

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58877; File No. SR-NYSE-2008-108)

October 29, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change for a Six-Month Pilot Program to Establish a New Class of NYSE Market Participants That Will Be Referred to as “Supplemental Liquidity Providers” (“SLPs”) and Will Be Designated as Exchange Rule 107B

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on October 24, 2008, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been 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 a six-month pilot program (“Pilot” or “program”) to establish a new class of NYSE market participants that will be referred to as “Supplemental Liquidity Providers” (“SLPs”) and will be designated as Exchange Rule 107B.

The text of the proposed rule change is available at NYSE, [www.nyse.com](http://www.nyse.com), and the Commission’s Public Reference Room.

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

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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.

received on the proposed rule change. The text of these 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 aspects of such statements.

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

1. Purpose

With this rule filing, the “NYSE is proposing a six-month pilot program to establish a new class of market participants: Supplemental Liquidity Providers (“SLP”). SLPs will supplement the liquidity provided by Designated Market Makers (“DMMs”) when the NYSE “New Market Model” is approved by the SEC. SLPs may only enter orders electronically from off the Floor of the Exchange and may only enter such orders directly into Exchange systems and facilities designated for this purpose. All SLP orders must only be for the proprietary account of the SLP member organization. Thus, an SLP will not handle orders from public customers or otherwise act on an agency basis. They will have a 5% average quoting requirement per assigned security. Additionally, if an SLP posts displayed or non-displayed liquidity in its assigned securities that results in an execution, the Exchange will pay the SLP a financial rebate.

By establishing this new class of market participant, the NYSE is seeking to provide incentives for quoting and to add competition to the existing group of liquidity providers. By requiring SLPs to quote at the National Best Bid (“NBB”) or the National Best Offer (“NBO”) a percentage of the regular trading day in their assigned securities, and by paying a rebate when the SLP’s interest results in an execution, the Exchange is rewarding aggressive liquidity providers in the market. The Exchange believes that this rebate program will encourage the additional utilization of, and interaction with, the NYSE and provide customers with the premier venue for price discovery, liquidity, competitive quotes and price improvement.

## Responsibilities of the Supplemental Liquidity Provider

### SLP's 5% Average Quoting Requirement

An SLP is required to maintain a bid or an offer at the NBB or NBO (e.g., the “inside”) averaging at least 5% of the trading day for each assigned security in round lots in order to maintain its status as an SLP. If an SLP fails to meet the quoting requirement for three consecutive months, the Exchange may revoke the SLP status pursuant to Section (i)(1)(C)(iii) of the proposed Rule.

### SLP's 3% Average or More Quoting Requirement For Rebate Purposes

If an SLP posts liquidity in its assigned securities that results in an execution, the Exchange will pay the SLP a financial rebate of \$.0015 per share for such executions provided the SLP meets its monthly quoting requirement for rebates averaging at least 3% at the NBB or the NBO in its assigned securities in round lots (see Section (i) (“Non-Regulatory Penalties”) and Section (f) (“Calculation of Quoting Requirements”) of the proposed Rule). Meeting the 3% average quoting requirement for rebates does not satisfy the 5% average quoting requirement which SLPs must meet in order to remain in the SLP program. The rebate calculation is described in more detail below.

A member organization that acts as an SLP is not permitted to act as a Designated Market Maker (“DMM”) on the Floor of the Exchange in the same security. Thus, a member organization that acts as a DMM on the Floor may not also act as an SLP in those securities registered to the DMM unit.

Like all other member organizations of the Exchange, an SLP must abide by NYSE and SEC rules and regulations and must deal in a manner consistent with just and equitable principles of trade. SLPs are subject to regulatory oversight by NYSE Regulation and FINRA.

### Assigned Securities

During the proposed SLP Pilot program, the SLP Liaison Committee, as defined in Section (d)(1) of the proposed Rule, will initially assign a cross section of NYSE-listed securities to each SLP. The SLP Liaison Committee will determine which securities will be assigned to an SLP and the number of securities assigned to each SLP. The eligible securities available to be assigned to SLPs will initially include five hundred (500) of the most actively traded NYSE-listed securities. Depending upon the success of the SLP program, the Exchange will gradually add more NYSE-listed securities to the program, with the intent of including all NYSE-listed securities to the program.

The Exchange believes that the Pilot will provide the Exchange with a unique opportunity to monitor the success of the SLP incentives by starting with a smaller cross section of securities. By doing so, the Exchange will be better equipped to address actual and potential administrative and operational problems without unnecessary risk to the Exchange and to its customers. The Pilot will also provide the Exchange with the opportunity to identify and address any such problems and make beneficial changes to the SLP program before expanding the program.

In addition to its usefulness to the Exchange, the Pilot will provide the SLPs with essential practical experience with the new program and enable the SLPs to become proficient in the SLP role before expanding the assigned securities to all NYSE-listed securities.

The SLP Liaison Committee, in its discretion, will assign one or more SLPs to each security depending upon the trading activity of the security. The SLP Liaison Committee will likely assign a greater number of SLPs to more actively traded securities.

