

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-65127; File No. SR-NYSE-2011-20)

August 12, 2011

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of Proposed Rule Change to Add New Section 907.00 to the Listed Company Manual that Sets Forth Certain Complimentary Products and Services that are Offered to Currently and Newly Listed Issuers

I. Introduction

On May 5, 2011, 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 the Listed Company Manual (“Manual”) setting forth certain complimentary products and services offered to currently and newly listed issuers. The proposed rule change was published in the Federal Register on May 23, 2011.<sup>3</sup> The Commission received seventeen comments from 14 commenters on the proposal.<sup>4</sup> NYSE submitted a letter in response to the

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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. 64506 (May 17, 2011), 76 FR 29806 (“Notice”).

<sup>4</sup> See Letters to the Commission, from Ronald Russo, GLX, Inc., dated May 18, 2011 (“GLX Letter”); Bryan Degnan, Taylor Rafferty Associates, dated May 19, 2011 (“Rafferty Letter”); Jennifer Kaminsky, dated May 19, 2011; Anonymous, dated May 19, 2011 (“Anonymous Letter”); Todd Allen, dated May 19, 2011 (“Allen Letter”); Brian Rivel, President, Rivel Research Group, dated May 20, 2011 (“Rivel Letter”); Jerry Falkner, dated May 22, 2011 (“Falkner Letter”); Enzo Villani, President, MZ North America, dated June 6, 2011 (“MZ Letter”); John Fairir, dated June 7, 2011 (“Fairir Letter”); Michael Pepe, CEO, PrecisionIR Group, dated June 7, 2011 (“PrecisionIR Letter”); Michael O’Connell, Director IR Solutions, SNL Financial, dated June 10, 2011 (“SNL Letter”); Dominic Jones, President, IR Web Reporting International, Inc., dated June 15, 2011 (“IR Web Reporting Letter”); Darrell Heaps, CEO, Q4 Web System, dated June 16, 2011 (“Q4 Letter”); Dominic Jones, President, IR Web Reporting International, Inc., dated June 29, 2011 (“IR Web Reporting Letter 2”); e-mails to Robert Cook, Director, Division of Trading and Markets and David Shillman, Associate Director, Division of

comments.<sup>5</sup> On July 5, 2011, the Commission extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to August 21, 2011.<sup>6</sup> This order grants approval of the proposed rule change.

## II. Description of the Proposal

In its filing, NYSE is proposing to amend the Manual by adding a new Section 907.00 that sets forth a practice of offering certain complimentary products and services to currently and newly listed issuers. NYSE offers the complimentary products and services as described below to respond to competitive pressures in the market for listings to attract new listings and retain existing listings.<sup>7</sup> These products and services are developed or delivered by NYSE or by a third-party for use by NYSE listed companies. Some of these products are commercially available by such third-party vendors. According to NYSE, all listed issuers receive the same complimentary products and services through the NYSE Market Access Center, while certain tiers of listed issuers receive additional products and services. As discussed in more detail below, the additional services an issuer receives is based, for currently listed issuers, on total

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Trading and Markets, from Patrick Healy, CEO, Issuer Advisory Group, LLC, dated June 26, 2011 and June 28, 2011 (both e-mails indicating that the Issuer Advisory Group would be filing a comment letter to the proposed rule change); and letter from Patrick Healy, CEO, Issuer Advisory Group, LLC, dated June 30, 2011 (“Issuer Advisory Letter”).

<sup>5</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from Janet L. McGinness, Senior Vice President – Legal and Corporate Secretary, NYSE, dated June 27, 2011 (“NYSE Response Letter”). NYSE’s Response Letter is in response to those comments submitted prior to June 27, 2011. See note 4, supra for a list of those letters.

<sup>6</sup> See Securities Exchange Act Release No. 64809 (July 5, 2011), 76 FR 40758 (July 11, 2011).

