

AMENDMENT NO. 5

This Amendment No. 5 to SR-NYSE -2005-77 replaces Amendment No. 4 in its entirety and Amendment No. 4 has been withdrawn. Amendment No. 5 is being filed (i) to make changes to the text of proposed Rules 300 and 300T and to make related conforming changes to the "Purpose" section in the Form 19b-4 and Exhibit 1 thereto, (ii) to make changes to the "Purpose" section in the Form 19b-4 and Exhibit 1 thereto to clarify the proposals' consistency with the fair access principles in Section 6(b)(2) of the Exchange Act, (iii) to correct a typographical error in the first sentence of the "Statutory Basis" section of Item 3 of the Form 19b-4 and the corresponding section of Exhibit 1 thereto, (iv) to summarize and respond to a comment letter received in relation to the filing and (v) to correct a typographical error in the second Sentence of Item 7 of the Form 19b-4 and the corresponding section of Exhibit 1 thereto.

Summary of Changes to Proposed Rule 300

The Exchange has modified proposed Rule 300 to:

- permit Trading Licenses to be transferred among member organizations that are affiliates, or to a member organization that is continuing substantially the same business;
- clarify that if more than 1366 licenses are bid for, the allocation to bids by lot will only be among those bids that were at the clearing price, not all bids made even at higher prices;
- clarify that if there are fewer than 1000 licenses bid for and the Exchange elects to sell to that lesser number rather than re-doing the auction, the clearing price at which the Exchange will sell will be the minimum bid price; and
- to provide that the seat price charged between auctions is the auction price from the most recent auction plus 10%, with the total amount prorated for the amount of time left in the year.

Summary of Changes to Proposed Rule 300T

In discussing the Trading License auction process with Exchange members, it has become clear to the Exchange that members are experiencing difficulty in determining how much to bid for Trading Licenses in light of the business uncertainties relating to the new trading environment that will be established in 2006 under Regulation NMS and the Exchange's hybrid market proposal. To address this concern, which the Exchange believes is related to the unique circumstances presented at this time, the Exchange proposes to impose a maximum bid price in the first trading license auction, in addition to the minimum bid price. Since the minimum is 80% of recent leases, the proposed maximum is 120% of recent leases. In addition, the Exchange has realized that the previously proposed text of Rule 300T is flawed in that it specified that the minimum bid for the first auction would be prorated to account for the fact that the license would be in

effect for less than a full year. It will not be possible to prorate in this manner, because, when the auction is conducted, the specific date of closing of the merger will not be known. Therefore, proposed Rule 300T has been modified to reflect the fact that the minimum bid will be calculated without proration, but that after the auction has provided the Exchange with a clearing price, the Exchange will prorate when calculating the auction price that Trading License holders will actually have to pay.

#### Text of Proposed Rules 300 and 300T

As a result of the changes discussed above, the text of proposed Rules 300 and 300T included in Exhibit 5 to Amendment No. 3 is replaced in its entirety by the following:

### **Rule 300.**

#### **Trading Licenses**

(a) A trading license issued by the Exchange is required to effect transactions on the floor of the Exchange or through any facility thereof. An organization may acquire and hold a trading license only if and for so long as such organization is qualified and approved to be a member organization of the Exchange. A member organization holding a trading license may designate a natural person to effect transactions on its behalf on the floor of the Exchange, subject to such qualification and approvals as the Exchange may require. A trading license is not transferable and may not be, in whole or in part, transferred, assigned, sublicensed or leased; provided, however, that the holder of the trading license may, with the prior written consent of the Exchange, transfer a trading license to a qualified and approved member organization (i) which is an affiliate or (ii) which continues substantially the same business of such trading license holder without regard to the form of the transaction used to achieve such continuation, e.g., merger, sale of substantially all assets, reincorporation, reorganization or the like.

