

fair representation candidates for each the NYSE Board and the NYSE Market Board, if the number that is equal to 20% of the total number of directors on their respective boards is not a whole number, such number would be rounded up to the next whole number.<sup>6</sup>

The Exchange has stated that the practical effect of the proposed rule change would be to enable the size of both the NYSE Board and the NYSE Market Board to be reduced from ten members to five members. The Exchange has represented that the initial implementation of the proposed changes immediately following approval by the Commission would be accomplished through the voluntary resignation of five of the ten directors from the NYSE Board and NYSE Market Board, respectively, including one "fair representation" director from each of the boards, in connection with a reduction in the size of each board to five directors. The Exchange's proposal would not revise the current fair representation candidate selection and petition process for, or the appointment or election of a fair representation candidate to, the NYSE Board and the NYSE Market Board.<sup>7</sup>

The Exchange has stated that its proposal is consistent with the governance structures of other national securities exchanges that have been approved by the Commission. The Exchange has noted, for example, that The NASDAQ Stock Market LLC ("Nasdaq") has a 20% fair representation requirement, without specifying a minimum number of fair representation directors,<sup>8</sup> and that Nasdaq has complete discretion as to the number of board members.<sup>9</sup> The Exchange also has noted that in the approval order relating to the

acquisition of the American Stock Exchange LLC by NYSE Euronext, the Commission similarly approved a discretionary board size (noting that Amex intended to have a five-member board), a 20% fair representation requirement, and no minimum number of fair representation directors.<sup>10</sup> The Exchange indicated that, by eliminating, for itself and NYSE Market, the current requirements for a minimum of two non-affiliated directors and two fair representation candidates, it will be able to improve administrative efficiency and effectiveness by operating with a smaller number of directors, while continuing to fulfill its statutory obligations regarding the fair representation of its members.

### III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>11</sup> In particular, the Commission finds that the proposal is consistent with the requirements of Section 6(b)(3) of the Act, which provides that the rules of an exchange must assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issues and investors and not be associated with a member of the exchange, broker, or dealer.<sup>12</sup>

The fair representation requirement in Section 6(b)(3) of the Act is intended to give members a voice in the selection of the exchange's directors and the administration of its affairs. Moreover, the Section 6(b)(3) requirement helps to ensure that members are protected from unfair, unfettered actions by an exchange and that, in general, an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities. The Commission notes that the requirement that at least 20% of the directors on the NYSE and NYSE Market boards be non-affiliated directors and fair representation candidates is designed to ensure the fair representation of NYSE members on the NYSE Board and the NYSE Market Board.<sup>13</sup> The Commission notes that, while the proposal eliminates the requirement regarding a

specific minimum number of non-affiliated directors and fair representation candidates on the boards, it does not alter the minimum 20% requirement for non-affiliated directors or fair representation candidates or the process by which members can directly petition and vote for representatives on the boards. Moreover, the proposal adds to the NYSE Operating Agreement and NYSE Market Bylaws a provision that: whenever 20% of the board would not result in a whole number, such number would in all cases be rounded up to the nearest whole number, thus ensuring that the non-affiliated directors and fair representation candidates never constitute less than 20% of the board. The Commission further notes that the proposed changes to the NYSE Operating Agreement and NYSE Market Bylaws are consistent with previous proposals approved by the Commission for other exchanges, which also do not specify the number of fair representation directors and which allow discretion as to the size of their boards.<sup>14</sup> The Commission therefore finds that the Exchange's proposal is consistent with Section 6(b)(3) of the Act.<sup>15</sup>

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>16</sup> that the proposed rule change (SR-NYSE-2009-12) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59677; File No. SR-NYSE-2009-38]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Revise Transaction Fees for the New York Block Exchange

April 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

<sup>14</sup> See, e.g., Section 9(a) of the NASDAQ Stock Market LLC Agreement and Article IV, Section 4-1 of the NASDAQ OMX PHLX, Inc. By-Laws.

<sup>15</sup> 15 U.S.C. 78f(b)(3).

<sup>16</sup> 15 U.S.C. 78s(b)(2).

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

<sup>6</sup> See Section 2.03(a)(i) and (iii) of the NYSE Operating Agreement and Article III, Section 1(A) and (B) of the NYSE Market Bylaws.

<sup>7</sup> As defined in the NYSE Operating Agreement, fair representation candidates are NYSE Board members that are determined by member organizations of the Exchange through a specified petition process ("Petition Candidates") or, in the absence of Petition Candidates, candidates recommended jointly by the Director Candidate Recommendation Committee ("DCRC") of NYSE Market and of NYSE Regulation, Inc. In the case of NYSE Market, fair representation candidates on the Market Board are determined similarly except that, in the absence of Petition Candidates, they are individuals recommended by the DCRC of NYSE Market.

<sup>8</sup> See Article I, paragraph (q) of the By-Laws of the NASDAQ Stock Market LLC, which states that, "Membership Representative Director" means a Director who has been elected or appointed after having been nominated by the Member Nominating Committee or by a Nasdaq Member pursuant to these By-Laws."

<sup>9</sup> See Section 9(a) of the NASDAQ Stock Market LLC Agreement.

<sup>10</sup> See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-Amex-2008-62).

<sup>11</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78f(b)(3).

<sup>13</sup> See *supra* notes 4 and 5.

("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 27, 2009, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule changes 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 changes from interested persons.

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

The Exchange proposes to modify the transaction fees for the New York Block Exchange<sup>SM</sup>, with effect from April 1, 2009. The text of the proposed rule change is available at NYSE's principal office, the Commission's Public Reference Room, and <http://www.nyse.com>.

### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

#### **A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

##### **1. Purpose**

The Exchange proposes to increase the charge per share for all NYBX transactions from \$.0025 per share to \$.0030 per share, with effect from April 1, 2009. The NYBX is an electronic facility of the Exchange that provides for the continuous matching and execution of securities listed on the NYSE of all non-displayed orders with the aggregate of all displayed and non-displayed orders of the NYSE Display Book ("Display Book" or "DBK") while also considering protected quotations of all automated trading centers ("away markets"). The proposed transactional fee of \$.0030 per executed share will be charged to both the buyer(s) and seller(s) of the executed shares. The fee

will be charged for all executions of NYBX orders, including those NYBX executions that take place in the DBK or in away markets. Only NYSE members, member organizations and sponsoring member organizations will be charged this transaction fee. Transaction fees for executions of orders entered by sponsored participants will be charged to the sponsoring member organization. Member organizations will not pay any additional transactional fee for the execution of NYBX orders to the extent that an NYBX order or a portion thereof may be executed in the DBK or is routed to an away market.

##### **2. Statutory Basis**

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>3</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>4</sup> in particular, in that it is designed provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

#### **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 purpose of the Act.

#### **C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others**

Written comments were neither solicited nor received.

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>5</sup> of the Act and Rule 19b-4(f)(2)<sup>6</sup> thereunder.

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. 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-2009-38 on the subject line.

#### **Paper Comments**

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

All submissions should refer to File Number SR-NYSE-2009-38. 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 publicly available. All submissions should refer to File Number SR-NYSE-2009-38 and should be submitted on or before April 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Florence E. Harmon,**  
Deputy Secretary.

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<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. 78f.

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

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>6</sup> 17 CFR 240.19b-4(f)(2).

<sup>7</sup> 17 CFR 200.30-3(a)(12).