

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55294; File No. SR-NYSEArca-2007-05]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Accelerated Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Regarding a Proposed Combination Between NYSE Group, Inc. and Euronext N.V.

February 14, 2007.

#### I. Introduction

On January 12, 2007, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended, ("Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change regarding the proposed business combination ("Combination") between NYSE Group, Inc. ("NYSE Group") and Euronext N.V. ("Euronext"). The proposed rule change was published for comment in the **Federal Register** on January 19, 2007.<sup>3</sup> The Commission received no comments on the proposal. On February 13, 2007, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> This order grants accelerated approval to the proposed rule change, grants accelerated approval to Amendment No. 1, and solicits comments from interested persons on Amendment No. 1.

The Commission has reviewed carefully the proposed rule change and finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>5</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b) of the Exchange Act,<sup>6</sup> which, among other things, requires a national securities exchange to be so

organized and have the capacity to be able to carry out the purposes of the Exchange Act and to enforce compliance by its members and persons associated with its members with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the exchange, and assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. Section 6(b) of the Exchange Act<sup>7</sup> also requires that the rules of the exchange be designed to promote just and equitable principles of trade, 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 Commission finds good cause for approving this proposed rule change before the thirtieth day after the publication of notice thereof in the **Federal Register**. This proposed rule change seeks to make changes to the following documents: The Amended and Restated Certificate of Incorporation of NYSE Euronext ("NYSE Euronext Certificate of Incorporation"); the Amended and Restated Bylaws of NYSE Euronext ("NYSE Euronext Bylaws"); the NYSE Euronext Director, Independence Policy ("Independence Policy"), which policy will replace the current NYSE Group Director Independence Policy; the proposed Amended and Restated Certificate of Incorporation of NYSE Group ("NYSE Group Certificate of Incorporation"); the proposed Amended and Restated Bylaws of NYSE Group ("NYSE Group Bylaws"); the resolutions of the board of directors of NYSE Group; and the proposed Trust Agreement for the Delaware Trust ("Trust Agreement"). All of the proposed changes to these documents were published for comment in connection with the proposed rule change submitted by the New York Stock Exchange LLC ("NYSE LLC") in connection with the Combination.<sup>8</sup> In addition to these changes, the Exchange has proposed changes to the proposed Amended and Restated Certificate of Incorporation of Archipelago Holdings, Inc. ("Arca Holdings") to allow for the ownership and voting of shares of Arca Holdings by the Delaware Trust

("Trust").<sup>9</sup> The Commission has received no comment letters on this proposal. The Commission finds good cause to accelerate approval of this proposal to allow the timing of this approval to coincide with the approval of the corresponding filing by the NYSE LLC.<sup>10</sup>

#### A. Accelerated Approval of Amendment No. 1

The Commission also finds good cause for approving Amendment No. 1 prior to the thirtieth day after publishing notice of Amendment No. 1 in the **Federal Register** pursuant to Section 19(b)(2) of the Exchange Act.<sup>11</sup> In Amendment No. 1, the Exchange made technical revisions to proposed Article VII, Section 2 of the proposed NYSE Group Certificate of Incorporation relating to quorum requirements for each meeting of stockholders.<sup>12</sup> These changes are necessary to clarify the proposal. The Commission finds good cause to accelerate approval of these changes prior to the thirtieth day after publication in the **Federal Register** because they clarify the Exchange's rules, which should facilitate the Exchange's compliance with its rules, and the Commission's ability to ensure compliance with such rules, and assist members and investors in understanding the application and scope of the rules.

In addition, the Exchange made certain clarifying, conforming, technical, non-material, and non-substantive changes to the proposed Amended and Restated Certificate of Incorporation of Arca Holdings ("Arca Holdings Certificate of Incorporation"), the proposed NYSE Group Certificate of Incorporation, the Independence Policy, and the proposed Trust Agreement, which raise no new or novel issues. These changes are non-substantive and technical in nature and are necessary to reflect the changes from the current rules of the Exchange and clarify the proposal. The Commission finds good cause exists to accelerate approval of these changes prior to the thirtieth day

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 55109 (January 16, 2007), 72 FR 2578 ("Notice").

