

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59020; File No. SR-NYSEALTR-2008-06)

November 26, 2008

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change by NYSE Alternext US LLC for Retroactive Application of a Previously Adopted Revenue Sharing Program for ETF Quoting Participants on the Exchange

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 17, 2008, NYSE Alternext US LLC (the “Exchange” or “NYSE Alternext”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change 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 change from interested persons and to grant approval of the proposal on an accelerated basis.

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

The Exchange proposes retroactive application of a previously adopted revenue sharing program for ETF quoting participants on the Exchange. The text of the proposed rule change is available at NYSE Alternext, the Commission’s Public Reference Room, and [www.nyse.com](http://www.nyse.com).

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 Exchange 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

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

<sup>2</sup> 17 CFR 240.19b-4.

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

The Exchange proposes to retroactively apply a previously adopted revenue sharing program (RSP) for ETF quoting participants on the Exchange. The RSP was first put in place by the Exchange for ETF specialists and registered traders effective July 1, 2007, and was to last through December 31, 2007 unless otherwise extended.<sup>3</sup> The RSP was subsequently extended through the end of September 2008.<sup>4</sup> The RSP was inadvertently allowed to lapse on September 30, 2008, but was subsequently reinstated by filing effective November 14, 2008.<sup>5</sup> The purpose of the instant filing is to seek approval to retroactively apply the now-reinstated RSP for the time period October 1, 2008 through November 13, 2008 (the "Retroactive Period") in order to effectively assure continuity of the RSP from its inception for all ETF quoting participants on the Exchange, who have continued to quote aggressively in the expectation of receiving RSP payments flowing therefrom. To date, the Exchange believes that the current RSP has been

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<sup>3</sup> Securities Exchange Act Release No. 55983 (June 29, 2007), 72 FR 37059 (July 6, 2007) (SR-Amex-2007-68). The RSP was subsequently extended to Designated Amex Remote Traders, now known as Designated NYSE Alternext Remote Traders (DARTs). Securities Exchange Act Release No. 57540 (March 20, 2008), 73 FR 16399 (March 27, 2008) (SR-Amex-2008-23).

<sup>4</sup> Securities Exchange Act Release No. 57541 (March 20, 2008), 73 FR 16400 (March 27, 2008) (SR-Amex-2008-25)(prospectively extending RSP from March 18, 2008 through end of September 2008). See also Securities Exchange Act Release No. 57794 (May 7, 2008), 73 FR 27582 (May 13, 2008) (SR-Amex-2008-34) (retroactively extending RSP from January 1, 2008 through March 17, 2008).

<sup>5</sup> See SR-NYSEALTR-2008-04 (reinstating RSP effective November 14, 2008 to last through November 30, 2008, by which point the trading of ETFs currently listed on the Exchange is expected to terminate in favor of having willing issuers list and trade such products on NYSE Alternext's sister exchange NYSE Arca, Inc).

beneficial in creating incentives for ETF quoting participants and does not believe it fair to withhold RSP payments from ETF quoting participants attributable to the Retroactive Period solely because of the Exchange's inadvertent error. Retroactive application of the RSP will preserve all ETF quoting participants' expectations.

For the Retroactive Period, the Exchange will apply the RSP in the same way the RSP was described in SR-NYSEALTR-2008-04 (see note 6 supra), to wit, that:

- RSP payments will be made from the Exchange's general revenues and will not be limited to a particular revenue source.
- ETF specialists may receive an aggregate RSP payment (calculated monthly) of as much as \$0.0024 per share (or 24 cents per 100 shares) whenever the specialist either buys or sells his specialty ETF on the Exchange and is a provider of liquidity in that transaction (e.g., whose quote is traded against or who offsets an order imbalance as part of an opening or closing transaction). The RSP payment is comprised of \$0.0004 per share (or 4 cents per 100 shares) for all shares executed on the Exchange in their specialty ETF (irrespective of whether the specialist is the provider of liquidity), plus another \$0.0020 (or 20 cents per 100 shares) if the specialist is the provider of liquidity in the transaction. If the specialist is not the liquidity provider, then the RSP payment is limited to \$0.0004 per share executed on the Exchange in their specialty ETF.
- Registered traders in ETFs will receive an RSP payment of \$0.0010 per share (or 10 cents per 100 shares) whenever the registered trader either buys or sells an ETF on the Exchange and is a provider of liquidity in that transaction.

- DARTS will receive an RSP payment of \$0.0015 per share (or 15 cents per 100 shares) whenever the DART either buys or sells an ETF on the Exchange and is a provider of liquidity in that transaction.
- No ETF quoting participant will receive an RSP payment when they are counterparties to the same transaction.
- RSP payments will only be made on transactions in securities trading at less than \$1.00 in amounts proportionate to the amount on which the Exchange collects revenue.

As customer transaction charges are capped at \$100 per transaction, meaning that transaction charges are assessed on only the first 43,478 shares executed, ETF quoting participants will only receive RSP payments based on the first 43,478 shares executed.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act<sup>6</sup> in general and furthers the objectives of Section 6(b)(4) of the Act<sup>7</sup> in particular in that it is intended to assure the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. Specifically, the Exchange proposes to retroactively apply the RSP to assure continuity of the program from its inception and to assure fairness for the ETF quoting participants.

### 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.

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<sup>6</sup> 15 U.S.C. 78f(b)

<sup>7</sup> 15 U.S.C. 78f(b)(4).

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. 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-2008-06 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-2008-06. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be

available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEALTR-2008-06 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>8</sup> In particular, the Commission believes that the proposal is consistent with Section 6(b)(4) of the Act<sup>9</sup> in that it is intended to assure the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Commission notes that the proposal would retroactively apply the RSP to cure a lapse that occurred in the program from October 1, 2008 to November 13, 2008, but would not introduce any changes to the RSP program.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. The Commission notes that it previously approved a similar proposal by the Exchange to retroactively cure an earlier lapse in the Exchange's RSP program.<sup>10</sup> The previous retroactive

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<sup>8</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78f(b)(4).

<sup>10</sup> See Securities Exchange Act Release No. 57794 (May 7, 2008), 73 FR 27582 (May 13, 2008) (SR-Amex-2008-34) (retroactively extending RSP from January 1, 2008 through March 17, 2008).

proposal was subject to the full comment period and did not generate any comments. Since this proposal is substantively the same as the previous retroactive proposal and in light of the hardship that the Exchange states members may face on account of the lapse of the RSP, the Commission believes that there is good cause to approve the proposal on an accelerated basis.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>11</sup> that the proposed rule change (SR-NYSEALTR-2008-06) is hereby approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

Florence E. Harmon  
Acting Secretary

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<sup>11</sup> 15 U.S.C. 78s(b)(2).

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