<sup>7</sup> See email from Theodore Lazo, General Counsel, NYSE to Sharon Lawson, Senior Special Counsel, Division of Trading and Markets and Arisa Tinaves, Special Counsel, Division of Trading and Markets on August 2, 2011.

shares of common stock or American Depositary Receipts (“ADRs”) issued and outstanding and, for newly listed issuers, on total global market value based on a public offering price.

A. NYSE Market Access Center

NYSE developed a market information analytics platform that is available for free to all NYSE listed issuers, called the NYSE Market Access Center. In the rule filing, NYSE states that the NYSE’s Market Access Center was created to “provide issuers with better market insight and information across all exchange and trading venues.”<sup>8</sup> The NYSE Market Access Center includes products and services that were either a) developed by NYSE using proprietary data and/or intellectual property or b) built by a third-party expressly for NYSE-listed companies. According to NYSE, within this platform, all issuers have access to tools and information related to market intelligence, education, investor outreach, media visibility, corporate governance, and advocacy initiatives.<sup>9</sup> Additionally, the NYSE Market Access Center provides all issuers with access to discounted products and services from the same third-party vendors. All issuers listed on the Exchange have access to the NYSE Market Access Center on the same basis. At the time of its filing with the Commission, NYSE noted that the products and services currently available through the NYSE Market Access Center have a commercial value of approximately \$50,000 annually.<sup>10</sup>

B. Tiered Products and Services Offered to Certain Companies

In addition to the NYSE Market Access Center, NYSE offers products and services to certain currently listed and newly listed issuers on a tiered basis. Currently listed issuers are

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<sup>8</sup> See Notice, supra note 3.

<sup>9</sup> In the Notice, the Exchange provided examples of the products and services offered by the NYSE Market Access Center and noted that a description of all offerings is available on the Exchange’s website. See Notice, supra note 3.

<sup>10</sup> See supra note 7.

categorized into two tiers, Tier One and Tier Two. Under NYSE’s proposal, Tier One issuers are U.S. issuers that have 270 million or more total shares of common stock issued and outstanding in all share classes, including and in addition to Treasury shares, and Foreign Private Issuers that have 270 million or more in ADRs issued and outstanding, each calculated annually as of December 31 of the preceding year.<sup>11</sup> Tier Two issuers are categorized as those U.S. issuers that have 160 million to 269,999,999 total shares of common stock issued and outstanding in all share classes, including and in addition to Treasury shares, and Foreign Private Issuers that have 160 million to 269,999,999 in ADRs issued and outstanding, each calculated annually as of December 31 of the preceding year.<sup>12</sup> In addition to the NYSE Market Access Center products and services, Tier One issuers receive market surveillance products and services, which NYSE states have a commercial value of \$45,000 annually, and web-hosting products and services, which NYSE states have a commercial value of approximately \$12,000 to \$16,000 annually. Tier Two issuers can choose to receive either web-hosting products and services at the values noted above, or market analytics products and services, with a commercial value according to NYSE of \$20,000 annually.

Newly listed issuers similarly are categorized into two tiers, Tier A and Tier B.<sup>13</sup> Tier A includes issuers with a global market value of \$400 million or more based on the public offering

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<sup>11</sup> All share classes issued include, for example, where a company has two classes of common stock, such as Class A and Class B common shares.

<sup>12</sup> See Notice, supra note 3.