(b) Trading licenses for the following calendar year will be sold annually by means of an auction conducted in December. The Exchange will determine the minimum price that a bidder will be required to pay for each license (the 'Minimum Bid Price'), which will be no greater than 80% of the last annual Auction Price (as defined below). Unpriced "at the market" bids will also be permitted. At the end of the auction, the Exchange will select as the purchase price for each trading license the highest bid price that will allow it to sell the number of trading licenses that will maximize auction revenue to the Exchange (the "Clearing Price"), provided that (i) the Clearing Price shall not be greater than the price that will result in the sale in the auction of at least 1000 trading licenses, (ii) the Exchange will not sell in the auction more than 1366 trading licenses, and if the bids at the Clearing Price bring the total to more than 1366 trading licenses, the Exchange will sell at the Clearing Price to the unpriced "at the market" bids and higher priced bids, but will allocate trading licenses among the bids at the

Clearing Price by lot, and (iii) the Exchange at its discretion may sell the number of trading licenses determined by the Clearing Price at a price less than the Clearing Price but not lower than the Minimum Bid Price. Notwithstanding the foregoing, if there are insufficient bids at the Minimum Bid Price (including unpriced at the market bids) to purchase at least 1000 trading licenses, the Exchange may, although it need not, sell the largest number of trading licenses as can be sold at a price equal to the Minimum Bid Price, even though such number of trading licenses is less than 1000. In the alternative, under such circumstances the Exchange may conduct another auction or auctions, setting a new Minimum Bid Price, which may be lower than that determined by the formula above, and in any such auction the Clearing Price will be determined as aforesaid, but without the requirement to sell at least 1000 trading licenses. In such case the Exchange shall use its discretion to conclude an auction that will best serve the dual goals of raising adequate proceeds for the Exchange while selling a number of trading licenses adequate to serve the needs of investors and the broker-dealer community. The price at which the trading licenses are sold in the auction shall be referred to herein as the "Auction Price".

(c) In each auction, the Exchange will limit the number of trading licenses that may be bid for by a single member organization to a number that is the greater of (i) 35 and (ii) 125% of the number of trading licenses utilized by the member organization in its business immediately prior to the auction.

(d) Between auctions, the Exchange shall sell additional trading licenses expiring at the end of the current year at a price equal to the last Auction Price, plus a premium equal to ten percent (10%) of the Auction Price (the "Premium"), with the total then pro rated to reflect the amount of time remaining in the year. The Exchange shall not sell additional trading licenses if such sale would cause the number of outstanding trading licenses to exceed 1366.

(e) For purposes of this rule the "Trading License Price" shall mean the Auction Price plus any Premium (as pro-rated, in the case of trading licenses purchased between auctions). A buyer of a trading license shall pay to the Exchange the Trading License Price in equal monthly installments in advance over the period during which the trading license is in effect. Prior to the commencement of the trading license, the holder shall pay to the Exchange the first monthly installment of the Trading License Price, plus a cash deposit (the "Deposit") equal to one month's installment of the Trading License Price. The Deposit shall be applied to the last month's installment or to any applicable Termination Fee (as defined below).

(f) Trading licenses shall expire at the end of the calendar year for which they are issued. Notwithstanding the foregoing, the holder of a trading license may terminate such trading license prior to the scheduled expiration of such trading license by providing at least 10 days' prior written notice to the Exchange of such termination and by paying the Exchange a Termination Fee. The termination will

be effective at the end of the month following the end of such 10-day notice period. The Termination Fee will be equal to one monthly installment of the Trading License Price.

(g) If a holder of a trading license shall cease to be a member organization of the Exchange for any reason, such holder shall be deemed to have terminated the trading license as of the last date of member organization status, and the applicable Termination Fee shall be due.

### **Rule 300T**

#### **Transition Rules Regarding the Merger**

(a) For the calendar year in which the business combination involving the New York Stock Exchange, Inc. and Archipelago Holdings, Inc. (the "Merger") occurs, the Exchange may conduct an auction of trading licenses in accordance with the provisions of Rule 300, except that the trading licenses sold in such auction shall expire at the end of the calendar year in which the Merger occurs.