### Qualifications of the Supplemental Liquidity Provider

A member organization of the Exchange must have the following qualifications in order to obtain SLP status:

- (1) adequate technology to support electronic trading through the related systems and facilities of the Exchange and report qualifying trading activity to Exchange systems utilizing unique and separate mnemonics specifically dedicated to SLP trading activity;
- (2) adequate trading infrastructure to support SLP trading activity, which includes support staff to maintain operational efficiencies in the SLP program and adequate administrative staff to manage the member organization's SLP program;
- (3) quoting performance that demonstrates an ability to meet the 5% quoting requirement in each assigned security;
- (4) a disciplinary history that is consistent with just and equitable business practices; and
- (5) the business unit of the member organization acting as an SLP must have in place adequate information barriers between the SLP unit and the member organization's customer, research and investment banking business.

Adequate Technology for Trading and Reporting: Because the SLP will only be permitted to trade electronically from off the Floor of the Exchange, a member organization's off-Floor technology must be fully automated to accommodate the Exchange's trading and reporting systems that are relevant to operating as an SLP. If a member organization is unable to support the relevant electronic trading and reporting systems of the Exchange for SLP trading activity, it will not qualify as an SLP.

Adequate Trading Infrastructure: Upon applying for status as an SLP, a member organization must have adequate trading infrastructure, which includes support staff to maintain

operational efficiencies in the SLP program and adequate administrative staff to manage the member organization's SLP program.

Disciplinary History: Upon applying for SLP status, a member organization's disciplinary history must reflect conduct that is consistent with just and equitable business practices.

Quoting Performance: Upon applying for SLP status, a member organization's ability to meet the 5% quoting requirement may be demonstrated by past and or current trading activity. If an applicant has not demonstrated an ability to meet the 5% quoting requirement to the satisfaction of the SLP Liaison Committee, the applicant may not qualify as an SLP.

Information Barriers: The business unit of the SLP that submits orders on behalf of the member organization must have in place adequate information barriers between the SLP unit and the member organization's customer, research and investment banking business.

#### SLP Application Process

To become an SLP, a member organization must submit an SLP application form with all supporting documentation to the SLP Liaison Committee. The SLP Liaison Committee will determine whether an applicant is qualified to become an SLP based on the qualifications described in Section (c) of the proposed Rule ("Qualifications of a Supplemental Liquidity Provider"). The qualifications focus on the adequacy of the applicant's trading and reporting technology and trading infrastructure. The applicant's disciplinary history will be considered as well.

After submission of the SLP application form and supporting documentation, the SLP Liaison Committee will notify the applicant member organization of its decision. If an applicant

is approved by the SLP Liaison Committee to receive SLP status, the applicant must establish connectivity with relevant Exchange systems and facilities.

The processing of all applications may be suspended when the SLP Liaison Committee has determined that there is a sufficient number of SLPs assigned to each eligible security in the SLP program (see Section (g)(2) of the proposed Rule).

If an applicant is disapproved or “disqualified,” pursuant to Section (i)(2) of the proposed Rule, by the SLP Liaison Committee, such applicant may request an appeal of such disapproval or disqualification by the SLP Panel as provided in Section (j) (“Appeal of Non-Regulatory Penalties”) of this Rule, and/or reapply for SLP status three (3) months after the month in which the applicant received a disapproval or disqualification notice from the Exchange (see Section (d)(6) of the proposed Rule).

#### Voluntary Withdrawal of SLP Status.

An SLP may withdraw from the status of an SLP at any time by giving notice to the SLP Liaison Committee, the Market Surveillance Division of NYSE Regulation, Inc. and the NYSE Operations Division (see Section (e) (“Voluntary Withdrawal of Supplemental Liquidity Provider Status” of the proposed Rule). However, withdrawal of SLP status will not become effective until the withdrawing SLP’s assigned securities are reassigned to other SLPs. After the notice of withdrawal is received by the SLP Liaison Committee, the Market Surveillance Division and the NYSE Operations Division, the SLP Liaison Committee will reassign said securities as soon as practicable but no later than 30 days of the date said notice is received by the SLP Liaison Committee, the Market Surveillance Division and the NYSE Operations Division. In the event the reassignment of securities takes longer than the 30-day period, the withdrawing SLP will have no obligations under this Rule 107B and will not be held responsible

for any matters concerning its previously assigned SLP securities upon termination of the 30-day period.

#### Quoting Requirements of the Supplemental Liquidity Provider

In order to maintain SLP status, an SLP is required to maintain a bid or an offer at the NBB or NBO on the Exchange averaging at least 5% of the trading day in round lots for each assigned security.<sup>4</sup> While the SLP may provide displayed and non-displayed liquidity (e.g., reserve and dark orders), the 5% average quoting requirement can only be satisfied when an SLP posts displayed liquidity in its assigned securities in round lots at the NBB or the NBO. Thus, non-displayed liquidity will not be counted as credit towards the 5% quoting requirement. Additionally, tick sensitive orders (i.e., “Sell Plus,” “Buy Minus” (see Rule 13) and “Buy Minus Zero Plus”) will not be counted as credit towards the 5% quoting requirement.

