

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60398; File No. NYSEAmex-2009-47)

July 30, 2009

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Amex Disciplinary Rule 476A to Add Rule 104(a)(1)(A) – NYSE Amex Equities to Its “List of Exchange Rule Violations and Fines Applicable Thereto”

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 22, 2009, NYSE Amex LLC (the “Exchange” or “NYSE Amex”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend NYSE Amex Disciplinary Rule 476A to add Rule 104(a)(1)(A) – NYSE Amex Equities to its “List of Exchange Rule Violations and Fines Applicable Thereto.”<sup>3</sup> The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room, and [www.nyse.com](http://www.nyse.com).

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

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

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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> New York Stock Exchange LLC (“NYSE”) has submitted a companion rule filing proposing corresponding amendments to NYSE Rule 476A. See SR-NYSE-2009-72 (formally submitted on July 22, 2009).

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

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

1. Purpose

The Exchange proposes to amend NYSE Amex Disciplinary Rule 476A to add Rule 104(a)(1)(A) – NYSE Amex Equities to its “List of Exchange Rule Violations and Fines Applicable Thereto.”

Background

As described more fully in a related rule filing<sup>4</sup>, NYSE Euronext acquired The Amex Membership Corporation (“AMC”) pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the “Merger”). In connection with the Merger, the Exchange’s predecessor, the American Stock Exchange LLC, a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext US LLC,<sup>5</sup> and continues to operate as a national securities exchange registered under Section 6 of the Act.<sup>6</sup> The effective date of the Merger was October 1, 2008.

In connection with the Merger, on December 1, 2008, the Exchange relocated all equities trading conducted on the Exchange legacy trading systems and facilities located at 86 Trinity Place, New York, New York, to trading systems and facilities located at 11 Wall Street, New York, New York (the “Equities Relocation”). The Exchange’s equity trading systems and

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<sup>4</sup> See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-NYSE-2008-60 and SR-Amex 2008-62).

<sup>5</sup> The Exchange changed its name to NYSE Amex in March 2009. See Securities Exchange Act Release No. 59575 (March 13, 2009), 74 FR 11803 (March 19, 2009) (SR-NYSEALTR-2009-24).

<sup>6</sup> 15 U.S.C. 78f.

facilities at 11 Wall Street (the “NYSE Amex Trading Systems”) are operated by the NYSE on behalf of the Exchange.<sup>7</sup>

As part of the Equities Relocation, NYSE Amex adopted NYSE Rules 1-1004, subject to such changes as necessary to apply the Rules to the Exchange, as the NYSE Amex Equities Rules to govern trading on the NYSE Amex Trading Systems.<sup>8</sup> The NYSE Amex Equities Rules, which became operative on December 1, 2008, are substantially identical to the current NYSE Rules 1-1004 and the Exchange continues to update the NYSE Amex Equities Rules as necessary to conform with rule changes to corresponding NYSE Rules filed by the NYSE.

#### Current Rules 104- and 103B- NYSE Amex Equities

Current Rule 104 – NYSE Amex Equities requires, inter alia, Designated Market Makers (“DMMs”) registered in one or more securities traded on the Exchange to engage in a course of dealings for their own account to assist in the maintenance of a fair and orderly market, insofar as reasonably practicable, by contributing liquidity when lack of price continuity and depth, or disparity between supply and demand, exists or is reasonably to be anticipated.<sup>9</sup> This includes an affirmative obligation to provide quotes at the National Best Bid or Offer a minimum percentage of the trading day (“Affirmative Quote Obligation”).

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<sup>7</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex 2008-63).

<sup>8</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex 2008-63); Securities Exchange Act Release No. 58833 (October 22, 2008), 73 FR 64642 (October 30, 2008) (SR-NYSE-2008-106); Securities Exchange Act Release No. 58839 (October 23, 2008), 73 FR 64645 (October 30, 2008) (SR-NYSEALTR-2008-03); Securities Exchange Act Release No. 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR-NYSEALTR-2008-10); and Securities Exchange Act Release No. 59027 (November 28, 2008), 73 FR 73681 (December 3, 2008) (SR-NYSEALTR-2008-11).

<sup>9</sup> See Rule 104(f)(ii) – NYSE Amex Equities.

