

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58108; File No. SR-NYSE-2007-64]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, Relating to Section 31 Accumulated Funds

July 7, 2008.

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 July 12, 2007, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (the “SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. On June 26, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

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

The Exchange proposes to adopt Supplementary Material .30 to NYSE Rule 440H (“Activity Assessment Fee”) to allow member firms to voluntarily submit, during a six-month period after the effective date of this rule proposal, funds previously accumulated by member firms to satisfy their, and subsequently NYSE’s, obligation to remit SEC Section 31-related fees, to the Exchange. In addition, a member or member organization may designate all or part of any accumulated excess held by the Exchange and allocated to such member or member organization to be used by the Exchange in accordance with the terms of proposed Supplementary Material .30. Finally, to the extent the payment of these historically accumulated funds or Exchange-accumulated excess is in excess of the fees due the Commission from NYSE under Section 31 of the Act,<sup>3</sup> such surplus shall be used by the

Exchange to offset Exchange regulatory costs.

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

#### 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. The text of these statements may be examined at the places specified in Item III 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

Pursuant to Section 31 of the Act and Rule 31 thereunder,<sup>4</sup> national securities exchanges and associations (collectively, “self-regulatory organizations” or “SROs”) are required to pay a transaction fee to the SEC 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, the Exchange assesses its members and member organizations an Activity Assessment Fee in accordance with NYSE Rule 440H. NYSE Rule 440H requires members and member organizations effecting “covered sales” (as defined in Section 31 of the Act) of securities on the Exchange to pay Activity Assessment Fees based upon their covered sales. The Exchange calculates such fees by multiplying the aggregate dollar amount of covered sales effected on the Exchange during the appropriate period by the Section 31(b) fee rate in effect during that period. 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 billed by the Exchange and the amounts collected from the customers historically had been difficult for member firms, causing surpluses to accumulate at some broker-dealer firms (referred to herein as

“accumulated funds”). These accumulated funds were not remitted to NYSE by certain firms, despite the fact that these charges may have been previously identified as “Section 31 Fees” or “SEC Fees” by the firms.<sup>5</sup> In addition, prior to direct billing of members and member organizations of Activity Assessment Fees as of June 1, 2005, the Exchange utilized “self-reporting” on Form 120-A of amounts payable under Rule 440H, and the Exchange has accumulated amounts so paid in excess of amounts paid by the Exchange to the SEC pursuant to Section 31 of the Act (“Exchange accumulated excess”).

In November 2004, the Exchange and other SROs received a letter from the SEC’s Division of Market Regulation<sup>6</sup> requesting, among other things, that the Exchange conduct an analysis to ascertain the amount of accumulated funds and present a plan for broker-dealers to dispose of or otherwise resolve title to such accumulated funds. Following discussion among the SROs and staff of the Division of Market Regulation, in an effort to ascertain the amount of accumulated funds, NASD surveyed 240 member clearing and self-clearing firms to review their practices regarding the collection of such fees from customers. After compiling and analyzing the data provided by member firms, NASD staff found that over half of the firms surveyed did not have an accumulated funds balance. NASD worked with the other SROs to recommend a potential solution to allow NASD and other SRO member firms to resolve title to the accumulated funds. It was determined, based upon information provided in connection with NASD’s survey, that it would be virtually impossible to return customer-related accumulated funds to the

<sup>5</sup> The SEC stated in its release adopting new Rule 31 and Rule 31T that “it is misleading to suggest that a customer or [SRO] member incurs an obligation to the Commission under Section 31.” See Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41060, 41072 (July 7, 2004). In response to this statement, the Exchange amended Rule 440H to refer to this fee as an “Activity Assessment Fee.” See Securities Exchange Act Release No. 52018 (July 12, 2005), 70 FR 41467 (July 19, 2005) (SR-NYSE-2005-39). The Exchange issued Information Memos regarding the Exchange’s “Activity Assessment Fee” and the SEC’s “Section 31 Fee”, and provided guidance for members and member organizations that choose to charge their customers fees. See Information Memo 05-48 (July 19, 2005) and Information Memo 05-36 (May 13, 2005).