In order for an SLP to be entitled to a rebate, an SLP must post liquidity on the Exchange that executes against incoming orders and meet the monthly minimum quoting requirement for rebates averaging at least 3% at the NBB or the NBO in round lots in its assigned securities (see Section (b) (“Financial Rebates for Executed Transactions”) in the proposed Rule). If the SLP does not meet a minimum monthly quoting requirement averaging at least 3%, an SLP will not be entitled to a rebate on executed volume in that given month in that particular affected security (see Section (i) (“Non-Regulatory Penalties”) of the proposed Rule).

The SLP is not subject to any minimum or maximum quoting size requirement apart from the requirement that an order be for at least one round lot (see Section (f)(2) of the proposed Rule).

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<sup>4</sup> See Section (a) of the proposed Rule.



An SLP must use its SLP mnemonic when trading as an SLP in its assigned securities in order to obtain credit for their SLP trading activity (see Section (f)(2) of the proposed Rule). Quoting and rebate credit will be measured only by using the SLP's unique mnemonics specifically designated for SLP trading activity.

Calculation of the Quoting Requirements:

The SLP's quoting requirements will not be in effect in the first month the SLP operates as an SLP. The Exchange will provide the SLP with a one-month grace period to allow preparation time for the SLP. Therefore, this quoting requirement will not take effect until the second month of an SLP's operation as an SLP.

Beginning with the second month an SLP is operating as an SLP, an SLP must satisfy the 5% quoting requirement for each assigned security.<sup>5</sup> The SLP Liaison Committee will determine whether an SLP has met its quoting requirement for the trading days<sup>6</sup> in a calendar month by calculating the following:

(1) the "Daily NBB Quoting Percentage" by determining the percentage of time an SLP has at least one round lot of displayed interest in an Exchange bid at the NBB during each trading day for a calendar month;

(2) the "Daily NBO Quoting Percentage" by determining the percentage of time an SLP has at least one round lot of displayed interest in an Exchange offer at the NBO during each trading day for a calendar month;

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<sup>5</sup> The Exchange Strategic Analysis Department will be responsible for generating SLP performance data and providing such data to the SLP Liaison Committee in order to determine which SLPs are meeting their quoting requirements and are eligible for financial rebates.

<sup>6</sup> For purposes of Section (f)(1) of the proposed rule text (Exhibit 5), "trading day" shall mean any day on which the Exchange is scheduled to be open for business. Days on which the Exchange closes prior to 4:00 p.m. (Eastern Time) for any reason, which may include any regulatory halt or trading halt, shall be considered a trading day.

(3) the “Average Daily NBBO Quoting Percentage” for each trading day by summing the “Daily NBB Quoting Percentage” and the “Daily NBO Quoting Percentage” in each assigned security then dividing such sum by two; and

(4) the “Monthly Average NBBO Quoting Percentage” for each assigned security by summing the security’s “Average Daily NBBO Quoting Percentages” for each trading day in a calendar month then dividing the resulting sum by the total number of trading days in such calendar month.

**Example of Quoting Requirement Calculation**

Below is an example of a quoting requirement calculation. For purposes of this example, it is assumed that SLP No. 1 has two assigned securities, A and B, and that there were 5 trading days in the selected calendar month.

The “Average Daily NBBO Quoting Percentage” for SLP No. 1 is calculated for each security by summing the daily NBB and NBO of each security for that day and dividing that number by two:

<b>Security A</b>				
Trading Days	NBB	NBO	Calculation of “Average Daily NBBO Quoting Percentage” for SLP No. 1	“Average Daily NBBO Quoting Percentage”
T1	4%	6%	$4\% + 6\% = 10\%$ divided by 2 = 5%	5%
T2	3%	5%	$3\% + 5\% = 8\%$ divided by 2 = 4%	4%
T3	4%	4%	$4\% + 4\% = 8\%$ divided by 2 = 4%	4%
T4	6%	8%	$6\% + 8\% = 14\%$ divided by 2 = 7%	7%
T5	5%	5%	$5\% + 5\% = 10\%$ divided by 2 = 5%	5%

<b>Security B</b>				
Trading Days	NBB	NB O	Calculation of “Average Daily NBBO Quoting Percentage” for SLP No. 1	“Average Daily NBBO Quoting Percentage”
T1	5%	7%	5% +7% = 12% divided by 2 = 6%	6%
T2	4%	6%	4% +6% = 10% divided by 2 = 5%	5%
T3	6%	8%	6% +8% = 14% divided by 2 = 7%	7%
T4	7%	9%	7% +9% = 16% divided by 2 = 8%	8%
T5	9%	9%	9% +9% = 18% divided by 2 = 9%	9%

The “Monthly Average NBBO Quoting Percentage” for each security is then calculated by summing the security’s “Average Daily NBBO Quoting Percentages” for all five trading days of the calendar month and then dividing the resulting total by the number of trading days in the calendar month (in this instance 5).

