

- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR-ISE-2008-76 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-ISE-2008-76. 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 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 No. SR-ISE-2008-76 and should be submitted on or before November 4, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-58743; File No. SR-NYSE-2008-102]

### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Amending Rule 48 To Permit the Exchange To Declare an Extreme Market Volatility Condition and Suspend Certain NYSE Requirements Relating to the Closing of Securities at the Exchange**

October 7, 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 October 2, 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. 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 Rule 48 to permit the Exchange to declare an extreme market volatility condition and suspend certain NYSE requirements relating to the closing of securities at the Exchange. The text of the proposed rule change is available at NYSE, [www.nyse.com](http://www.nyse.com), and 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 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**

The Exchange is proposing to amend NYSE Rule 48 to provide the Exchange with the ability to suspend certain requirements at the closing when extremely high market volatility could negatively affect the ability to ensure a fair and orderly close.

Based on what the markets have experienced in the past month, and in particular, at the close on September 29, 2008, the Exchange believes that in addition to the open, an extreme market volatility condition can also impact the close at the Exchange. In particular, the Exchange believes that in an extreme market volatility condition at the close, the Exchange should be able to permit orders to be entered after 4 p.m. for the purpose of offsetting an imbalance that may exist as of that time and to cancel or reduce a market-on-close or limit-on-close order that is a legitimate error and would cause significant price dislocation at the close.

#### **NYSE Rule 48 Background**

The Exchange adopted NYSE Rule 48 on December 5, 2007 in order to provide the Exchange with the ability to suspend the requirement to disseminate price indications and obtain Floor Official approval prior to the opening when extremely high market volatility could negatively impact the operation of the market by causing Floor-wide delays in the opening of securities on the Exchange.<sup>4</sup>

Under NYSE Rule 48, in the event of extremely high market volatility that would have a Floor-wide impact on the ability of specialists to arrange for the timely opening of trading at the Exchange under the normal rules, a qualified Exchange officer may declare an extreme market volatility condition. For purposes of the rule, a "qualified Exchange officer" means the Chief Executive Officer of NYSE Euronext, Inc. or his or her designee, or the Chief Executive Officer of NYSE Regulation, Inc., or his or her designee. While either may declare the extreme market volatility condition, each must make a reasonable effort to consult with the other prior to taking such action.

NYSE Rule 48 is intended to be invoked only in those situations where the potential for extreme market volatility would likely impair Floor-wide operations at the Exchange by

<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 SEC Release No. 34-56920 (Dec. 6, 2007) (SR-NYSE-2007-111).

<sup>20</sup> 17 CFR 200.30-3(a)(12).

impeding the fair and orderly opening of securities. Accordingly, the rule sets forth a number of factors that the qualified Exchange officer would have to consider before declaring such a condition, including: volatility during the previous day's trading session; trading in foreign markets before the open; substantial activity in the futures market before the open; the volume of pre-opening indications of interest; evidence of pre-opening significant order imbalances across the market; government announcements; news and corporate events; and any such other market conditions that could impact Floor-wide trading conditions.

Once the qualified Exchange officer has reviewed such factors and determined that an extreme market volatility condition exists, the qualified Exchange officer must make reasonable efforts to consult with the Commission staff before making such a declaration. The qualified Exchange officer must also document the basis for making such a declaration. If the qualified Exchange officer is unable to reach the Commission staff before the opening, he or she may declare such a condition, but must, as promptly as practicable in the circumstances, inform the Commission staff of such declaration, and the basis for making such declaration.

Because the declaration of an extreme market volatility condition concerns the opening of securities at the Exchange, the rule further provides that such condition must be declared before the scheduled opening of securities at the Exchange. Moreover, such declaration would be in effect only for the opening of that trading session (or reopenings during the same trading day following the imposition of a mandatory halt pursuant to NYSE Rule 80B). Should market conditions that led to the declaration continue on subsequent days, the Exchange would have to review on a day-by-day basis the factors necessitating such a declaration and on each day make a reasonable effort to consult with the Commission staff as described above.

