

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58631; File No. SR-NYSE-2008-84)

September 24, 2008

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Proposing to Suspend the Operation of certain NYSE rules to Respond to the Impact to the Marketplace of the Events of September 15, 2008, Including the Bankruptcy Filing by Lehman Brothers Holding Inc.

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 September 15, 2008, New York Stock Exchange LLC (“NYSE” or the “Exchange”) 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 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

New York Stock Exchange LLC (“NYSE” or the “Exchange”) is proposing to suspend the operation of certain NYSE rules to respond to the impact to the marketplace of the events of September 15, 2008, including the bankruptcy filing by Lehman Brothers Holding Inc. (LEH) and the proposed acquisition of Merrill Lynch by Bank of America.

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

In its filing with the Commission, NYSE included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the

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<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.

places specified in Item IV below. 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

On Monday, September 15, 2008, the markets experienced almost unprecedented turmoil that impacted some of the most significant players on Wall Street: Lehman Brothers Holding Inc. (LEH) (“Lehman”) filed for bankruptcy protection in the United States District Court for the Southern District of New York under Chapter 11 of the U.S. bankruptcy code; Bank of America agreed to acquire Merrill Lynch in an all-stock transaction; and American Insurance Group, Inc. (“AIG”) announced a significant restructuring.

In response to these events, the Exchange undertook a number of steps to ensure continuity of the marketplace. First, the Exchange invoked NYSE Rule 48, which authorizes the Exchange to suspend certain rules relating to the opening of trading at the Exchange. Second, because the pre-opening market in LEH suggested that the stock would open below \$1.05, at 9:00 a.m. on September 15, 2008, the Exchange announced a Rule 123D(3) “Sub-penny trading” condition for LEH and halted trading in LEH at the Exchange. Third, to ensure a fair and orderly market in all securities listed at the Exchange, the Exchange announced that, pursuant to NYSE Rule 103.11, NYSE-listed securities for which Lehman Brothers Market Makers, a division of Lehman Brothers Inc. (“Lehman Brothers”), had been the specialist, would be temporarily reallocated to Spear, Leeds & Kellogg Specialists LLC (“Spear Leeds”). Notwithstanding the reallocation, these stocks will continue to trade using Lehman Brothers technology and staff until a more permanent allocation can be effected.

To ensure a fair and orderly market during this period of market stress, the Exchange is seeking temporary relief from certain NYSE rules that are implicated by the Lehman Brothers situation. In particular, the Exchange is proposing to suspend the operation of NYSE Rule 123D(3) on September 15, 2008 for derivative securities of LEH that trade at the Exchange (“LEH Preferreds”)<sup>4</sup> that would open at a price of \$1.05 or less. This proposed suspension relates only to the opening of LEH Preferreds on September 15, 2008. Immediately following the opening of such securities, the Exchange intends to halt trading of LEH Preferreds pursuant to NYSE Rule 123D(3) and invoke a Sub-penny trading condition.

In addition, pending the installation of telephone lines at Lehman Brothers’ specialist posts that are connected to Spear Leeds, the Exchange proposes to temporarily suspend NYSE Rule 36.30 so that Spear Leeds may conduct permitted communications from those post locations via non-Exchange portable telephones.

a. NYSE Rule 123D(3)

(1) Background

NYSE Rule 123D(3) provides that if a security would open on the Exchange at a price of \$1.05 or less, trading on the Exchange shall be immediately halted because of a “Sub-penny trading” condition. The Exchange adopted Rule 123D(3) in part to be compliant with Regulation NMS.

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<sup>4</sup> See Lehman Bros Pfd C (LEH-PC); Lehman Bros 5.67 D (LEH-PD); Lehman Bros Dep SH F (LEH-PF); Lehman Dep Pfd G (LEH-PG); Lehman Pfd J (LEH-PJ); Lehman CP III 6.375 K (LEH-PK); Lehman Br Cap Tr IV (LEH-PL); Lehman Bro Cap V 6.0 (LEH-PM); and Lehman Br Hld 6.24 N (LEH-PN).

Regulation NMS, adopted by the Securities and Exchange Commission (“SEC”) in April 2005,<sup>5</sup> provides that each trading center intending to qualify for trade-through protection under Regulation NMS Rule 611<sup>6</sup> is required to have a Regulation NMS-compliant trading system fully operational by March 5, 2007 (the “Trading Phase Date”).<sup>7</sup>

For stocks priced below \$1.00 per share, Regulation NMS Rule 612<sup>8</sup> permits markets to accept bids, offers, orders and indications of interest in increments smaller than a \$0.01, but not less than \$0.0001, and to quote and trade such stocks in sub-pennies. Markets may choose not to accept such bids, offers, orders or indications of interest and the NYSE has done so, maintaining a minimum trading and quoting variation of \$0.01 for all securities trading below \$100,000. See NYSE Rule 62.

