

recognizing these limitations, the Commission agrees with the Exchange that consideration of both of these values should provide the Exchange with an estimation of a company's market value that supports listing the company on the Exchange. In addition, the proposed rule is designed to ensure that the Valuation is reliable by providing that the Valuation must be provided by an entity that has significant experience and demonstrable competence in providing valuations of companies, and must be of a recent date as of the time of the approval of the company for listing. Further, by assuming a market value equal to the lesser of the Valuation and a value based on the most recent Private Placement Market trading, the Exchange will be using the more conservative estimate of a company's market value.

In addition, the Commission notes that companies listing under this alternative provision will be required to meet higher market value standards. Specifically, companies will have to meet the \$100 million transfer market value requirement, rather than the \$60 million IPO requirement of Section 102.01B. Further, companies will be required to meet global market capitalization standards in Section 102.01C of the Manual that are 20% higher than the normal standards.<sup>9</sup>

The Commission notes that it expects the vast majority of companies to continue to list in connection with a firm commitment underwritten IPO, upon transfer from another market, or pursuant to a spin-off, and that this proposed alternative standard will be used by the Exchange at its discretion. In particular, in accordance with the terms of the proposed rule, the Exchange will apply this standard only for the very narrow category of companies that are seeking to list their common equity securities on the Exchange without an underwritten offering at the time of effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements. Further, the Commission expects the Exchange to utilize its discretion only after thorough consideration and evaluation of the specific company and all relevant factors. Specifically, the proposed rule change requires the Exchange to consider the appropriateness of relying on Private Placement Market trading in light of the price trends for the stock over a period of several months and only rely on a Private Placement Market price if consistent with a sustained

history evidencing a market value in excess of the listing requirement. In relying on such Private Placement Market, the Commission expects the NYSE to consider the trading characteristics of the stock, including its trading volume and price volatility over a sustained period of time. In addition, in relying on the Valuation, the Exchange must consider any market factors or factors particular to the listing applicant that would cause concern that the value of the company had diminished since the date of Valuation and continue to monitor the company and the appropriateness of relying on the Valuation up until the time of listing. The Commission expects that where these factors indicate that the value calculated may not be an accurate estimation of a company's market value, the Exchange will use its discretion to determine not to list such company pursuant to the proposed provisions. In general, the Commission expects that the Exchange will deny listing to any company seeking to list pursuant to the proposed rule change if the Exchange determines that the listing of any such company is not in the interests of the Exchange or the public interest.

The Commission also notes that companies listing pursuant to the new proposed provision will still be required to meet the IPO distribution requirements of Section 102.01A of the Manual, *i.e.*, that the company have 400 beneficial holders of round lots of 100 shares and 1,100,000 publicly held shares. The Commission believes that these existing provisions will continue to help ensure that the company has the requisite liquidity for listing on the Exchange.<sup>10</sup> The Exchange's reliance on the transfer agent for assurance that the holder requirement is met, and on the disclosure in the company's registration statement for assurance that the publicly held shares requirement is met, will ensure that these important liquidity requirements are verified before a company may qualify for listing.

For the reasons set forth above, the Commission finds that the proposed rule change is consistent with the Act.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>11</sup> that the

<sup>10</sup> See also note 8 *supra*. The Commission notes that once listed, the company would have to comply with the continued listing standards like other companies. The NYSE has not proposed any changes to the continued listing standards for companies listing under the provisions approved herein. See Section 802 of the Manual.

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

proposed rule change (SR-NYSE-2008-68) be, and hereby is, approved.

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

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-21944 Filed 9-18-08; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58549; File No. SR-NYSE-2008-80]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Conforming Certain NYSE Rules to Changes to NYSE Incorporated Rules Recently Filed by the Financial Industry Regulatory Authority, Inc.

September 15, 2008.

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 September 5, 2008, New York Stock Exchange LLC ("NYSE" or the "Exchange") 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. On September 11, 2008, the Exchange filed Amendment No. 1. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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 New York Stock Exchange ("NYSE" or the "Exchange") Rules to conform with proposed amendments to certain NYSE Incorporated Rules (defined below) recently filed by the Financial Industry Regulatory Authority, Inc. ("FINRA")<sup>4</sup> to reduce regulatory duplication and relieve firms that are members of both FINRA and the Exchange of conflicting or unnecessary regulatory burdens in the interim period

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

<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.

