

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-64522; File No. SR-NYSE-2011-22)

May 19, 2011

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending NYSE Rule 70.40(3) to Permit Member Organizations to Engage in Proprietary Trading From Their Approved Booth Premises in Certain OTC Bulletin Board and OTC Markets Securities

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 May 11, 2011, 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 to amend NYSE Rule 70.40(3) to permit member organizations to engage in proprietary trading from their approved booth premises in certain OTC Bulletin Board (“OTCBB”) and OTC Markets<sup>4</sup> securities. The text of the proposed rule change is available at the Exchange, at [www.nyse.com](http://www.nyse.com), at the Commission’s Public Reference Room, and on the Commission’s website at [www.sec.gov](http://www.sec.gov).

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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.

<sup>4</sup> The OTCBB and OTC Markets Group Inc. each operate electronic quotation systems for broker-dealers to trade unlisted securities. The marketplaces operated by OTC Markets Group Inc. include OTCQX, OTCQB and OTC Pink.

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

NYSE proposes to amend NYSE Rule 70.40(3) to permit member organizations to engage in proprietary trading from their approved booth premises in certain OTCBB and OTC Markets securities.<sup>5</sup>

In June 2007, the Exchange adopted NYSE Rule 70.40, which permits a member organization to operate its booth premises on the Exchange Floor in a manner similar to its “upstairs” office, thereby allowing member organizations to access other markets and trade a wider array of products from their booth premises and thus operate more efficiently and competitively.<sup>6</sup> At the time that NYSE Rule 70.40 was adopted, it included certain conditions and limitations on such trading, including that only trading on behalf of customers would be permitted. As such, NYSE Rule 70.40(3) prohibits member organizations approved to operate

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<sup>5</sup> The Exchange's affiliate, NYSE Amex LLC (“NYSE Amex”), has proposed to adopt the same rule. See SR-NYSEAmex-2010-34.

<sup>6</sup> See Securities Exchange Act Release 55908 (June 14, 2007), 72 FR 34056 (June 20, 2007) (SR-NYSE-2007-51) (notice of filing and immediate effectiveness of proposed rule change permitting member organizations to operate booth as upstairs office). Under NYSE Rule 70.40, only Floor brokers may conduct activity from booth premises.

booth premises pursuant to such Rule from effecting any transaction from their approved booth premises for their own account, the account of an associated person, or an account with respect to which they or an associated person thereof exercise investment discretion on the Exchange.

After more than three years of experience with NYSE Rule 70.40, member organizations have requested that certain types of proprietary trading be permitted under the Rule, and the Exchange has determined that it is appropriate to do so. Therefore, the Exchange proposes to revise NYSE Rule 70.40(3) to permit member organizations to effect transactions in the common, preferred, and debt securities of an operating company that is quoted on the OTC Bulletin Board or OTC Markets (an “OTC Security”) from their approved booth premises for their own account, the account of an associated person, or an account with respect to which they or an associated person thereof exercise investment discretion, except that such member organizations could not effect such transactions in an OTC Security that is related to a security listed or traded on the Exchange or NYSE Amex.<sup>7</sup> Because trading would be limited to the common, preferred, and debt securities of an operating company, a member organization could not trade in an index-based or derivative security (e.g., a right or warrant) that is quoted on the OTCBB or OTC Markets.

Under the proposed rule change, an OTC Security would be considered related to a security listed or traded on the Exchange or NYSE Amex<sup>8</sup> if:

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<sup>7</sup> Since the merger of NYSE and NYSE Amex in 2008, the exchanges have conducted equity trading from the same Trading Floor, and NYSE Amex has conducted options trading in rooms adjacent the Trading Floor. See Securities Exchange Act Release No. 58673 (September 29, 2008) (SR-Amex-2008-62 and SR-NYSE-2008-60), 73 FR 57707 (October 3, 2008), and NYSE Rule 6A.

<sup>8</sup> Securities listed on The NASDAQ Stock Market are traded on NYSE Amex pursuant to unlisted trading privileges and thus would be considered a security traded on NYSE Amex under the proposed rule change. See Rules 500 - 525 - NYSE Amex Equities.

(a) the OTC Security is issued by an issuer of a security that is listed or traded on the Exchange or NYSE Amex or that underlies an NYSE Amex option, or an affiliate of such issuer;

(b) the OTC Security is subject to a corporate action that relates to the issuer of a security that is listed or traded on the Exchange or NYSE Amex or that underlies an NYSE Amex option, or an affiliate of such issuer;

(c) the OTC Security is issued by an issuer of a security that is a component of a narrow-based security index<sup>9</sup> that is linked to a security that listed or traded on the Exchange or NYSE Amex or that underlies an Amex option; or

(d) the OTC Security is issued by a foreign issuer or is a depositary receipt (or the equivalent thereof) for such a security, and a security issued by such foreign issuer or a depositary receipt (or the equivalent thereof) for such a security is listed or traded on the Exchange or NYSE Amex or underlies an NYSE Amex option.

