view, permitting a company to have only one member on its audit committee by the listing date, at least two members within ninety days of the listing date, and three members within a year of the listing date, affords a reasonable accommodation for such companies. The Commission notes that a

company emerging from bankruptcy will continue to be required to have at least three members on its audit committee from the day its securities begin to trade on the Exchange.

The Commission further notes that the proposed rule change does not grant an exemption or phase-in period to any newly-listed company with respect to the provision set forth in Section 303A.07 of the Manual that requires every listed company's audit committee – without distinction as to the committee's size – to have at least one member who has accounting or related financial management expertise. In addition, Rule 10A-3 under the Act requires at least one member of a listed company's audit committee to be independent as of the listing date, even when the company is allowed a phase-in period with respect to the independence of other audit committee members.<sup>22</sup> Thus, if a newly-listed company that is eligible for a phase-in period with respect to the size requirement chooses to have initially only one member on its audit committee, that member would need to be independent and also to meet the NYSE financial expertise requirement.

With respect to NYSE's Section 303A.08 governing shareholder approval of equity compensation plans, the Commission believes that it is reasonable for NYSE to incorporate the determination date in Rule 3b-4 under the Act<sup>23</sup> for a transition period for a company that ceases to be a foreign private issuer and to provide its issuers guidance on the continued use of formula plans, both with and without shareholder approval, after its status changes from a foreign private issuer.

#### Other Proposed Revisions

The Commission understands that the Exchange proposes to clarify in the Introduction to Section 303A.00 that closed-end funds are subject to Section 303A.08. The fact that this provision does not currently appear to require closed-end funds to comply with Section 303A.08

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<sup>22</sup> See 17 CFR 240.10A-3(b)(1)(iv).

<sup>23</sup> 17 CFR 240.3b-4.

apparently results from an oversight on the part of the Exchange. The inclusion of securities governed by Section 703.22 of the Manual (Equity Index-Linked Securities, Commodity-Linked Securities and Currency-Linked Securities) among the list of preferred and debt securities to which the NYSE governance standards do not apply is an appropriate update of the rules and is consistent with NYSE's treatment of similar securities.<sup>24</sup> The proposed amendment to the definition of a controlled company is a revision that has previously been filed with the Commission by another exchange as a "non-controversial" proposed rule change.<sup>25</sup>

The Commission agrees with the Exchange that allowing companies to hold executive sessions of independent directors rather than of non-management directors is consistent with the intention of the current rule. The proposal to require that all interested parties, not only shareholders, be able to communicate concerns regarding a listed company to the director(s) also is appropriate. The Commission further believes that it is appropriate to provide that if a closed-end fund voluntarily includes a Management's Discussion of Fund Performance in its Form N-CSR, its audit committee should be required to meet and review it.

Currently, Section 303A.10 of the Manual provides that waivers of a company's code of business ethics and conduct must be "promptly disclosed to shareholders" and does not specify how such disclosure should be made. The proposed rule change sets a timeframe that is consistent with the requirements set by the Commission in Item 5.05 of Form 8-K<sup>26</sup> regarding such waivers,

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<sup>24</sup> See, e.g., Introduction to Section 303A.00 of the Manual, excepting Equity-Linked Debt Securities, Trust Issued Receipts, and Other Securities listed pursuant to Section 703.19 of the Manual, from certain corporate governance standards.

<sup>25</sup> See Securities Exchange Act Release No. 59424 (Feb. 19, 2009), 74 FR 8831 (Feb. 26, 2009) (SR-NASDAQ-2009-009).

<sup>26</sup> 17 CFR 249.308.

and improves the listing standard by setting forth specific alternatives by which the disclosures may be made.

The proposal would remove the provision in Section 303A.12(a) that requires a company to disclose in its annual report to shareholders (or, if the company does not prepare an annual report, in its annual Form 10-K) the specified certifications regarding any non-compliance filed with the NYSE and the Commission. The Exchange states that that this provision has caused confusion because it relates to certifications made in the prior year. Further, the Commission now requires a company to provide certifications by its principal executive officer and principal financial officer as an exhibit to the company's Form 10-Q and 10-K, and the Commission's disclosure requirements now include detailed provisions relating to a company's obligation to file a Form 8-K in instances where the company notifies the Exchange or the Exchange notifies the company of non-compliance with Exchange listing standards. In addition, the NYSE appends a BC indicator to the ticker symbol of an issuer that is non-compliant with the Exchange's corporate governance standards. In view of these changes, the Commission agrees that it is reasonable to delete the certification disclosure requirement of Section 303A.12(a). The Commission also believes that it is reasonable to allow NYSE to modify Section 303A.12(c) to require companies to submit a Written Affirmation as and when required by the Exchange's interim Written Affirmation form, as opposed to each time a change occurs to the board or any of the committees subject to Section 303A.

The two comment letters on the proposed rule change generally support its revisions, but oppose the amendment to require the CEO of a company to notify the NYSE after any executive officer becomes aware of "any" non-compliance with Section 303A, rather than "any material"

non-compliance.<sup>27</sup> The commenters believe that public companies should not be burdened with a duty to report minor or inadvertent breaches, and that investors could overlook material instances of non-compliance among the many inconsequential matters that would need to be reported under the proposal. One commenter was concerned that, upon notification of such matters, “the NYSE may be compelled to include the company on the list of noncompliant companies (after the proper notice period) and to disseminate a BC indicator for that company over the consolidated tape.”<sup>28</sup> This commenter states: “Because the noncompliant company list and BC indicator give no further detail about the company’s infraction or degree of noncompliance, investors may assume that a company is in danger of being delisted when only a relatively minor infraction exists.”<sup>29</sup>

The Commission believes that it is not unreasonable for the NYSE to require a company that is listed on its facility to notify the Exchange when it becomes aware that it is out of compliance with the Exchange’s listing standards. With respect to the concern that the BC indicator provides no details about the reasons why the BC indicator was appended to the company’s stock symbol, the NYSE’s website provides the reason why a company has been placed on the non-compliant list.<sup>30</sup>

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<sup>27</sup> See *supra*, note 5.

<sup>28</sup> See Davis Polk Letter.

<sup>29</sup> *Id.*

<sup>30</sup> See <http://www.nyse.com/regulation/nyse/bcindex.html>. The website lists companies that are non-compliant with the Exchange’s corporate governance listing standards separately from those non-compliant with other standards, and states: “A noncompliant issuer is added to the list seven business days after the NYSE notifies the issuer of the deficiency; if the noncompliance results from a death or illness of a director, the issuer is added to the list six months after the event. An issuer is removed from the list one business day after the NYSE determines that the issuer is in compliance with NYSE corporate governance listing standards.” The reason why a company is on the list can be seen via a link entitled, “View more information on issuers noncompliant with NYSE corporate governance standards.”

Finally, the Commission believes that the technical and other minor changes in the proposal improve and add to the clarity of the Exchange's corporate governance listing rules.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>31</sup> that the proposed rule change (SR-NYSE-2009-89), as amended, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>32</sup>

Elizabeth M. Murphy  
Secretary

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<sup>31</sup> 15 U.S.C. 78s(b)(2).

<sup>32</sup> 17 CFR 200.30-3(a)(12).