<sup>6</sup> As of November 2007, the Division of Market Regulation was renamed the Division of Trading and Markets.

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

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

<sup>3</sup> 15 U.S.C. 78ee.

<sup>4</sup> 17 CFR 240.31.

customers that had paid these funds to the firms.<sup>7</sup>

The proposed rule change is aimed at enabling those fees that may have been collected for purposes of paying an "SEC Fee" or "Section 31 Fee" to be used to pay such fees. The Exchange is proposing new Supplementary Material .30 to NYSE Rule 440H that will allow firms, on a one-time-only basis, voluntarily to remit historically accumulated funds to the Exchange. These funds then would 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 could designate all or part of the Exchange accumulated excess held by the Exchange and allocated to such member or member organization to be used by the Exchange in accordance with the terms of Supplementary Material .30.

Finally, to the extent the payment of these historically accumulated funds or Exchange accumulated excess is in excess of the fees due the SEC from NYSE under Section 31, such surplus shall be used by the Exchange to offset Exchange regulatory costs. Specifically, the Exchange will subject such surplus to the same treatment utilized with respect to unused fine income that has accumulated beyond a level reasonably necessary for future contingencies. That is, the board of directors of NYSE Regulation would utilize any such surplus to fund one or more special projects of NYSE Regulation, to reduce fees charged by NYSE Regulation to its member organizations or the markets that it serves, or for a charitable purpose.<sup>8</sup>

The Exchange proposes that the effective date of the proposed rule change be the date on which any Commission order approving the proposed rule change is published in the **Federal Register**. In addition, Supplementary Material .30 to Rule 440H would automatically sunset six months after the effective date.<sup>9</sup>

<sup>7</sup> NASD had asked all surveyed firms whether they could "identify and relate the funds to specific customers on a transaction by transaction basis." The surveyed firms universally stated that tracking fractions of a penny to individual customers would be impossible and any over-collections could not be passed back at the customer level. See Securities Exchange Act Release No. 55886 (June 8, 2007), 72 FR 32935 (June 14, 2007) (Order approving SR-NASD-2007-027).

<sup>8</sup> See Securities Exchange Act Release No. 55003 (December 22, 2006), 71 FR 78497 (December 29, 2007) (SR-NYSE-2006-109) (approved in Securities Exchange Act Release No. 55216 (January 31, 2007), 72 FR 5779 (February 7, 2007) (relating to NYSE Regulation policies regarding exercise of power to fine NYSE member organizations and use of money collected as fines).

<sup>9</sup> The proposed effective date and sunset date of the proposed rule change are comparable to those

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,<sup>10</sup> in general, and further the objectives of Section 6(b)(5),<sup>11</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, and 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 the proposed rule change will provide a transparent way of addressing the issue of accumulated funds held at the member firm level as well as the Exchange accumulated excess. As this proposed rule change would automatically sunset, it will be of limited duration. Moreover, based on the reminder set for this in the proposed Supplementary Material .30 to NYSE Rule 440H and the issuance of prior Information Memos on this matter, the accumulation of funds that are collected and disclosed as "Section 31 Fees" or "SEC Fees" should not reoccur.

### 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. 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

approved by the Commission for a similar proposed rule change by the American Stock Exchange LLC ("Amex"). See Securities Exchange Act Release No. 57829 (May 16, 2008), 73 FR 30173 (May 23, 2008) (SR-Amex-2007-107).

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

<sup>11</sup> 15 U.S.C. 78f(b)(5).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2007-64 on the subject line.

### Paper Comments

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

All submissions should refer to File Number SR-NYSE-2007-64. 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 a.m. and 3 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-NYSE-2007-64 and should be submitted on or before August 4, 2008.

## IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Changes

After careful review, 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>12</sup> In addition, the Commission finds good cause to approve the proposed rule change prior to the thirtieth day after the date of publication of the notice of filing. The Commission previously found similar proposals from other SROs to be

<sup>12</sup> In approving this 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).

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 Commission from approving the NYSE proposal on the same basis. The Commission notes that, because the program is voluntary, it imposes no obligation on any NYSE member that believes that accumulated funds should be retained or disposed of in another manner.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (SR-NYSE-2007-64), as modified by Amendment No. 1, be and hereby is approved on an accelerated basis.