Under the proposed rule, a corporate action would be any action by an issuer of an OTC Security or a security listed or traded on the Exchange or NYSE Amex that causes a relationship between the price of the OTC Security and the price of the security that is listed or traded on the Exchange or NYSE Amex or that underlies an NYSE Amex option, such as the announcement of a merger, acquisition, joint venture, spinoff, dissolution, bankruptcy filing or other similar type of event involving the issuers.

The Exchange believes that an NYSE member organization would not have any type of time, place, or information advantage with respect to the proposed proprietary trading activity that could create a potential issue or conflict with respect to the federal securities laws or Exchange rules. A member organization's proprietary transactions in OTC Securities would receive the same treatment as any other investor's transactions in such securities. Consistent with the permitted customer trading under current NYSE Rule 70.40, the Exchange would deem

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<sup>9</sup> For purposes of the proposed rule, the definition of narrow-based security index would be the same as the definition in Section 3(a)(55) of the Securities Exchange Act of 1934 (the "Act").

the proposed proprietary transactions to be off-Floor or “upstairs” transactions for purposes of its Rules.<sup>10</sup>

The Exchange believes that member organizations face increased competition as a result of changes in the structure of securities markets and are continually searching for ways to operate more efficiently.<sup>11</sup> The proposed rule change would allow member organizations to expand the types of activities that can be conducted from booth premises and more efficiently use member organization staff.

At the same time, the proposed proprietary transactions in OTC Securities would remain subject to all of the other provisions of NYSE Rule 70.40. First, a member organization would have to obtain approval from NYSE Regulation, Inc. (“NYSER”) to engage in proprietary OTC Securities trading from booth premises.<sup>12</sup>

Second, all such transactions would be subject to the regulatory requirements that apply to “upstairs” trading, including registration requirements and audit trail requirements applicable to those markets and supervision requirements under NYSE Rule 342.<sup>13</sup>

Finally, a member organization would be required to adopt and implement comprehensive written procedures governing the conduct and supervision of proprietary trading in OTC Securities handled through the booth and the staff responsible for such activities; such procedures must be reasonably designed to ensure that the member organization would be

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<sup>10</sup> Because the transactions would be (1) solely in securities not listed or admitted to unlisted trading privileges on NYSE or NYSE Amex, and (2) deemed initiated from off the Floor of NYSE, NYSE does not believe that Section 11(a) of the Act or the rules thereunder would be implicated by the proposed rule change.

<sup>11</sup> See supra note 6.

<sup>12</sup> NYSE Rule 70.40(1).

<sup>13</sup> NYSE Rule 70.40(4) and (5).

trading in compliance with the requirements of NYSE Rule 70.40, including that it is not effecting transactions from booth premises in OTC Securities that are related to securities listed or traded on the Exchange or NYSE Amex. A member organization would be required to obtain NYSER approval of such written procedures before such trading commences.<sup>14</sup> A member organization would be required to regularly review such procedures and compliance therewith, and obtain approval from NYSER of any subsequent changes to such procedures.<sup>15</sup>

At a minimum, such written procedures must require the member organization to exercise due diligence before commencing trading in an OTC Security from the booth premises pursuant to this Rule to ensure that such trading is in compliance with the requirements of this Rule and that the member organization has procedures to monitor its trading activity in order to remain in compliance. A member organization must have supervisory systems in place that produce records sufficient to reconstruct, in a time-sequenced manner, all orders with respect to which the member organization is trading from the booth premises under this Rule. The member organization must be able to demonstrate which OTC Security transactions were effected from the booth premises (as compared to off-Floor trading, if applicable). If the member organization could not demonstrate which trading is from the booth premises, the Exchange would presume that all such trading was effected from the booth premises.

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<sup>14</sup> If a member organization had already obtained approval to operate a booth premises under NYSE Rule 70.40, it would still be required to update its written procedures to address proprietary trading in OTC Securities and obtain NYSER approval under NYSE Rule 70.40(7).

<sup>15</sup> NYSE Rule 70.40(6) and (7).

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>16</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>17</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 proposed rule change provides member organizations with a means to remain competitive in view of changes in the markets by permitting Floor brokers to engage in proprietary trading in certain OTC Securities from their booth premises. Such trading offers member organizations no time, place, or information advantage but permits them to more fully utilize booth staff and thereby operate their booth premises more efficiently in conjunction with upstairs trading. The permitted proprietary trading activity in OTC Securities would remain subject to robust, existing regulatory requirements that serve to foster just and equitable principles of trade.

### 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 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer

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<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (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-2011-22 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 SR-NYSE-2011-22. 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 website (<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 website viewing and printing 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 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-2011-22 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>18</sup>

Cathy H. Ahn  
Deputy Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).