

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58598; File No. SR-NYSEArca-2008-78)

September 19, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change To Waive Annual Fees for Securities Transferring to NYSE Arca from NYSE Alternext US

I. Introduction

On July 23, 2008, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change to waive annual listing fees for securities transferring to NYSE Arca from NYSE Alternext US after the closing of the purchase of the American Stock Exchange LLC (“Amex”) by NYSE Euronext (the “Merger”).³ The proposed rule change was published in the Federal Register on August 11, 2008.⁴ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes that securities transferring to NYSE Arca from NYSE Alternext US after the closing of the Merger will not be charged any prorated annual fee for the remainder of the year in which the Merger takes place. The fee waiver in the preceding sentence will be of no further effect if the closing of the Merger does not take place by March 31, 2009.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ NYSE Euronext, the ultimate parent company of the Exchange, has agreed to acquire the Amex pursuant to an Agreement and Plan of Merger, dated as of January 17, 2008. After the closing of the Merger, the Amex will be renamed NYSE Alternext US LLC.

⁴ See Securities Exchange Act Release No. 58297 (August 4, 2008), 73 FR 46683.

The Exchange believes this proposed fee waiver does not render the allocation of its listing fees inequitable or unfairly discriminatory, in particular because, after the Merger, NYSE Regulation, Inc. (“NYSE Regulation”) will perform listed company regulation for both the Exchange and NYSE Alternext US, including a substantial review of companies upon original listing. The Exchange notes that many of the regulatory staff who currently perform initial and continued listing reviews at the Amex will become employees of NYSE Regulation at the time of the Merger and will continue to perform the same duties with respect to NYSE Alternext US securities after the Merger. The Exchange represents that securities transferring from NYSE Alternext US will be subjected to the same rigorous regulatory review as any other securities with respect to which an application for listing is made to the Exchange. However, the Exchange expects that, on average, the review of securities transferring from NYSE Alternext US to the Exchange will be less costly than the review of a transfer from an unaffiliated market, as the Amex listing regulatory staff that will have been absorbed by NYSE Regulation will already have performed a substantial review of any NYSE Alternext US-listed issuer, and NYSE Regulation will be able to rely on that prior work as a baseline in qualifying the issuer for listing on the Exchange and in conducting ongoing compliance activities with respect to any such issuer. In support of its proposal, the Exchange also notes that transferring issuers would have already paid annual continued listing fees to the Amex for the calendar year in which the transfer took place.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act and the rules and regulations

thereunder. Specifically, the Commission finds that the proposal is consistent with Sections 6(b)(4)⁵ and 6(b)(5) of the Act,⁶ which require that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities, and are designed, among other things, 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 to not permit unfair discrimination between customers, issuers, brokers, or dealers.⁷

National securities exchanges traditionally assess annual listing fees on listed companies at the beginning of the calendar year. When a company transfers to another marketplace, such annual fees are typically pro-rated by the new market for the remainder of the calendar year. Annual fees aid a listed market in, among other things, conducting its regulatory responsibilities to ensure compliance by listed companies with continued listing standards and other regulatory requirements. The Commission notes that an Amex issuer seeking to transfer to the Exchange has already paid annual continued listing fees to another national securities exchange for the calendar year in which it transferred. Further, the Commission recognizes that subsequent to the consummation of the Merger, both Amex as NYSE Alternext US and NYSE Arca will be under the same common ownership. The Commission also notes that the Exchange anticipates the review of securities transferring from NYSE Alternext US to be less costly than the review of a transfer from an unaffiliated market, because Amex listing regulatory staff that will be part of NYSE Regulation will continue to perform both initial and continued listing reviews. However,

⁵ 15 U.S.C. 78f(b)(4).

⁶ 15 U.S.C. 78f(b)(5).

⁷ In approving this proposed rule change, the Commission notes that it has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

the Commission expects, and the Exchange has represented, that a rigorous and independent review of compliance with the listing standards will be conducted for any company seeking to take advantage of the fee waiver, just as for any company that lists on the Exchange. The Commission expects the Exchange to maintain its commitment of resources to its regulatory oversight of the listing process and its ongoing compliance review of listed companies under its regulatory program.

In summary, for the reasons set forth above, including NYSE Arca's assertion that the same regulatory staff on Amex (that will have been absorbed by NYSE Regulation) will have conducted a substantial review of an Amex company that NYSE Regulation will be able to rely upon as a baseline in qualifying the company for listing on the Exchange and in conducting ongoing compliance activities with respect to any such company, the Commission believes it is not inequitable or unfair to provide for a waiver of annual fees for a limited period of time after the merger is consummated.

Based on the above, the Commission believes the proposed fee waiver does not constitute an inequitable allocation of reasonable dues, fees, and other charges under Section 6(b)(4) of the Act,⁸ does not permit unfair discrimination between issuers under Section 6(b)(5) of the Act,⁹ and is otherwise consistent with the requirements of the Act.

⁸ 15 U.S.C. 78f(b)(4).

⁹ 15 U.S.C. 78f(b)(5).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-NYSEArca-2008-78) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Florence E. Harmon
Acting Secretary

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).