

This proposal would make permanent the NYSE Realtime Reference Prices service and make permanent the \$70,000 flat monthly fee for that service.<sup>12</sup> The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.<sup>13</sup> There are a variety of alternative sources of information that impose significant competitive pressures on NYSE in setting the terms for distributing the NYSE Realtime Reference Prices service. The Commission believes that the availability of those alternatives, as well as NYSE's compelling need to attract order flow, imposed significant competitive pressure on NYSE to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because NYSE was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (SR-NYSE-2009-42), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60001; File No. SR-NYSEAmex-2009-21]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC Amending NYSE Amex Equities Rule 123E To Be More Consistent With the Exchange's Current Designated Market Maker System

May 29, 2009.

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 May 22, 2009, NYSE Amex LLC (the "Exchange" or "NYSE Amex") 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 Exchange. NYSE Amex filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act <sup>4</sup> and Rule 19b-4(f)(6) thereunder, <sup>5</sup> which renders it effective upon filing with the Commission. 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 Amex Equities Rule 123E ("DMM Combination Review Policy") to be more consistent with the Exchange's current Designated Market Maker ("DMM") system. The text of the proposed rule change is available at the Exchange, 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 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 Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The Exchange proposes to amend NYSE Amex Equities Rule 123E ("DMM Combination Review Policy") to be more consistent with the Exchange's current Designated Market Maker ("DMM") system. These amendments are proposed to conform to amendments filed by the New York Stock Exchange LLC ("NYSE").<sup>6</sup>

##### I. Background

As described more fully in a related rule filing,<sup>7</sup> NYSE Euronext acquired The Amex Membership Corporation ("AMC") pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the "Merger"). In connection with the Merger, the Exchange's predecessor, the American Stock Exchange LLC ("Amex"), a subsidiary of AMC, became a subsidiary of NYSE Euronext now called NYSE Amex LLC, and continues to operate as a national securities exchange registered under Section 6 of the Securities Exchange Act of 1934, as amended (the "Act").<sup>8</sup> The effective date of the Merger was October 1, 2008.

In connection with the Merger, on December 1, 2008, the Exchange relocated all equities trading conducted on the Exchange legacy trading systems and facilities located at 86 Trinity Place, New York, New York, to trading systems and facilities located at 11 Wall Street, New York, New York (the "Equities Relocation"). The Exchange's equity trading systems and facilities at 11 Wall Street (the "NYSE Amex Trading Systems") are operated by the NYSE on behalf of the Exchange.<sup>9</sup>

As part of the Equities Relocation, NYSE Amex adopted NYSE Rules 1-1004, subject to such changes as necessary to apply the Rules to the Exchange, as the NYSE Amex Equities Rules to govern trading on the NYSE Amex Trading Systems.<sup>10</sup> The NYSE

<sup>12</sup> See *supra* note 4.

<sup>13</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) ("NYSE Arca Order"). In the NYSE Arca Order, the Commission describes the competitive factors that apply to non-core market data products. The Commission hereby incorporates by reference the data and analysis from the NYSE Arca Order into this order. In addition, the Commission notes that it recently found that NYSE was subject to competitive forces when setting the terms of its NYSE OpenBook nonprofessional subscriber fee. See Securities Exchange Act Release No. 59544 (March 9, 2009), 74 FR 11162 (March 16, 2009) (SR-NYSE-2008-131).

<sup>14</sup> 15 U.S.C. 78s(b)(2).

<sup>15</sup> 17 CFR 200.30-3(a)(12).

<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.

<sup>4</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>5</sup> 17 CFR 240.19b-4(f)(6).

<sup>6</sup> See Securities Exchange Act Release No. 59383 (February 11, 2009), 74 FR 7947 (February 20, 2009) (SR-NYSE-2009-07).

<sup>7</sup> See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-NYSE-2008-60 and SR-Amex 2008-62) (approving the Merger).

<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex 2008-63) (approving the Equities Relocation).

<sup>10</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex 2008-63) (approving the Equities

Amex Equities Rules, which became operative on December 1, 2008, are substantially identical to the current NYSE Rules 1–1004 and the Exchange continues to update the NYSE Amex Equities Rules as necessary to conform with rule changes to corresponding NYSE Rules filed by the NYSE.

