

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59416; File No. SR-NYSEALTR-2009-09)

February 18, 2009

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Alternext US LLC Amending Certain NYSE Alternext Equities Rules to Reflect that Designated Market Makers (“DMMs”) on the Exchange No Longer Act as Agents for Orders Entered on the Exchange

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 February 4, 2009, NYSE Alternext US LLC (the “Exchange” or “NYSE Alternext”) 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 certain NYSE Alternext Equities rules to reflect that Designated Market Makers (“DMMs”) on the Exchange will no longer act as agents for orders entered on the Exchange.

The text of the proposed rule change is available at [www.nyse.com](http://www.nyse.com), the Exchange, and 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 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

Through this filing, the Exchange proposes to amend certain NYSE Alternext Equities rules to conform them with amendments filed by the New York Stock Exchange, Inc. [sic] LLC<sup>4</sup> to reflect that the Designated Market Makers ("DMMs") no longer have agency responsibilities for orders entered on the Display Book<sup>®</sup> ("Display Book").<sup>5</sup>

As described more fully in a related rule filing<sup>6</sup>, NYSE Euronext acquired The Amex Membership Corporation ("AMC") pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the "Merger"). In connection with the Merger, the Exchange's

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<sup>4</sup> See SR-NYSE-2009-13 (to be filed on February 4, 2009).

<sup>5</sup> The Display Book<sup>®</sup> system is an order management and execution facility. The Display Book system receives and displays orders to the DMM, contains the Book, and provides a mechanism to execute and report transactions and publish results to the Consolidated Tape. The Display Book system is connected to a number of other Exchange systems for the purposes of comparison, surveillance, and reporting information to customers and other market data and national market systems.

<sup>6</sup> See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-NYSE-2008-60 and SR-Amex 2008-62) (approving the Merger).

predecessor, the American Stock Exchange LLC (“Amex”), a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext US LLC, and continues to operate as a national securities exchange registered under Section 6 of the Securities Exchange Act of 1934, as amended (the “Act”).<sup>7</sup> The effective date of the Merger was October 1, 2008.

In connection with the Merger, on December 1, 2008, the Exchange relocated all equities trading conducted on the Exchange legacy trading systems and facilities located at 86 Trinity Place, New York, New York, to trading systems and facilities located at 11 Wall Street, New York, New York (the “Equities Relocation”). The Exchange’s equity trading systems and facilities at 11 Wall Street (the “NYSE Alternext Trading Systems”) are operated by the NYSE on behalf of the Exchange.<sup>8</sup>

As part of the Equities Relocation, NYSE Alternext adopted NYSE Rules 1-1004, subject to such changes as necessary to apply the Rules to the Exchange, as the NYSE Alternext Equities Rules to govern trading on the NYSE Alternext Trading Systems.<sup>9</sup> The NYSE Alternext Equities Rules, which became operative on December 1, 2008, are

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<sup>7</sup> 15 U.S.C. 78f.

<sup>8</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex 2008-63) (approving the Equities Relocation).

<sup>9</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex 2008-63) (approving the Equities Relocation); Securities Exchange Act Release No. 58833 (October 22, 2008), 73 FR 64642 (October 30, 2008) (SR-NYSE-2008-106) and Securities Exchange Act Release No. 58839 (October 23, 2008), 73 FR 64645 (October 30, 2008) (SR-NYSEALTR-2008-03) (together, approving the Bonds Relocation); Securities Exchange Act Release No. 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR-NYSEALTR-2008-10) (adopting amendments to NYSE Alternext Equities Rules to track changes to corresponding NYSE Rules); Securities Exchange Act Release No. 59027 (November 28, 2008), 73 FR 73681 (December 3, 2008) (SR-NYSEALTR-2008-11) (adopting amendments to Rule 62 - NYSE Alternext Equities to track changes to corresponding NYSE Rule 62).

substantially identical to the current NYSE Rules 1-1004 and the Exchange continues to update the NYSE Alternext Equities Rules as necessary to conform with rule changes to corresponding NYSE Rules filed by the NYSE.

### Background

On June 12, 2008, the NYSE filed a set of proposed rule changes designed to transform its market structure and reinforce the NYSE as the premier venue for price discovery, liquidity, competitive quotes and price improvement.<sup>10</sup> That and other filings<sup>11</sup> formed the core initiatives submitted by the NYSE to reinforce its dynamic and competitive marketplace.

