

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58450; File No. SR-NYSE-2008-78)

September 2, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending NYSE Rule 18 to Allow NYSE Alternext US LLC to Participate in the Compensation Fund Established by the NYSE to Reimburse Claimants for Losses Associated with NYSE-Operated System Failures

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on August 26, 2008, the New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend Rule 18 (Compensation in Relation to Exchange System Failure) to provide, as part of the migration of NYSE Alternext US LLC (“NYSE Alternext”) trading onto systems and facilities operated by NYSE for the benefit of NYSE Alternext, that NYSE Alternext may participate in the compensation fund established by the Exchange to reimburse claimants for losses associated with Exchange-operated system failures. The text of the proposed rule change is available at NYSE’s principal office, the Commission’s Public Reference Room, and <http://www.nyse.com>.

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

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

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

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

This proposal is to amend NYSE Rule 18 to provide that NYSE Alternext will be permitted to participate in the compensation fund established by the Exchange to reimburse claimants for Exchange-operated system failures.

Background

As described more fully in a related rule filing, NYSE Euronext is expected to acquire The Amex Membership Corporation through a series of mergers (the "Mergers") pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the "Merger Agreement").<sup>4</sup> Upon completion of the Mergers, the American Stock Exchange LLC ("Amex"), currently a subsidiary of The Amex Membership Corporation, will become a subsidiary of NYSE Euronext and will

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<sup>4</sup> See Securities Exchange Act Release No. 58284 (August 1, 2008), 73 FR 46086 (August 7, 2008) (SR-Amex-2008-62).

continue to operate as a national securities exchange registered under the Act.<sup>5</sup> Following the Mergers, the name of the new exchange will be NYSE Alternext US LLC.<sup>6</sup>

In connection with the Mergers, NYSE Alternext will relocate all equities trading currently conducted on or through the Amex legacy trading systems and facilities located at 86 Trinity Place, New York, New York, to the NYSE trading systems and facilities located at 11 Wall Street, New York, New York (the “NYSE Alternext Trading Systems”), which will be operated by the NYSE on behalf of NYSE Alternext (the “Equities Relocation”). NYSE Euronext has determined that extending its existing trading systems and facilities to NYSE Alternext will be more efficient than maintaining two separate trading platforms for trading equities. At the same time, because NYSE Euronext reports its financial results on a consolidated basis, it does not plan to break out and allocate technology costs between New York Stock Exchange LLC (the registered self-regulatory organization that owns and operates the NYSE market) and NYSE Alternext US LLC (the registered self-regulatory organization that will own and operate the NYSE Alternext equities market after the merger is complete).

In connection with the Equities Relocation, NYSE Alternext will adopt NYSE Rules 1-1004 in substantially their existing form as the “NYSE Alternext Equities Rules.”<sup>7</sup> Because the NYSE Alternext Trading Systems will be operated by the NYSE for the benefit of NYSE Alternext, the NYSE Alternext Equities Rules will be substantively identical to the existing NYSE Rules, subject to certain changes necessary to apply such rules to NYSE Alternext.

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<sup>5</sup> 15 U.S.C. 78f.

<sup>6</sup> As noted, Amex will be renamed NYSE Alternext US LLC. For the avoidance of doubt, NYSE Alternext US LLC will be a self-regulatory organization distinct from NYSE Euronext’s European-market subsidiary, NYSE Alternext. See SR-Amex-2008-62.

<sup>7</sup> See Securities Exchange Act Release No. 58265 (July 30, 2008), 73 FR 46075 (August 7, 2008) (SR-Amex-2008-63).

Among the rules that NYSE Alternext is adopting is a version of NYSE's Rule 18, which establishes that NYSE Alternext members may be compensated for losses incurred as a result of an NYSE Alternext system malfunction (NYSE Alternext rules elsewhere provide that the exchange is not liable for losses resulting from the use of its systems or facilities), and prescribes the procedures for submitting claims to the fund. If there is a system malfunction, NYSE Alternext members will be able to submit claims to NYSE Alternext pursuant to that rule.

Under NYSE's Rule 18, the Exchange has established a monthly fund, described in more detail below, from which valid compensation claims are paid. Because of the consolidated accounting referenced above, however, NYSE Euronext does not intend to establish a separate compensation fund for NYSE Alternext members under NYSE Alternext's Rule 18. Instead, NYSE Alternext members who submit claims will be paid directly by NYSE Alternext. Through this filing, the Exchange is providing a mechanism for NYSE Alternext itself to seek reimbursement for the amounts that it undertakes to pay out to its members under its Rule 18 as a result of an NYSE system malfunction.

