

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

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*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59482; File No. SR-NYSEALTR-2009-13]

### Self-Regulatory Organizations; NYSE Alternext U.S. LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Amending NYSE Alternext Equities Rule 17 To Address Issues Related to Vendor Liability and To Make Amendments and Conforming Changes to NYSE Alternext Equities Rule 18

March 2, 2009.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on February 17, 2009, NYSE Alternext U.S. LLC (“Exchange” or “NYSE Alternext”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)<sup>4</sup> of the Act and Rule 19b-4(f)(6) thereunder,<sup>5</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 NYSE Alternext Equities Rule 17 (“Use of Exchange Facilities”) to address issues related to vendor liability. The Exchange also seeks to make amendments and conforming changes to NYSE Alternext Equities Rule 18 (“Compensation in Relation to Exchange System Failure”). 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 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 proposes to amend NYSE Alternext Equities Rule 17 (“Use of Exchange Facilities”) to address issues related to vendor liability. Specifically, the proposed rule would require that member organizations that have trading losses due to malfunctions of third-party systems provided by the Exchange submit such losses to the Exchange’s compensation fund prior to pursuing legal remedies against the third-party vendors that provided these systems.<sup>6</sup>

The Exchange also seeks to make amendments and conforming changes to NYSE Alternext Equities Rule 18 (“Compensation in Relation to Exchange System Failure”). Specifically, the Exchange seeks to include in the definition of “Exchange system failure” the malfunction of a third-party system or technology provided by the Exchange, *i.e.*, vendor and/or subcontractor systems and to codify a net loss requirement for members or member organizations that seek compensation for losses sustained from an Exchange system failure.

These amendments are proposed to conform to amendments filed by the New York Stock Exchange (“NYSE”).<sup>7</sup>

###### Background

As described more fully in a related rule filing,<sup>8</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 called NYSE Alternext U.S. 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>9</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 Alternext Trading Systems”) are operated by the NYSE on behalf of the Exchange.<sup>10</sup>

As part of the Equities Relocation, NYSE Alternext adopted NYSE Rules 1-1004, subject to such changes as necessary to apply the Rules to the Exchange, as the NYSE Alternext Equities Rules to govern trading on the NYSE Alternext Trading Systems.<sup>11</sup> The NYSE Alternext 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 Alternext Equities Rules as necessary to conform with rule changes to corresponding NYSE Rules filed by the NYSE.

###### Proposed Amendments

Currently, NYSE Alternext Equities Rule 17 provides that the Exchange shall not be liable for any damages sustained by a member or member organization growing out of the use or

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

<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 Relocation).

<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); 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) (together, approving 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 Alternext 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 Alternext Equities to track changes to corresponding NYSE Rule 62).

<sup>19</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 E-mail from Jennifer D. Kim, Counsel, Office of the General Counsel, Exchange, to Michou H.M. Nguyen, Special Counsel, Division of Trading and Markets, Commission, on March 2, 2009.

<sup>7</sup> See SR-NYSE-2009-16 (to be filed on February 17, 2009).

<sup>8</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).

enjoyment of the facilities afforded by the Exchange, except as provided in NYSE Alternext Equities Rule 18. Currently, NYSE Alternext Equities Rule 18 affords members and member organizations the recourse to seek compensation for losses sustained by an Exchange system failure.<sup>12</sup>

As noted previously, the Exchange increasingly offers member organizations access to certain systems and technologies that are supplied by third-party vendors and delivered via Exchange systems (e.g., the Exchange delivers broker algorithms to brokers on the broker handheld device). These third-party products are designed to enhance the member organizations' ability to execute trades efficiently. Notably, the Exchange is acting primarily as a facilitator between the vendor and the Exchange member using the service. Use of these vendor-supplied services is not required, and Exchange members can perform their respective jobs without using these third-party vendor services. If a member wishes to use such a service, however, the Exchange works with the vendor and the member to connect the member and to deliver the service from the vendor to the user. The Exchange also simplifies the negotiation process, in that a member does not need to separately negotiate with the vendor to receive the service. Because the services are supplied and supported by a third-party vendor, however, they are not explicitly "systems or facilities of the Exchange."<sup>13</sup>

Currently, NYSE Alternext Equities Rules 17 and 18 do not address the issue of a member or member organization

that sustains a loss arising from the malfunction of non-core systems or technology supplied by third-party vendors for use by member organizations.<sup>14</sup> In light of the increased availability of third-party technology to provide additional facilities or services to the Exchange, the Exchange proposes to amend NYSE Alternext Equities Rules 17 and 18 to address third-party vendor liability, third-party vendor system malfunction and the avenue of recourse for members and member organizations as a result of this third-party vendor system malfunction.

