

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59231; File No. SR-NYSE-2008-143)

January 12, 2009

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Amending NYSE Rule 103B (“Security Allocation and Reallocation”) to: 1) Prohibit DMM Units from Communicating with Issuers After Receipt of Notice from the Exchange of the Issuer’s Impending Listing; 2) Provide DMM Unit Marketing Materials to the Issuer Prior to the Scheduled Interview Rather than the Day Before; and 3) Allow An Issuer Transferring from NYSE Alternext US LLC to the NYSE to Retain its DMM Unit if such DMM Unit is An Approved and Registered DMM on the NYSE

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 December 31, 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

The Exchange proposes to amend NYSE Rule 103B (“Security Allocation and Reallocation”) to: 1) prohibit DMM units from communicating with issuers after receipt of notice from the Exchange of the issuer’s impending listing; 2) provide DMM unit marketing materials to the issuer prior to the scheduled interview rather than the day before; and 3) allow an issuer transferring from NYSE Alternext US LLC (“Alternext”) to the NYSE to retain its DMM unit if such DMM unit is an approved and registered DMM on the NYSE.

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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.

The text of the proposed rule change is available on the Exchange's Web site ([www.nyse.com](http://www.nyse.com)), at the Exchange's Office of the Secretary, 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 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 Exchange proposes to amend NYSE Rule 103B ("Security Allocation and Reallocation") to: 1) prohibit DMM units from communicating with issuers after receipt of notice from the Exchange of the issuer's impending listing; 2) provide DMM unit marketing materials to the issuer prior to the scheduled interview rather than the day before; and 3) allow an issuer transferring from NYSE Alternext US LLC ("Alternext") to the NYSE to retain its DMM unit if such DMM unit is an approved and registered DMM on the NYSE.

The Exchange notes that parallel changes are proposed to be made to the rules of the NYSE Alternext Exchange (formerly the American Stock Exchange).<sup>4</sup>

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<sup>4</sup> See SR-NYSEALTR-2008-21 (to be filed on December 31, 2008).

## I. Background

On October 24, 2008, the NYSE amended its allocation process to provide issuers with more autonomy in the selection of its assigned DMM unit.<sup>5</sup> The revised allocation process established a single objective measure<sup>6</sup> to determine a DMM unit's eligibility to participate in the allocation process. The single objective measure made it feasible for an issuer to select and conduct interviews of eligible DMM units or delegate the selection to the Exchange.<sup>7</sup> DMM units selected for an interview are notified directly by the Exchange and may provide material to the Exchange which will be given to the issuer the day before the scheduled interview.

## II. Proposed Amendments

During the administration of the new allocation process, it has become clear that certain amendments to the rule are required as a result of certain practical considerations that need to be addressed in the application of the rule.

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<sup>5</sup> See Securities Exchange Act Release No. 58857 (October 24, 2008), 73 FR 65435 (November 3, 2008) (SR-NYSE-2008-52) (“Allocation Policy”). Specialist units were eliminated and replaced with DMM units in the new Market Model filing. See Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46) (“New Market Model”).

<sup>6</sup> DMM units are eligible to participate in the allocation process of a listed security when the DMM unit has not failed to comply with its quoting requirements for “Less Active” (any listed security that has a consolidated average daily volume of less than one million shares per calendar month)” and “More Active” (any listed security that has a consolidated average daily volume equal to or greater than one million shares per calendar month)” securities. Those DMM units that have failed to meet the quoting requirement for a consecutive two month period are ineligible for a minimum of two months following the second consecutive month of its failure to meet its quoting requirement. (“Penalty Period”). The DMM unit must satisfy the quoting requirement for the two consecutive months of the Penalty Period to be eligible to participate in the allocation process. See NYSE Rule 103B, Section II(J)(2).

<sup>7</sup> NYSE Rule 103B, Section III.

## 1. Interview Process

The Exchange proposes to amend Section III(A) of NYSE Rule 103B to prohibit DMM units from having contact with an issuer after the Exchange provides notice to DMM units about the issuer's impending listing on the NYSE. Pursuant to the Exchange's former Allocation Policy, specialists were required to cease communication with an issuer once the Exchange issued the invitation for specialists to apply for an issue.

The modification to the allocation process to allow an issuer to select its DMM units from the list of eligible DMM units on the Exchange ended the administrative need for the Exchange to solicit applications from DMM units which would have triggered the prohibition of communication between DMM units and listing companies. Thus, the Exchange inadvertently removed the prohibition of ending communication between the DMM unit and the issuer prior to the interview. Currently NYSE 103B prohibits communication between DMM units and issuers following their interview.