## II. NYSE Amex Equities Rule 123E

Currently, pursuant to NYSE Amex Equities Rule 123E, the Exchange is responsible for reviewing proposed DMM unit combinations, subject to certain considerations, when the proposed DMM unit combination would result in an aggregate of more than five percent (“Tier 1 combination”), 10 percent (“Tier 2 combination”) or 15 percent or more (“Tier 3 combination”) in any one of four concentration measures: (1) Common stocks listed on the Exchange; (2) the 250 most active listed common stocks; (3) the total trading volume of common stock listed on the Exchange; and (4) the total dollar value of common stock listed on the Exchange.

Where a proposed combination involves or would result in a DMM unit accounting for more than five percent of any of the “concentration measures,” the Exchange is required to review the proposed combination to take into consideration:

(1) The effects of the proposed combination in terms of the following criteria:

(a) Strengthening the capital base of the resulting DMM unit;

(b) minimizing both the potential for financial failure and the negative consequences of any such failure on the DMM system as a whole; and

(c) maintaining or increasing operational efficiencies;

(2) commitment to the Exchange market, focusing on whether the constituent DMM units have worked to support, strengthen and advance the Exchange, its agency/auction market and its competitiveness in relation to other markets; and

(3) the effect of the proposed combination on overall concentration of DMM units.

Where a DMM unit currently exceeds five percent of any concentration measure, and then proposes a combination that would not result in increasing its concentration measure by more than two percentage points, or not result in the combined unit moving into a higher tier classification, the Exchange shall not review the proposed combination.

When a proposed combination has a concentration percentage of 10% or higher in any of the four measures set forth above, NYSE Amex Equities Rule 123E(c)(1)(a)(i)–(iv) requires the combined entity to prove by a preponderance of the evidence that the proposed combination: (1) Would not create or foster concentration in the DMM business detrimental to the Exchange and its markets; (2) would foster competition among DMM units; (3) would enhance the performance of the constituent DMM unit and the quality of market of stocks involved; and (4) would demonstrate that, if approved, the proposed combination is otherwise in the public interest.

Moreover, pursuant to NYSE Amex Equities Rule 123E(d), proposed combinations that would result in the DMM units accounting for more than 10% of a concentration measure require the proponents of the combination to submit an operational certification prepared by an independent, nationally recognized management consulting organization with respect to all aspects of the unit’s management and operations.<sup>11</sup> The proponents must also submit an acceptable risk management plan with respect to any line of business in which they engage.

If the proposed combination has a concentration percentage greater than 15%, NYSE Amex Equities Rule 123E(c)(1)(b)(i)–(iv) further requires the combined entity to prove that the measures set forth for combination of 10% are satisfied by clear and convincing evidence.

## III. Proposed Amendments to NYSE Amex Equities Rule 123E

The Exchange proposes to amend the DMM Combination review to more clearly define what constitutes a DMM Combination that requires review and approval by the Exchange. The Exchange further seeks to clarify the administrative process associated with that review.

The Exchange proposes to amend NYSE Amex Equities Rule 123E to eliminate the current “Tier” system as the mechanism for determining the

nature of the review for a proposed DMM combination. Today, there are four DMM units approved to operate on the Exchange; as such, any proposed combination has the potential to have significant impact on the Exchange’s ability to maintain its DMM system and to provide a fair and orderly market place. Accordingly, the Exchange proposes to eliminate threshold concentration levels as the instigating factor for the Exchange to review a proposed DMM combination. Pursuant to proposed NYSE Amex Equities Rule 123E(a), any “proposed combination” must be approved by the Exchange.

Proposed NYSE Amex Equities Rule 123E(b) defines a “proposed combination” to include changes to the current DMM unit business that has the potential to have a significant impact on the Exchange’s market. As such, the Exchange will review when: (1) Two or more DMM units merge or otherwise combine their businesses with the result that the total number of existing DMM units will be reduced; (2) two or more DMM units combine their businesses with the result that the existing number of DMM units is not reduced, but one or more of the surviving units is substantially reduced in size; or (3) a DMM unit merges or otherwise combines with a non-DMM business resulting in a change of control of the existing DMM unit.<sup>12</sup>

The current rule does not specify where the correspondence regarding a proposed combination should be directed. Through this amendment, the Exchange would require the proponents of a proposed combination to direct the correspondence to the Office of the Corporate Secretary.<sup>13</sup> This department will be able to coordinate and facilitate the timely review of the request.

