

Dated: February 26, 2009.

Elizabeth M. Murphy,

Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59451; File No. SR-NYSEALTR-2009-10]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by NYSE Alternext US LLC Amending Rule 472—NYSE Alternext Equities (Communications With the Public)

February 25, 2009.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on February 5, 2009, NYSE Alternext US LLC (the “Exchange” or “NYSE Alternext”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II, below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>4</sup> and Rule 19b-4(f)(6) thereunder.<sup>5</sup> NYSE Alternext filed Amendment No. 1 to the proposed rule change on February 12, 2009.<sup>6</sup> 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 472—NYSE Alternext Equities to conform with proposed amendments to corresponding NYSE Rule 472 submitted in a companion filing by the New York Stock Exchange LLC (“NYSE”).<sup>7</sup>

#### 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 the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The purpose of the proposed rule change is to amend Rule 472—NYSE Alternext Equities to conform with proposed amendments to corresponding NYSE Rule 472, submitted in a companion filing by the NYSE, which itself conforms with amendments to corresponding FINRA Incorporated NYSE Rule 472 recently filed by FINRA and approved by the Commission.

###### Background

As described more fully in a related rule filing,<sup>8</sup> NYSE Euronext acquired The Amex Membership Corporation (“AMC”) pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the “Merger”). In connection with the Merger, the Exchange’s predecessor, the American Stock Exchange LLC (“Amex”), a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext US LLC, and continues to operate as a national securities exchange registered under Section 6 of the Act.<sup>9</sup> The effective date of the Merger was October 1, 2008.

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

Systems”) are operated by the NYSE on behalf of the Exchange.<sup>10</sup>

As part of the Equities Relocation, NYSE Alternext adopted NYSE Rules 1-1004, subject to such changes as necessary to apply the Rules to the Exchange, as the NYSE Alternext Equities Rules to govern trading on the NYSE Alternext Trading Systems.<sup>11</sup> The NYSE Alternext Equities Rules, which became operative on December 1, 2008, are substantially identical to the current NYSE Rules 1-1004 and the Exchange continues to update the NYSE Alternext Equities Rules as necessary to conform with rule changes to corresponding NYSE Rules filed by the NYSE.

##### Proposed Conforming Amendments to NYSE Alternext Equities Rules

As noted above, the Exchange proposes to amend Rule 472—NYSE Alternext Equities to conform with proposed amendments to corresponding NYSE Rule 472 submitted in a companion filing by the NYSE. As discussed in more detail below, the NYSE is filing the proposed rule change to harmonize NYSE Rule 472 with changes to corresponding Incorporated NYSE Rule 472 recently filed by the Financial Industry Regulatory Authority, Inc. (“FINRA”) and approved by the Commission.<sup>12</sup> The Exchange is proposing to adopt the NYSE’s proposed rule change in the form that it was filed with the Commission, subject to such technical changes as are necessary to apply the changes to the Exchange. The Exchange further proposes that the operative date of the rule change be the same as the operative date of the NYSE’s proposed rule change, on which this filing is based.

FINRA amended NASD Rules 2210 (Communications with the Public) and 2211 (Institutional Sales Material and Correspondence) and FINRA Incorporated NYSE Rule 472 (Communications with the Public) to remove, in certain circumstances, the

<sup>10</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex 2008-63) (approving the Equities Relocation).

<sup>11</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex 2008-63); Securities Exchange Act Release No. 58833 (October 22, 2008), 73 FR 64642 (October 30, 2008) (SR-NYSE-2008-106); Securities Exchange Act Release No. 58839 (October 23, 2008), 73 FR 64645 (October 30, 2008) (SR-NYSEALTR-2008-03); Securities Exchange Act Release No. 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR-NYSEALTR-2008-10); and Securities Exchange Act Release No. 59027 (November 28, 2008), 73 FR 73681 (December 3, 2008) (SR-NYSEALTR-2008-11).

<sup>12</sup> See Securities Exchange Act Release No. 59096 (December 12, 2008), 73 FR 77085 (December 18, 2008) (SR-FINRA-2008-044).

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

<sup>5</sup> 17 CFR 240.19b-4(f)(6).

<sup>6</sup> Amendment No. 1 removed unnecessary language regarding the operative date of the proposed rule change.

<sup>7</sup> See SR-NYSE-2009-14 (submitted on February 5, 2009).

<sup>8</sup> See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-NYSE-2008-60 and SR-Amex 2008-62) (approving the Merger).

<sup>9</sup> 15 U.S.C. 78f.

pre-approval requirements for the use of “market letters.”<sup>13</sup>

Specifically, FINRA created a new definition of the term “market letter” in NASD Rule 2211 and modified the definition in FINRA Incorporated NYSE Rule 472 to mean any communication specifically excepted from the definition of “research report” under NASD Rule 2711(a)(9)(A) and FINRA Incorporated NYSE Rule 472.10(2)(a). In addition, FINRA amended the definition of “sales literature” in NASD Rule 2210 to exclude market letters. FINRA also amended FINRA Incorporated NYSE Rule 472 to eliminate the requirement that a qualified person approve market letters in advance of distribution. Finally, FINRA amended the definition of “correspondence” in NASD Rule 2211 to include market letters (as well as any written letter or electronic mail message) distributed by a member to one or more of its existing retail customers and fewer than 25 prospective retail customers within any 30 calendar-day period.