<b>Security A</b>						
“Average Daily NBBO Quoting Percentage”					Calculation of “Monthly Average NBBO Quoting Percentage” for SLP No. 1	“Monthly Average NBBO Quoting Percentage”
T1	T2	T3	T4	T5		
5%	4%	4%	7%	5%	5%+4%+4%+7%+5% = 25% divided by 5= 5%	5%

<b>Security B</b>						
“Average Daily NBBO Quoting Percentage”					Calculation of “Monthly Average NBBO Quoting Percentage” for SLP No. 1	“Monthly Average NBBO Quoting Percentage”
T1	T2	T3	T4	T5		
6%	5%	7%	8%	9%	6%+5%+7%+8%+9% = 35% divided by 5= 7%	7%

#### Financial Rebates for Executed Transactions

When an SLP posts liquidity, displayed or non-displayed, on the Exchange in its SLP assigned securities and such liquidity executes against an incoming order, the SLP will receive a financial rebate for that executed transaction provided the SLP has met its rebate quoting requirement averaging at least 3% at the NBB or the NBO in each assigned security pursuant to

Section (i)(1)(A) and (B) (“Non-Regulatory Penalties”). An SLP will only receive a rebate when it has met the monthly 3% or better quoting requirement in its assigned securities and the SLP’s posted displayed or non-displayed liquidity results in an execution.

#### SLP Rebate Calculation

The SLP rebate will be \$.0015 per share on executed volume when the SLP provides liquidity.<sup>7</sup> The rebate will be paid for displayed and non-displayed orders provided that the SLP meets the quoting requirement averaging 3% or more at the NBB or NBO in its assigned securities for a given month. If an SLP does not meet the average quoting requirement described above, such SLP will not be entitled to a rebate. As discussed previously, if an SLP does not meet its quoting requirement averaging 5% at the NBB or the NBO for each assigned security for 3 consecutive months, such SLP may be disqualified from SLP status. The Exchange will track the volume and quoting requirement of SLPs by their designated SLP mnemonics.

Except for the rebate, all other SLP fees are the same as existing customer fees on the Exchange (see the NYSE Price List for equities on the NYSE website).

#### SLP Parity with other Market Participants Pursuant to Rule 72

#### Proposed New Market Model

In the New Market Model Exchange systems will be responsible for share allocation and thus will create interest files for each market participant. Individual Floor brokers and the DMM registered in the security shall each constitute single participants. All off-Floor orders entered in Exchange systems at the Exchange BBO shall together constitute a single participant (“Book Participant”) for the purpose of share allocation. SLP orders will be in the “Book Participant”

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<sup>7</sup> The Exchange will file a separate fee filing with the SEC pursuant to the provisions of Section 19b-4 that will outline the SLP rebate program described above. Thereafter, the calculation and amount of the SLP rebate (\$.0015 per executed share) will be published in the NYSE Price List available on the NYSE website.

category pursuant to Rule 72 of the proposed New Market Model (see Section (f)(4) of the proposed Rule).

#### Market Data and Trading Information Available to the SLP

The universe of trading information and market data available to the SLP will include market data published by the NYSE and all other automated trading centers (as defined in Rule 600 of Regulation NMS), trading information published on the Consolidated Tape and on the NYSE Open Book<sup>®</sup> (“Open Book”).<sup>8</sup> Thus, the SLP will have the same published trading information and market data that all other NYSE customers have available to them.

#### Non-Regulatory Penalties

If an SLP fails to meet the 5% average quoting requirement for any assigned security, the SLP may be subject to non-regulatory penalties imposed by the SLP Liaison Committee (see Section (i) of the proposed Rule). Such non-regulatory penalties include: 1) denial of the financial rebate; 2) removal of one or more assigned securities from the SLP; and 3) disqualification. These non-regulatory penalties and the conditions under which such penalties are imposed may be appealed by an SLP as provided in Section (j) (“Appeal of a Non-Regulatory Penalty”) of the proposed Rule and described in more detail below.

#### Penalties for Quoting Less than 5% in a Given Calendar Month:

In a given calendar month, if an SLP maintains a quote at the NBB or NBO averaging 3% of the trading day, but less than the average of 5% of the trading day in any assigned security, the SLP will receive a financial rebate for that calendar month for executed transactions in that

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<sup>8</sup> The NYSE Open Book is provided by the NYSE to vendors and customers in two modes. The first displays the depth of the market refreshed every five seconds. The second displays the depth of the market in real time. NYSE Open Book discloses limit order interest at the price at the best bid and offer and at prices below the best bid and above the best offer.

particular security as described in Section (b) (“Rebates for Executed Transactions”) of the proposed Rule. Failure to meet the 5% quoting requirement for each assigned security in that month will be counted towards the three-month disqualification period provided in paragraph (i)(C) of the proposed Rule.

In a given calendar month, if an SLP maintains a quote at the NBB or the NBO averaging less than 3% of the regular trading day in an assigned security, the SLP will not receive the financial rebate for that month for transactions executed in that particular assigned security. The failure to meet the 5% average quoting requirement for any assigned security in that month will also be counted towards the three-month disqualification period.

If an SLP fails to meet the 5% quoting requirement for three consecutive calendar months in any assigned security, the SLP Liaison Committee may, in its discretion, take the following non-regulatory action:

- 1) revoke the assignment of the affected security(ies);
- 2) revoke the assignment of an additional, unaffected security from an SLP; or
- 3) disqualify a member organization’s status as an SLP.