The DMMs' Affirmative Quote Obligation is set forth in Rule 104(a)(1)(A) – NYSE Amex Equities. Section (a)(1)(A) of Rule 104 requires DMMs to maintain a bid or an offer at the National Best Bid and National Best Offer (“inside”) at least 10% of the trading day for securities in which the DMM unit is registered with an average daily volume on the Exchange of less than one million shares, and at least 5% for securities in which the DMM unit is registered with an average daily volume equal to or greater than one million shares. Time at the inside is calculated as the average percentage of time the DMM unit has a bid or offer at the inside. In calculating whether the DMM is meeting the 10% and 5% requirement, credit may be given for executions for the liquidity provided by the DMM.<sup>10</sup> DMM Reserve or other hidden orders are not included in the inside quote calculations.

#### Proposed Rule Change

As noted above, the Exchange proposes to add Rule 104(a)(1)(A) – NYSE Amex Equities to its “List of Exchange Rule Violations and Fines Applicable Thereto.”

Under the Exchange’s Minor Rule Violation Plan, NYSE Amex Disciplinary Rule 476A, the Exchange may impose a fine, not to exceed \$5,000, on any member, member organization, allied member, approved person or registered or non-registered employee of a member or member organization for a minor violation of certain specified Exchange rules. Fines provide a meaningful sanction for rule violations when the initiation of a disciplinary procedure under

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<sup>10</sup> When a DMM sends an s-quote to establish a new best bid or best offer, the DMM's s-quote may end up executing immediately against dark liquidity inside the spread rather than being quoted. Absent rule relief, the s-quote would not be counted toward the DMM Unit's quoting requirement, even though the DMM's intent was to add liquidity to the market, and even though the s-quote in fact resulted in an execution. To address this, the Exchange added a provision to Rule 104 – NYSE Amex Equities that allows the Exchange to give credit to a DMM unit that did not meet its quoting requirement as a result of the continuous immediate execution of its s-quotes.

Disciplinary Rule 476 is unwarranted given the facts and circumstances of the violation, or when the violation calls for a stronger response informal discipline than an admonition letter.<sup>11</sup>

Currently, when a DMM fails to meet the affirmative quote obligations set forth in Rule 104(a)(1)(A) – NYSE Amex Equities, the Exchange’s only remedy is to bring a formal disciplinary proceeding pursuant to NYSE Amex Disciplinary Rule 476. This is the case whether or not the DMM has failed to meet its obligations once or many times and regardless of whether the DMM made a technical error or an intentional one.

The Exchange believes that the current regulatory approach for dealing with DMM quoting obligations is too inflexible. The Exchange recognizes that DMMs may, for many reasons, fail to meet their affirmative quote obligations under Rule 104(a)(1)(A) - NYSE Amex Equities. In some circumstances, formal disciplinary measures in accordance with NYSE Amex Disciplinary Rule 476 are warranted. However, in other instances such a proceeding may be unwarranted, and the Exchange is of the view that the addition of Rule 104(a)(1)(A) – NYSE Amex Equities to the list of rule violations and fines under Disciplinary Rule 476A will provide a more flexible and appropriate tool to enforce potential failure by DMMs to adhere to the quoting requirements set forth in the Rule, while preserving the Exchange’s discretion to seek formal discipline under the appropriate circumstances.

## 2. Statutory Basis

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<sup>11</sup> The Exchange’s current Minor Rule Violation Plan, NYSE Amex Disciplinary Rule 476A, is based on both NYSE Rule 476A, which was originally adopted by the NYSE and approved by the Commission in 1985, as well as legacy American Stock Exchange Rule 590, which was adopted by the Exchange’s predecessor and approved by the Commission in 1989. See Securities Exchange Act Release No. 34-[sic]21688 (January 25, 1985), 50 FR 5025-01 (February 5, 1985) (approving NYSE Rule 476A) and Securities Exchange Act Release No. 34-27543 (December 15, 1989), 54 FR 53223 (December 27, 1989) (approving American Stock Exchange Rule 590).

The Exchange believes that the proposed rule changes are consistent with, and further the objectives of, Section 6(b)(5) of the Act,<sup>12</sup> in that they are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule changes also further the objectives of Section 6(b)(6), in that they provide for appropriate discipline for violations of principles of the Act, the rules and regulations thereunder, and Exchange rules and regulations.

The Exchange believes that the proposed rule changes will provide the Exchange with greater regulatory flexibility to enforce the DMM quoting requirements set forth in Rule 104(a)(1)(A) - NYSE Amex Equities in a more informal manner while also preserving the Exchange's discretion to seek formal discipline for more serious transgressions as warranted.

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

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

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

No written comments were solicited or received with respect to the proposed rule change.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>13</sup> and Rule 19b-4(f)(6) thereunder.<sup>14</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant

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<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

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

#### IV. Solicitation of Comments

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

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number NYSEAmex-2009-47 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 NYSEAmex-2009-47. 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 the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. 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 NYSEAmex-2009-47 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).