The Exchange notes that even when the dissemination and Floor Official (including Senior Floor Official and above) approval requirements are suspended, specialists *remain* responsible for the fair and orderly opening of securities. Exchange rules already provide that when Floor Official approval is sought for certain actions, the specialist remains ultimately responsible for arranging the opening of securities at the Exchange. This obligation remains unchanged. Even in the absence of price indications and a Floor Official's independent, impartial

review of the opening, specialists are still charged with ensuring that an opening price reflects market conditions and all participants have had a reasonable opportunity to participate.

The Exchange notes also that when Rule 48 is invoked, it does not affect situations where the opening of a security was delayed for reasons unrelated to extreme market volatility, such as where there is material news pending that justifies a regulatory halt under NYSE Rule 123D. In such cases, notwithstanding the invocation of Rule 48, the specialist in the affected security is expected to follow regular procedures for opening the security (that is, as if Rule 48 had not been invoked).

### Proposed Amendments to Rule 48

#### Background

Pursuant to NYSE Rule 52, dealings on the Exchange are limited to the hours during which the Exchange is open for business, *i.e.*, 9:30 a.m. to 4 p.m. Except for certain pre-opening submission of orders, a member or member organization may not make bids or offers outside of those hours, and cannot enter orders after 4 p.m. (or earlier, in the event of an earlier scheduled close).

In the event a security has an imbalance of market-on-close ("MOC") or limit-on-close ("LOC") orders or when the closing price would elect a significant volume of stop orders, there may be little time to attract offsetting orders before 4 p.m. For example, a member, member organization, or customer may be willing to offset the imbalance, but be unable to enter an order before 4 p.m. Under current Exchange rules, specialists are enabled to represent such legitimate market interest that was willing to participate in the close, but could not enter a timely order. When a specialist has included another member's or member organization's interest in offsetting the imbalance when setting a closing price, NYSE Rule 902(a)(ii)(B) permits the specialist and such member or member organization to enter a coupled order into Crossing Session 1. Pursuant to Rule 903(d)(ii), the specialist must obtain Floor Official approval in order to enter a coupled order pursuant to that rule. Such procedure essentially permits the specialist to represent the member's or member organization's interest on a riskless principal basis.

NYSE Rule 123C(1) and (2) govern the entry of MOC and LOC orders at the Exchange. MOC and LOC orders must be entered by 3:40 p.m., unless entered to offset a published imbalance. Between 3:40 p.m. and 3:50 p.m., an MOC or LOC order cannot be cancelled

or reduced, except in the case of a legitimate error. After 3:50 p.m., an MOC or LOC order cannot be cancelled for any reason, including in the case of a legitimate error.

### Suspending Certain Rules During an Extreme Market Volatility Condition at the Close

On September 29, 2008, the U.S. markets experienced the largest single point drop in the history of the Dow Jones Industrial Average ("DJIA")—777 points. That drop capped a month of volatility and significant changes to the financial marketplace, including the federal takeovers of Fannie Mae, Freddie Mac, American International Group, Inc., and Washington Mutual, the bankruptcy of Lehman Brothers, Inc., the acquisition of Merrill Lynch by Bank of America, and the sale of Wachovia's banking business to Citigroup.

Rule 48 has served as an invaluable tool for the Exchange to ensure a fair and orderly open in these times of extreme market volatility. During the month of September, the Exchange invoked Rule 48 nine times. This, in contrast to the four times that the Exchange invoked Rule 48 in the prior nine-month period, since it was adopted. Given the events of September 29, 2008, which included market-wide sell imbalances at the close, the Exchange believes that it should have the ability to declare an extreme market volatility condition at the close as well so that the Exchange can suspend certain rules to ensure a fair and orderly close.

