

equitable principles of trade, and, in general, to protect investors and the public interest.

More specifically, the Commission believes requiring a member firm to disclose the risks of day-trading to non-institutional customers when the firm promotes a day-trading strategy should help alert individuals to the risks associated with a day-trading strategy. In addition, requiring a member firm to determine whether a day-trading strategy is appropriate for a customer should help to assure that individuals who are unable to bear the risks of day-trading, or who have investment objectives incompatible with day-trading, are not approved for day-trading.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (SR-FINRA-2009-059) be, and it hereby is, approved.

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

**Elizabeth M. Murphy,**  
Secretary.

[FR Doc. E9-28613 Filed 11-30-09; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61046; File No. SR-NYSE-2009-114]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the Sample Broker Letters Set Forth In Rule 451

November 20, 2009.

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 November 16, 2009, New York Stock Exchange LLC (the "Exchange" or "NYSE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which

renders the proposal 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 Exchange Rule 451 and Sections 905.01, 905.02 and 905.03 of the Exchange's Listed Company Manual (the "Manual") to amend the forms of letters contained in those rules to reflect the recent amendments to the Exchange's broker voting rules.

The text of the proposed rule change is available on the Exchange's Web site (<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 these statements may be examined at the places specified in Item IV below. The 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

The Exchange recently amended Exchange Rule 452 and Section 402.08 of the Manual to provide that brokers which are record holders of shares held in client accounts will no longer be permitted to vote those shares in the election of directors without instructions from the beneficial holder of those shares.<sup>4</sup> The amendments take effect for shareholder meetings held on or after January 1, 2010, except to the extent that a meeting was originally scheduled to be held prior to such effective date but was properly adjourned to a date on or after such effective date.<sup>5</sup>

Supplementary Material .20 to Exchange Rule 451 and Sections 905.01, 905.02 and 905.03 contain specimens of letters containing the information and instructions required pursuant to the proxy rules to be given by NYSE member organizations to clients where the member organization is the record holder of shares beneficially owned by those clients in the circumstances where a broker (i) may vote on all proposals without voting instructions (Section 905.01), (ii) may not vote on any proposals without instructions (Section 905.02), and (iii) may vote on certain but not all proposals without instructions (Section 905.03). These letters are shown as examples and not as prescribed forms. Member organizations are permitted to adapt the form of these letters for their own purposes provided all of the required information and instructions are clearly enumerated in letters to clients.

The Exchange is concerned that many shareholders receiving proxy materials from their brokers for meetings scheduled after January 1, 2010 will not be aware of the amendments to the NYSE's broker voting rules and may therefore assume that the broker as record holder will vote their shares on the election of directors if they do not return voting instructions to their broker. The NYSE believes it is important for as many shares as possible to be voted in the election of directors and, therefore, believes it is important to educate retail investors with respect to the implications of their failure to return voting instructions under the amended rules. Consequently, the Exchange proposes to amend the forms of letters provided for use in connection with meetings where the broker may vote on none of the proposals before the meeting and meetings where the broker may vote on some but not all of the proposals before the meeting. The proposed amendments will insert the following language in those forms for use in connection with meetings scheduled after January 1, 2010:

Please note that, under a rule amendment adopted by the New York Stock Exchange for shareholder meetings held on or after January 1, 2010, brokers are no longer allowed to vote shares held in their clients' accounts on uncontested elections of directors unless the client has provided voting instructions (it will continue to be the case that brokers cannot vote their clients' shares in contested director elections). Consequently, if you want us to vote your shares on your behalf on the election of directors, you must provide voting instructions to us. Voting on matters presented at shareholders meetings, particularly the election of directors, is the primary method for shareholders to influence the direction taken by a publicly-traded

<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> 17 CFR 240.19b-4.

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> See Securities Exchange Act Release No. 60215 (July 1, 2009) 74 FR 33293 (July 10, 2009) (SR-NYSE-2006-92).

<sup>5</sup> The amendment does not affect brokers voting as record holders of shares of companies registered under the Investment Company Act of 1940.

company. We urge you to participate in the election by returning the enclosed voting instruction form to us with instructions as to how to vote your shares in this election.

The Exchange also proposes to amend Supplementary Material .20 to Rule 451 and Sections 905.01, 905.02 and 905.03 of the Manual to correct references in the text which indicate that the broker is sending a "proxy" to its clients. In actuality, these letters are intended for use in circumstances where the broker as record holder is seeking voting instructions from its clients as beneficial holders. The broker then provides a voting proxy to the company, voting according to client instructions to the extent applicable. As such, the broker sends a voting instruction form to its clients, rather than a proxy, and the Exchange is amending the rule text to accurately reflect this fact.

Currently, the letters for use when the broker may not vote on any proposals without instructions and may vote on certain but not all proposals without instructions state that if a client returns a signed voting instruction form without otherwise marking the form, the shares will be voted as recommended by the management on all matters to be considered at the meeting. Rule 14a-4(b)(1) under the Act provides that "a proxy may confer discretionary authority with respect to matters as to which a choice is not specified by the security holder provided that the form of proxy states in bold-face type how it is intended to vote the shares represented by the proxy in each such case." In light of this requirement that it be made very clear that the absence of instructions gives the broker discretion as to how the shares are voted, the Exchange proposes to amend the language of the applicable letters to emphasize this fact by clarifying that it is understood that, if the client signs without otherwise marking the form, this will be construed as instruction to vote the shares as recommended by the management on all matters to be considered at the meeting.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)<sup>6</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>7</sup> in particular in that it is designed 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. The Exchange believes that the proposed amendments are consistent with the investor protection objectives of the Act in that their sole purpose is to explain to shareholders the implications of failing to provide voting instructions to their brokers, thereby enabling them to make a more informed decision with respect to the exercise of their voting rights.