**Disqualification Determinations:**

In the second consecutive calendar month that an SLP fails to meet the 5% quoting requirement, the SLP Liaison Committee’s will notify the SLP in writing that the SLP may be disqualified if it fails to meet the quoting requirement the third consecutive month.<sup>9</sup> If the SLP fails to meet the 5% quoting requirement for a third consecutive month, the SLP may be disqualified from SLP status.

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<sup>9</sup> The SLP Liaison Committee will be responsible for issuing the letter to an SLP that fails to meet its quoting requirement for three consecutive months. It will also be responsible for advising an SLP of its eligibility or ineligibility to become an SLP.

When disqualification determinations are made, the SLP Liaison Committee will provide a disqualification notice to the member organization informing the member organization of its disqualification as an SLP.

If a member organization is disqualified from its status as an SLP pursuant to Section (i)(1)(C)(iii) of the proposed Rule, the member organization may appeal the disqualification pursuant to Section (j) (“Appeal of a Non-Regulatory Penalties”) of the proposed Rule, or re-apply for SLP status in accordance with Section (d)(6) (“Re-application for SLP Status”) of the proposed Rule. However, the re-application processes may not begin until three calendar months after the month in which the member organization received its disqualification notice.

#### Appeal of Non-Regulatory Penalties

An SLP may request an appeal of the decision to impose a non-regulatory penalty as provided in Section (j) of the proposed Rule. Upon receiving a request for an appeal, a panel of NYSE employees referred to as the “SLP Panel” will review the decision to impose non-regulatory penalties. The SLP Panel shall consist of the NYSE's Chief Regulatory Officer (“CRO”), or a designee of the CRO, and two (2) officers of the Exchange designated by the Head of the U.S. Markets Division.

The SLP Panel will review the facts of the subject non-regulatory penalty and render a decision as to the correctness of the decision to impose the penalty. The SLP Panel may overturn or modify an action taken by the SLP Liaison Committee, and all determinations by the SLP Panel will constitute final action by the Exchange on the disputed matter.

#### Regulatory Oversight of SLPs

Member organizations that act as SLPs will be subject to regulatory oversight by NYSE Regulation and FINRA.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),<sup>10</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>11</sup> in particular, in that it is 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 Exchange believes the proposed Rule is consistent with these principles in that it seeks to establish a new class of market participant that will provide additional liquidity to the market and add competition to the existing group of liquidity providers. The NYSE believes that by requiring an SLP to quote at the NBB or the NBO a percentage of the regular trading day in their assigned securities, and by paying an SLP a rebate when its posted interest results in an execution, the Exchange is rewarding aggressive liquidity providers in the market, and by doing so, the Exchange will encourage the additional utilization of, and interaction with, the NYSE and provide customers with the premier venue for price discovery, liquidity, competitive quotes and price improvement.

### 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.

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<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(5).



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

The proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and Rule 19b-4(f)(6) thereunder<sup>13</sup> because the foregoing proposed rule change: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms, does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

The Exchange states that the Commission recently issued interpretative guidance regarding the rule-filing process (the “Rule Streamlining Guidance”).<sup>14</sup> In that release, the Commission recognized the need to expedite the rule-making process for self-regulatory organizations in order to help the U.S. capital markets remain competitive both domestically (with ECNs, ATs and other less-regulated venues), and internationally:

The national securities exchanges’ need to implement quickly new trading rules has become increasingly critical, particularly given the evolving role of securities exchanges, innovations in U.S. and cross-border trading, and the increasingly competitive financial marketplace.<sup>15</sup>

The Exchange states that, in recognition of the highly competitive environment for national securities exchanges today, the Commission gave interpretative guidance on Section 19(b)(3)(A) and Rule 19b-4(f), which permit SROs to designate proposed rule changes as

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<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> See Securities Exchange Commission Release No. 58092 (July 3, 2008), 73 FR 40144 (July 11, 2008) (“Commission Guidance and Amendment to the Rule Relating to Organization and Program Management Concerning Proposed Rule Changes by Self-Regulatory Organizations”).

<sup>15</sup> Id. at page 12 [sic].

“immediately effective” without the formal approval process provided elsewhere in the Act. In particular, the Commission “encourage[d] exchanges to consider filing a broader range of proposed rules” based on the standards outlined in Rule 19b-4(f)(6).<sup>16</sup> These standards generally permit immediate effectiveness for trading rule changes that meet certain technical requirements<sup>17</sup> and do not “significantly affect the protection of investors or the public interest,” or “impose any significant burden on competition.”

The proposed rule meets the immediate effectiveness criteria in the Rule Streamlining Guidance because it is consistent with previously approved rules for market makers

As explained more fully in the Rule Streamlining Guidance, proposed trading rules can be filed for immediate effectiveness if each policy issue raised by the proposed trading rule “(i) has previously been considered by the Commission when the Commission approved another trading rule (that was subject to notice and comment) pursuant to 19(b)(2) of the Exchange Act, and (ii) the rule change resolves such policy issue in a manner consistent with such prior approval.”<sup>18</sup>

The Exchange believes that the proposed rule filing meets both the statutory standards for filings under Rule 19b-4(f)(6) and the standards set out in the Rule Streamlining Guidance. In particular, and as explained more fully below, the policies raised in this proposed rule:

- (1) have previously been considered by the Commission when the Commission approved other market maker rules after public notice and comment under Section 19(b)(2) of the Exchange Act; and

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<sup>16</sup> 17 CFR 240.19b-4(f)(6)(i) and (ii).