<sup>4</sup> See Partial Amendment dated February 13, 2007 ("Amendment No. 1"). The text of Amendment No. 1 and Exhibits 5C, 5D, 5G, and 5H, which set forth certain governing documents as proposed to be amended, are available on the Commission's Web site (<http://www.sec.gov/rules/sro.shtml>), at the Commission's Public Reference Room, at the Exchange, and on the Exchange's Web site (<http://www.nysearca.com>).

<sup>5</sup> In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

<sup>7</sup> *Id.*

<sup>8</sup> See Securities Exchange Act Release No. 55026 (December 29, 2006), 72 FR 814 (January 8, 2007) ("NYSE LLC Rule Filing").

<sup>9</sup> Similar changes have been proposed for NYSE Group. See proposed NYSE Group Certificate of Incorporation, Article IV, Section 4.

<sup>10</sup> See Securities Exchange Act Release No. 55293 (February 14, 2007) (approval order for SR-NYSE-2006-120 ("NYSE LLC Approval Order")).

<sup>11</sup> 15 U.S.C. 78s(b)(2). Pursuant to Section 19(b)(2) of the Exchange Act, the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission finds good cause for so doing.

<sup>12</sup> In the Notice, the Exchange mistakenly showed proposed deletions to the current quorum requirements. The Exchange is not proposing to change the quorum requirements that exist in the current NYSE Group Certificate of Incorporation.

after publication in the **Federal Register** because they clarify the Exchange's rules, which should facilitate the Exchange's compliance with its rules, the Commission's ability to ensure compliance with such rules, and assist members and investors in understanding the application and scope of the rules.

The Commission finds that the changes proposed in Amendment No. 1 are consistent with the Exchange Act and therefore finds good cause to accelerate approval of Amendment No. 1, pursuant to Section 19(b)(2) of the Exchange Act.<sup>13</sup>

#### B. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether Amendment No. 1 is consistent with the Exchange 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-NYSEArca-2007-05 on the subject line.

##### Paper Comments

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

All submissions should refer to File Number SR-NYSEArca-2007-05. 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. 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 Amendment No. 1 of File Number SR-NYSEArca-2007-05 and should be submitted on or before March 15, 2007.

## II. Discussion

The Exchange has submitted the proposed rule change in connection with the Combination of NYSE Group with Euronext. As a result of the Combination, the businesses of NYSE Group (including the businesses of the Exchange and NYSE LLC (a New York limited liability company, registered national securities exchange and self-regulatory organization)), and Euronext will be held under a single, publicly traded holding company named NYSE Euronext, a Delaware corporation ("NYSE Euronext"). Following the Combination, each of NYSE Group and Euronext will be a separate subsidiary of NYSE Euronext, and their respective businesses and assets will continue to be held as they are currently held (subject to any post-closing corporate reorganization of Euronext). The proposed rule change is necessary to effectuate the consummation of the Combination and will not be operative until the consummation of the Combination.

### A. Corporate Structure

After the Combination, Arca Holdings, a Delaware corporation, will remain a wholly owned subsidiary of NYSE Group. NYSE Arca Holdings, Inc., a Delaware corporation ("NYSE Arca Holdings"), and NYSE Arca L.L.C., a Delaware limited liability company ("NYSE Arca LLC"), will remain wholly owned subsidiaries of Arca Holdings. NYSE Arca will remain a wholly owned subsidiary of NYSE Arca Holdings, and NYSE Arca Equities, Inc. ("NYSE Arca Equities"), a Delaware corporation formerly known as PCX Equities, Inc., will remain a wholly owned subsidiary of NYSE Arca. NYSE Arca will continue to maintain its status as a registered national securities exchange and self-regulatory organization. Arca Holdings' businesses and assets will continue to be held by it and its subsidiaries. NYSE LLC will remain a wholly owned subsidiary of NYSE Group. NYSE Market, Inc. ("NYSE Market"), a Delaware corporation, and NYSE Regulation, Inc. ("NYSE Regulation"), a New York Type A not-for-profit