<sup>4</sup> See Securities Exchange Act Release No. 58533 (September 12, 2008) (SR-FINRA-2008-036).

<sup>9</sup> See Section II, Description of the Proposal, *supra*.

prior to completion of a consolidated FINRA rulebook.

## 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

On July 30, 2007, NASD and NYSE Regulation, Inc. consolidated their member firm regulation operations into a combined organization, FINRA.<sup>5</sup> As noted above, pursuant to its new regulatory responsibilities, FINRA recently filed proposed amendments to certain NYSE Incorporated Rules (and applicable Rule Interpretations). The NYSE hereby proposes to amend its version of these same rules to conform to the proposed changes filed by FINRA.

The amendments proposed by FINRA fall into the following categories:<sup>6</sup>

- Replacing the term "allied member" with the newly defined category of "principal executive", and making

<sup>5</sup> Pursuant to Rule 17d-2 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), NYSE, NYSE Regulation, Inc., and NASD entered into an agreement (the "Agreement") to reduce regulatory duplication for firms that are members of FINRA and also members of NYSE on or after July 30, 2007 ("Dual Members"), by allocating to FINRA certain regulatory responsibilities for selected NYSE rules. The Agreement includes a list of all of those NYSE and NASD rules for which FINRA has assumed regulatory responsibilities ("Common Rules"). See Securities Exchange Act Release No. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (Notice of Filing and Order Approving and Declaring Effective a Plan for the Allocation of Regulatory Responsibilities). The Common Rules include those NYSE rules that FINRA has incorporated into its rulebook (the "NYSE Incorporated Rules"). See Securities Exchange Act Release No. 56147 (July 26, 2007), 72 FR 42166 (August 1, 2007) (Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Incorporate Certain NYSE Rules Relating to Member Firm Conduct; File No. SR-NASD-2007-054). Paragraph 2(b) of the 17d-2 Agreement sets forth procedures regarding proposed changes by either NYSE or FINRA to the substance of any of the Common Rules.

<sup>6</sup> For more detail, see Securities Exchange Act Release No. 58103 (July 3, 2008), 73 FR 40403 (July 14, 2008) (SR-FINRA-2008-036).

corresponding technical changes as needed, in NYSE Incorporated Rules 2, 2A, 311-313, 321, 342, 345, 345A, 346, 351-354, 401, 405, 407-410, 414, 424, 431, 435, 440F, 440G, 477, 704, 705, 723, 724 and 791.

- Repositioning and consolidating certain NYSE Incorporated Rules. In order to consolidate all "Buy-In" requirements and procedures into one rule, FINRA proposes to reposition NYSE Incorporated Rule 283 and 285-290 as supplementary material in NYSE Incorporated Rule 282, and to make conforming changes to NYSE Incorporated Rule 134. FINRA also proposes to move certain provisions of NYSE Incorporated Rule 407 to Common Rule 346.

- Deleting NYSE Incorporated Rules that are obsolete or no longer applicable, including Rules 311(h) and 436.

- Eliminating certain provisions of NYSE Incorporated Rules that do not have a corresponding NASD equivalent, and therefore are deemed unnecessary rules, including the training requirements and registration for "securities trader" under Rule 345, Rule 345(b) and Rule 346(c).

- Additional amendments to further harmonize certain NYSE and NASD Rules, including NYSE Incorporated Rules 342.13(a), 346(e), 346.10, 351.13, 352(c) and (d), and 408(a). In order to further harmonize NYSE Incorporated Rule 282 with NASD's 11000 Rule Series, FINRA also proposes to add as supplementary material the substance of NYSE Rule 140 and provisions from NASD Rule 11810.