<sup>13</sup> “Newly listed issuers” means U.S. issuers conducting an initial public offering (“IPO”), issuers emerging from bankruptcy, spinoffs (where a company lists new shares in the absence of a public offering), and carve-outs (where a company carves out a business line or division, which then conducts a separate IPO). Newly listed issuers do not include issuers that transfer their listings from another national securities exchange; rather, transferring issuers are eligible for the services available to currently listed issuers. See proposed Rule 907.00 in the Manual.

price. Tier B includes issuers with a global market value of less than \$400 million based on the public offering price. In addition to the NYSE Market Access Center products and services, Tier A issuers receive either market surveillance products and services for a period of 12 calendar months from the date of listing or market analytics products and services for a period of 24 calendar months from the date of listing, at the issuer's election. The commercial value for these services is the same as those described above for Tier One or Tier Two issuers. Additionally, Tier A companies receive web-hosting, the value of which is noted above, and news distribution products and services, with a commercial value of \$10,000 annually, for a period of 24 calendar months from the date of listing. Tier B companies receive web-hosting and news distribution products and services for a period of 24 calendar months from the date of listing. At the expiration of the 24-month period, Tier A or Tier B issuers that meet the qualifications of Tier One or Tier Two based on total shares or total ADRs issued and outstanding receive either Tier One or Tier Two products and services.<sup>14</sup>

### III. Summary of Comments and NYSE Response to Comments

Fourteen commenters raised objections to the proposal.<sup>15</sup> Generally, commenters expressed concern that the NYSE's practice of offering complimentary services harms competing suppliers of those services or adversely affects competition in affected markets.<sup>16</sup> Specifically, several commenters expressed concern about adverse effects arising from the "strategic partnership" with Thomson-Reuters and Ipreo. The concern is that offering complimentary

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<sup>14</sup> The Exchange provided a description of all products and services offered to the Tiers. See Notice, supra note 3.

<sup>15</sup> See supra note 4.

<sup>16</sup> See Rafferty Letter, Allen Letter, Rivel Letter, Falkner Letter, MZ Letter, Fairir Letter, PrecisionIR Letter, SNL Letter, and IR Web Reporting Letter. See also, Issuer Advisory Letter (stating that the proposed rule change restricts competition for listings).

services disadvantages smaller businesses providing investor relations services.<sup>17</sup> One commenter noted that the NYSE’s complimentary offering of these services makes it “too difficult to compete” with Thomson-Reuters and Ipreo.”<sup>18</sup> Commenters also believed that the proposal, by endorsing certain vendors, would discourage new vendors from entering markets for vendor services or stifle innovation.<sup>19</sup>

Commenters believed that the proposal would require issuers to use the specific vendor offered by NYSE or create the impression that listed companies must use the preferred vendor.<sup>20</sup> Additionally, three commenters believed that although issuers are not required to use the services and providers offered by NYSE, providers of competing products are still disadvantaged because they would have to convince issuers to pay for a similar service that the issuers are able to receive for no cost from the Exchange.<sup>21</sup> However, one vendor who commented stated that in the last several months, its service has replaced an NYSE complimentary service, specifically web-hosting, for a number of NYSE issuers.<sup>22</sup> Additionally, another commenter stated that numerous issuers

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<sup>17</sup> See Allen Letter, Falkner Letter, Fairir Letter, and Rivel Letter. See also, Anonymous Letter (noting that there are already obstacles for smaller businesses).

<sup>18</sup> See Fairir Letter (arguing that NYSE is trying to justify its high listing cost).

<sup>19</sup> See GLX Letter, MZ Letter, Fairir Letter, PrecisionIR Letter, IR Web Reporting Letter, and Q4 Letter. See also, Falkner Letter (noting the smaller providers provide innovative and often times better value).

<sup>20</sup> See Rafferty Letter, Rivel Letter, Fairir Letter, PrecisionIR Letter, and IR Web Reporting Letter. See also, SNL Letter (noting that the proposal could reasonably be viewed as an endorsement by the NYSE and Commission of specific vendors) and IR Web Reporting Letter 2 (noting that issuers may conclude that certain vendors will enable issuers to comply with the Exchange’s listing requirement given the NYSE’s endorsement).

<sup>21</sup> See Fairir Letter, Precision IR Letter, and IR Web Reporting Letter.