corporation, will remain wholly owned subsidiaries of NYSE LLC.<sup>14</sup>

The Exchange represents that the Combination will also have no effect on the ability of any party to trade securities on NYSE Arca, NYSE Arca Equities, or NYSE Market. Euronext and its subsidiaries will continue to operate their business and operations in substantially the same manner as they are conducted currently, with any changes subject to the approval of the European Regulators to the extent required.

### 1. NYSE Euronext

Following the Combination, NYSE Euronext will be a for-profit, publicly traded stock corporation and will act as a holding company for the businesses of NYSE Group and Euronext. NYSE Euronext will own all of the equity interests in NYSE Group and its subsidiaries, including the Exchange and NYSE Arca, and a majority (if not all) of the equity interests in Euronext and its respective subsidiaries. Section 19(b) of the Exchange Act and rule 19b-4 thereunder require a self-regulatory organization ("SRO") to file proposed rule changes with the Commission. Although NYSE Euronext is not an SRO, certain provisions of the NYSE Euronext Certificate of Incorporation and NYSE Euronext Bylaws are rules of an exchange<sup>15</sup> if they are stated policies, practice, or interpretations, as defined in rule 19b-4 under the Exchange Act,

<sup>14</sup> For a description of the Combination and related rule changes regarding NYSE Euronext, NYSE Group, and the Trust, see the NYSE LLC Approval Order, *supra* note 10. See also NYSE LLC Rule Filing, *supra* note 8. The Combination involves certain modifications to the organizational documents of NYSE Group and of NYSE Euronext, which upon consummation of the Combination will be the new indirect parent company of NYSE LLC and of the Exchange. Provisions of the organizational documents of NYSE Group and NYSE Euronext and the Trust Agreement constitute rules of NYSE LLC and of the Exchange. The resolutions of the board of directors of NYSE Group are also rules of NYSE LLC and of the Exchange requiring Commission approval. Accordingly, NYSE LLC and the Exchange have each submitted proposed rule changes to reflect the rule changes to be implemented in connection with the Combination.

<sup>15</sup> See section 3(a)(27) of the Exchange Act, 15 U.S.C. 78c(a)(27). If NYSE Euronext decides to change its Amended and Restated Certificate of Incorporation or Amended and Restated Bylaws, NYSE Euronext must submit such change to the board of directors of NYSE LLC, NYSE Market, NYSE Regulation, NYSE Arca, and NYSE Arca Equities, and if any or all of such board of directors shall determine that such amendment or repeal must be filed with or filed with and approved by the Commission pursuant to section 19 of the Exchange Act and the rules thereunder, such change shall not be effective until filed with or filed with and approved by the Commission, as applicable. See proposed NYSE Euronext Certificate of Incorporation, Article X and proposed NYSE Euronext Bylaws, Article X, section 10.10(C).

<sup>13</sup> 15 U.S.C. 78s(b)(2).

of the exchange, and must be filed with the Commission pursuant to section 19(b)(4) of the Exchange Act and rule 19b-4 thereunder. Accordingly, the Exchange has filed the NYSE Euronext Certificate of Incorporation and NYSE Euronext Bylaws with the Commission.

#### a. Board of Directors

It is currently contemplated that immediately after the Combination, the NYSE Euronext board of directors will consist of twenty-two directors.<sup>16</sup> Each member of the NYSE Euronext board of directors (other than the chief executive officer and deputy chief executive officer of NYSE Euronext if they are members of the board of directors) must satisfy the independence requirements set forth in the Independence Policy, as amended from time to time. This Independence Policy, however, is not referenced in the organizational documents of the Exchange or NYSE Arca Equities,<sup>17</sup> and is therefore not relevant to the Commission's consideration of whether the boards of directors of the Exchange or NYSE Arca Equities are consistent with the Exchange Act.

