

part of the complete operation of the New Model related to RCMM and CT trading. Once Phase 2 implementation is complete, the NYSE will have the fuller data set to decide what roles, if any, RCMMs and CTs should perform at the NYSE. Thereafter, the Exchange will formally submit a proposal to the Commission outlining the roles, if any, these classes of traders have in the Exchange's New Model market. The Exchange is therefore proposing to extend the Moratorium as amended<sup>10</sup> for an additional three (3) months to March 31, 2009 in order to finalize its determination as to the roles of RCMMs and CTs at the NYSE.

The Exchange will issue an Information Memo announcing the extension of the Moratorium.

## 2. Statutory Basis

The basis under the Act<sup>11</sup> for this proposed rule change is the requirement under Section 6(b)(5)<sup>12</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. The Exchange believes that the instant filing is consistent with these principles in that the review of data associated with RCMM and CT trading in light of the significant developments in its technology and New Model will allow the Exchange to make an informed decision as to the viability of RCMMs and CTs in this evolving marketplace and may potentially remove impediments to and better improve the mechanism of a free and open market.

### 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.

<sup>10</sup> See Securities Exchange Act Release No. 53549 (March 24, 2006), 71 FR 16388 (March 31, 2006) (SR-NYSE-2006-11) (making certain amendments to the Moratorium).

<sup>11</sup> 15 U.S.C. 78a.

<sup>12</sup> 15 U.S.C. 78f(b)(5).

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act.<sup>13</sup> The Exchange asserts that the proposed rule change (i) will not significantly affect the protection of investors or the public interest, (ii) will not impose any significant burden on competition, and (iii) by its terms, will not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest; provided that the self-regulatory organization has given the Commission written 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 the requirement that it give the Commission written 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.

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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2008-124 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2008-124. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2008-124 and should be submitted on or before January 5, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59064; File No. SR-NYSE-2008-91]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change To Adopt a Policy Relating to Its Treatment of Trade Reports That It Determines To Be Inconsistent With the Prevailing Market

December 5, 2008.

#### I. Introduction

On September 26, 2008, the New York Stock Exchange LLC ("NYSE" or

<sup>14</sup> 17 CFR 200.30-3(a)(12).

“Exchange”) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change to allow the Exchange to exercise the discretion to append an indicator (an “Aberrant Report Indicator”) to a trade report to indicate that the market believes that the trade price in a trade executed on that market does not accurately reflect the prevailing market for the security. The proposed rule change was published for comment in the **Federal Register** on October 10, 2008.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

## II. Description of the Proposal

Trades in listed securities occasionally occur at prices that deviate significantly from prevailing market prices and those trades sometimes establish a high, low or last sale price for a security that does not reflect the true market for the security.

The Exchange proposes to adopt as policies of the Exchange that it will:

- i. Monitor for trade prices that do not accurately reflect the prevailing market for a security;
- ii. Append an Aberrant Report Indicator to any trade report with respect to any trade executed on the Exchange that the Exchange determines to be inconsistent with the prevailing market; and
- iii. Discourage vendors and other data recipients from using prices to which the Exchange has appended the Aberrant Report Indicator in any calculation of the high, low or last sale price of a security.

The Exchange proposes to append retroactively the Aberrant Report Indicator to trades that do not accurately reflect the prevailing market for a security, commencing as of January 1, 2007.

The Exchange intends to urge vendors to disclose the exclusion from high, low or last sale price data of any aberrant trades excluded from high, low or last sale price information that they disseminate and to provide to data users an explanation of the parameters used in the Exchange’s aberrant trade policy. Upon adoption of the Aberrant Report Indicator, the Exchange also will contact all of its listed companies to explain the aberrant trade policy and will notify users of the information that these are

still valid trades. The Exchange will inform the affected listed company each time the Exchange or another market <sup>4</sup> appends the Aberrant Report Indicator to a trade in an NYSE-listed stock and will remind the users of the information that these are still valid trades in that they were executed and not broken, such as in the case of clearly erroneous trades.