(b) In the auction referred to in paragraph (a) above, the Minimum Bid Price shall be eighty percent (80%) of the Reference Price (as hereinafter defined), and there shall also be imposed a "Maximum Bid Price" which shall be one hundred twenty percent (120%) of the Reference Price. For purposes of this paragraph, the term "Reference Price" shall mean the average annual lease price for leases (including renewal leases) which leases (or renewals) commenced during the six-month period ending on the last business day of the last calendar month ending at least thirty days before the opening of the auction. In addition, in determining the Auction Price, the Clearing Price shall be reduced by multiplying it by a fraction the numerator of which is the number of months for which the license shall be issued and the denominator of which is twelve (12).

(c) In the auction referred to in paragraph (a) above, the Exchange will limit the number of trading licenses that may be acquired by a single member organization to a number that is the greater of (i) 35 and (ii) 125% of the number of regular and electronic access Exchange memberships utilized by the member organization in its business immediately prior to the Merger.

(d) Subject to their continued compliance with all applicable rules and requirements, each member organization, and each individual regular member qualified and approved to effect transactions on the trading floor, and each allied member, approved person or registered employee, in good standing at the time of the Merger, shall continue qualified in their respective capacities upon completion of the Merger. Without limiting the foregoing, a regular member qualified and approved to effect transactions on the floor of the Exchange on behalf of his or her member organization shall be deemed qualified and approved to be a person designated by such member organization to effect transactions on the floor of the

Exchange on its behalf in connection with a trading license acquired by such member organization.

Modifications to ‘Purpose’ Section

To conform the description of proposed Rules 300 and 300T included in the ‘Purpose’ section to the revised rule text set forth above and to clarify the proposals’ consistency with the fair access principles in Section 6(b)(2) of the Exchange Act, the subsection of the ‘Purpose’ section entitled ‘Trading Licenses; Access to NYSE Market’ included in Amendment No. 3 is deleted in its entirety in both the Form 19b-4 and Exhibit 1 thereto and replaced with the following:

*Trading Licenses; Access to NYSE Market*

Following the Merger, NYSE Market will issue Trading Licenses to registered broker-dealers, subject to an annual fee to NYSE Market paid in monthly installments, and review and approval of the applicant by NYSE Regulation. Organizations holding Trading Licenses will be subject to rules applicable to member organizations, and except as otherwise noted herein, those rules will be substantively the same as the rules applicable to NYSE member organizations under the NYSE’s current Constitution and Rules.<sup>1</sup> Each Trading License will entitle its holder to have physical and electronic access to the trading facilities of NYSE Market, subject to such limitations and requirements as may be specified in the rules, and in each case will include the right to designate a natural person, subject to pre-approval by NYSE Regulation, who may have physical access to the floor and facilities of NYSE Market to trade thereon. The quantity and price of Trading Licenses issued shall be annually determined by a ‘Dutch auction.’

The clearing price at which all Trading Licenses will be sold in the auction will be determined under procedures calculated to provide suitable revenue to NYSE Market while providing fair access to its facilities to member organizations that wish to do business there. For each auction NYSE Market will determine the minimum price that a bidder will be required to pay for each Trading License (the ‘Minimum Bid Price’), which will be no greater than 80% of the clearing price at the last annual auction, or for the first auction, 80% of the average annual lease price for leases commenced during a recent six month period.<sup>2</sup> Unpriced ‘at the market’ bids will also be permitted. At the end of the auction, NYSE Market will

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<sup>1</sup> As noted above, the term “member organization” may also include any other registered broker-dealer that agrees to be regulated by NYSE Regulation, notwithstanding that it does not hold a Trading License and thus does not have direct access to the trading facilities of NYSE Market.

<sup>2</sup> The first auction will also have a maximum price for bids, which will be 120% of the average annual lease price for leases commenced during such recent six month period. This is expected to ease the concerns of existing members given the potentially significant changes to business models that may evolve following the implementation of the Commission’s new Regulation NMS and the Exchange’s own hybrid market initiative.