NYSE correspondingly proposes to amend NYSE Rule 472 to conform to FINRA’s approved amendments to the incorporated version of the Rule. Under the proposed amended NYSE Rule 472, members and member organizations would be permitted to distribute “market letters,” as redefined, to customers and the public without obtaining prior approval by a supervisory analyst or qualified person. As redefined under the proposed amendments, “market letters” would comprise any communication that is excepted from the definition of “research report” contained in NYSE Rule 472.10(2)(a). As communications with the public, market letters remain subject to the supervision and review requirements of NYSE Rule 342.17, which require each member and member organization to establish written policies and procedures that are appropriate for their business, size, structure and customers for the review of such communications.<sup>14</sup>

The Exchange proposes to correspondingly amend Rule 472—NYSE Alternext Equities in the form proposed by the NYSE, subject to such changes as are necessary to apply the proposed changes to the Exchange. The Exchange also proposes to add “-NYSE

Alternext Equities” to the title of the Rule.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>15</sup> in general, and further the objectives of Section 6(b)(5) of the Act,<sup>16</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change also supports the principles of Section 11A(a)(1)<sup>17</sup> of the Act in that it seeks to ensure the economically efficient execution of securities transactions and fair competition among brokers and dealers and among exchange markets.

The Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization among NYSE Rules, NYSE Alternext Equities Rules and FINRA Rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for their common members and member organizations. To the extent the Exchange has proposed changes that differ from the proposed NYSE version of Rule 472, such changes are technical in nature and do not change the substance of the proposed NYSE Alternext Equities Rule.

### 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 believes that the proposal qualifies for immediate effectiveness upon filing as a non-controversial rule change in accordance with Section 19(b)(3)(A) of the Act<sup>18</sup>

and Rule 19b-4(f)(6)<sup>19</sup> thereunder. 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. In addition, the Exchange provided the Commission with 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.

A proposed rule change filed under Rule 19b-4(f)(6) 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>20</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 asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange believes the waiver of this period will allow it to conform its rule to NYSE and FINRA rules without delay and ensure that there is no regulatory gap among those rules. The Commission has determined that waiving the 30-day operative delay of the Exchange’s proposal is consistent with the protection of investors and the public interest because such waiver will allow the Exchange to promptly conform its rule to NYSE and FINRA rules and ensure elimination of any potential regulatory gap.<sup>21</sup> Therefore, the Commission designates the proposal as operative upon filing. 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.

## 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.

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

<sup>20</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>21</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>13</sup> See Securities Exchange Act Release No. 59096 (December 12, 2008), 73 FR 77085 (December 18, 2008).

<sup>14</sup> FINRA has proposed to amend the current requirements governing the supervision and review of correspondence, including FINRA Incorporated NYSE Rule 342.17 and NASD Rule 3010. See Regulatory Notice 08-24 (May 2008).

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

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> 15 U.S.C. 78k-1(a)(1).

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A).

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-NYSEALTR-2009-10 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEALTR-2009-10. 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 20549-1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at <http://www.nyse.com>. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEALTR-2009-10 and should be submitted on or before March 25, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-59457; File No. SR-BATS-2009-006]

**Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend BATS Rule 11.9, Entitled "Orders and Modifiers"**

February 26, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 20, 2009, BATS Exchange, Inc. ("BATS" or the "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 prepared by the Exchange. The Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6)(iii) thereunder,<sup>4</sup> which renders it effective upon filing with the Commission. 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 is proposing to amend BATS Rule 11.9, entitled "Orders and Modifiers," to provide for a new order type, a Partial Post Only at Limit Order. In addition, the Exchange is proposing to eliminate an Exchange order processing behavior described in Rule 11.9(c)(4) and (c)(5) as the "price sliding process" due to the fact that this functionality is rarely selected by Users of the Exchange.

The text of the proposed rule change is available at the Exchange's website at <http://www.batstrading.com>, at the principal office of the Exchange, 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 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 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 purpose of the proposed rule change is to provide a new order type to Users of the Exchange, a Partial Post Only at Limit Order. The Exchange currently allows Users to enter BATS Post Only Orders,<sup>5</sup> which do not remove liquidity from the Exchange. Frequently, Exchange Users utilize BATS Post Only Orders because such Users do not want to be charged the access fee for removing liquidity from the BATS Book.<sup>6</sup> However, if such Users could receive a price better than their limit price (*i.e.*, price improvement), then the Exchange believes that such Users may wish to remove that liquidity and pay the access fee. In addition, regardless of whether any part of the order is executed with price improvement, the Exchange believes that some Users of BATS Post Only Orders would be willing to remove from the BATS Book a certain amount of liquidity at the order's limit price if the residual of the order could then post to the BATS Book at that limit price. Accordingly, as proposed, the new order type will enable Users to: (i) enter an order to the Exchange that will remove liquidity from the Exchange when the order will receive price improvement; and (ii) designate a "Maximum Remove Percentage," instructing the Exchange to execute up to a designated percentage of the order size remaining after any applicable price improvement execution by removing liquidity at the order's limit price if the residual, after executions at the limit price, can be posted on the BATS Book.<sup>7</sup>

If no Maximum Remove Percentage is entered, then a Partial Post Only at Limit Order will only remove liquidity to the extent the order will obtain price improvement from its limit price. If no price improvement on an order is obtained, but a Maximum Remove

<sup>5</sup> As defined in Exchange Rule 11.9(c)(5).

<sup>6</sup> The Exchange currently charges \$0.0025 per share removed from the BATS Book, except for securities priced below \$1.00, for which no access fee is charged.

<sup>7</sup> Because the Exchange cannot post a bid or offer with a partial share amount (*e.g.*, 99.9 shares), any Maximum Remove Percentage that would result in such an amount will be rounded down to the next whole share amount (*e.g.*, 99 shares).

<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. 78s(b)(3)(A).

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

<sup>22</sup> 17 CFR 200.30-3(a)(12).