#### Current NYSE Rule 18 and Proposed NYSE Alternext Rule 18

NYSE Rule 18, adopted by the Exchange in 2007, provides a procedure for compensating claimants in the event of an Exchange system failure.<sup>8</sup> In its filing to amend its rules, Amex has

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<sup>8</sup> See Securities Exchange Act Release Nos. 56085 (July 17, 2007), 72 FR 40348 (July 24, 2007) (SR-NYSE-2007-09) (adopting NYSE Rule 18); 56718 (October 29, 2007), 72 FR 62506 (November 5, 2007) (SR-NYSE-2007-95) (approving certain amendments to NYSE Rule 18). NYSE Rule 18 defines an Exchange system failure as a "malfunction of the Exchange's physical equipment, devices, and/or programming which results in an incorrect execution or no execution of an order that was received in Exchange systems." However, misuse of Exchange systems is not considered such a system failure. See NYSE Rule 18(b). As proposed by Amex, upon the Equities Relocation, those systems and facilities will be deemed systems and facilities of NYSE Alternext for the purposes of administering NYSE Alternext's compensation plan.

proposed to adopt substantially the same rule. Accordingly, the process described below will be the same process for members of both NYSE and NYSE Alternext.

Both rules require claimants to informally notify their respective Exchanges of a suspected Exchange system failure by the opening of the next business day following an incident, followed by formal written notice no later than end of the third business day after the incident.<sup>9</sup> Net losses less than \$500 are not eligible for compensation. Upon receipt of a claim, Exchange staff from the Division of Floor Operations verify that (i) a valid order was accepted into the Exchange's systems, and (ii) an Exchange system failure occurred during the execution or handling of that order. If all of the criteria for submitting a claim have been met, the claim will be qualified for processing with all other eligible claims at the end of the calendar month in which the incident occurred.<sup>10</sup>

Each Exchange will appoint a Compensation Review Panel consisting of three Floor Governors and three Exchange employees, who will meet and review all qualified claims submitted for each calendar month and administer any payments to be made thereon. As part of their determinations, the respective Compensation Review Panels review the actions of the claimant before and after the error occurred in order to determine if any of the claimant's actions contributed to the loss sustained. The Compensation Review Panels may increase or reduce the amount deemed eligible for payment as a result of their review. All decisions by the respective

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<sup>9</sup> Because NYSE will operate the systems and facilities for NYSE Alternext, there may not be a separate "Division of Floor Operations" for NYSE Alternext. A member of the NYSE's Floor Operations staff will be cross-designated as the Floor Operations representative for NYSE Alternext for purposes of the NYSE Alternext rules that require interfacing with the Division of Floor Operations. NYSE Alternext members would submit their claims to this representative.

<sup>10</sup> See NYSE Rule 18(a).

Compensation Review Panel are final, except that where there is a deadlock, the final determination will be made by the Exchange CEO or a designee.<sup>11</sup>

#### Payment of Valid Claims

Currently, claims by NYSE members are paid from a compensation fund established by the Exchange. Each month the Exchange allots \$500,000 (“Monthly Allotment”) to be used for payments to NYSE member claimants who qualify for compensation under NYSE Rule 18. The Monthly Allotments do not aggregate and, in the event that less than \$250,000 of the Monthly Allotment is paid out in any given month, \$50,000 of the remaining Monthly Allotment (“Supplemental Allotment”) is added to a supplemental fund available for payment in subsequent calendar months. The Supplemental Allotment is used to pay NYSE member claims only after the Monthly Allotment is exhausted. If NYSE member claims are satisfied by the Monthly Allotment, the Supplemental Allotment, or any unused portion thereof, is carried forward.<sup>12</sup>

If the total dollar amount of approved NYSE member claims is less than the Monthly Allotment, then all claims will be paid in full. If the total amount of approved NYSE member claims exceeds the Monthly Allotment, then any Supplemental Allotment will be added to the Monthly Allotment in order to satisfy approved claims. In the event that the approved claims for a given month exceed the sum of the Monthly Allotment and any Supplemental Allotment, the approved claims will be paid out to claimants based on the proportion that each eligible claim bears to the total amount of all approved claims.<sup>13</sup>

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<sup>11</sup> See NYSE Rule 18(d) – (f).