select as the purchase price for each Trading License the highest bid price that will allow it to sell the number of Trading Licenses that will maximize auction revenue to NYSE Market (referred to as a clearing price), provided that (i) the clearing price shall not be greater than the price that will result in the sale in the auction of at least 1000 Trading Licenses, (ii) NYSE Market will not sell in the auction more than 1366 Trading Licenses, and if the bids at the clearing price bring the total to more than 1366 Trading Licenses, NYSE Market will sell at the Clearing Price to the unpriced "at the market" bids and higher priced bids, but will allocate trading licenses among the bids at the clearing price by lot, and (iii) NYSE Market at its discretion may sell the number of Trading Licenses determined by the clearing price at a price less than the clearing price but not lower than the Minimum Bid Price. However, if there are insufficient bids at the Minimum Bid Price (including unpriced at the market bids) to purchase at least 1000 Trading Licenses, NYSE Market may, although it need not, sell the largest number of Trading Licenses as can be sold at a price equal to the Minimum Bid Price, even though such number of Trading Licenses is less than 1000. In the alternative, under such circumstances NYSE Market may conduct another auction or auctions, setting a new Minimum Bid Price, which may be lower than that determined by the formula above, and in any such auction the clearing price will be determined as explained above, but without the requirement to sell at least 1000 trading licenses. In such case NYSE Market will use its discretion to conclude an auction that will best serve the dual goals of raising adequate proceeds for NYSE Market while selling a number of Trading Licenses adequate to serve the needs of investors and the broker-dealer community.

It is also proposed that, in each auction, NYSE Market will limit the number of Trading Licenses that may be bid for by a single member organization to the greater of (i) 35 and (ii) 125% of the number of trading licenses (or in the case of the first auction, regular and electronic access memberships) utilized by the member organization in its business immediately prior to the auction. It is also proposed that the aggregate number of Trading Licenses to be issued in any one year will be limited to 1,366.

Except for the initial Trading Licenses, which will be valid from the closing date of the Merger through the end of the calendar year in which the Merger occurs, each Trading License will be valid for one calendar year.<sup>3</sup> Trading Licenses will not be able to be leased or transferred, although they will be permitted to be transferred to an affiliated member organization, or to another qualified member organization which continues substantially the same business as the Trading

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<sup>3</sup> The NYSE also proposes to provide for the sale of additional Trading Licenses during the year at a premium to the auction price, pro rated for the amount of time remaining for the year, in order to, among other things, ensure that the supply of Trading Licenses is adequate to meet demand for Trading Licenses should conditions change after the auction, and to accommodate new businesses that commence operations after the beginning of the year. This will also accommodate those who under priced their bids in the auction. The premium will help defray out-of-cycle administration costs and encourage participation in the annual auction, thereby promoting the optimal price and quantity discovery in the auction.

License holder. A member organization may terminate a Trading License prior to the expiration of its term in accordance with applicable rules and subject to applicable administrative fees. Trading Licenses will not represent any equity interest in NYSE Group or any of its subsidiaries (including NYSE Market). Holders of Trading Licenses will not have any voting rights or rights to distribution in New York Stock Exchange LLC, NYSE Market or NYSE Group by virtue of their status as holders of Trading Licenses, except to the extent their vote is sought in connection with the petition nomination process described under 'Fair Representation of Members' above.

As noted above, the procedures under which Trading Licenses will be made available are calculated to comply with the requirements of Section 6(b)(2) of the Exchange Act regarding fair access to the facilities of a registered exchange. As discussed more fully below, the Dutch auction is itself a fair way to determine access, especially given that it is subject to provisions calculated to insure that Trading Licenses are widely available, such as the provisions (i) specifying a reasonable minimum bid price, (ii) calculating the clearing price with reference to what will sell at least 1000 Trading Licenses, assuming sufficient bids, (iii) limiting the number of Trading Licenses that may be bid for by a single member organization, and (iv) the arrangement to sell additional Trading Licenses during the year at a 10% premium up to the maximum of 1366 Trading Licenses. The procedures under which Trading Licenses will be made available are also intended to comply with the requirements of Section 6(b)(4) of the Exchange Act, which requires that a registered exchange provide for the equitable allocation of reasonable dues, fees, and charges among its members and issuers and other persons using its facilities. The price for a Trading License is reasonable because it is basically determined by "the market", that is, by the member organizations that wish to obtain a trading license. The Dutch auction allows those member organizations to themselves determine the price, subject to the provisions referenced in clauses (i) to (iv) above which, as noted, are calculated to insure that Trading Licenses are widely available. The minimum bid price is reasonable because it is determined with reference to the prices which member organizations have recently been willing to pay for direct access to the trading facilities. The auction is also closely related to the way access to the New York Stock Exchange was traditionally priced, with supply and demand governing the price at which traditional memberships were purchased or leased. The pricing of Trading Licenses in between auctions is also reasonable, as it is based on the auction price, but with a premium to the auction price that is modest, but hopefully will encourage participation in the auction, which in turn will strengthen the price discovery mechanism that the auction provides.