The SEC’s interpretation of Rule 612 requires a market that routes an order to another market in compliance with Rule 611 and receives a sub-penny execution, to accept the sub-penny execution, report that execution to the customer, and compare, clear and settle that trade. Failure to do so constitutes a violation of Rule 611’s Order Protection Rule. However, pursuant to Rule 611(b)(3) of Regulation NMS,<sup>9</sup> transactions that constitute a single-priced opening, reopening, or closing transaction by a trading center are excepted from the Order Protection

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<sup>5</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 17 CFR Parts 200, 201, 230, 240, 242, 249 and 270.

<sup>6</sup> See 17 C.F.R. § 242.611.

<sup>7</sup> See Securities Exchange Act Release No. 55160 (January 24, 2007), 72 FR 4202 (January 30, 2007) (S7-10-04).

<sup>8</sup> See 17 C.F.R. § 242.612. Rule 612 originally was to become effective on August 29, 2005, but the date was later extended to January 29, 2006. See Securities Exchange Act Release No. 52196 (Aug. 2, 2005), 70 FR 45529 (Aug. 8, 2005).

<sup>9</sup> See 17 C.F.R. § 242.611(b)(3).

Rule. Accordingly, a sub-penny execution at the opening that trades through another market center does not constitute a violation of Regulation NMS Rule 611's Order Protection Rule.

The Exchange adopted Rule 123D(3) to provide for a "Sub-penny trading" condition because the Exchange's trading systems did not then accommodate sub-penny executions on orders routed to better-priced protected quotations, nor could it recognize a quote disseminated by another market center if such quote had a sub-penny component and, therefore, could have inadvertently traded through better protected quotations. The rule allows the Exchange to halt trading in a security whose price was about to fall below \$1.00, without delisting the security, so that the security could continue to trade on other markets that deal in bids, offers, orders or indications of interest in sub-penny prices, until the price of the security had recovered sufficiently to permit the Exchange to resume trading in minimum increments of no less than one penny or the issuer is delisted for failing to correct the price condition within the time provided under NYSE rules.<sup>10</sup>

A subsequent amendment established that any orders received by the NYSE in a security subject to a "Sub-penny trading" condition would be routed to NYSE Arca, Inc. ("NYSE Arca") and handled in accordance with the rules governing that market.<sup>11</sup> When a "Sub-penny trading" condition is invoked, all open limit orders in such security at the Exchange will be cancelled and will not be routed to NYSE Arca.

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<sup>10</sup> See Securities and Exchange Commission Release No. 34-55398; File No. SR-NYSE-2007-25 (Mar. 5, 2007).

<sup>11</sup> See Securities and Exchange Commission Release No. 34-55537; File No. SR-NYSE-2007-30 (Mar. 27, 2007).

(2) Proposed Suspension of Rule 123D(3) for LEH Preferreds

Pre-opening quoting and trading in away markets relating to LEH Preferreds indicated that such securities would open at prices below \$1.05.<sup>12</sup> Prior to the opening, the Exchange received pre-opening orders in LEH Preferreds. If the Exchange were to invoke a “Sub-penny trading” condition for those securities prior to the opening, such orders would be cancelled and would not be routed to NYSE Arca. Therefore, such orders would not be executed, potentially harming the investing public that routed such orders to the Exchange before the Exchange’s announcement of a sub-penny trading halt.

The Exchange notes that while such an opening transaction would be a violation of NYSE Rule 123D(3), an execution at a sub-penny price at the opening at the Exchange would not be a violation of Regulation NMS. Accordingly, because a sub-penny execution at the opening would not constitute a violation of the Regulation NMS Rule 611 Order Protection Rule, the Exchange believes that the harm to the investing public in not having their orders in LEH Preferreds executed at the opening outweighs any harm that may result from a violation of NYSE Rule 123D(3). The Exchange therefore proposes a one-day suspension of the operation of NYSE Rule 123D(3) that would be in effect only for the opening transactions of LEH Preferreds on September 15, 2008.

Once trading in LEH Preferreds open at the Exchange, should such opening prices be at or below \$1.05, the Exchange would, in compliance with NYSE Rule 123D(3), immediately halt trading and invoke a “Sub-penny trading” condition for such securities.

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<sup>12</sup> Prior to the open on September 15, 2008, the Exchange announced that it was invoking a Rule 123D(3) “Sub-penny trading” condition for LEH and that any trading in that security would take place at NYSE Arca. Trading in LEH had begun at NYSE Arca at 4:00 a.m. EST on September 15, 2008.

b. Proposed Suspension of NYSE Rule 36.30

NYSE Rule 36 bars members or member organizations from establishing or maintaining any telephonic or electronic location between the Floor of the Exchange and any other location without the approval of the Exchange. NYSE Rule 36.30 permits a specialist unit to maintain telephone lines at its stock trading post locations that connect to off-Floor offices of the specialist unit or the unit's clearing firm. Specialists, however, are not permitted to use cell phones from the Floor of the Exchange.