The Exchange therefore proposes to amend Rule 48 to include the close of trading as a time when a qualified Exchange officer would be permitted to declare an extreme market volatility condition. In such event, the Exchange proposes temporarily suspending NYSE Rules 52 (Hours of Operation) and 123C(1) and (2) (Market on the Close Policy and Expiration Policy), provided that certain requirements are met. The Exchange also proposes to amend Rule 48 to clarify that the existing rule covers not just openings of trading, but also reopening of trading following a market-wide halt of securities at the Exchange.

To enable a qualified Exchange officer to declare a Rule 48 condition at the close, the Exchange proposes amending Rule 48(c) to include that a qualified Exchange officer may consider the volatility during that day's trading session and evidence of significant order imbalances across the market at the close for purposes of determining whether to declare an extreme market volatility condition at the close. The

Exchange also proposes that an extreme market volatility condition at the close is a separate event and must be considered in light of the facts and circumstances leading to the close. A Rule 48 condition at the opening would not extend to the close; as proposed, a qualified Exchange officer would need to make an independent determination to invoke Rule 48 at the close regardless of whether Rule 48 was invoked at the open.

To ensure a fair and orderly close in an extreme market volatility condition, the Exchange proposes to temporarily suspend Rule 52 so that interest can be solicited and entered into Exchange systems to offset imbalances after the scheduled close of trading. As noted above, while interest that has not been entered by 4 p.m. can be included to offset imbalances under Exchange rules, the process for including such interest in the close requires a specialist to represent the interest and then enter a coupled order in Crossing Session I with the member or member organization who was willing to include such interest in the close. Because of the need for Floor Official approval and the fact that such orders are entered manually, processing Rule 902(a)(ii)(B) coupled orders, particularly when there are multiple coupled orders per stock, can take time.

The Exchange therefore proposes suspending Rule 52 for the sole purpose of bypassing the Rule 902 process in times of extreme market volatility. As proposed, during an extreme market volatility condition, interest may be solicited—including interest that may not have been present prior to 4 p.m.—to offset any imbalance that may exist as of 4 p.m. (or earlier, in the case of an earlier scheduled close). If offsetting interest is received in response to such solicitation, rather than have the specialist represent such offsetting interest in the close, as proposed, such interest could be entered directly into Exchange systems on behalf of the member or member organization representing such interest. Because Exchange systems do not allow for the electronic entry of orders after 4 p.m., as proposed, such interest must be represented manually by a Floor broker in the closing auction process and entered into Exchange systems by the specialist by no later than 4:30 p.m. The Exchange further proposes that the entry of any orders after 4 p.m. pursuant to the proposed rule must be under the supervision and approval of a Floor Governor.

By permitting such offsetting interest to be entered directly into Exchange systems, the specialist will be better

able to manage the order flow that may be entered to offset the imbalance, particularly if such offsetting order flow is at multiple limit prices. It will also enable a better audit trail of whose interest participated in the close. To ensure a complete audit trail, as proposed, any offsetting interest entered after 4 p.m. during an extreme market volatility condition must also be entered into Front End Systemic Capture database (“FESC”), as required by NYSE Rule 123. Because such interest may not have been known until after 4 p.m., as proposed, a Floor broker may represent such offsetting interest after 4 p.m. without first entering the details of the order into a FESC, as required by NYSE Rule 123, so long as such orders are entered into FESC on an “as of” basis immediately following execution of the order.

The Exchange also proposes providing the ability to temporarily suspend the NYSE Rule 123C(1) and (2) requirements that MOC and LOC orders that are legitimate errors cannot be cancelled or reduced after 3:50 p.m. during an extreme market volatility condition at the close. As proposed, only an erroneous MOC or LOC that would cause significant price dislocation in the close could be considered for cancellation. In other words, an MOC or LOC order that is a legitimate error that would have no impact on the closing price could not take advantage of the proposed temporary suspension, even in an extreme market volatility condition. If it is determined that such an MOC/LOC legitimate error would dislocate the close, such order can be cancelled or reduced at any time up until that particular security has closed. To further ensure that the ability to cancel an MOC or LOC order after 3:50 is not abused, as proposed, such an order can be cancelled or reduced only with the supervision and approval of both an Executive Floor Governor and a qualified Exchange officer. In the event an Executive Floor Governor is not available, a Floor Governor’s approval must be obtained.