<sup>12</sup> See NYSE Rule 18(c).

<sup>13</sup> See NYSE Rule 18(c).

### Proposed Amendments

The Exchange proposes to amend NYSE Rule 18 to add supplemental material permitting NYSE Alternext to participate alongside NYSE members in the compensation fund established by the Exchange to reimburse claimants for Exchange-operated system failures.

As described above, upon the Equities Relocation, all equities trading currently conducted on Amex legacy trading systems will take place on the NYSE Alternext Trading Systems, which are the same trading systems as those of the Exchange. As a result, any system failure on the Exchange will affect equally both NYSE members and member organizations and NYSE Alternext members and member organizations. Through the proposed amendments, the Exchange wants to ensure that members and member organizations of both SROs are treated fairly and equitably in the event of such a system failure, while maintaining and respecting the distinctions between them.

Under the proposed amendments, NYSE Alternext members and member organizations affected by the failure of the NYSE Alternext Trading Systems would submit claims for compensation to NYSE Alternext pursuant to the proposed NYSE Alternext Equities Rule 18.<sup>14</sup> NYSE Alternext members and member organizations would not be able to submit their claims directly to the NYSE. NYSE Alternext's Compensation Review Panel will then decide the validity of NYSE Alternext claims.

After its Compensation Review Panel has determined the number and amount of claims that NYSE Alternext deems valid, NYSE Alternext would submit to the NYSE a separate claim for each valid claim made by NYSE Alternext members or member organizations, subject to the same requirements under NYSE Rule 18 as any other NYSE claimant. NYSE Alternext will not,

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<sup>14</sup> See SR-Amex-2008-63.

however, be required to provide verbal notice of its claims to the Exchange's Division of Floor Operations.

In the event that the total amount of valid claims by NYSE members and NYSE Alternext exceeds the available funds, NYSE Alternext would receive a partial payment of claims pursuant to NYSE Rule 18(c), and NYSE Alternext's obligation to compensate its members for valid claims would be reduced by a like percentage. In view of (i) the probable volume of trading on NYSE Alternext; (ii) the fact that to date, the existing compensation fund has been sufficient to pay all valid claims in full; and (iii) the current amount available in the supplemental fund, the Exchange does not anticipate that the additional claims by NYSE Alternext would create a substantial burden on the fund in the event of a system malfunction.

In the event that a reduction is required, in calculating any such reduction, NYSE officials would consider each claim submitted by NYSE Alternext as a separate claim, so that all claimants from both the Exchange and NYSE Alternext will share equitably from the Compensation Fund. As described more fully in the related filing by Amex, payments against valid claims submitted by NYSE Alternext members are subject to being reduced by the amount that NYSE Alternext's claims against the NYSE fund are reduced.

The Exchange also proposes technical changes to NYSE Rule 18, including renumbering subparagraphs (c)(iv) – (c)(vi), accordingly.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act,<sup>15</sup> in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove

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

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 Exchange believes that the proposed amendments to NYSE Rule 18 will enhance the efficient execution of transactions and fair competition among broker-dealers and markets and provide a fair and reasonable process by which both NYSE members and member organizations and NYSE Alternext members and member organizations may petition for compensation when they suffer a loss due to a failure of Exchange-operated systems.<sup>16</sup>

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the NYSE consents, the Commission will:

- (A) by order approve such proposed rule change; or

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<sup>16</sup> The second paragraph of the Statutory Basis section appears in the Form 19b-4 portion of SR-NYSE-2008-78 filing, but not in Exhibit 1. In a phone call with Jason Harman, Consultant, NYSE Regulation on September 2, 2008, Sarah Albertson, Attorney, Division of Trading and Markets, SEC, confirmed that NYSE inadvertently omitted this paragraph of the Statutory Basis section in Exhibit 1. Mr. Harman asked that the paragraph be included as the second paragraph under the Statutory Basis heading in this Notice.

- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

#### 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-2008-78 on the subject line.

##### Paper Comments:

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

All submissions should refer to File Number SR-NYSE-2008-78. 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, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be

available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2008-78 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>17</sup>

Florence E. Harmon  
Acting Secretary

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