In the first sentence of the "Statutory Basis" section of Amendment No. 3 to the Form 19b-4 and in the corresponding text in Exhibit 1 thereto, the first reference to "Section 6(b)(1)" should read "Section 6(b)" and the accompanying footnote reference should read "15 U.S.C. 78f(b)" instead of "15 U.S.C. 78f(b)(1)". In addition, insert a footnote after the current second reference in that sentence to "Section 6(b)(1)", to read "15 U.S.C. 78f(b)(1)". The

amended sentence reads as follows (with footnotes indicated by the bracketed references):

The Exchange believes that this filing is consistent with Section 6(b) {footnote: 15 U.S.C. 78f(b).} under the Securities Exchange Act of 1934, as amended (the 'Exchange Act'), {footnote: 15 U.S.C. 78a.} in general, and furthers the objectives of Section 6(b)(1) {footnote: 15 U.S.C. 78f(b)(1).} in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

Delete in its entirety the text appearing under Item 5 of Amendment No. 3 to the Form 19b-4 and the corresponding section in Exhibit 1 thereto and replace it in both places with the following:

While the Exchange did not solicit comments on the Proposed Rule Change, it did receive one written comment in a letter dated December 14, 2005 from the Independent Broker Action Committee ("IBAC"). IBAC noted that the Exchange had informed its members that the first Trading License auction would take place on December 20, 2005. IBAC stated that it is improper for the Exchange to hold an auction under the Proposed Rule Change before it has been published for comment and approved by the Commission, and that if the Exchange did so it would prejudice IBAC's ability to comment on Proposed Rule Change.

IBAC has not commented on the substance of the Proposed Rule Change, but rather has objected to proposed Exchange action prior to Commission approval of the Proposed Rule Change. The Exchange does not agree that IBAC would be in any way prejudiced in its ability to comment. Conducting the first auction provisionally would simply give members and others as much certainty as possible as early as possible to plan for post-Merger business, as well as permitting both the Commission and the Exchange the opportunity to observe whether the auction procedures resulted in a fair and orderly pricing of the Trading Licenses and fair access to the facilities of the Exchange.

At the very end of the second sentence of Item 7 of Amendment No. 3 to the Form 19b-4 and in the corresponding text in Exhibit 1 thereto, the reference to January 23, 2005 should be changed to refer to January 23, 2006. The amended sentence reads as follows:

In the event that it is necessary in order to facilitate that timetable, the Exchange requests that the Commission accelerate effectiveness of the filing pursuant to Section 19(b)(2) to a date no later than January 23, 2006.

Additions in Amendment No. 5 underscored

Deletions in Amendment No. 5 [bracketed]

### **Rule 300.**

#### **Trading Licenses**

(a) A trading license issued by the Exchange is required to effect transactions on the floor of the Exchange or through any facility thereof. An organization may acquire and hold a trading license only if and for so long as such organization is qualified and approved to be a member organization of the Exchange. A member organization holding a trading license may designate a natural person to effect transactions on its behalf on the floor of the Exchange, subject to such qualification and approvals as the Exchange may require. A trading license is not transferable and may not be, in whole or in part, transferred, assigned, sublicensed or leased; provided, however, that the holder of the trading license may, with the prior written consent of the Exchange, transfer a trading license to a qualified and approved member organization [in connection with the transfer of all or substantially all of the assets of such trading license holder to such member organization or an affiliate thereof] which (i) is an affiliate or (ii) continues substantially the same business of such trading license holder without regard to the form of the transaction used to achieve such continuation, e.g., merger, sale of substantially all assets, reincorporation, reorganization or the like.