<sup>22</sup> See Q4 Letter.

have continued to use their existing preferred service providers at an additional cost to the issuers, instead of taking advantage of the complimentary products and services provided by NYSE.<sup>23</sup>

Four commenters suggested that instead of offering complimentary products and services of certain vendors, NYSE should instead offer issuers a subsidy or credit, which would allow them to use any service provider.<sup>24</sup> One commenter argued that such credit would benefit the Exchange by allowing it to continue to provide such products and services to issuers, but through a vendor of the issuers' own choosing.<sup>25</sup> This commenter believed that such an approach would ultimately benefit competition by leveling the playing field and allowing all vendors, both large and small to compete.<sup>26</sup>

Another commenter recommended disapproving the proposed rule change and having the exchanges consider free listings or alternatively, having the Commission require increased disclosure regarding listing benefit packages provided to issuers, which would address transparency concerns.<sup>27</sup> Additionally, the commenter suggested that the Commission appoint an independent task force comprised of issuers to recommend a model that would permit the exchanges to provide services while not limiting value-added service offerings.<sup>28</sup> The commenter argued that NYSE's proposal would result in the equivalent of a maximum service cap and that the

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<sup>23</sup> See Issuer Advisory Letter.

<sup>24</sup> See MZ Letter, Fairir Letter, IR Web Reporting Letter, Q4 Letter, and IR Web Reporting Letter 2. See also, Issuer Advisory Letter (noting that the NYSE's proposal restricts issuers by forcing them to select from a narrow list of providers).

<sup>25</sup> See MZ Letter. See also, IR Web Reporting Letter (noting that a subsidy or credit would serve the NYSE's objective of attracting listings).

<sup>26</sup> See MZ Letter.

<sup>27</sup> See Issuer Advisory Letter.

<sup>28</sup> Id.

Commission's approval of the proposal will be used by the Exchange as a justification for limiting their service offerings.<sup>29</sup>

One commenter noted that the proposal is not clear on the fee arrangements between the Exchange and the product and service vendors and questioned whether issuers pay for services over and above the services provided by NYSE and if the vendors share revenues with the Exchange or if the services are competitively priced.<sup>30</sup> The commenter also asked if NYSE receives payment from its preferred providers.<sup>31</sup>

Lastly, this commenter raised the issue of whether a for-profit exchange should be in the investor relations services business at all.<sup>32</sup> According to the commenter, there is a conflict of interest between the exchange's role as a service provider or endorser of service providers and its role as a self-regulatory organization that sets and enforces disclosure requirements for its listed companies.<sup>33</sup>

In the NYSE Response Letter, NYSE responded to the issues raised by the commenters.<sup>34</sup> The NYSE Response Letter clarified that no issuer is forced or required to utilize the complimentary products or services as a condition of listing and consequently, can continue to use alternative products and services of their choice.<sup>35</sup>

Further, the Exchange represented that it provides the third-party products and services to listed companies through non-exclusive arrangements with vendors. Accordingly, the Exchange is

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Id.

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See IR Web Reporting Letter.

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Id.

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Id.

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Id.

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See supra note 5.

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See NYSE Response Letter.



willing to consider entering into such arrangements with other third-party vendors that provide “high-quality” products and services. NYSE further stated that it does not endorse, nor require the use of, any particular vendor or any particular products and services.<sup>36</sup>

In response to the NYSE Response Letter, one commenter questioned the Exchange’s willingness to enter into arrangements with other third-party vendors, stating that upon performing its own research, the commenter was unable to “find any information provided by NYSE outlining the process that vendors must follow to have their services added or reviewed.”<sup>37</sup> Further, the commenter questioned whether the Exchange’s current vendor that offers web-hosting and wire services is of “high quality”, asserting that the vendor lacked distribution to a popular website for investors to which all of its competitors provide distribution services.<sup>38</sup>

Finally, in response to the conflict of interest issue that was raised, the Exchange disagreed that there is any conflict of interest with respect to its offerings of products and services because such product and services are offered on a complimentary basis and the arrangements with the vendors are non-exclusive. NYSE also reiterated that issuers are not required to accept or use the products or services to satisfy their obligations under the Exchange’s listing standards.<sup>39</sup>

#### IV. Discussion and Commission’s Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act.<sup>40</sup> Specifically, the Commission finds that

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<sup>36</sup>

Id.

