

a particular series should open may allow CBOE to achieve more competitive, efficient, and orderly openings, while allowing the Exchange to provide sufficient liquidity at the open in particular classes.

While the Commission continues to believe that the quoting obligations of LMMs, DPMs, and e-DPMs are appropriate, given the benefits (such as favorable margin treatment) that are provided to market makers, the Commission also believes that it is reasonable for CBOE to excuse them from submitting opening quotes in their assigned series when at least one other market maker has already entered an opening quote in that series. The Commission notes that if no other market maker has entered an opening quote, the DPM and e-DPM or LMM would be responsible for ensuring that an opening quote is promptly entered so that HOSS can automatically open the series. This proposal, in conjunction with another recently approved proposed rule change,<sup>11</sup> also should encourage LMMs, DPMs, and e-DPMs to quote more competitively during HOSS opening rotations.<sup>12</sup>

### III. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> that the proposed rule change (SR-CBOE-2007-87), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Nancy M. Morris,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57065; File No. SR-NYSE-2007-119]

### Self-Regulatory Organizations; New York Stock Exchange, LLC; Notice of Filing of Proposed Rule Change Relating to the Adoption of New Exchange Rule 309 (Failure To Pay Fees)

December 28, 2007.

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 December 21, 2007, the New York Stock Exchange, LLC (“NYSE” or “Exchange”) 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 substantially 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

NYSE proposes to adopt new Exchange Rule 309, which delineates procedures for the collection of fee arrearages due the Exchange. The text of the proposed rule change is set forth below. New text is in *italics*.

Admission of Members (Rules 300–324)

\* \* \* \* \*

#### Rule 309. Failure to Pay Exchange Fees

*Any member, member organization or allied member who shall not pay a fee or any other sums due to the Exchange, within forty-five days after the same shall become payable, shall be reported to the Chief Financial Officer of the Exchange or designee who, after notice has been given to such member, member organization or allied member of such arrearages, may suspend access to some or all of the facilities of the Exchange until payment is made. Except that failure to pay any fine levied in connection with a disciplinary action shall be governed by Exchange Rule 476(k) (Disciplinary Proceedings Involving Charges Against Members, Member Organizations, Allied Members, Approved Persons, Employees, or Others).*

*Denial of access to some or all of the facilities of the Exchange through suspension under the provisions of this*

*Rule shall not prevent the member, member organization or allied member from being proceeded against for any offense other than that for which such member, member organization, or allied member was suspended.*

\* \* \* \* \*

#### 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 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 Exchange 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 seeks to adopt new procedures that relate to the collection of fees due the Exchange. Currently, Exchange Rule 476(k) delineates the procedures to address the failure of members, member organizations or allied members to pay a fine (*i.e.*, a fine levied in connection with a disciplinary proceeding and related fees also associated with a disciplinary proceeding), or any other sum due the Exchange. Specifically, Exchange Rule 476(k) provides that upon written notice to such members, member organizations or allied members and notification of the Chairman of the Board of Directors of the Exchange of the arrearage, the Board of Directors may suspend the member, member organization or allied member for failure to pay the arrearages due the Exchange until payment is made.

The Exchange now proposes to adopt new Exchange Rule 309 to provide procedures to address members, member organizations and allied members who fail to pay fees and any other sums due the Exchange. Types of payments that would be considered a “fee” under proposed Rule 309 include, but are not limited to, regulatory fees (*i.e.*, Gross Financial and Operational Combined Uniform Single Report (FOCUS) revenue fees and trading floor regulatory fees), trading license fees, and transaction charges. Additionally, examples of payments that would constitute “any other sums” include,

<sup>11</sup> See Securities Exchange Act Release No. 56860 (November 29, 2007), 72 FR 68919 (December 6, 2007) (SR-CBOE-2007-59) (allowing market makers to enter an opening quote for as low as one contract if the underlying primary market disseminates less than a 1,000-share best bid or offer quote immediately prior to an option series opening).

<sup>12</sup> Nothing in this proposal would affect a Market-Maker’s obligation to honor its firm quote obligations imposed by CBOE Rule 8.51.

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

<sup>14</sup> 17 CFR 200.30-3(a)(12).

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

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

but are not limited to, charges for using Exchange Floor facilities and equipment and phone service charges.<sup>3</sup>

Pursuant to proposed Exchange Rule 309, if payment is not made within forty-five days, notice of the arrearage will be given to the member, member organization or allied member and reported to Chief Financial Officer ("CFO") of the Exchange or a designee. The CFO or designee will be responsible for determining and taking any remedial action he or she deems appropriate, including suspension of the delinquent member's, member organization's or allied member's access to one or more Exchange facilities.

The terms "fees" and "any other sums" in the text of proposed Exchange Rule 309 will not include fines levied in connection with a disciplinary proceeding. Failure to pay such disciplinary fines will continue to be governed by the provisions of Rule 476(k). In any event, the Exchange Treasurer will not be precluded from presenting notice of any arrearage to the Board pursuant to Exchange Rule 476(k) where appropriate.

The current prerequisite of applying to the Exchange Board of Directors to address the issue of other unpaid sums due the Exchange is an inefficient and onerous process. Presently, invoices for fees and any other sum due the Exchange are issued on a monthly basis to members, member organizations and allied members. Payment is due upon presentation of the invoice. After thirty days, another invoice is issued for the current month and any outstanding balance due the Exchange. Pursuant to Rule 476(k), the ability to suspend members, member organizations and allied members for arrearages becomes operative after 45 days. The relief afforded in Rule 476(k) currently is not utilized by the Exchange; instead, arrearages are referred to the Exchange's collections department for resolution.<sup>4</sup> In order for the Exchange to effect the efficient operations of its business, the authority to address non-payment of sums due the Exchange, other than disciplinary fines and related fees governed by Rule 476(k), is more appropriately vested with Exchange senior management, who are more familiar with the daily operation of the Exchange and thus more adept than the

Board of Directors at addressing these matters.

Accordingly, the Exchange seeks to have notice of overdue fees reported to the CFO or his designee and to vest in the CFO or his designee the authority to determine what if any remedial action should be taken upon receipt of a report that a member, member organization or allied member failed to pay a fee.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirement under Section 6(b)(5)<sup>5</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>6</sup> that an Exchange have rules that are 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.

### *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*

The Exchange has neither solicited nor received written comments on the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which NYSE consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

## 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-2007-119 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-NYSE-2007-119. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2007-119 and should be submitted on or before January 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Nancy M. Morris,**  
Secretary.

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<sup>3</sup> Telephone bills for Exchange provided portable phones are paid by the Exchange and thereafter the Exchange submits an invoice to the member, member organization, and allied member for reimbursement.

<sup>4</sup> The collections department similarly does not avail itself of the recourse provided in Exchange Rule 476(k).

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

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

<sup>7</sup> 17 CFR 200.30-3(a)(12).