### *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*

Written comments were neither solicited nor received.

## 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, provided that the self-regulatory organization has given 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, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>8</sup> and Rule 19b-4(f)(6) thereunder.<sup>9</sup>

At any time within 60 days of the filing of such 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>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(6). The Commission notes that the Exchange has met this requirement.

## 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 Number SR-NYSE-2009-114 on the subject line.

### *Paper Comments*

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

All submissions should refer to File Number SR-NYSE-2009-114. 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, 100 F Street, NE., Washington, DC 20549, 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 publicly available. All submissions should refer to File Number SR-NYSE-2009-114 and should be submitted on or before December 22, 2009.

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9-28614 Filed 11-30-09; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61049; File No. SR-NYSEAmex-2009-82]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Amex LLC Rescinding NYSE Information Memoranda 04-27 and 07-66 and Issuing a New Information Memo Concerning the Exchange's Gap Quote Policy

November 23, 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 November 9, 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, II, and III below, which Items have been prepared by the Exchange. 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 rescind NYSE Information Memoranda ("Information Memo") 04-27 and 07-66 and issue a new Information Memo that provides updated parameters for, and guidance on the application of, the Exchange's Gap Quote Policy (the "Policy"). 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 purpose of the proposed rule changes is to rescind NYSE Information Memos 04-27 and 07-66 and issue a new Information Memo that provides updated parameters for, and guidance on the application of, the Policy.<sup>4</sup>

The principal change to the Policy is a reduction in the minimum size (from at least 10,000 shares to at least 5,000) and value (from \$200,000 or more to \$100,000 or more) requirements for publishing a gap quote. In addition, the Exchange proposes to clarify certain aspects of the Policy related to setting the price of the gap quote. Finally, the Exchange proposes adding language clarifying or reminding members of certain aspects of the Policy and other technical or non-substantive changes.

In order to ensure an orderly transition to usage of the new parameters, the Exchange proposes that these changes be made operative within ten business days after the approval of this filing.

##### Background

The purpose of the Policy, described in greater detail below, is to provide public notice of order imbalances for securities, facilitate price discovery, and minimize short-term price dislocation, by allowing for the entry of offsetting orders or the cancellation of orders on the side of an imbalance.

An order imbalance may occur when the Exchange receives a sudden influx of orders for a particular security on the same side of the market within a short time interval, or when one or more large-size orders for a security are entered, and there is insufficient offsetting interest.

When an imbalance in a security exists, the Policy provides that the Designated Market Maker ("DMM") for the security should widen the spread between the bid and offer—a process known as "gapping the quote." The use of a gap quote signals the existence of the imbalance to the market in order to

attract contra-side liquidity and mitigate volatility.

Gap quotes occur more frequently in securities that are illiquid or thinly traded than in securities that are very liquid or heavily traded.<sup>5</sup>

##### History

In 2004, the NYSE updated its policies and procedures for gapping the quote, which had previously been implemented in 1994.<sup>6</sup> The NYSE announced the updated policy through a new Information Memo 04-27 (June 9, 2004), which it also filed with the Commission.<sup>7</sup> In 2007, the NYSE changed the minimum size and value requirements for use of gap quotes to at least 10,000 shares or \$200,000, and updated the policies and procedures to reflect technical changes to the market and NYSE systems.<sup>8</sup>

Effective October 1, 2008, NYSE Euronext acquired The Amex Membership Corporation ("AMC") pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the "Merger").<sup>9</sup> 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 called NYSE Alternext US LLC, later renamed NYSE Amex LLC.<sup>10</sup> In connection with the Merger, on December 1, 2008, the Exchange relocated all equities trading to systems and facilities located at 11 Wall Street, New York, New York (the "NYSE Amex Equities Trading Systems"), which are operated by the NYSE on behalf of the Exchange.<sup>11</sup> The Exchange then adopted NYSE Rules 1-1004 and related interpretive guidance and policies, including NYSE Information Memos 04-27 and 07-66, as the NYSE Amex Equities Rules to govern trading on the NYSE Amex Equities Trading Systems.<sup>12</sup>

<sup>5</sup> Currently, it is not cost-effective for the Exchange to implement stock-specific gap quote procedures.

<sup>6</sup> See NYSE Information Memo 94-32 (August 9, 1994).

<sup>7</sup> See Securities Exchange Act Release No. 50237 (August 24, 2004), 69 FR 53123 (August 31, 2004) (SR-NYSE-2004-37) (concerning NYSE Information Memo 04-27).

<sup>8</sup> See NYSE Information Memo 07-66 (July 5, 2007). This Information Memo was not filed with the Commission.

<sup>9</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>10</sup> 15 U.S.C. 78f.

<sup>11</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>12</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008)

Continued

<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> The Exchange's corporate affiliate, New York Stock Exchange LLC ("NYSE"), has submitted an identical companion filing updating its Gap Quote Policy governing equities trading. See SR-NYSE-2009-112. The proposed new Information Memo will be jointly issued by both the Exchange and NYSE.