Similar to the current rule, the written submission should address all of the factors for review as well as: (1) Performance in any securities received through previous combinations or transfers of registrations during the

<sup>12</sup> The current provisions of NYSE Amex Equities Rule 123E(g)(4) will be deleted and not incorporated in the text of the proposed definition of “proposed combination.” NYSE Amex Equities Rule 123E(g)(4) includes as a definition of a DMM combination: “an individual DMM leaving an existing unit and proposing to take securities with him or her to join another existing unit.” Securities allocated on the Exchange are assigned to DMM units pursuant to NYSE Amex Equities Rule 103B with an individual employed by the unit assigned as the DMM. As such, the individual DMM on the NYSE [sic] is not permitted to take securities with him or her if the DMM becomes employed by another DMM unit. Accordingly, this concept is not being carried over into proposed NYSE Amex Equities Rule 123E.

<sup>13</sup> See proposed NYSE Amex Equities Rule 123E(c).

Relocation); Securities Exchange Act Release No. 58833 (October 22, 2008), 73 FR 64642 (October 30, 2008) (SR–NYSE–2008–106) and Securities Exchange Act Release No. 58839 (October 23, 2008), 73 FR 64645 (October 30, 2008) (SR–NYSEALTR–2008–03) (implementing the Bonds Relocation); Securities Exchange Act Release No. 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR–NYSEALTR–2008–10) (adopting amendments to NYSE Amex Equities Rules to track changes to corresponding NYSE Rules); Securities Exchange Act Release No. 59027 (November 28, 2008), 73 FR 73681 (December 3, 2008) (SR–NYSEALTR–2008–11) (adopting amendments to Rule 62–NYSE Amex Equities to track changes to corresponding NYSE Rule 62).

<sup>11</sup> The initial rationale behind this additional requirement was to minimize the risk of financial and/or operational failure of larger specialist units.

preceding two years; (2) whether the resulting DMM unit will maintain staffing adequate to the needs of the market place; (3) whether the proposed combined unit will have a real-time surveillance system that monitors DMM trading and uses exception alerts to detect unusual trades or trading patterns; (4) whether the proposed combined unit will have disaster recovery facilities for its computer network and software; (5) whether it has designated specific individuals to handle unusual situations on the Floor (if so, the names of the individuals); (6) whether the combined unit will employ a "zone" or other management system on the Floor (with identification of the names of the individuals and their specific responsibilities, as applicable); and (7) whether the combined unit will designate a senior staff member to be responsible for reviewing DMM performance data, with specific procedures for correcting any deficiencies identified.<sup>14</sup>

The Exchange further proposes to rescind the requirement to submit an operational certification prepared by an independent, nationally recognized management consulting organization with respect to all aspects of the firm's management and operations for proposed combinations as it related to proposed combinations of 10% or higher, as required by NYSE Amex Equities Rule 123E(d).

The Exchange believes that the management and operational concerns contemplated by this requirement do not exist today. Specifically, the Exchange submits that its current rules already address and monitor the management and operational requirements originally contemplated by the performance of an independent consultant and therefore, such outside certification is duplicative and unnecessary.

As a result of the New Multi-Party Regulatory Services Agreement ("Multi-Party RSA") signed by FINRA, NYSE and NYSE Amex on October 1, 2008, FINRA oversees NYSE and NYSE Amex Member Firm Regulation and carefully reviews organizations seeking membership with FINRA, NYSE and NYSE Amex.<sup>15</sup> All prospective member

organizations are required to comply with the Securities and Exchange Act of 1934 as well as its rules with regard to the creation and preservation of books and records, the corporate structure of the proposed member organization, the supervision and control, and the net capital requirements of the proposed member organization. Furthermore, these rules require annual audits of the member organization's financial statements by an independent public account and the submission of an audited financial and operational report to the respective Exchanges.<sup>16</sup>

The structure and regulatory concerns that accompany applications for membership on the Exchange in today's market have been carefully considered and addressed in the FINRA and NYSE Consolidated Rules. These Rules create a multi-tiered level of review to ensure that requirements related to appropriate managerial and financial capabilities for DMM units are in place from the onset of membership with the Exchange to the approval of members as DMMs.