The NYSE noted that, while the Consolidated Tape Association disseminates its own calculations of high, low and last sale prices, vendors and other data recipients frequently determine their own methodology by which they wish to calculate high, low and last sale prices. Therefore, the Exchange proposes to explain to those vendors and other data recipients the potential impact of including in those calculations a trade to which the Aberrant Report Indicator has been appended.

In determining whether to append the Aberrant Report Indicator, the Exchange will consider all factors related to a trade, including, but not limited to, the following:

- Material news released for the security;
- Suspicious trading activity;
- System malfunctions or disruptions;
- Locked or crossed markets;
- A recent trading halt or resumption of trading in the security;
- Whether the security is in its initial public offering;
- Volume and volatility for the security;
- Whether the trade price represents a 52-week high or low for the security;
- Whether the trade price deviates significantly from recent trading patterns in the security;
- Whether the trade price reflects a stock-split, reorganization or other corporate action;
- The validity of consolidated tape trades and quotes in comparison to national best bids and offers; and
- The general volatility of market conditions.

Currently, the Exchange does not trade on an unlisted trading privilege (“UTP”) basis any securities listed on other markets. In the event that the Exchange commences UTP trading at some future date, the Exchange proposes that its policy will be to

consult with the listing exchange and with other markets (in the case of executions that take place across multiple markets) and to seek a consensus as to whether the trade price is consistent with the prevailing market for the security.

In monitoring trade prices that may be inconsistent with the prevailing market, the Exchange proposes that Exchange policy will be to follow the following general guidelines: The Exchange will review whether a trade price does not reflect the prevailing market for a security if the trade occurs during regular trading hours (*i.e.*, 9:30 a.m. to 4 p.m.) and occurs at a price that deviates from the “Reference Price” by an amount that meets or exceeds the following thresholds:

Trade price	Numerical threshold (percent)
Between \$0 and \$15.00 .....	Seven.
Between \$15.01 and \$50.00 .....	Five.
In excess of \$50.00 .....	Three.

The “Reference Price” refers to: (a) If the primary market for the security is open at the time of the trade, the national best bid or offer for the security; or (b) if the primary market for the security is not open at the time of the trade, the first executable quote or print for the security on the primary market after execution of the trade in question. However, if the circumstances suggest that a different Reference Price would be more appropriate, the Exchange will use the different Reference Price. For instance, if the national best bid and offer for the security are so wide as to fail to reflect the market for the security, the Exchange might use as the Reference Price a trade price or best bid or offer that was available prior to the trade in question.

If the Exchange determines that a trade price does not reflect the prevailing market for a security and the trade represented the last sale of the security on the Exchange during a trading session, the Exchange may also determine to remove that trade’s designation as the last sale. The Exchange may do so either on the day of the trade or at a later date, so as to provide reasonable time for the Exchange to conduct due diligence regarding the trade, including the consideration of input from other markets and market participants.

## III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the

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

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

<sup>3</sup> See Securities Exchange Act Release No. 58736 (October 6, 2008), 73 FR 60380.

<sup>4</sup> The Commission notes that any proposal by another regulatory organization to establish a policy to append an Aberrant Report Indicator to any trade report with respect to any trade executed on its market that it determines to be inconsistent with the prevailing market must be filed with the Commission as a proposed rule change under Section 19(b) of the Act.

Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with Section 6(b) of the Act<sup>5</sup> and the rules and regulations thereunder. Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>6</sup> which requires, among other things, that the rules of a national securities exchange be 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, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.<sup>7</sup>

The Commission believes that the Exchange's proposal to append an Aberrant Report Indicator to certain trade reports is a reasonable means to alert investors and others that the Exchange believes that the trade price for a trade executed in its market does not accurately reflect the prevailing market for the security. In addition, the Commission notes that the Exchange will use objective numerical thresholds in determining whether a trade report is eligible to have an Aberrant Trade Indicator appended to it. The Commission further notes that the Exchange's appending the Aberrant Trade Indicator to a trade report has no effect on the validity of the underlying trade.

