

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58933; File No. SR-NYSEALTR-2008-05)

November 12, 2008

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Alternext US LLC to Extend its Temporary Program Relating to Section 31-Related Funds

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 November 7, 2008, NYSE Alternext US LLC (“NYSE Alternext” or the “Exchange”) filed with the Securities and Exchange Commission the proposed rule changes as described in Items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

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

The NYSE Alternext, formerly known as the American Stock Exchange LLC (“Amex”), proposes to extend until January 13, 2009 a temporary program, which allows member firms to voluntarily submit funds previously accumulated by the member firms pursuant to Rule 393 and not forwarded to be subsequently used by the Exchange to satisfy its obligation to remit Section 31 fees to the Commission.

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

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

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

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

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NYSE Alternext 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

Pursuant to Section 31 of the Act<sup>4</sup> and Commission Rule 31,<sup>5</sup> NYSE Alternext US and other national securities exchanges are required to pay a transaction fee to the Commission that is designed to recover the costs related to the government’s supervision and regulation of the securities markets and securities professionals. To offset this obligation, NYSE Alternext US assesses its clearing and self-clearing members a regulatory fee in accordance with Rule 393, which mirrors Section 31 in both scope and amount. Clearing members may in turn seek to charge a fee to their customers or correspondent firms. Any allocation of the fee between the clearing member and its correspondent firm or customer is the responsibility of the clearing member.

Reconciling the amounts reported to the Exchange and the amounts collected from the customers historically had been difficult for member firms, causing surpluses to accumulate at some member firms (referred to as “accumulated funds”). These accumulated funds were not remitted to the Exchange by certain members, despite the fact that these charges may have been

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<sup>4</sup> 15 U.S.C. 78ee.

<sup>5</sup> 17 CFR 240.31.

previously identified as “Section 31 Fees” or “SEC Fee” by the firms<sup>6</sup>. In addition, since Amex used a “self-reporting” methodology for its members to report and remit amounts payable pursuant to Rule 393 prior to the implementation of its billing system in December 2007, the Exchange accumulated amounts in excess of the amounts due and paid by the Exchange to the Commission pursuant to Section 31 and Rule 31 (“Exchange accumulated funds”).

In May 2008, the Commission approved the adoption of Commentary .01 to Rule 393 that allows firms, on a one-time-only basis, voluntarily to remit historically accumulated funds to the Exchange. These funds will be used to pay the Exchange’s current Section 31 fees in conformity with prior representations made by member firms. In addition, a member or member organization may designate all or part of the Exchange accumulated excess held by the Exchange and allocated to such member be used by the Exchange in accordance with the new Commentary to Rule 393. Finally, to the extent the payment of these historically accumulated funds or Exchange accumulated funds is in excess of the Section 31 fees due the Commission from NYSE Alternext US, such surplus shall be used by the Exchange to offset regulatory costs.

In accordance with Rule 393, Commentary .01 the effective dates of the temporary program were from May 23, 2008 through October 23, 2008.<sup>7</sup> In the interest of providing member firms with additional notice of the temporary program and providing additional

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<sup>6</sup> The Commission stated in its release adopting new Rule 31 and Rule 31T that “it is misleading to suggest that a customer or [self-regulatory organization] member incurs an obligation to the Commission under Section 31.” See, Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41060 (July 7, 2004). In response to this statement, the Exchange issued a Notice to members regarding its Rule 393 Fee and the SEC’s “Section 31 Fee”, and provided guidance for members and member organizations that choose to charge their customers fees. See, Amex Notice REG 2004-42 Finance (October 29, 2004).

<sup>7</sup> See Securities Exchange Act Release No. 57829 (May 16, 2008), 73 FR 30173 (May 23, 2008) (SR-Amex-2007-107) (order approving procedures under Rule 393 regarding Section 31-related funds).

opportunity for member firms to remit historically accumulated funds in accordance with such program, the Exchange now proposes to extend the program through January 13, 2009. The Exchange believes that an extension of its temporary program will permit the Exchange to provide additional notice of the program to members firms and will provide a transparent way of addressing the issue of accumulated funds held at the member firm level and by the Exchange.<sup>8</sup>

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act<sup>9</sup> in general and furthers the objectives of Section 6(b)(5) of the Act<sup>10</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 foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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 that an extension of its temporary program until January 13, 2009 will permit the Exchange to provide additional notice to member firms regarding the program and will provide a transparent way of addressing the issue of accumulated funds held at the member firm level and by the Exchange.

### 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 purpose of the Act.

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<sup>8</sup> The Exchange notes that the date of proposed termination of the program coincides with the termination date of a similar temporary program implemented by the New York Stock Exchange LLC. See Securities Exchange Act Release No. 58108 (July 7, 2008), 73 FR 40413 (July 14, 2008) (SR-NYSE-2007-64).

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Because the proposed rule change: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup>

The Exchange has requested that the Commission waive the 30-day operative delay in this case. The Commission hereby grants the Exchange's request and believes that doing so is consistent with the protection of investors and the public interest. The Commission previously found similar proposals from other SROs to be consistent with the Act.<sup>13</sup> The Commission is not aware of any issue that should cause it to revisit those findings or preclude the immediate operativeness of the extension of the NYSE Alternext proposal. The Commission notes that, because the program is voluntary, it imposes no obligation on any NYSE Alternext member that

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). Pursuant to Rule 19b-4(f)(6)(iii) under the Act, the Exchange is required to give the Commission written 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. The Exchange has satisfied this requirement.

<sup>13</sup> See Securities Exchange Act Release No. 58108 (July 7, 2008), 73 FR 40413 (July 14, 2008) (SR-NYSE-2007-64); Securities Exchange Act Release No. 55886 (June 8, 2007), 72 FR 32935 (June 14, 2007) (SR-NASD-2007-027).

believes that accumulated funds should be retained or disposed of in another manner. For these reasons, the Commission designates that the proposed rule change become operative immediately upon filing.<sup>14</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the 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-NYSEALTR-2008-05 on the subject line.

##### Paper Comments:

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

All submissions should refer to File Number SR-NYSEALTR-2008-05. 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>14</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, 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-NYSEALTR-2008-05 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Florence E. Harmon  
Acting Secretary

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