As outlined in SR-NYSE-2008-46 (the “New Market Model filing”), the changes to the NYSE’s marketplace included the replacement of NYSE specialists with DMMs. These changes are also applicable to the NYSE Alternext market. The function of the DMM is substantially different from the manner in which Exchange specialists functioned vis-à-vis the relationship between order givers and representation of these orders in the marketplace. DMMs no longer receive copies of orders entered in Exchange systems prior to the order’s publication to all market participants by Display Book. Similarly, DMMs do not have a negative obligation which would require the DMM to yield trading for the DMM unit’s proprietary account in order to allow public orders to be executed against each other. DMMs therefore trade on parity with all market participants.

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<sup>10</sup> See Securities Exchange Act Release No. 58184 (July 17, 2008), 73 FR 42853 (July 23, 2008) (SR-NYSE-2008-46).

<sup>11</sup> See for example, Securities Exchange Act Release No. 58052 (June 27, 2008), 73 FR 38274 (July 3, 2008) (SR-NYSE-2008-45) (amending NYSE Rule 98); see also Securities Exchange Act Release No. 58363 (August 14, 2008), 73 FR 49514 (August 21, 2008) (SR-NYSE-2008-52) (amending the NYSE allocation policy).

Incoming orders to buy and sell submitted to the Exchange are eligible for automatic quoting and immediate and automatic execution. Instead of the DMM, the Display Book is responsible for tracking the liquidity available at each specified price point. Exchange systems automatically review the liquidity available on the Display Book for execution and then using sophisticated execution logic access the necessary liquidity to consummate trades. Exchange systems report executions to the entering parties, update the quote and process order cancellations.

Although the DMM no longer receives order by order information, he or she is still responsible for the execution of manual transactions on the Exchange including opening and re-opening transactions, closing transactions, block transactions, gap quote situations and when trading reaches LRPs that would lock or cross the market.<sup>12</sup> DMMs are responsible for choosing the price<sup>13</sup> and the executions of the orders at that price during those specific situations.

In the current Exchange trading environment, the DMM no longer functions as an agent for orders on the Display Book because the DMM does not control order by order information. As such the Exchange proposes through this filing to amend legacy rules that retain the concept of the Exchange market maker as agent.

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<sup>12</sup> See NYSE Alternext Rule 104(a)(2)-(5).

<sup>13</sup> In an opening and reopening trade, Display Book will verify that all interest that must be executed in the opening or reopening can be executed at the price chosen by the DMM. If all the interest that must be executed in the transaction cannot be executed at that price, the Display Book will block the execution. In addition, when executing blocks (10,000 shares or more or value of \$200,000 or more), trading out of a gap quote situation or an LRP that locks or crossed the market, the Display Book may adjust the execution price if there is enough interest on the Display Book to complete the transaction at a better price.

### Proposed Rule Changes

Certain Exchange rules contain language that refers to the DMM “holding,” “receiving,” and/or “accepting” orders. These concepts were consistent with the role performed by former specialist but are inconsistent with the role of the DMM. The Exchange therefore proposes to amend NYSE Alternext Rules 13 (“Definitions of Orders”), 91 (“Taking or Supplying Securities Named in Order”), 123A (“Miscellaneous Requirements”) and 123B (“Exchange Automated Order Routing Systems”) to remove this concept.

Specifically, the Exchange proposes to delete the Supplementary Material .10 of NYSE Alternext Rule 13 in its entirety to remove language that provides a DMM must accept any order given to him, unless he obtains Floor Official approval to decline an order. The Exchange further seeks to remove the phrase “the DMM via”<sup>14</sup> from Supplementary Material .40 of NYSE Alternext Rule 91 that governs a DMM making a proprietary trade against an order, but retain the procedural provisions. In Supplementary Material to Rule 123A, the Exchange proposes to delete .10 (“Limited orders-Market orders”) since it speaks to a member giving an order to the DMM. The first paragraph of .20 (“Sending orders to DMMs”) in that rule is proposed for deletion as it governs members and member organizations transmitting orders to DMMs. The Exchange further proposes to amend .20 of NYSE Alternext Rule 123A to: (i) delete the concept of orders being sent to the DMMs; and (ii) change the title to “Changes in Day Orders” which reflects the retained material. Similarly, Supplementary Material .31 (“Orders sent to