As permitted by NYSE Rule 36.30, the Lehman Brothers specialist posts (posts 10 and 11), which are located in the Main Room of the Floor of the Exchange, have telephone lines connected to its off-Floor offices. Those post locations do not have telephone lines connected to any other entities. Because the temporary reallocation to Spear Leeds of the securities registered with Lehman as specialist was done shortly before the opening of trading at the Exchange, the Exchange was unable to install telephone lines at posts 10 and 11 that connect to Spear Leeds in time for the opening of trading or otherwise reorganize so that the Lehman Brothers and Spear Leeds posts are located in contiguous space.

Without telephone lines from the posts 10 and 11 to Spear Leeds' off-Floor location, Spear Leeds is limited in its ability to engage in permitted telephonic communications from posts 10 and 11. Accordingly, the Exchange proposes to temporarily suspend NYSE Rule 36.30 as it applies only to Spear Leeds at posts 10 and 11. Such suspension would end the earlier of (i) the installation of telephone wires at posts 10 and 11 that connect to Spear Leeds' off-Floor locations; or (ii) the end of the temporary reallocation of the securities assigned to Lehman Brothers to Spear Leeds.

In connection with this temporary relief, the Exchange will advise Spear Leeds' management and risk personnel that use of the mobile telephones is limited to permitted communications, and may not be used from the Lehman Brothers' posts for any other purposes.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act,<sup>13</sup> in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system, and, in general, to protect investors and the public interest.

### 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 has designated the proposed rule change as one that: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Therefore, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>15</sup>

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<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).



A proposed rule change filed under 19b-4(f)(6) normally does not become operative until 30 days after the date of filing.<sup>16</sup> However, Rule 19b-4(f)(6)(iii)<sup>17</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. In view of the immediate nature of the relief requested, the Exchange seeks to have the proposed amendments become operative immediately. The Exchange requests that the Commission waive the 30-day delayed operative date, so that the proposed rule change may become immediately operative pursuant to Section 19(b)(3)(A) and Rule 19b-4(f)(6) thereunder. Waiver of these periods will allow the Exchange to immediately implement the proposed rule change.

As outlined more fully above, the Exchange believes that the proposed relief is limited in nature, and that the benefits of the proposed relief outweigh the potential harms. In particular, the proposed suspension of NYSE Rule 123D(3) would be applicable only to the opening transactions on September 15, 2008 for nine Lehman Preferred securities. Similarly, the proposed temporary suspension of NYSE Rule 36.30 is only applicable for posts 10 and 11 on the Floor of the Exchange to respond to the emergency reallocation of Lehman Brothers securities to Spear Leeds, and the suspension would end the earlier of (i) the installation of telephone wires at posts 10 and 11 that connect to Spear Leeds' off-Floor locations; or (ii) the end of the temporary reallocation of the securities assigned to Lehman Brothers to Spear Leeds.<sup>18</sup>

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<sup>15</sup> 17 CFR 240.19b-4(f)(6).

<sup>16</sup> Id. In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file 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. NYSE has satisfied this requirement.

<sup>17</sup> Id.

<sup>18</sup> Subsequent to filing this proposed rule change, the Exchange informed the Commission that installation of telephone wires at posts 10 and 11 connecting to Spear Leeds's off-

Moreover, given the rapidity of recent developments, the NYSE believes that immediate effectiveness is required in order to avoid significant disruption to the market. The NYSE believes that this need satisfies the standards set out in the Exchange Act and related rules regarding immediate effectiveness filings.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission therefore grants the Exchange's request and designates the proposal to be operative upon filing.<sup>19</sup>

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 No. SR-NYSE-2008-84 on the subject line.

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Floor locations was completed the afternoon of September 15, 2008. Thus, the suspension would end and Rule 36.30 would be in effect again prior to the opening of trading on September 16, 2008. Telephone conversation between Clare Saperstein, Director, Office of the General Counsel, Exchange, and Nathan Saunders, Special Counsel, Division of Trading and Markets, Commission, September 15, 2008.

Paper comments:

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

All submissions should refer to File Number SR-NYSE-2008-84. 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 such filing also will be available for inspection and copying at the principal office of NYSE. 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

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<sup>19</sup> For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

publicly. All submissions should refer to File Number SR-NYSE-2008-84 and should be submitted on or before [insert date 21 days from the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

Florence E. Harmon  
Acting Secretary

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<sup>20</sup> 17 CFR 200.30-3(a)(12).