

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59473; File No. SR-NYSEALTR-2009-18)

February 27, 2009

Self-Regulatory Organizations; NYSE Alternext US LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Use Its Broker Dealer Affiliate, Archipelago Securities, LLC, as Its Routing Broker for Options Orders

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> notice is hereby given that on February 25, 2009, NYSE Alternext US LLC (“NYSE Alternext” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is granting accelerated approval to the proposed rule change.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to use its broker dealer affiliate,<sup>3</sup> Archipelago Securities LLC (“ArcaSec”), as its Routing Broker to route options orders<sup>4</sup> to away market centers when that

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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> On September 29, 2008, the Commission approved the Exchange’s business combination with NYSE Euronext, Inc. (“Merger”). See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (order approving SR-NYSE-2008-60 and SR-Amex-2008-62). Pursuant to the Merger, NYSE Euronext became the overall parent company of the Exchange. NYSE Euronext now operates three self-regulatory entities: the Exchange, the NYSE, and NYSE Arca, Inc. ArcaSec is also a wholly owned subsidiary of NYSE Euronext, and is therefore an affiliate of the Exchange.

<sup>4</sup> ArcaSec acts as the outbound order routing facility of the NYSE and NYSE Arca. See Securities Exchange Act Release No. 52497 (September 22, 2005), 70 FR 56949 (September 29, 2005) (SR-PCX-2005-90). See also Securities Exchange Act Release Nos. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (SR-PCX-00-25); 58681 (September 29, 2008), 73 FR 58285 (October 6, 2008) (order approving SR-

market center is displaying the national best bid and offer, in accordance with Exchange Rules.

A copy of this filing is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the

Exchange's principal office 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 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 III 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 use ArcaSec as its Routing Broker to route options orders to away market centers when that market center is displaying the national best bid and offer in accordance with Exchange Rules. The Exchange intends to use ArcaSec as its Routing Broker, pending approval, as of the date that the Exchange implements its new electronic trading system

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NYSEArca-2008-90); 55590 (April 5, 2007), 72 FR 18707 (April 13, 2007) (notice of immediate effectiveness of SR-NYSE-2007-29); and 58680 (September 29, 2008), 73 FR 58283 (October 6, 2008) (order approving SR-NYSE-2008-76).

On November 24, 2008, the Commission also approved ArcaSec to act as the outbound order routing facility for NYSE Alternext for the purpose of routing equities orders to away market centers. Securities Exchange Act Release No. 59009 (November 24, 2008), 73 FR 73363 (December 2, 2008) (SR-NYSEALTR-2008-07).

Currently, FINRA is the examining authority for the Routing Broker designated by the Commission pursuant to Rule 17d-1 of the Act. As such, FINRA is responsible for the oversight and enforcement of the Routing Broker for compliance with the applicable financial responsibility rules.

in conjunction with the opening of its new options trading floor at 11 Wall Street in New York, New York.

Rule 2B – NYSE Alternext Equities provides, in pertinent part, that: without prior SEC approval, the Exchange or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member organization.

In its Order approving the acquisition of the American Stock Exchange LLC by NYSE Euronext, the SEC, among other things, approved the affiliation between NYSE Alternext and ArcaSec, subject to certain conditions.<sup>5</sup> The SEC also approved revisions to Rule 2B – NYSE Alternext Equities, in order to address inbound routing by affiliated members.<sup>6</sup> The Exchange also recently received approval to implement Rule 17 - NYSE Alternext Equities, which defines the term Routing Broker and establishes the conditions under which the Exchange’s Routing Broker operates.<sup>7</sup>

NYSE Alternext Rule 900.1NY – Applicability, Definitions, and References states that, unless otherwise specified or unless the context otherwise requires, the Rules and Policies of the Board of Directors shall be applicable to the trading of option contracts. As a result, Rules 2B and 17, as described above, encompass and apply to the trading of options contracts.

Pursuant to Rule 2B - NYSE Alternext Equities, the Exchange now seeks authorization to use ArcaSec, an affiliated broker-dealer, to operate as its Routing Broker for the purpose of routing options orders to away market centers.<sup>8</sup>

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<sup>5</sup> See Securities Exchange Act Release No. 58673, supra note 3.

<sup>6</sup> Id. See also Securities Exchange Act Release No. 59009, supra note 4.

<sup>7</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (order approving SR-Amex-2008-63).

<sup>8</sup> Presently, ArcaSec does not route options orders directly to away market centers and, as such, will not route options orders directly from NYSE Alternext to any affiliated

Pursuant to the proposal, the Exchange systems will provide the Routing Broker with routing instructions, to route orders to other market centers and report such executions back to the Exchange. The Routing Broker cannot change the terms of an order or the routing instructions, nor does the Routing Broker have any discretion about where to route an order.