For example, NYSE Amex Equities Rules 98, 103, and 104 set forth various criteria required for the operation, management and responsibilities of a DMM unit on the Exchange.

There are currently two versions of NYSE Amex Equities Rule 98 in the NYSE Amex Equities Rulebook. In either form, NYSE Amex Equities Rule 98 governs the relationship between a DMM unit and its approved persons (both versions of NYSE Amex Equities Rule 98) or the other departments, divisions or aggregation units of the member organization that operate an NYSE Amex DMM unit (Current NYSE Amex Equities Rule 98). NYSE Amex Equities Rule 98 Former applies to those DMM member organizations and associated approved persons that were approved before October 1, 2008 for an exemption under Amex Rule 193, which was the Amex analog to NYSE Amex Equities Rule 98.

responsibilities for selected NYSE rules. The Agreement includes a list of all of those NYSE rules for which FINRA has assumed regulatory responsibilities ("Common Rules"). NYSE and NYSE Amex entered into a regulatory contract under which NYSE Regulation performs regulatory functions on behalf of NYSE Amex. Some of those contracted regulatory functions will be performed by FINRA, pursuant to the Multi-Party RSA.

Pursuant to NYSE Rule 2, approved member organizations of NYSE Amex are approved as NYSE member organizations. Likewise, NYSE Amex Equities Rule 2 provides that approved NYSE member organizations are approved NYSE Amex member organizations. Both NYSE and NYSE Amex Equities Rule 2(b) define a member organization as a registered broker or dealer that is a member of FINRA and approved by its respective Exchange as a member organization.

<sup>16</sup> See, e.g., NYSE, NYSE Amex Equities and FINRA Rules 104, 311, 325–328, 382, and 418.

When an NYSE Amex DMM unit either operates within a larger member organization with other business units or has approved persons, NYSE Amex Equities Rule 98 provides additional regulatory authority for NYSE Regulation, Inc. and FINRA to review the structure of a member organization's information barriers between the DMM unit and the rest of the member organization. Additionally, NYSE Amex Equities Rule 98 requires that these DMM units maintain the necessary net capital requirements in compliance with NYSE Amex Equities Rule 103.20, separate and apart from the rest of the member organization.<sup>17</sup>

NYSE Amex Equities Rule 103 sets forth the criteria that an Exchange member must satisfy in order to apply as a DMM unit. As part of the approval process, the Exchange reviews the member organization's market making ability and the capital available for market making. NYSE Amex Equities Rule 103.20 imposes stringent net capital requirements for all DMM units and requires the DMM unit to immediately notify FINRA, on behalf of NYSE Regulation, if it is unable to comply with these prescribed requirements. DMM units that anticipate falling below the warning level of its tentative capital requirements must notify the Exchange, which will work closely with the DMM unit in order to develop a written plan to assist the DMM unit in meeting its capital requirement.<sup>18</sup> Thereafter, compliance with the established plan is monitored by the Exchange and FINRA. These net capital requirements apply to all DMM units whether these units are stand-alone businesses or part of a larger member organization.

NYSE Amex Equities Rule 104 sets forth the dealings and responsibilities of DMMs and requires the DMM units to maintain compliance at all times with NYSE [sic] and SEC regulations. NYSE Regulation's Division of Market Surveillance and FINRA reviews assess whether DMM units are complying with their obligations as DMMs.

Once approved as a DMM unit, FINRA and NYSE Regulation continue to monitor for compliance with these rules. FINRA reviews a DMM unit's

<sup>17</sup> NYSE Amex Equities Rule 98 is not intended to assess the fitness of a DMM unit; rather, it assesses whether the DMM unit is properly walled off from approved persons or a parent member organization. If a DMM unit is a stand-alone business without any affiliates, approved persons, or parent company, NYSE Amex Equities Rule 98 is inapplicable. Currently, two of the four NYSE Amex DMM units are stand-alone firms and therefore not subject to NYSE Amex Equities Rule 98.