The Exchange still believes that prohibiting communication between DMM units and issuers just prior to the interview is appropriate in order to promote fairness and objectivity in the interview process. The Exchange therefore proposes to amend NYSE Rule 103B, Section III to add a section prohibiting DMM units, or any individuals acting on their behalf, from having any contact with any listing company once the Exchange provides written notice to DMM units that the listing company is listing on the Exchange.

In addition to the above modification related to the interview process, the Exchange further seeks to allow more flexibility in the delivery of DMM marketing materials to an issuer based on the availability of the issuer. Currently, the rule provides that DMM marketing materials are to be provided the day before the interview. The Exchange proposes to amend the

language to allow for the marketing materials to be provided prior to the interview. Some issuers that interview at the Exchange may be in transit the day prior to the interview or participating in road shows and business trips and are therefore unavailable to receive the materials the day before the scheduled interview. In those instances the Exchange provides the issuer with the materials the day of the interview. In instances where an issuer is available to receive the marketing materials in advance of the scheduled interview the Exchange would like to be able to provide the materials to the issuer. Accordingly, the Exchange proposes to amend the rule to simply state that the Exchange will provide the issuer with the DMM units' marketing materials prior to the interview.

2. Allocation of listing companies transferring from Alternext to the NYSE

On October 1, 2008, the Exchange completed its acquisition of Alternext.<sup>8</sup> Alternext, similar to the Exchange, operates a DMM system and securities traded on Alternext are assigned to a DMM unit. In certain instances, Alternext DMM units may also be registered DMM units on the NYSE.

In these instances, the Exchange seeks to afford issuers transferring from Alternext the same privileges it affords issuers transferring from its other affiliated Exchange, NYSE Arca.<sup>9</sup> Specifically, the Exchange seeks to amend NYSE Rule 103B to allow an issuer that transfers from Alternext to the NYSE to waive the allocation process in instances where the issuer's security was assigned to a registered DMM unit that is also an approved and registered DMM

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

<sup>9</sup> See Securities Exchange Act Release No. 55641 (April 17, 2007), 72 FR 20396 (April 24, 2007) (SR-NYSE-2007-39) (amending NYSE Rule 103B to allow an issuer to waive the allocation process when the issuer's security was assigned an LMM that was also a registered NYSE specialist, thus affording the issuer to retain the same market maker).

unit on the NYSE.<sup>10</sup> In any event, the issuer may still choose to follow the regular allocation process and have its security referred for allocation through the allocation process pursuant to NYSE Rule 103B, Section III. If the listing company chooses to have its DMM unit selected by the Exchange pursuant to NYSE Rule 103B, Section III(B), and requests not to be allocated to the DMM unit that was its Alternext DMM unit, such request will be honored.

The Exchange believes that the proposed rule change is consistent with the goals of the Allocation policy to provide an incentive for ongoing enhancement of the relationship between the listing company and the DMM unit, to encourage continued high performance of the DMM unit by allowing them to use their experience and knowledge of the listing company's securities and to provide the best possible match between the DMM unit and the security.

## 2. Statutory Basis

The basis under the Act for the proposed rule change is the requirement under Section 6(b)(5),<sup>11</sup> which requires that an exchange have rules that are designed 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. The Exchange believes that the proposed amendments are consistent with these objectives. The amendments sought herein seek to alleviate impediments in the administrative process of assigning securities to DMM units which ultimately facilitates the fair and orderly trading in the subject security.

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<sup>10</sup> Currently, the proposed waiver of the allocation process would occur in very limited circumstances because only one DMM unit is registered on both Alternext and the NYSE.

<sup>11</sup> 15 U.S.C. 78f(b)(5).

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

Because the proposed rule change: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>14</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>15</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay.

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

<sup>13</sup> 17 CFR 240.19b-4(f)(6). Pursuant to Rule 19b-4(f)(6)(iii) under the Act, the Exchange is required to give the Commission 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 of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

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

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to immediately remove any disparity in the treatment afforded issuers of the NYSE's affiliate exchanges and to further objectivity and fairness of the allocation process by immediately establishing the specific point in time when DMM units must cease communication with issuers prior to interviews. The language being used in this proposed rule filing for the transfer of issuers from NYSE Alternext to NYSE is substantively similar to the language already in place for its other related Exchange, NYSE Arca.<sup>16</sup> Furthermore, the proposed rule filing seeks to restore language regarding the prohibition of communication between the DMM units and the issuer that was inadvertently omitted from the former NYSE Rule 103B to the current NYSE Rule 103B. For these reasons, the Commission designates that the proposed rule change become operative immediately upon filing.<sup>17</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the 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:

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<sup>16</sup> See Securities Exchange Act Release No. 55641 (April 17, 2007), 72 FR 20396 (April 24, 2007) (SR-NYSE-2007-39).

<sup>17</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. 15 U.S.C. 78c(f).



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-2008-143 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-NYSE-2008-143. 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 am and 3:00 pm. 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-NYSE-2008-143 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).