

advantage.<sup>28</sup> Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests when the exchange is affiliated with one of its members, the Commission believes that it is consistent with the Act to permit NES to expand the outbound routing services it provides to Nasdaq, subject to certain conditions.

Nasdaq Rule 4758 imposes certain conditions on NES as the Exchange's outbound order router. For example, NES must: (1) Be a member of a self-regulatory organization unaffiliated with Nasdaq that is its designated examining authority; (2) be regulated as a facility of the Exchange;<sup>29</sup> and (3) not engage in any business other than its outbound router function unless otherwise approved by the Commission. Also, the books, records, premises, officers, agents, directors and employees of NES, as a facility of Nasdaq are deemed to be those of the Exchange for purposes of and subject to oversight pursuant to the Act.<sup>30</sup> In addition, use of NES to route orders from Nasdaq to away market centers is optional,<sup>31</sup> and a Nasdaq member is free to route orders to other market centers through alternative means. Pursuant to the proposal, NES will also establish and maintain procedures and internal controls reasonably designed to restrict the flow of confidential and proprietary information between Nasdaq and its facilities, including NES, and any other entity.<sup>32</sup>

<sup>28</sup> See, e.g., Securities Exchange Act Release Nos. 58324, *supra* note 11; 58673, (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-NYSE-2008-60 and SR-Amex-2008-62) (order approving the business combination between NYSE Euronext and NYSE Alternext US LLC); 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members); and 53382 (February 27, 2006, 71 FR 11251) (March 6, 2006) (SR-NYSE-2005-77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings).

<sup>29</sup> The Commission notes that, as a facility of the Exchange, NES is subject to Exchange oversight, as well as Commission oversight. Further, the Exchange is responsible for filing with the Commission proposed rule changes and fees relating to NES's outbound router function and NES's outbound router function is subject to exchange non-discrimination requirements.

<sup>30</sup> See Nasdaq Rule 4758(b)(6). In addition, the books and records of NES, as a facility of the Exchange, are subject at all times to inspection and copying by the Exchange and the Commission. *Id.*

<sup>31</sup> Nasdaq Rule 4758(b)(7).

<sup>32</sup> See proposed Nasdaq Rule 4758(b)(8). The Commission notes that this proposed requirement is consistent with the rules for Nasdaq Options Services LLC, which provides outbound routing services for the Nasdaq Options Market, that were previously approved by the Commission. See

In light of the protections discussed above and contained in Nasdaq Rule 4758, the Commission believes that it is consistent with the Act to permit Nasdaq to expand the availability of the outbound routing services provided by its affiliate, NES.

Nasdaq has asked the Commission to accelerate approval of the proposed rule change concurrent with approval of the BX Rulebook Proposal which establishes protections against possible conflicts of interest as a result of routing by NES to BX.<sup>33</sup> The Commission finds good cause for approving the proposed rule change before the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission notes that Nasdaq's proposal to expand the use of NES as its outbound order routing facility is consistent with prior Commission action.<sup>34</sup> Accordingly, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>35</sup> to approve the proposed rule change on an accelerated basis.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NASDAQ-2008-098) is hereby approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>36</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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Nasdaq Options Rule Section 11(e). See also Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080) (order approving a proposed rule change relating to the establishment and operation of the NASDAQ Options Market).

<sup>33</sup> See SR-Nasdaq-2008-098, Item 7. The Commission is also approving today the BX Rulebook Proposal. See BX Rulebook Approval Order, *supra* note 26.

<sup>34</sup> See, e.g., Securities Exchange Act Release Nos. 59009 (November 24, 2008), 73 FR 73363 (December 2, 2008) (SR-NYSEALTR-2008-07); 58681, *supra* note 13; and 58680 *supra* note 13.

<sup>35</sup> 15 U.S.C. 78s(b)(2).

<sup>36</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59140; File No. SR-NYSE-2008-130]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC To Establish a Trading License Fee for 2009 and Amend Certain Other Floor Fees

December 22, 2008.

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 18, 2008, New York Stock Exchange LLC (the "NYSE" or the "Exchange") 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 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: (i) Amend Exchange Rule 300 (Trading Licenses) to provide that the fee for trading licenses will be set forth on the Exchange's Price List rather than in Rule 300; (ii) amend Rule 300 to provide that trading licenses purchased following the annual offering will be sold for a pro rated portion of the annual fee, rather than at a premium to the annual price; (iii) establish a trading license fee for 2009 of \$40,000; (iv) reduce from \$5,000 to \$1,000 the fee related to the approval of a pre-qualified substitute employee; and (v) eliminate the \$1,000 clerk badge fee. 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 Exchange included statements concerning the purpose of, and basis for, 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

<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 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

Exchange Rule 300(b) sets forth the fee payable by member organizations buying trading licenses in the annual offering. The Exchange proposes to amend Rule 300(b) to provide that the trading license fee for each year will not be set forth in the rule itself but will rather be established each year by way of an amendment to the Exchange's price list submitted to the Commission as a rule filing under Rule 19b-4.<sup>4</sup> This is consistent with the Exchange's general approach to fees applicable to member organizations, which are typically set forth in the Exchange's price list but not included in the Exchange rules. Rule 300(d) provides that member organizations buying trading licenses after the start of the applicable calendar year are charged \$44,000 (a 10 percent premium over the 2008 trading license fee of \$40,000), pro rated to reflect the amount of time left in the year. The Exchange proposes to amend Rule 300(d) to provide that additional trading licenses purchased after the annual offering will be sold at the same price as licenses purchased in the annual offering, pro rated to reflect the amount of time remaining in the year. The Exchange proposes to maintain the trading license fee at \$40,000 for calendar 2009.

The Exchange currently charges a \$5,000 fee with respect to the approval of a pre-qualified substitute employee.<sup>5</sup> This fee is billed to the member organization which is the new employer of (i) any new member or pre-qualified substitute not transferring from another member organization, (ii) any approved member who changes employment and continues as a member with that member organization, or (iii) any pre-qualified substitute who changes employment and continues as a pre-qualified substitute with that member organization. The Exchange proposes to reduce this fee from \$5,000 to \$1,000 commencing January 1, 2009.

The Exchange currently charges member organizations a \$1,000 badge fee for each clerk working on the trading

floor. The Exchange proposes to eliminate this fee with effect from January 1, 2009.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6<sup>6</sup> of the Act in general and furthers the objectives of Section 6(b)(4)<sup>7</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange believes that the proposal does not constitute an inequitable allocation of dues, fees and other charges as it provides the DMMs appropriate incentives to act as liquidity providers and supports them in performing their central function in the Exchange's market model.

*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**

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>8</sup> of the Act and Rule 19b-4(f)(2)<sup>9</sup> thereunder.

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 Number SR-NYSE-2008-130 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR-NYSE-2008-130. 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 the filing also will be available for inspection and copying at the principal office of the self-regulatory organization. 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-2008-130 and should be submitted on or before January 21, 2009.

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

**Florence E. Harmon,**

*Acting Secretary.*

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<sup>4</sup> 17 CFR 240.19b-4.

<sup>5</sup> A pre-qualified substitute employee is an employee of a member organization who has been approved to work on the Exchange trading floor and can be assigned to work on the trading floor at anytime that the member organization has a trading license available for use.

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

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(2).

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