The Exchange also proposes adding supplementary material to NYSE Rule 48 that provides that the amendments proposed in this rule filing to include an extreme market volatility condition at the close and the related proposed rule suspensions in such a condition are temporary and will end on December 31, 2008.

## 2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement

under Section 6(b)(5)<sup>5</sup> that an Exchange have rules that are designed 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.

## 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 designated the proposed rule change as one that: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) 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. Therefore, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>6</sup> and Rule 19b-4(f)(6) thereunder.<sup>7</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of its filing.<sup>8</sup> However, Rule 19b-4(f)(6)(iii)<sup>9</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. In view of the immediate nature of the relief requested, the Exchange seeks to have the proposed amendments become operative immediately. The Exchange has requested that the Commission waive the 30-day operative delay. Waiver of this period will allow the Exchange to

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

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>7</sup> 17 CFR 240.19b-4(f)(6).

<sup>8</sup> In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file 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. NYSE has satisfied this requirement.

<sup>9</sup> 17 CFR 240.19b-4(f)(6)(iii).

immediately implement the proposed rule change.

The Exchange believes that given the current market climate, immediate implementation of the foregoing proposed rule change is necessary in order to avoid significant disruption to the market and to ensure investor protection in light of the potential for additional volatility in the market as the credit crisis continues. In particular, recent and near-term events, including the Emergency Economic Stabilization Act of 2008 and the pending expiration of the Commission's Emergency Order that prohibits persons from selling short the securities of financial institutions,<sup>10</sup> could cause additional volatility in the market in the coming days. Moreover, the Exchange proposes suspending only those rules that could impact specialists' ability to arrange a fair and orderly close during an extreme market volatility condition. Finally, the proposed changes to NYSE Rule 48 are temporary and will end on December 31, 2008. The Exchange believes that its need to immediately implement the proposed rule change satisfies the standards set out in the Exchange Act and related rules.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission therefore grants the Exchange's request and designates the proposal to be operative upon filing.<sup>11</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. Please include File Number SR-NYSE-2008-102 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-NYSE-2008-102. 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 NYSE. 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-2008-102 and should be submitted on or before November 4, 2008.

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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**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58745; File No. SR-NYSEArca-2008-94]

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

October 7, 2008.

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"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend NYSE Arca Equities Rules 5.1(b)(14) and 5.2(j)(2) to permit the listing of Equity Linked Notes ("ELNs") that are linked to securities issued by companies registered under the Investment Company Act of 1940 ("1940 Act")<sup>3</sup> and are listed on a national securities exchange. The proposed rule change was published in the **Federal Register** on September 19, 2008 for a 15-day comment period.<sup>4</sup> The Commission received no comments on the proposal. This order grants approval to the proposed rule change on an accelerated basis.

#### I. Description of the Proposal

The Exchange proposes to amend NYSE Arca Equities Rules 5.1(b)(14), the Exchange's definition of 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 issued by companies registered under the 1940 Act and are listed on a national securities exchange.

##### *A. Definition of ELN*

NYSE Arca Equities Rule 5.1(b)(14) currently defines ELNs as notes that are linked, in whole or in part, to the market performance of up to thirty common stocks or non-convertible preferred stocks. The Exchange proposes to amend NYSE Arca Equities Rule 5.1(b)(14) and define ELNs as notes that are linked, in whole or in part, to

<sup>10</sup> See Securities Exchange Act Release No. 58592 (September 18, 2008), 73 FR 55169 (September 24, 2008).

<sup>11</sup> For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>12</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.

<sup>4</sup> See Securities Exchange Act Release No. 58518 (September 11, 2008), 73 FR 54446.