The Routing Broker will operate as a “facility”<sup>9</sup> of the Exchange in that it will serve as a “system of communication to or from”<sup>10</sup> the Exchange. When an order must be routed to an away market center for execution, the Exchange systems will affix all order handling information to the order. Exchange systems will automatically transmit the order and the relevant order handling information to the Routing Broker. In turn, the Routing Broker will facilitate the delivery of the received order to the destination away market. The Routing Broker will obtain receipts of executions and deliver those receipts of executions back to Exchange systems.<sup>11</sup> The Routing Broker, as merely a conduit or system of communication between the Exchange and away market centers, cannot change the terms of an order, systemically reject an order, or

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markets, including NYSE Arca, Inc. Should ArcaSec route orders directly from NYSE Alternext to an affiliated market, it would do so only after the affiliated market has rules approved that authorize it to receive such routed options orders from its broker-dealer affiliate.

<sup>9</sup> The term ‘facility’ as defined in Section 3(a)(2) of the Securities Exchange Act of 1934, as amended provides, when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service. See 15 U.S.C. 78c.

<sup>10</sup> Id.

<sup>11</sup> Comparable to the operation of ArcaSec in its capacity as a facility of the NYSE and NYSE Arca, the use of ArcaSec by the Exchange is only available to members of NYSE Alternext.

otherwise perform data validation prior to delivery of the order to an away market center or after return receipt and delivery of the execution to the Exchange.

In particular, and without limitation, under the Act, the Exchange will be responsible for filing with the Commission rule changes and fees relating to the functions performed by the Routing Broker for the Exchange and will be subject to exchange non-discrimination requirements.

Furthermore, the books, records, premises, officers, agents, directors, and employees of the Routing Broker, as a facility of the Exchange, shall be deemed to be the books, records, premises, officers, agents, directors, and employees of the Exchange for purposes of, and subject to oversight pursuant to, the Act. The books and records of the Routing Broker as a facility of the Exchange shall be subject at all times to inspection and copying by the Exchange and the Commission.

The use of the Routing Broker to route orders to another market center will be optional. In the event a member organization does not want to use the Routing Broker it must enter an immediate-or-cancel order or any such other order type available on the Exchange that is not eligible for routing. All bids and offers entered on the Exchange that are routed to other market centers via the Routing Broker which result in an execution shall be binding on the member organization that entered such bid and offer.

The Routing Broker will not engage in any business for the Exchange other than its outbound router and facilitation functions as described above. In the event the Exchange seeks to have the Routing Broker engage in any other activities it understands that the ability of the Routing Broker to engage in such new business activity would require Commission approval.

The Exchange believes that the above described operation of the Routing Broker will serve as the most economically efficient execution of transactions in options contracts. Furthermore, the Routing Broker is necessary for the Exchange to comply with its Rules and best execution obligations.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirement under Section 6(b)(5) of the Act<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 proposed rule change also is designed to support the principles of Section 11A(a)(1)<sup>13</sup> in that it seeks to assure economically efficient execution of securities transactions. Specifically, the proposed rule change will allow Exchange to establish and implement mechanisms to remain fully compliant with Exchange rules and its best execution obligations.

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.

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

<sup>13</sup> 15 U.S.C. 78k-1(a)(1).

### III. 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-NYSEALTR-2009-18 on the subject line.

#### Paper Comments:

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

All submissions should refer to File Number SR-NYSEALTR-2009-18. 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 10:00 a.m. and 3:00 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-NYSEALTR-2009-18 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of a Proposed Rule Change

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.<sup>14</sup> In particular, it is consistent with Section 6(b)(5) of the Act,<sup>15</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 foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

On September 29, 2008, the Commission approved the Exchange's business combination with NYSE Euronext.<sup>16</sup> In conjunction with the Merger, the Exchange proposed to transfer trading from the American Stock Exchange LLC system to a new system based on NYSE's existing system. Accordingly, the Exchange proposed new rules that would govern trading on the Exchange once trading was transferred to the new electronic system.<sup>17</sup> Included in those recently approved

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<sup>14</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>15</sup> 15 U.S.C. 78f(b)(5).

<sup>16</sup> See supra note 3.