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>8</sup> that the proposed rule change (SR-NYSE-2008-91) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59063; File No. SR-NYSEArca-2008-114]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change To Revise the Listing and Annual Fees Applicable to Paired Trust Shares

December 5, 2008.

#### I. Introduction

On October 22, 2008, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change amending its Schedule of Fees and Charges for Exchange Services ("Fee Schedule") to revise the listing and annual fees applicable to Paired Trust Shares listed on NYSE Arca, LLC ("NYSE Arca Marketplace"), the equities facility of NYSE Arca Equities, Inc. ("NYSE Arca Equities"). The proposed rule change was published for comment in the **Federal Register** on November 5, 2008.<sup>3</sup> The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

#### II. Description of the Proposed Rule Change

Under the current Fee Schedule, Paired Trust Shares (listed under NYSE Arca Equities Rule 8.400) are classified as "Derivative Securities Products." NYSE Arca proposes to reclassify Paired Trust Shares as "Structured Products" for purposes of the Fee Schedule. Specifically, the Exchange proposes to delete the term Paired Trust Shares from footnote 3 of the Fee Schedule (defining "Derivative Securities Products") and to add such term to footnote 4 of the Fee Schedule (defining "Structured Products").

As a result of the proposed rule change, the Listing and Annual Fees for Paired Trust Shares would change accordingly. Under the current Fee Schedule, the Listing Fee for Paired Trust Shares (classified as Derivative Securities Products) is \$5,000 per issue, and the Annual Fee for such securities, which is based on the number of shares outstanding per issue, ranges from \$2,000 to \$25,000 per issue. Under the proposal, the Listing Fee for Paired

Trust Shares (reclassified as Structured Products), which is based on the number of shares outstanding per issue, would range from \$5,000 to \$45,000 per issue, and the Annual Fee for such securities, which also is based on the number of shares outstanding per issue, would range from \$10,000 to \$55,000 per issue.

In addition, the Exchange proposes to make non-substantive changes to footnote 4 of the Fee Schedule, including updating the title of NYSE Arca Equities Rule 5.2(j)(6) to include Fixed Income Index-Linked Securities, Futures-Linked Securities, and Multifactor Index-Linked Securities.

#### III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act<sup>4</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>5</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>6</sup> which requires that the rules of the Exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

The Commission believes that the proposal to reclassify Paired Trust Shares as Structured Products for purposes of the Fee Schedule reasonably reflects the similarity of this type of product to other Structured Products, the issuers of which do not hold underlying securities, commodities, futures, or other financial instruments (other than U.S. Treasuries and repurchase agreements on U.S. Treasuries to secure specified obligations), unlike issuers of Derivative Securities Products. The Commission notes that, except for the shares of the MacroShares \$100 Oil Up Trust and the MacroShares \$100 Oil Down Trust, for which annual and listing fees for 2008 have been waived,<sup>7</sup> no issue of Paired

<sup>4</sup> 15 U.S.C. 78f.

<sup>5</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>6</sup> 15 U.S.C. 78f(b)(4).

<sup>7</sup> See e-mail from Michael Cavalier, Associate General Counsel, NYSE Euronext, to Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated November 24, 2008 at 12:25 p.m. ("Nov. 24 E-Mail"); see also Securities Exchange Act Release No. 58598 (September 19, 2008), 73 FR 55888 (September 26, 2008) (SR-NYSEArca-2008-78) (approving the waiver of all Annual Fees for securities delisted from Amex and listed on the Exchange in connection with the

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

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

<sup>3</sup> See Securities Exchange Act Release No. 58878 (October 29, 2008), 73 FR 65912.