#### b. Voting and Ownership Limitations; Changes in Control of the Exchange

The NYSE Euronext Certificate of Incorporation includes restrictions on the ability to vote and own shares of stock of NYSE Euronext.<sup>18</sup> Members that trade on an exchange traditionally have ownership interests in such exchange. As the Commission has noted in the past, however, a member's interest in an exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.<sup>19</sup> A member that is a

controlling shareholder of an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and surveil the member's conduct or diligently enforce its rules and the federal securities laws with respect to conduct by the member that violates such provisions.

The Commission finds the ownership and voting restrictions in the NYSE Euronext Certificate of Incorporation are consistent with the Exchange Act. These requirements should minimize the potential that a person could improperly interfere with or restrict the ability of the Commission, the Exchange, or its subsidiaries to effectively carry out their regulatory oversight responsibilities under the Exchange Act.

#### 2. NYSE Group

Following the Combination, NYSE Group will merge with a wholly owned subsidiary of NYSE Euronext and the surviving corporation will be a wholly owned subsidiary of NYSE Euronext. Section 19(b) of the Exchange Act and Rule 19b-4 thereunder require an SRO to file proposed rule changes with the Commission. Although NYSE Group is not an SRO, certain provisions of its Amended and Restated Certificate of Incorporation and Amended and Restated Bylaws are rules of an exchange<sup>20</sup> if they are stated policies, practices, or interpretations, as defined in Rule 19b-4 of the Exchange Act, of the exchange, and must be filed with the Commission pursuant to Section 19(b)(4) of the Exchange Act and Rule 19b-4 thereunder. Accordingly, the Exchange has filed the proposed NYSE Group Certificate of Incorporation and proposed NYSE Group Bylaws with the Commission.

The Exchange has proposed to change the voting and ownership limitations of NYSE Group to include a statement that such limitations will not be applicable so long as NYSE Euronext and the Trust collectively own all of the capital stock of NYSE Group. Instead, while NYSE Group is a wholly owned subsidiary of NYSE Euronext, or as provided for in the Trust Agreement, there shall be no transfer of the shares of NYSE Group held by NYSE Euronext without the approval of the Commission.<sup>21</sup> If NYSE Group ceases to be wholly owned by NYSE Euronext or the Trust, the current voting and ownership limitations will apply.<sup>22</sup>

The Commission finds the changes to the ownership and voting restrictions in the proposed NYSE Group Certificate of Incorporation are consistent with the Exchange Act. These requirements should minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or the ability of the Exchange, NYSE Market, NYSE Regulation, NYSE Arca LLC, NYSE Arca, and NYSE Arca Equities (together, the "U.S. Regulated Subsidiaries") to effectively carry out their regulatory oversight responsibilities under the Exchange Act.

The Exchange requested that the Commission allow NYSE Euronext to wholly own and vote all of the outstanding common stock of NYSE Group.<sup>23</sup> The Commission believes it is consistent with the Exchange Act to allow NYSE Euronext to wholly own and vote all of the outstanding common stock of NYSE Group.<sup>24</sup> The Commission notes that NYSE Euronext represents that neither NYSE Euronext nor any of its related persons is subject to any statutory disqualification (as defined in Section 3(a)(39) of the Exchange Act), or is an ETP Holder of NYSE Arca Equities, OTP Holder or OTP Firm of NYSE Arca or member or member organization of NYSE LLC. Moreover, NYSE Euronext has comparable voting and ownership limitations to NYSE Group. NYSE Euronext has also included in its corporate documents certain provisions designed to maintain the independence of the U.S. Regulated Subsidiaries' self-

<sup>16</sup> For a detailed description of the provisions regarding the composition of, and the selection process for, the NYSE Euronext board of directors, see NYSE LLC Approval Order, *supra* note 10.