<sup>17</sup> See Securities Exchange Act Release No. 58705, supra note 7.



rules were NYSE Alternext Equities Rules 13 and 17, which define the term Routing Broker and establish the conditions under which the Exchange's Routing Broker shall operate.<sup>18</sup> The Exchange also proposed, and the Commission approved, the Exchange's use of ArcaSec, an affiliated broker-dealer, as its Routing Broker for the trading of equity orders on its new system.<sup>19</sup> The Exchange recently proposed, and the Commission approved, new rules for the trading of options on its new trading system.<sup>20</sup> In the instant filing, the Exchange proposes to use ArcaSec as its Routing Broker to route options orders to away market centers, in accordance with Exchange rules, as of the date that the Exchange implements its new system.<sup>21</sup>

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.<sup>22</sup> Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests when the exchange is affiliated with one of its members, the Commission believes that it is consistent with the Act to permit ArcaSec to also provide outbound routing

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<sup>18</sup> Id.

<sup>19</sup> See Securities Exchange Act Release No. 59009, supra note 4.

<sup>20</sup> See Securities Exchange Act Release No. 59472 (February 27, 2009) (order approving SR-NYSEALTR-2008-14).

<sup>21</sup> The Commission notes that the Exchange intends to transfer options trading to its new system on March 2, 2009. See email from Andrew Stevens, Chief Counsel - U.S. Equities & Derivatives, NYSE Euronext, to Jennifer Dodd, Special Counsel, Division of Trading and Markets, Commission, dated February 26, 2009.

<sup>22</sup> See, e.g., Securities Exchange Act Release Nos. 58673, supra note 3; 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members); and 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings) at 11255.

services for options orders to NYSE Alternext, subject to the same conditions that currently apply to ArcaSec providing outbound routing services to the Exchange for equities orders.

NYSE Alternext Equities Rule 17 imposes certain conditions on an Exchange Routing Broker, which would apply to ArcaSec as the Exchange's outbound options order router as they do now in ArcaSec's capacity as the Exchange's outbound equities order router. For example, ArcaSec must: 1) be a member of a self-regulatory organization unaffiliated with NYSE Alternext that is its designated examining authority; 2) establish and maintain procedures and internal controls reasonably designed to restrict the flow of confidential and proprietary information between NYSE Alternext and its facilities, including ArcaSec, and any other entity; 3) be regulated as a facility of the Exchange;<sup>23</sup> and 4) not engage in any business other than its outbound router function unless otherwise approved by the Commission. Also, the books, records, premises, officers, agents, directors and employees of ArcaSec, as a facility of NYSE Alternext, will be deemed to be those of the Exchange for purposes of and subject to oversight pursuant to the Act.<sup>24</sup> In addition, use of ArcaSec to route options orders from NYSE Alternext to away market centers is optional, and a NYSE Alternext member is free to route orders to other market centers through alternative means. The Commission also notes that ArcaSec will not route options orders to any affiliated market, unless such market has in place rules that authorize it to receive such routed options orders from its broker-dealer affiliate.<sup>25</sup>

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<sup>23</sup> The Commission notes that, as a facility of the Exchange, ArcaSec will be subject to Exchange oversight, as well as Commission oversight. Further, the Exchange will be responsible for filing with the Commission proposed rule changes and fees relating to ArcaSec's outbound router function and ArcaSec's outbound router function will be subject to exchange non-discrimination requirements.

<sup>24</sup> See NYSE Alternext Equities Rule 17(b). In addition, the books and records of ArcaSec, as a facility of the Exchange, will be subject at all times to inspection and copying by the Exchange and the Commission. Id.

<sup>25</sup> See supra note 8.

In light of the protections discussed above and contained in NYSE Alternext Equities Rule 17, the Commission believes that it is consistent with the Act to permit NYSE Alternext to use its affiliate, ArcaSec, as its Routing Broker, as proposed.

NYSE Alternext has asked the Commission to accelerate approval of the proposed rule change. NYSE Alternext states that accelerated approval “will permit the Exchange to establish and implement mechanisms to remain fully compliant with its best execution obligations and other Exchange rules immediately upon implementation of its new electronic trading system and in conjunction with the opening of its new trading floor at 11 Wall Street.”<sup>26</sup> NYSE Alternext notes that it “intends to implement its new trading system and open its new trading floor on February 9, 2009.”<sup>27</sup> The Commission finds good cause for approving the proposed rule change before the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. The Commission notes that NYSE Alternext’s proposal to use ArcaSec as its outbound order routing facility is consistent with prior Commission action.<sup>28</sup> Accordingly, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>29</sup> to approve the proposed rule change on an accelerated basis.

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<sup>26</sup> See SR-NYSEALTR-2009-18, Item 7.

<sup>27</sup> Id.

<sup>28</sup> See, e.g., Securities Exchange Act Release Nos. 52497, 55590, and 59009, supra note 4.

<sup>29</sup> 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NYSEALTR-2009-18) is hereby approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>30</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>30</sup> 17 CFR 200.30-3(a)(12).