<sup>18</sup> NYSE Amex Equities Rule 103.20(a)(x).

<sup>14</sup> *Id.*

<sup>15</sup> On July 30, 2007, NASD and NYSE Regulation, Inc. consolidated their member firm regulation operations into a combined organization, FINRA. Pursuant to Rule 17d-2 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), NYSE, NYSE Regulation, Inc., and NASD entered into an agreement (the "Agreement") to reduce regulatory duplication for firms that are members of FINRA and also members of NYSE on or after July 30, 2007 ("Dual Members"), by allocating to FINRA certain regulatory

compliance with net capital requirements on a daily basis and examines DMM units on an annual basis for compliance with Exchange rules. The Exchange submits that the FINRA and NYSE [sic] rules applicable to DMMs, combined with the FINRA exam program, provide for appropriate monitoring and review of organizations seeking initial membership to the Exchange and the ability to operate as a DMM on the Exchange on an ongoing basis. This regulatory structure obviates the need for an independent consultant to perform a review of a proposed combination's management and operational efficiencies. The Exchange therefore believes that the requirement for an independent, nationally recognized management consulting organization review with respect to all aspects of the proposed combined entity's management and operations is no longer warranted.

The Exchange further seeks to make the criteria for the Exchange's review of a proposed combination consistent with the requirements for operating a DMM unit. Under the proposed rule change, the Exchange will review whether the proposed combined entity will be able to comply with the provisions of NYSE Amex Equities Rule 103B, Section II<sup>19</sup> which sets forth the process of allocating securities to the DMM units. The Exchange will further review the proposed combination to determine whether that proposed combination can comply with the provisions of NYSE Amex Equities Rules 98, 103 and 104 which set forth the requirements for the operation of a DMM unit. Additionally, the Exchange proposes to retain the criteria set forth in the current process and include as part of its review: (1) Whether the proposed combination minimizes both the potential for financial failure and the negative consequences of any such failure on the DMM system as a whole; (2) whether the proposed combination maintains or increases operational efficiencies; (3) the surviving DMM unit's commitment to the Exchange's market; and (4) the effect of the proposed combination on overall concentration of DMM units.<sup>20</sup>

<sup>19</sup> The NYSE established an allocation system based on a single objective measure to determine a DMM unit's eligibility to participate in the allocation process. See Securities Exchange Release No. 58363 (August 14, 2008), 73 FR 49514 (August 21, 2008) (SR-NYSE-2008-52). NYSE Amex adopted this allocation policy pursuant to the Equities Relocation.

<sup>20</sup> In addition, the Exchange seeks to eliminate references to certain legacy programs that were operated by the NYSE that no longer exist. Specifically, NYSE Amex Equities Rule 123E, Supplementary Material .10(a) refers to participation in a "FACTS" program.

The Exchange's ultimate determination to approve or disapprove a proposed combination will be based upon a determination that the proposed combination has satisfied the criteria set forth in proposed NYSE Amex Equities Rule 123E(d)(1)–(5) and the Exchange determines that the proposed combination would: (1) Not create or foster concentration in the DMM business detrimental to the Exchange and its markets; (2) foster competition among DMM units; and (3) enhance the performance of the constituent DMM unit and the quality of the markets in the securities involved.<sup>21</sup> The Exchange may condition its approval upon compliance by the resulting DMM unit with any steps the Exchange may specify to address any concerns it may have in regard to considerations of the above criteria.

To ensure the fairness of the new process, pursuant to proposed NYSE Amex Equities Rule 123E(f), the Exchange must approve or disapprove a proposed combination within ten (10) business days of the written submission. The Exchange reserves the right to extend its review process if the information submitted by the proponents of the DMM combination is inadequate or requires additional time to review in order for the Exchange to reach a decision.

In any instance where the Exchange does not approve a proposed combination, the proponents of such proposed combination have a right to have such decision reviewed by the Exchange's Board of Directors.