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See IR Web Reporting Letter 2.

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Id.

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See NYSE Response Letter.

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15 U.S.C. 78f. In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

the proposal is consistent with Sections 6(b)(4),<sup>41</sup> 6(b)(5),<sup>42</sup> and 6(b)(8)<sup>43</sup> in that the proposal is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among exchange members and issuers and other persons using its facilities and among other things, that the Exchange's rule is designed to promote just and equitable principles of trade, and is not designed to permit unfair discrimination between issuers, and that the rules of the Exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes that the proposed rule change, which would permit the NYSE to provide complimentary products and services to all listed companies and additional products and services to certain companies based on (i) total shares or total ADRs issued and outstanding for currently listed issuers or (ii) global market value based on a public offering price for newly listed issuers, is appropriate and consistent with the Act. The Commission also believes that by describing in the Manual the products and services available to issuers and the values of the products and services, the Exchange is adding greater transparency to its rules and the fees applicable to issuers.

The Commission notes that the NYSE has represented that the various tiers are designed so that qualifying issuers with increased trading volumes and market activity have enhanced access to products and services that the listed companies would use in the absence of the complimentary services arrangement. The NYSE has further represented that all issuers receive some level of free services and that the requirements to qualify for a higher level of free services and products are transparent and set forth clearly in the language being adopted in new Section

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<sup>41</sup> 15 U.S.C. 78f(b)(4).

<sup>42</sup> 15 U.S.C. 78f(b)(5).

<sup>43</sup> 15 U.S.C. 78f(b)(8).

907.00 of the Manual. This language also includes the commercial value of the free services in each tier. While not all issuers receive the same level of services, NYSE has stated that trading volume and market activity are related to the level of services that the listed companies would use in the absence of the complimentary services arrangements.<sup>44</sup> Further, the criteria for satisfying the tiers are the same for all issuers. Accordingly, based on the factors noted above, the Commission believes that the proposed rule changes to the Manual are consistent with the requirements of the Act and, in particular, that the products and services and their commercial value are equitably allocated among issuers consistent with Section 6(b)(4) of the Act, and the rule does not unfairly discriminate between issuers consistent with Section 6(b)(5) of the Act.

The NYSE Response Letter clarified and responded to many of the questions and concerns raised by commenters. Specifically, NYSE represented that issuers are not forced or required to utilize the complimentary products and services as a condition of listing. Furthermore, the third-party products and services are provided through non-exclusive arrangements with vendors and the Exchange does not expressly endorse any particular vendor or any product or services provided by any particular vendor. In fact, one vendor noted that it has replaced the NYSE's complimentary web-hosting vendor with its web system for a number of NYSE listed issuers.<sup>45</sup> Another commenter stated that issuers use other service providers despite incurring additional costs.<sup>46</sup>

The Commission recognizes, however, that the proposed rule change may affect the purchase decisions of some listed issuers. The effect of offering the services of some vendors on a complimentary basis is to provide issuers with the services of those vendors at a price that is

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<sup>44</sup> See Notice, supra note 3.

<sup>45</sup> See Q4 Letter.

<sup>46</sup> See Issuer Advisory Letter.

lower in relative terms than what other vendors charge. A reduction in a vendor's relative price will generally cause some issuers to substitute their business toward that vendor. Accordingly, the Commission believes that the NYSE's offering of selected vendors' products and services on a complimentary basis will, by lowering their relative price, likely cause some listed issuers to substitute their business away from other vendors and toward the selected vendors. The Commission believes, however, that the impact of this substitution would be mitigated for the reasons discussed below.