<sup>17</sup> The organizational documents of the Exchange and NYSE Arca Equities (unlike the organizational documents of NYSE LLC, NYSE Market and NYSE Regulation) do not require that any of the members of the board of directors of the Exchange and NYSE Arca Equities be members of the board of directors of NYSE Euronext. See Bylaws of NYSE Arca, Article III, Section 3.02, and Bylaws of NYSE Arca Equities, Article III, Section 3.02.

<sup>18</sup> See NYSE LLC Approval Order, *supra* note 10, for a detailed description of the provisions regarding restrictions on the ability to vote and own shares of stock of NYSE Euronext.

<sup>19</sup> See Securities Exchange Act Release Nos. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving merger of New York Stock Exchange, Inc. and Archipelago, and demutualization of New York Stock Exchange, Inc. ("NYSE Inc.-Archipelago Merger Order")); 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131); 51149 (February 8, 2005),

70 FR 7531 (February 14, 2005) (SR-CHX-2004-26); 49718 (May 17, 2004), 69 FR 29611 (May 24, 2004) (SR-PCX-2004-08); 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003-73); and 49067 (January 13, 2004), 69 FR 2761 (January 20, 2004) (SR-BSE-2003-19).

<sup>20</sup> See Section 3(a)(27) of the Exchange Act, 15 U.S.C. 78c(a)(27). If NYSE Group decides to change its Amended and Restated Certificate of Incorporation or Amended and Restated Bylaws, NYSE Group must submit such change to the board of directors of NYSE LLC, NYSE Market, NYSE Regulation, NYSE Arca, and NYSE Arca Equities, and if any or all of such board of directors shall determine that such amendment or repeal is required by law or regulation to be filed with or filed with and approved by the Commission pursuant to Section 19 of the Exchange Act and the rules thereunder, such change shall not be effective until filed with or filed with and approved by the Commission, as applicable. See proposed NYSE Group Certificate of Incorporation, Article XII and proposed Amended and Restated Bylaws of NYSE Group ("NYSE Group Bylaws"), Article VII, Section 7.9(b).

<sup>21</sup> See proposed NYSE Group Certificate of Incorporation, Article IV, Section 4(a).

<sup>22</sup> See proposed NYSE Group Certificate of Incorporation, Article IV, Section 4(b).

<sup>23</sup> The Exchange clarified in Amendment No. 1 that NYSE Euronext alone be permitted to wholly own and vote such shares. See Amendment No. 1 *supra* note 4.

<sup>24</sup> See NYSE LLC Approval Order, *supra* note 10, for a description of the proposal that NYSE Euronext wholly own and vote all of the outstanding stock of NYSE Group upon the consummation of the Combination.

regulatory functions from NYSE Euronext and NYSE Group. Accordingly, the Commission believes that the acquisition of ownership and exercise of voting rights of NYSE Group common stock by NYSE Euronext will not impair the ability of the Commission or any of the U.S. Regulated Subsidiaries to discharge their respective responsibilities under the Exchange Act.

### 3. The Exchange and NYSE Arca Equities

Following the Combination, NYSE Arca, which is registered as a national securities exchange and is an SRO, will remain a wholly owned subsidiary of NYSE Arca Holdings, and NYSE Arca Equities will remain a wholly owned subsidiary of NYSE Arca. The Combination will have no effect on the ability of any party to trade securities on NYSE Arca or NYSE Arca Equities. Pursuant to a regulatory services agreement, NYSE Regulation will continue to perform many of the regulatory functions of NYSE Arca.

There will be no change to the current manner of election or appointment of the directors and officers of Arca Holdings, NYSE Arca Holdings, NYSE Arca LLC, NYSE Arca, or NYSE Arca Equities as a result of the Combination.