<sup>17</sup> Filings must be submitted for pre-clearance at least five days prior to filing, and must not become effective, on their terms, until the thirtieth day after the filing date.

<sup>18</sup> Id. at page 14 [sic].

(2) the rule resolves such policy issues in a manner that is consistent with such prior approvals.

According to the Exchange, the concepts contained in the proposed rule are not new. Indeed, the Exchange notes that the Commission has had extensive opportunities to consider and hear comment on how market makers should interact with markets and the appropriate rewards for those services.<sup>19</sup> As a result, the Exchange believes that each policy issue raised by proposed Rule 107B “has previously been considered by the Commission when the Commission approved another trading rule (that was subject to notice and comment) pursuant to 19(b)(2) of the Exchange Act.”

While the SLP is not a “market maker” per se, the Exchange believes that the proposed SLP rule filing shares most, if not all, of the same policy issues previously commented upon and resolved in some of the market maker rules referred to in the Rule Streamlining Guidance at footnote 44 and other rules that were filed “regular way,” noticed, commented upon and approved by the SEC.<sup>20</sup> The Exchange believe that, by analogy, the market maker policy issues are the same or similar to those of the SLP, but to a lesser extent. According to the Exchange, a market maker may have more obligations and more trading advantages than an SLP, but the quoting requirements of a market maker and an SLP are not materially different. The same

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<sup>19</sup> Footnote 44 of the Rule Streamlining Guidance includes cites to several SRO market maker rules that were filed “regular way” pursuant to Section 19(b)(2) of the Act.

<sup>20</sup> The filings referenced herein include some of those noted by the Commission in footnote 44 of the Rule Streamlining Guidance, see Securities Exchange Act Release Nos. 53652 (April 13, 2006), 71 FR 20422 (April 20, 2006) (SR-Amex-2005-100) and 54580 (October 6, 2006), 71 FR 60781 (October 16, 2006) (SR-ISE-2006-40), as well as other filings submitted, reviewed and approved by the Commission pursuant to Section 19b-2, See Securities Exchange Act Release Nos. 43004 (June 30, 2000), 65 FR 43060 (July 12, 2000) (SR-CBOE-1998-54), 50003 (July 12, 2004), 69 FR 43028 (July 19, 2004) (SR-CBOE-2004-24) and 53635 (April 12, 2006), 71 FR 20144 (April 19, 2006) (SR-Amex-2005-75).

argument may be made for the rebate. A market maker rebate for posting liquidity is not materially different in policy or application than the SLP rebate. Therefore, the Exchange contends that the resolution and approval of market maker policies is analogous to the resolution of SLP policies. The policy issues that have been “resolved” in prior market maker filings include:

- application process for market maker and SLP status;<sup>21</sup>
- market maker qualifications for on Floor or off-Floor electronic trading;<sup>22</sup>
- process for voluntary withdrawal from the market maker program;<sup>23</sup>
- appeal process if disapproved or disqualified;<sup>24</sup>
- process for allocation of assigned securities;<sup>25</sup>
- quoting requirement at the NBB or the NBO a percentage of the trading day for proprietary accounts;<sup>26</sup>
- creation of information barriers to prevent prohibited sharing of trading information;<sup>27</sup>
- imposition of penalties when quoting requirement is not met;<sup>28</sup> and
- appeal process when penalties are imposed.<sup>29</sup>

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<sup>21</sup> See AMEX Rules 993 and 994 -ANTE (concerning Supplemental and Remote Registered Options Traders (“SROT’s” and “RROT’s”), respectively); ISE Rule 902 (concerning Second Market Competitive Market Makers (“SMCMMs”)); CBOE Rules 8.83 and 8.92 (concerning Designated Primary Market Makers (“DPMs”) and e-DPMs, respectively).

<sup>22</sup> See AMEX Rules 993 and 994 -ANTE; ISE Rule 902; CBOE Rules 8.83 and 8.92.

<sup>23</sup> See AMEX Rules 993 and 994 -ANTE; CBOE Rule 8.83.

<sup>24</sup> See AMEX Rule 993-ANTE.

<sup>25</sup> See AMEX Rules 993 and 994 -ANTE; CBOE Rules 8.84 and 8.92.

<sup>26</sup> See AMEX Rules 993 and 994 -ANTE; ISE Rule 904; CBOE Rules 8.85 and 8.93.

<sup>27</sup> See AMEX Rules 993 and 994 -ANTE; CBOE Rules 8.91 and 8.93.

<sup>28</sup> See AMEX Rules 993 and 994 -ANTE; CBOE Rules 8.90 and 8.94.

<sup>29</sup> See AMEX Rules 993 and 994 -ANTE; CBOE Rules 8.90 and 8.94.