(b) Trading licenses for the following calendar year will be sold annually by means of an auction conducted in December. The Exchange will determine the minimum price that a bidder will be required to pay for each license (the 'Minimum Bid Price'), which will be no greater than 80% of the last annual Auction Price (as defined below). Unpriced "at the market" bids will also be permitted. At the end of the auction, the Exchange will select as the purchase price for each trading license the highest bid price that will allow it to sell the number of trading licenses that will maximize auction revenue to the Exchange (the "Clearing Price"), provided that: (i) the Clearing Price shall not be greater than the price that will result in the sale in the auction of at least 1000 trading licenses[,]; (ii) the Exchange will not sell in the auction more than 1366 trading licenses, and if the bids at the Clearing Price [are for] bring the total to more than 1366 trading licenses, the Exchange will sell at the Clearing Price to the unpriced "at the market" bids and higher priced bids, but will allocate [the 1366] trading licenses among [those] the bids at the Clearing Price by lot[,]; and (iii) the Exchange at its discretion may sell the number of trading licenses determined by the Clearing Price at a price less than the Clearing Price but not lower than the Minimum Bid Price. Notwithstanding the foregoing, if there are insufficient bids at the Minimum Bid Price (including unpriced at the market bids) to purchase at

least 1000 trading licenses, the Exchange may, although it need not, sell the largest number of trading licenses as can be sold at a price [at least] equal to the Minimum Bid Price, even though such number of trading licenses is less than 1000. In the alternative, under such circumstances the Exchange may conduct another auction or auctions, setting a new Minimum Bid Price, which may be lower than that determined by the formula above, and in any such auction the Clearing Price will be determined as aforesaid, but without the requirement to sell at least 1000 trading licenses. In such case the Exchange shall use its discretion to conclude an auction that will best serve the dual goals of raising adequate proceeds for the Exchange while selling a number of trading licenses adequate to serve the needs of investors and the broker-dealer community. The price at which the trading licenses are sold in the auction shall be referred to herein as the "Auction Price".

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(d) Between auctions, the Exchange shall sell additional trading licenses expiring at the end of the current year at a price equal to the last Auction Price, plus a premium equal to ten percent (10%) of the Auction Price (the "Premium"), [as hereinafter defined] with the total then prorated to reflect the amount of time remaining in the year. [For purposes of this rule, the Premium shall be, if the license commences on or prior to June 30 of any calendar year, 10% of the Auction Price, or if the license commences on or after July 1 of any calendar year, 5% of the Auction Price.] The Exchange shall not sell additional trading licenses if such sale would cause the number of outstanding trading licenses to exceed 1366.

(e) For purposes of this rule the "Trading License Price" shall mean the Auction Price plus any Premium (as prorated, in the case of trading licenses purchased between auctions). A buyer of a trading license shall pay to the Exchange the Trading License Price in equal monthly installments in advance over the period during which the trading license is in effect. Prior to the commencement of the trading license, the holder shall pay to the Exchange the first monthly installment of the Trading License Price, plus a cash deposit (the "Deposit") equal to one month's installment of the Trading License Price. The Deposit shall be applied to the last month's installment or to any applicable Termination Fee (as defined below).

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## **Rule 300T**

### **Transition Rules Regarding the Merger**

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(b) In the auction referred to in paragraph (a) above, the Minimum Bid Price shall be eighty percent (80%) of the Reference Price (as hereinafter defined), and there shall also be imposed a 'Maximum Bid Price' which shall be one hundred twenty percent (120%) of the Reference Price. For purposes of this paragraph, the term 'Reference Price' shall mean the average annual lease price for leases (including renewal leases) which leases (or renewals) commenced during the six-month period ending on the last business day of the last calendar month ending at least thirty days before the opening of the auction. [,provided, however, that the eighty percent (80%) referenced above in this sentence] In addition, in determining the Auction Price, the Clearing Price shall be reduced by multiplying [(i) the eighty percent by (ii)] it by a fraction the numerator of which is the number of months for which the license shall be issued and the denominator of which is twelve (12).

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