Article Fourth of the proposed Arca Holdings Certificate of Incorporation will be amended to provide for voting or ownership of the shares of stock of Arca Holdings by the Trust pursuant to the terms and conditions of the Trust Agreement by and among NYSE Euronext, Inc., NYSE Group, Inc. and the trustees and Delaware trustee thereto.<sup>25</sup> The Commission finds that these changes to the ownership and voting restrictions in the proposed Arca Holdings Certificate of Incorporation are consistent with the Exchange Act. These requirements should minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or the U.S. Regulated Subsidiaries to effectively carry out their regulatory oversight responsibilities under the Exchange Act.

### *B. Relationship of NYSE Euronext, NYSE Group, and the U.S. Regulated Subsidiaries; Jurisdiction Over NYSE Euronext*

Although NYSE Euronext itself will not carry out regulatory functions, its activities with respect to the operation of any of the U.S. Regulated Subsidiaries must be consistent with, and not interfere with, the U.S.

Regulated Subsidiaries' self-regulatory obligations. The NYSE Euronext corporate documents include certain provisions that are designed to maintain the independence of the U.S. Regulated Subsidiaries' self-regulatory functions from NYSE Euronext and NYSE Group, enable the U.S. Regulated Subsidiaries to operate in a manner that complies with the federal securities laws, including the objectives of Sections 6(b) and 19(g) of the Exchange Act,<sup>26</sup> and facilitate the ability of the U.S. Regulated Subsidiaries and the Commission to fulfill their regulatory and oversight obligations under the Exchange Act.<sup>27</sup>

The Commission finds that the provisions proposed by the Exchange are consistent with the Exchange Act, and that they will assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Exchange Act. With respect to the maintenance of books and records of NYSE Euronext, the Commission notes that while NYSE Euronext has the discretion to maintain books and records that relate to both the U.S. Regulated Subsidiaries and the European Market Subsidiaries (each such book and record, an "Overlapping Record") in either the United States or the home jurisdiction of one or more of the European Market Subsidiaries, NYSE Euronext has represented to the Commission that it will maintain in the United States originals or copies of Overlapping Records covered by Rule 17a-1(b) under the Exchange Act<sup>28</sup> promptly after creation of such Overlapping Records.<sup>29</sup> The Commission believes that such actions by NYSE Euronext with respect to its books and records are necessary to ensure that the U.S. Regulated Subsidiaries comply with the requirements of Section 17 of the Exchange Act<sup>30</sup> and Rule 17a-1(b) thereunder.

Under Section 20(a) of the Exchange Act,<sup>31</sup> any person with a controlling

interest in NYSE LLC or NYSE Arca shall be jointly and severally liable with and to the same extent that NYSE LLC and NYSE Arca are liable under any provision of the Exchange Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Exchange Act<sup>32</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rules thereunder. Further, Section 21C of the Exchange Act<sup>33</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been "a cause of" a violation of any provision of the Exchange Act through an act or omission that the person knew or should have known would contribute to the violation. These provisions are applicable to NYSE Euronext's and NYSE Group's dealings with the U.S. Regulated Subsidiaries.

### *C. Trust*

NYSE Euronext will operate several regulated entities located in the United States and in various jurisdictions in Europe. In connection with obtaining regulatory approval of the Combination, NYSE Euronext proposed to implement two standby structures, one involving a Delaware trust and one involving a Dutch foundation ("Dutch Foundation").<sup>34</sup> Pursuant to the terms of the Trust Agreement,<sup>35</sup> the Trust will be empowered to take actions to mitigate the effects of any material adverse change in European law that has an "extraterritorial" impact on the non-European issuers listed on NYSE Group securities exchanges, non-European financial services firms that are members of any NYSE Group securities exchange, or any NYSE Group securities exchange.

Upon the occurrence of a material adverse change of law that continues after the designated cure periods, the Trust may exercise certain remedies that result in a total or partial loss by NYSE Euronext of operating control over some of its securities exchanges. The Trust may require that NYSE Euronext transfer control over a substantial portion of its business and assets to the direction of the Trust. As a result,

<sup>32</sup> 15 U.S.C. 78t(e).

<sup>33</sup> 15 U.S.C. 78u-3.