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<sup>14</sup> See e-mail from Deanna G. W. Logan, Managing Director, NYSE Regulation, Inc., to David Liu, Assistant Director, Division of Trading and Markets, Commission, dated February 13, 2009 (making technical edits) (“February 13<sup>th</sup> e-mail”).

representatives”), .32 (“Report not received”), .33 (“Addressed order or order handed to DMM”), .34 (“Unaddressed order”), .35 (“Erroneous statement”), .36 (“Legibility of orders”), .37 (“Identity of stock”), .38 (“Reports, written and oral”) and .39 (“Duplicate reports”) of NYSE Alternext<sup>15</sup> Rule 123A are proposed for deletion as they speak to transmitting or giving orders to DMMs, DMMs receiving orders, DMMs giving reports on orders, and similar provisions.

In addition, the Exchange proposes to delete NYSE Alternext Rule 123B(b)(2)(B) because it speaks of orders received by the DMM through the Designated Order Turnaround System and to erroneous reports sent by the DMM on executions. These functions are no longer handled in this manner. As previously explained, order acceptance and reports of executions are handled by Exchange systems. The Exchange also proposes to delete NYSE Alternext Rule 123B(d) because it describes orders being sent to and executed by the DMM.

The Exchange also proposes to amend paragraph (2)(A) of Rule 123B(b) to have it apply to all members if the member makes an erroneous report of the price of a transaction, by substituting the word “member” for the word “broker” in the rule. This will then include situations in which a DMM makes an erroneous report as to price on a transaction.

NYSE Alternext<sup>16</sup> Rule 92(d)(6) (“Limitations on Members’ Trading Because of Customers’ Orders”) is further proposed for deletion as it restricts DMM proprietary trading during the hours the Exchange is closed. The restriction was predicated on the former specialist system where the specialist had knowledge of customer orders in his or

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<sup>15</sup> See February 13<sup>th</sup> e-mail, supra, note 14.

<sup>16</sup> Id.

her possession. The restriction is obviated by the fact that the DMM no longer “holds” customer orders. Nevertheless, as members, DMMs will continue to be subject to the rule’s general prohibition. Similarly, the last sentence of NYSE Alternext Rule 127(d)(3) (“Block Crosses Outside the Prevailing NYSE Quotation”) is proposed for deletion because it also is predicated on the DMM retaining stock for the DMM’s own account at a price at which the DMM “holds” unexecuted customer orders.<sup>17</sup>

The Exchange believes that the amendments proposed herein to remove legacy rule language that is inconsistent with the role of the DMM as approved by the Commission in the New Market Model filing are necessary to adequately reflect the functions performed by the DMM.

## 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>18</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>19</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 changes are consistent with these principles in that it amends legacy rules to accurately reflect the role performed by the Exchange’s market maker thus removing impediments to and perfecting the mechanism of a free and open market.

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<sup>17</sup> Id.

<sup>18</sup> 15 U.S.C. 78f(b).

<sup>19</sup> 15 U.S.C. 78f(b)(5).

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

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 proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>20</sup> and Rule 19b-4(f)(6) thereunder.<sup>21</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing.<sup>22</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

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<sup>20</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>21</sup> 17 CFR 240.19b-4(f)(6).

<sup>22</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. The Exchange has satisfied this requirement.

investors and the public interest. The Exchange requested that the Commission waive the 30-day operative delay and designate the proposed rule change operative upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The proposed rule change seeks to remove legacy language that is inconsistent with the role performed by DMMs as approved by the Commission in NYSE's New Market Model filing,<sup>23</sup> which also applies to DMMs on Alternext. Furthermore, it seeks to clarify its rule text in order to avoid any undue confusion on the part of Exchange market participants as it relates to the function performed by DMMs. Therefore, the Commission designates the proposal operative upon filing.<sup>24</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.<sup>25</sup>

#### 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:

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<sup>23</sup> See supra note 10.

<sup>24</sup> For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>25</sup> 15 U.S.C. 78s(b)(3)(C).

- 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-2009-09 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-NYSEALTR-2009-09. 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 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 available publicly. All submissions should refer to File Number SR-NYSEALTR-2009-09 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>26</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>26</sup> 17 CFR 200.30-3(a)(12).