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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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58109; File No. SR-NYSEArca-2008-47]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To Waive Retroactively as of June 24, 2008, Certain Initial Listing Fees for Companies Transferring the Listing of Their Securities From Any Other National Securities Exchange

July 7, 2008.

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 June 24, 2008, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposal from interested persons.

<sup>13</sup> See Securities Exchange Act Release No. 57829 (May 16, 2008), 73 FR 30173 (May 23, 2008) (SR-Amex-2007-107); Securities Exchange Act Release No. 55886 (June 8, 2007), 72 FR 32935 (June 14, 2007) (SR-NASD-2007-027).

<sup>14</sup> 15 U.S.C. 78s(b)(2).

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

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

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

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

The Exchange, through its wholly-owned subsidiary NYSE Arca Equities, Inc. ("NYSE Arca Equities"), proposes to waive initial listing fees for companies transferring the listing of their equity securities from any other national securities exchange. The proposed fee waiver would be applied retroactively to any companies that apply to list after the date of initial submission of this filing. The text of the proposed rule change is available at the Exchange's principal office, the Commission's Public Reference Room, and <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 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 waive initial listing fees for companies transferring the listing of their securities from any other national securities exchange. The waiver will apply to all classes of securities. The Exchange had previously waived initial listing fees in these circumstances for all companies that transferred from the New York Stock Exchange ("NYSE") at any time or from Nasdaq Stock Market ("Nasdaq") or the American Stock Exchange prior to December 31, 2007, or had applied to list prior to that date.<sup>3</sup> The proposed amendment brings the Exchange's fee policy in line with those of the NYSE and Nasdaq,<sup>4</sup> both of which currently provide fee waivers to companies transferring from the other national securities exchanges. The proposed fee waiver would be applied retroactively to any companies that apply to list after

<sup>3</sup> See Securities Exchange Act Release No. 54007 (June 16, 2006), 71 FR 36155 (June 23, 2006) (SR-PCX-2006-16).

<sup>4</sup> See Section 902.02 of the NYSE Listed Company Manual and Nasdaq Marketplace Rule IM-4500-4.

the date of initial submission of this filing.

Issuers of securities that qualify for the proposed waiver of initial listing fees will be subject to the same level of annual fees and listing of additional shares fees as other NYSE Arca issuers. The proposed rule change will not affect the Exchange's commitment of resources to its regulatory oversight of the listing process or its regulatory programs. Specifically, companies that benefit from the waiver will be reviewed for compliance with the Exchange initial and continued listing standards in the same manner as any other company that applies to be listed on the Exchange. The Exchange will conduct a full and independent review of each issuer's compliance with the Exchange's initial listing standards.

The Exchange believes that the elimination of such fees in the case of securities transferring from other national securities exchanges is justified on several grounds. An issuer that already paid initial listing fees to another national securities exchange when it became a publicly traded company is reluctant to pay a second initial listing fee to another listing venue, even if it concludes that the Exchange offers the issuer and its investors superior services and market quality. Even if an issuer concludes that the Exchange would provide a superior market for its stock, the benefits of the transfer must currently be weighed against the cost of initial inclusion. Since the expected benefits of the transfer would be diffused among the issuers' investors and realized over time, but the initial listing fees must be paid by the issuer immediately, the Exchange is concerned that issuers that stand to benefit may nevertheless opt to forgo a transfer. As such, the Exchange believes that assessing the initial fees against issuers that have already paid fees to list on another market imposes a burden on the competition between exchange markets and markets other than exchange markets, a competition that the Exchange believes is one of the central goals of the national market system. This concern is particularly great in light of the fact that the Commission has approved the waiver of initial listing fees by Nasdaq with respect to the listing of any security being transferred from another national securities exchange.<sup>5</sup>

The Exchange understands that the effect of this proposed rule change will be to impose a lower level of listing fees

<sup>5</sup> See Securities Exchange Act Release No. 51004 (January 10, 2005), 70 FR 2917 (January 18, 2005) (SR-NASD-2004-140).