The Commission believes that the NYSE is responding to competitive pressures in the market for listing in making this proposal. Specifically, the NYSE is offering complimentary products and services to attract new listings, retain currently-listed issuers, and respond to competitive pressures.<sup>47</sup> The Commission understands that the NYSE faces competition in the market for listing services, and that it competes in part by improving the quality of the services that it offers listed companies. By offering products and services on a complimentary basis and ensuring that it is offering the services most valued by its listed issuers, the NYSE will improve the quality of the services that listed companies receive. Accordingly, the Commission believes that NYSE's proposal reflects the current competitive environment for exchange listings among national securities exchanges, and is appropriate and consistent with Section 6(b)(8) in furtherance of the purposes of the Act.<sup>48</sup>

The Commission also recognizes that to ensure quality to its listed issuers, the NYSE represented that it selects only vendors with the capacity to service all their eligible listed

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<sup>47</sup> See supra note 7.

<sup>48</sup> 15 U.S.C. 78f(b)(8).

companies without sacrificing quality.<sup>49</sup> Thus, some small service vendors may be placed at a disadvantage. Nonetheless, the Commission does not believe that the proposal harms the market for the complimentary products and services in a way that constitutes an inappropriate burden on competition or an inequitable allocation of fees, or fails to promote just and equitable principles of trade, in a manner inconsistent with the Act. As noted above, issuers are not forced or required to utilize the complimentary products and services and some issuers have selected competing products and services. The NYSE's consideration of quality and the needs of its listed issuers in selecting the vendors and its willingness to change vendors is consistent with competition for vendor services. The Commission also understands that the NYSE selected its current service providers substantially based on the service providers that many NYSE listed issuers were using at the time of the selection.<sup>50</sup> The approval of the rule proposal, will, however, help ensure that individual issuers are not given specially negotiated packages for products and services to list or remain listed which would raise unfair discrimination issues under the Act.

While some commenters have argued that the Commission's approval of the NYSE's proposal will mean the Commission has implicitly approved the particular service providers NYSE currently uses, the Commission disagrees. The Commission, in approving the

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<sup>49</sup> See email from Theodore Lazo, General Counsel, NYSE Regulation to Sharon Lawson, Senior Special Counsel, Division of Trading and Markets on August 5, 2011. See also, telephone conversation between Joseph Mecane, Executive Vice President, NYSE, Theresa Molloy, Vice President, NYSE, Holly Kulka, Senior Vice President, NYSE, Theodore Lazo, General Counsel, NYSE Regulation and Sharon Lawson, Senior Special Counsel and Arisa Tinaves, Special Counsel, Division of Trading and Markets, Commission and Amy K. Edwards, Assistant Director and Cindy Alexander, Assistant Chief Economist, Division of Risk, Strategy, and Financial Information, Commission.

<sup>50</sup> Id.

Exchange's proposal, is not endorsing, specifically or implicitly, any party with which the NYSE has chosen to do business.

The Commission has carefully considered the comment letters. Although some of the alternative proposals by the commenters might also satisfy the standards under Sections 6(b) and 19(b) of the Act<sup>51</sup> depending on the facts and circumstances, those proposals are not before us, and the Commission believes that the NYSE's proposal is consistent with these standards and, therefore, should be approved. Other commenters raised certain issues beyond the scope of the Commission's review of this rule proposal, such as the fee arrangements between the NYSE and the providers of the services described in this order. The Commission has carefully considered these comments but believes that the proposal before the Commission satisfies the requirements for approval under Sections 6(b) and 19(b) of the Act<sup>52</sup> for the reasons discussed above.

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

<sup>52</sup> Id.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>53</sup> that the proposed rule change (SR-NYSE-2011-20) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>54</sup>

Elizabeth M. Murphy  
Secretary

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<sup>53</sup> 15 U.S.C. 78s(b)(2).

<sup>54</sup> 17 CFR 200.30-3(a)(12).