The Exchange acknowledges that the cited market maker rules do not specifically discuss rebates for executions of quoted liquidity, which is offered in the proposed SLP rule. However, the Exchange argues that other SRO rule filings relating to pricing incentive programs for market makers have been submitted pursuant to Section 19(b)(3)(a)(f)(2) and received SEC approval.<sup>30</sup>

For example, on NYSE Arca, the exchange pays a rebate to the Lead Marker Maker (“LMM”) and customers for executions on posted liquidity.<sup>31</sup> The Exchange itself currently offers “liquidity provision payments” to specialists, which are similar to rebates, based on Exchange revenue and the amount of liquidity posted by each specialist unit.<sup>32</sup> Rebates for liquidity providers have become a common industry practice and are utilized by most, if not all, trading venues including NASDAQ, BATS, Direct Edge and others.<sup>33</sup>

To the extent that an SLP’s quoting requirement is one of the services also provided by a market maker, approving a commensurate rebate for an SLP is analogous to the rebates previously approved by the Commission for one aspect of a market maker’s services.

In view of the analogous precedents established in the market maker rules, the Exchange believes that its proposed rule for SLPs presents no novel issues and that the compensation scheme is consistent with both industry practice and prior approval of market maker rules. Accordingly, the Exchange believes that immediate effectiveness would be appropriate under the Exchange Act, the Exchange Act rules, and the Rule Streamlining Guidance.

The proposed rule meets the immediate effectiveness criteria in the Rule Streamlining Guidance for rules relating to market participants

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<sup>30</sup> See SR-NYSE Arca-2008-36 (approving Market Maker Post Liquidity Incentive credits) and SR-NASDAQ-2007-61 (approving incentives for market makers for ETFs and ILSs).

<sup>31</sup> See NYSE Arca Equities Fee Schedule.

<sup>32</sup> See SR-NYSE-2007-78.

<sup>33</sup> See the following web sites for price lists: NASDAQ ([www.nasdaqtrader.com](http://www.nasdaqtrader.com)); BATS ([www.batstrading.com](http://www.batstrading.com)); Direct Edge ([www.directedge.com](http://www.directedge.com)).

The Exchange believes that the proposed rule also qualifies for immediate effectiveness because it is a trading rule that addresses the obligations of market participants (e.g., SLPs), would have the effect of strengthening the market, and provides a reward to SLPs that is not disproportionate to the services they provide to the market.

At the outset, the Exchange notes that in the Rule Streamlining Guidance, the Commission provided examples of proposed rule filings that are “appropriate” for immediate effectiveness in the rule streamlining publication, and specifically included proposed rule filings that address market maker obligations:

The Commission carefully reviews special advantages provided to market makers when it considers exchange trading rule proposals. Market makers can play an important role in providing liquidity to the market, and an exchange can appropriately reward them for that as well as the services they provide to the exchange’s market, as long as the rewards are not disproportionate to the services provided. For example, a proposed trading rule change that strengthens the market while providing benefits to market makers is eligible for immediate effectiveness if the benefits conferred are offset by corresponding responsibilities to the market that provide customer trading interest a net benefit.<sup>34</sup>

Thus, under Commission precedent, a rule filing involving incentives for market makers would be appropriate for immediate effectiveness if the reward to market makers is in line with the services or benefits that the market maker is providing to the market.

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<sup>34</sup> See Rule Streamlining Guidance, page 16 [sic], paragraph 2, “Market Maker Obligations.”

The proposed rebate to SLPs is not disproportionate to the benefit they provide

The Exchange asserts that the payment of rebates to market makers has long been considered by the SEC to be an appropriate incentive for adding liquidity to the market thereby improving the market. As noted more fully above, the SEC has previously approved the payment of incentives to market makers on Nasdaq,<sup>35</sup> NYSE Arca,<sup>36</sup> Direct Edge<sup>37</sup> and BATS,<sup>38</sup> among others. The Exchange also notes that previous NYSE fee filings for rebates have been submitted to the SEC pursuant to Section (f)(2), and have become immediately effective. For example, Nasdaq submitted a filing that became immediately effective upon filing, which had the same effect as the NYSE's proposed SLP filing. In particular, SR-NASDAQ-2007-61, which is similar to NYSE Arca's Designated Market Maker filing (see NYSE Arca Equities Rule 7.24 (b) which refers to DMMs who also act as LMMs),<sup>39</sup> requires the Designated Liquidity Provider ("DLP") to maintain a "minimum performance standard" in which the DLP must quote a percentage of the trading day at the NBB or the NBO in ETFs and ILSs. If the DLP quotes a certain percentage of the trading day, it will receive a 40 cent rebate for posting liquidity and a 25 cent fee for taking liquidity. In this fee filing, NASDAQ indicated that by allocating pricing benefits to certain market makers who have "tangible commitments to the market," the program would encourage, among other things, development of new financial products. In reviewing Nasdaq's proposal, the Exchange believes that the SEC evaluated the balance struck between the rewards obtained and services provided by the various market makers.

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<sup>35</sup> See SR-Nasdaq-2007-61. See also "[www.nasdaqtrader.com](http://www.nasdaqtrader.com)."

<sup>36</sup> See SR-NYSE Arca-2008-36.

<sup>37</sup> See Direct Edge Price List at "[www.directedge.com](http://www.directedge.com)."

<sup>38</sup> See BATS Price List at "[www.batstrading.com](http://www.batstrading.com)."