<sup>34</sup> See NYSE LLC Approval Order, *supra* note 10, for a detailed discussion of the Delaware Trust and Dutch Foundation.

<sup>35</sup> See proposed Trust Agreement, by and among NYSE Euronext, NYSE Group, the Delaware trustee and the trustees, attached as Exhibit H to Amendment No. 1.

<sup>25</sup> See proposed Arca Holdings Certificate of Incorporation, Article Fourth (C)(1) and (D)(1).

<sup>26</sup> 15 U.S.C. 78f(b) and 15 U.S.C. 78s(g).

<sup>27</sup> See NYSE LLC Approval Order, Section II.B., *supra* note 10, for a detailed discussion of proposed provisions in the NYSE Euronext Bylaws regarding NYSE Euronext compliance with U.S. federal securities laws; NYSE Euronext books and records; jurisdiction of the U.S. federal courts and the Commission; confidential information pertaining to self-regulation; and responsibilities of NYSE Euronext directors with respect to the ability of U.S. Regulated Subsidiaries, NYSE Euronext, and NYSE Group to carry out their responsibilities under the Exchange Act, including referring rule violations and providing funding to NYSE Regulation.

<sup>28</sup> 17 CFR 240.17a-1(b).

<sup>29</sup> See NYSE LLC Rule Filing, *supra* note 8, at 822.

<sup>30</sup> 15 U.S.C. 78q.

<sup>31</sup> 15 U.S.C. 78t(a).

control of NYSE Group of any NYSE Group securities exchange may be assumed by the Trust. As discussed above, Section 19(b) of the Exchange Act and Rule 19b-4 thereunder require an SRO to file a proposed rule change with the Commission. Although the Trust is not an SRO, certain provisions of the Trust Agreement are rules of an exchange<sup>36</sup> if they are stated policies, practices, or interpretations, as defined in Rule 19b-4 under the Exchange Act,<sup>37</sup> of the exchange, and must be filed with the Commission pursuant to Section 19(b)(4) of the Exchange Act<sup>38</sup> and Rule 19b-4 thereunder.

Accordingly, the Exchange has filed the Trust Agreement with the Commission.

The Trust Agreement contains detailed provisions with respect to governance of the Trust; remedies that may be exercised by trustees upon the occurrence of a material adverse change in law; the relationship of the Trust, NYSE Group, and the U.S. Regulated Subsidiaries; and jurisdiction over the Trust.<sup>39</sup> The Commission finds that the Trust Agreement's provisions are designed to enable the U.S. Regulated Subsidiaries to operate in a manner that complies with the federal securities laws, including the objectives and requirements of Sections 6(b) and 19(g) of the Exchange Act,<sup>40</sup> and to facilitate the ability of the U.S. Regulated Subsidiaries and the Commission to fulfill their regulatory and oversight obligations under the Exchange Act,<sup>41</sup> and are consistent with the provisions other entities that directly or indirectly own or control an SRO have instituted and that have been approved by the Commission.<sup>42</sup> The Commission finds that the Trust's provisions are consistent with the Exchange Act, and that they are intended to assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Exchange Act.

Under Section 20(a) of the Exchange Act,<sup>43</sup> any person with a controlling interest in NYSE LLC and NYSE Arca shall be jointly and severally liable with and to the same extent that NYSE LLC and NYSE Arca are liable under any provision of the Exchange Act, unless

the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Exchange Act<sup>44</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Exchange Act or rule thereunder. Further, Section 21C of the Exchange Act<sup>45</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been "a cause of" a violation of any provision of the Exchange Act through an act or omission that the person knew or should have known would contribute to the violation. These provisions are applicable to the Trust and all other entities controlling the U.S. Regulated Subsidiaries.