#### Conclusion

The Exchange believes that the proposed modifications to the Exchange's current administrative procedures relating to the review of a proposed DMM combination reflect the current operational structure of DMM systems on the Exchange. These proposed modifications also clarify what constitutes a proposed combination and amends the criteria used to review the proposed combination. Moreover, by establishing a deadline for the completion of the review and a right to appeal to the Exchange Board of Directors, NYSE Amex believes that its process will be fair and allow member organizations to properly manage their business initiatives.

Finally, the Exchange notes that these proposed amendments would conform the DMM Combination Policy of NYSE Amex Equities Rule 123E to the DMM

Combination Policy of its affiliated exchange, the New York Stock Exchange LLC.

#### 2. Statutory Basis

The basis under the Act for the proposed rule change is the requirement under Section 6(b)(5),<sup>22</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 proposed rule change is consistent with these objectives in that it enables the Exchange to further enhance the process by which it reviews proposed combinations of DMM units. Through the instant filing to make its internal administrative process related to the Exchange review of a proposed DMM combination consistent with the underlying requirements for DMMs and maintaining criteria that fosters the DMM system, the Exchange believes that it is facilitating transactions.

Specifically, the Exchange believes that the proposed changes to the DMM combination review process are necessary to facilitate the continuation of its DMM system which allows the Exchange to provide its market participants with a market maker that is responsible for: (i) Providing liquidity to the market when there is a recognized need for additional liquidity; (ii) bridging the gap between supply/demand by purchasing when no one else is buying or selling when no one else is selling; and (iii) overall maintaining a fair and orderly market, that ultimately removes impediments to and perfects the mechanism of a free and open market and a national market system and, in general, protects 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.

<sup>21</sup> See Proposed NYSE Amex Equities Rule 123E(f).

<sup>22</sup> 15 U.S.C. 78f(b)(5).

*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 foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms, does not become operative for 30 days after the date of 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>23</sup> and Rule 19b-4(f)(6) thereunder.<sup>24</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing.<sup>25</sup> However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requested that the Commission waive the 30-day operative delay and designate the proposed rule change operative upon filing.

The Exchange believes that the instant filing is non-controversial because the proposed amendments remove impediments to and perfect the mechanism of a free and open market and a national market system by creating systems and procedures for the Exchange to efficiently evaluate and approve proposed DMM combinations in light of the evolving market system. The Commission notes that these proposed amendments would conform the DMM Combination Review Policy of NYSE Amex Equities Rule 123E to the DMM Combination Review Policy of its affiliated exchange, NYSE.

The Exchange believes that good cause exists to justify waiver of the 30-day operative delay in order to immediately eliminate the disparity between NYSE's and NYSEAmex's

DMM Combination Review Policies and to immediately allow the Exchange to implement procedures for reviewing proposed mergers, acquisitions and other combinations between or among DMM units that are appropriate in the current marketplace. The proposed rule changes update the combination review policy that was created in 1994, for the NYSE market structure, which did not adequately contemplate the conditions of today's market.

Additionally, the Exchange believes that good cause exists to justify waiver of the 30-day operative delay in order to avoid potential delays in proposed DMM combinations that would support, strengthen, and advance the Exchange and its market, and would ultimately benefit its investors and the public interest. The Exchange believes that this proposed rule change provides guidelines to proposed combinations and ensures that these proposed combinations do not foster business detrimental to the Exchange, but also enhances the performance of the DMM unit and the quality of markets. By doing so, the Exchange believes, this proposed rule change ultimately protects the customers and the public interest and should be immediately effective in order to promote investor protection.

In light of the foregoing, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission designates the proposal operative upon filing.<sup>26</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.<sup>27</sup>

**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:

<sup>26</sup> For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>27</sup> 15 U.S.C. 78s(b)(3)(C).

*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-NYSEAmex-2009-21 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-NYSEAmex-2009-21. 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 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 available publicly. All submissions should refer to File Number SR-NYSEAmex-2009-21 and should be submitted on or before June 25, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>28</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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<sup>28</sup> 17 CFR 200.30-3(a)(12).

<sup>23</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>24</sup> 17 CFR 240.19b-4(f)(6).

<sup>25</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires the self-regulatory organization to give the Commission 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.