<sup>39</sup> See NYSE Arca Equities Rule 7.24.

Based on the rationale of previous rule filings for market maker rebates, the Exchange contends that the proposed SLP rebate for executions of posted liquidity is not “disproportionate to the services provided” by the SLP. It is important to note that the SLP rebate<sup>40</sup> is the only benefit the SLP earns when posted liquidity results in an execution. As discussed earlier, the SLP rebate will be \$.0015 per share on executed volume when the SLP posts liquidity to the market provided that the SLP meets the quoting requirement averaging at least 3% at the NBB or NBO in its assigned securities for a given month.<sup>41</sup> The rebate will be paid for displayed and non-displayed orders. If an SLP does not meet the average quoting requirement of at least 3% described above, such SLP will not be entitled to a rebate. Further, if an SLP does not meet its monthly quoting requirement averaging 5% at the NBB or the NBO for each assigned security for 3 consecutive months, such SLP may be disqualified from SLP status. Except for the rebate, all other SLP fees are the same as existing customer fees on the Exchange.

The Exchange notes that the proposed rebate is commensurate with the quoting requirements the SLP has for each assigned security as the SLP has no informational or trading advantage in the market. SLPs are basically customers with quoting requirements that may receive a financial incentive when posted SLP liquidity results in an execution. Under the proposed Rule, even if an SLP meets its quoting requirement averaging 3% or more in a given month, it may not receive a rebate if the posted liquidity does not result in an execution. Further, the Exchange believes that, while it is likely that when an SLP posts liquidity to the market the posted liquidity will result in executions, the SLP will not receive a rebate for such executions if it does not meet its average monthly quoting requirement of at least 3%.

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<sup>40</sup> The SLP rebate calculation will be provided in a subsequent fee filing by the Exchange, and when filed with the SEC, the rebate calculation will appear on the Exchange’s published Price List.

<sup>41</sup> The Exchange will file a separate fee filing pursuant to Section 19b-4.



The Exchange believes that the SLP rebate is commensurate with their limited role in the market. For example, NYSE Arca has tiered rebates: the “Market Maker Post Liquidity Incentive Credit,” which is a fee credit that applies to Market Makers (“MMs”) and LMMs, is substantially higher than those fee credits available to customers who have no affirmative obligations. Additionally, when posting liquidity on Arca, LMMs are entitled to 40 cents per 100 shares, while customer rebates, which are tiered, are only 22 cents and 23 cents per 100 shares.

Accordingly, the Exchange submits that this proposed filing qualifies for immediate effectiveness pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) because the introduction of SLPs to the Exchange would strengthen the market while providing benefits to customers, the SLP’s quoting requirement will increase liquidity in the market and enhance trading opportunities for customers and the rebate, which is conditioned on executions of posted liquidity, is commensurate with the services the SLP will provide to the market. Additionally, as discussed above, the Exchange believes that the Commission has already approved the introduction of similar classes of market participants on various exchanges in the past (e.g., AMEX, CBOE, ISE, NASDAQ, NYSE Arca and NYSE) which, while filed regular way, were ultimately approved by the Commission. The Exchange therefore proposes that this rule should be made immediately effective upon filing in keeping with the policies and guidance of the Commission's rule streamlining publication.

Based on the foregoing, the Exchange submits that this proposed filing qualifies for immediate effectiveness pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) because it is based on the provisions of similar rule filings which, while filed regular way, were ultimately approved by the Commission. The Exchange proposes that this rule should be made

immediately effective upon filing in keeping with the policies and guidance enumerated in the Commission's Rule Streamlining Guidance.

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.<sup>42</sup> However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay, as specified in Rule 19b-4(f)(6)(iii),<sup>43</sup> which would make the rule change effective and operative upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because waiving the operative delay would allow SLPs to immediately add liquidity to the market and provide trading opportunities that may benefit all market participants. By requiring SLPs to quote at the NBB or the NBO a percentage of the regular trading day in their assigned securities, and by paying a rebate when the SLP's interest results in an execution, the Exchange proposes to reward liquidity providers in the market. Further, the Commission believes that the proposed quoting requirement and rebate is analogous to some of the benefits and obligations of Registered Market Makers<sup>44</sup> and notes that the SLP has no informational or trading advantage in the market.

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<sup>42</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires the self-regulatory organization to give the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NYSE has satisfied this requirement.

<sup>43</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>44</sup> See Securities Exchange Act Release No. 58845 (October 24, 2008) (SR-NYSE-2008-46) (approving NYSE's new market model and noting that an exchange may reward market makers for benefits they provide to the exchange's market, but such rewards must not be disproportionate to the services provided by the market maker).

Accordingly, the Commission designates the proposed rule change effective and operative upon filing with the Commission.<sup>45</sup>

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 SR-NYSE-2008-108 on the subject line.

##### Paper comments:

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

All submissions should refer to File Number SR-NYSE-2008-108. 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

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<sup>45</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of 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 publicly available. All submissions should refer to File Number SR-NYSE-2008-108 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>46</sup>

Florence E. Harmon  
Acting Secretary

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<sup>46</sup> 17 CFR 200.30-3(a)(12).