#### *D. Automatic Suspension and Repeal of Certain Provisions in the NYSE Euronext Organizational Documents*

Under the organizational documents of NYSE Euronext, immediately following the exercise of a call option over a substantial portion of Euronext's business (a "Euronext call option"), whereby the priority shares or ordinary shares of Euronext are transferred from NYSE Euronext to the Dutch Foundation, and for so long as the Dutch Foundation shall continue to hold any priority shares or ordinary shares of Euronext, or the voting securities of one or more of the subsidiaries of Euronext that, taken together, represent a substantial portion of Euronext's business, then certain provisions of the NYSE Euronext Bylaws shall be suspended.<sup>46</sup>

In addition, if after a period of six months following the exercise of a Euronext call option, the Dutch Foundation shall continue to hold any ordinary or priority shares of Euronext or any ordinary or priority shares or similar voting securities of one or more subsidiaries of Euronext that, taken together, represent a substantial portion of Euronext's business, or if at any time, NYSE Euronext no longer holds a direct

or indirect controlling interest in Euronext or in one or more subsidiaries of Euronext that, taken together, represent a substantial portion of Euronext's business, then certain provisions of the NYSE Euronext Bylaws and the NYSE Euronext Certificate of Incorporation shall be revoked.<sup>47</sup> In addition, any officer or director of NYSE Euronext who is a European Person shall resign or be removed from his or her office.

The Commission finds the suspension or repeal of the above described provisions of the NYSE Euronext Bylaws and the NYSE Euronext Certificate of Incorporation under circumstances in which the Dutch Foundation controls a substantial portion of Euronext's business, is consistent with the Exchange Act.

### **III. Conclusion**

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act<sup>48</sup> that the proposed rule change (SR-NYSEArca-2007-05), as amended by Amendment No. 1, is approved on an accelerated basis.

By the Commission.

**Nancy M. Morris,**

*Secretary.*

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<sup>36</sup> See Section 3(a)(27) of the Exchange Act, 15 U.S.C. 78c(a)(27).

<sup>37</sup> 17 CFR 240.19b-4.

<sup>38</sup> 15 U.S.C. 78s(b).

<sup>39</sup> See NYSE LLC Approval Order, Sections ILC and ILD, *supra* note 10, for a detailed description of the provisions contained in the Trust Agreement.

<sup>40</sup> 15 U.S.C. 78f(b) and 15 U.S.C. 78s(g).

<sup>41</sup> See Trust Agreement, Articles V, VI, and VIII.

<sup>42</sup> See, e.g., NYSE Inc.-Archipelago Merger Order, *supra* note 19.

<sup>43</sup> 15 U.S.C. 78t(a).

<sup>44</sup> 15 U.S.C. 78t(e).

<sup>45</sup> 15 U.S.C. 78u-3.

<sup>46</sup> These include the requirement that European Persons are represented in a certain proportion on the NYSE Euronext board of directors and the nominating and governance committee of the NYSE Euronext board of directors; the requirement of supermajority board or shareholder approval for certain extraordinary transactions; the provisions granting jurisdiction to European regulators over certain actions of NYSE Euronext and the NYSE Euronext board of directors; and references to European regulators, European market subsidiaries and European disqualified persons appearing in the NYSE Euronext Bylaws.

<sup>47</sup> These include the provisions of the NYSE Euronext Bylaws subject to suspension; the references in the NYSE Euronext Certificate of Incorporation and NYSE Euronext Bylaws to European regulators, European exchange regulations, European market subsidiaries, European regulated markets, Europe and European disqualified persons; the provisions in the NYSE Euronext Certificate of Incorporation and NYSE Euronext Bylaws requiring that amendments to such certificate of incorporation or bylaws be submitted to the European market subsidiaries and, if applicable, filed with and approved by a European regulator; and the provisions in the NYSE Euronext Bylaws requiring approval of either two-thirds or more of the NYSE Euronext directors or 80% of the votes entitled to be cast by the holders of the then-outstanding shares of capital stock of NYSE Euronext entitled to vote generally in the election of directors to amend certain bylaw provisions.

<sup>48</sup> 15 U.S.C. 78s(b)(2).