- Deleting NYSE Incorporated Rules that are substantively duplicative of existing NASD Rules and procedures, including Rules 404, 412 and 446. Similarly, FINRA proposes limiting application of NYSE Incorporated Rule 345(a) to securities lending representatives and supervisors only, since registered representatives and their supervisors are already addressed by NASD Rule 1031. For these particular proposed changes, the Exchange proposes to amend NYSE Rules 404, 412, 446 and 345(a) to incorporate by reference the applicable NASD Rules that will be applied by FINRA going forward.<sup>7</sup>

The Exchange proposes to amend its version of the above-referenced NYSE

<sup>7</sup> The Exchange recognizes that the proposed amendments to NYSE Rules 404, 412, 446 and 345(a) will remove these Rules from their status as Common Rules under the 17d-2 Agreement. Notwithstanding, FINRA will continue to provide regulatory services to the Exchange with respect to these Rules pursuant to the existing Regulatory Services Agreement, dated July 30, 2007, by and among FINRA, the Exchange and NYSE Regulation, Inc.

Incorporated Rules to conform to FINRA's proposed rule changes. The Exchange proposes that the operative date of the proposed rule changes be the same as the operative date of FINRA's proposed amendments to the NYSE Incorporated Rules and Rule Interpretations.

#### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5)<sup>8</sup> of the Act, in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanisms 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 changes will provide greater harmonization between NYSE Incorporated Rules and NASD Rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for their members. Where proposed amendments do not entirely conform to existing NYSE Incorporated or NASD Rules or address a provision without a direct counterpart, the Exchange believes the standards the proposed amendments establish further the objectives of the Exchange Act by providing greater regulatory clarity and relieving unnecessary regulatory burdens in the interim period until a Consolidated Rulebook is completed.

### 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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>9</sup> and Rule 19b-4(f)(6) thereunder.<sup>10</sup> Because the

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, 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 and Rule 19b-4(f)(6)(iii) thereunder.<sup>11</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>12</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>13</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative pursuant to Section 19(b)(3)(A) and Rule 19b-4(f)(6) at the same time that FINRA's proposed amendments become operative.

The purpose of the proposed rule change is to conform NYSE Rules to FINRA's proposed amendments to certain NYSE Incorporated Rules, in furtherance of the consolidation of the member firm regulations functions of NYSE Regulation and FINRA. NYSE requests that the operative date of the proposed rule change be the same as the operative date of FINRA's proposal in order to ensure that the NYSE Rules maintain their status as Common Rules under the 17d-2 Agreement. As provided in paragraph 2(b) of the Agreement, FINRA and NYSE will, absent a disagreement about the substance of a proposed rule change to one of the Common Rules, promptly propose conforming changes to ensure that such rules continue to be Common Rules under the Agreement. For this reason, the Commission designates that the proposed rule change has become operative as of September 12, 2008.<sup>14</sup>

<sup>11</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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 the pre-filing requirement.

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>14</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).

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>15</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*

- 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-NYSE-2008-80 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-2008-80. 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, 100 F Street, NE., Washington, DC 20549, 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

<sup>15</sup> 15 U.S.C. 78s(b)(3)(C). For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposal, the Commission considers the period to commence on September 11, 2008, the date on which the Exchange submitted Amendment No. 1.

without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR-NYSE-2008-80 and should be submitted on or before October 10, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-21948 Filed 9-18-08; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58518; File No. SR-NYSEArca-2008-94]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Arca, Inc. Amending NYSE Arca Equities Rules 5.1(b)(14) and 5.2(j)(2) To Permit the Listing of ELNs That Are Linked to Securities Issued by Companies Registered Under the Investment Company Act of 1940

Date: September 11, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934<sup>1</sup> (the "Exchange Act") and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 25, 2008, NYSE Arca, Inc. ("NYSE Arca" or "Exchange"), through its wholly owned subsidiary, NYSE Arca Equities, Inc. ("NYSE Arca Equities"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III 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.

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

The Exchange proposes to amend NYSE Arca Equities Rule 5.1(b)(14), the Exchange's definition of Equity-Linked Notes ("ELNs"), and NYSE Arca Equities Rule 5.2(j)(2), the Exchange's listing standards for ELNs, to permit the listing of ELNs that are linked to securities that are issued by companies registered under the Investment Company Act of 1940 ("1940 Act")<sup>3</sup>

<sup>16</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.

<sup>3</sup> 15 U.S.C. 80a-1.