In connection with member or member organization use of any third-party vendors provided by the Exchange to members for the conduct of their business on the Exchange, the Exchange proposes that NYSE Alternext Equities Rule 17 provide that the Exchange shall not be liable for any damages sustained by a member, allied member or member organization growing out of the use or enjoyment by such member, allied member or member organization of a third-party electronic system, service, or facility provided by the Exchange, except as provided in NYSE Alternext Equities Rule 18.

The Exchange further proposes that members or member organizations that sustain a loss from the use of these third-party vendors provided by the Exchange may seek compensation from the Exchange for their losses in the same way they seek compensation for an Exchange system failure. Specifically, NYSE Alternext Equities Rule 18 would permit members or member organizations to file a claim with the Exchange for losses caused by the third-party vendor's malfunction. These claims would be evaluated and submitted to the NYSE pursuant to the existing procedure set out in NYSE Alternext Rule 18 and NYSE Rule 18.<sup>15</sup>

<sup>14</sup> The third-party vendors directly provide their services to the member or member organization. Therefore, the customers are aware that they are using an Exchange system, which is provided directly by the Exchange, or a third-party vendor system, that also has direct contact with the customer.

<sup>15</sup> Because NYSE Alternext and NYSE share a common trading platform, NYSE Rule 18 provides a mechanism for NYSE Alternext itself to seek reimbursement from NYSE for the amounts that NYSE Alternext undertakes to pay out to NYSE Alternext members under NYSE Alternext Equities Rule 18. Under that procedure, after the NYSE Alternext Compensation Review Panel has determined the number and amount of claims that NYSE Alternext deems valid, NYSE Alternext submits to the NYSE a separate claim for each valid claim made by NYSE Alternext members or member organizations. If the combined amount of valid claims by NYSE members and NYSE Alternext exceeded the available funds in the NYSE Rule 18 compensation fund, NYSE Alternext would receive a partial payment of claims pursuant to NYSE Rule

In the event that claims arising out of the use of these third-party vendor systems cannot be fully satisfied because the aggregated claims exceed the funds available for such payment as set forth in NYSE Alternext Equities Rule 18, the aggrieved member or member organization would not be precluded from bringing a claim against the third-party vendor directly for the balance of the loss amount.

The Exchange also seeks to make a conforming amendment to NYSE Alternext Equities Rule 18 to include in the definition of an Exchange system failure "any malfunction of any third-party vendor provided by the Exchange that results in an incorrect execution of an order or no execution of an order that was received in Exchange systems."

Finally, the Exchange seeks to codify its existing policy regarding the netting of losses prior to submitting claims under NYSE Alternext Equities Rule 18. Specifically, the Exchange is codifying its understanding that if members and member organizations retain profits from a system malfunction, then they are required to net these profits against their losses from the same malfunction before submitting any claims under NYSE Alternext Rule 18.<sup>16</sup>

For example, a broker enters orders for Customer #1 and Customer #2. As a result of a system malfunction, Customer #1 derives a profit that would have occurred but for the malfunction and Customer #2 derives a loss. The broker passes along the gain to Customer #1, and files a claim with the Exchange with respect to Customer #2's loss. The broker would not be required to net the gain against the loss.

Brokers are required to offer profitable errors to their customers; in certain circumstances, however, customers may decline to take the error in which case the error position is retained by the brokers.<sup>17</sup> If Customer #1 declines to accept the profit, as is the customer's option, then the broker would retain the profit and must net is against the loss incurred on behalf of Customer #2.

18(c), and NYSE Alternext's obligation to compensate its members for valid claims would be reduced by a like percentage.

<sup>16</sup> Related system malfunctions that occur repeatedly over the course of the trading day will constitute one system malfunction for purposes of determining the aggregation of customer claims resulting from that system malfunction. Distinct and separate malfunctions that originate from different system failures are considered unrelated malfunctions and are treated as separate system malfunctions.

<sup>17</sup> Customers may decline to take the gains for varied reasons. For example, if the cost to the customer of processing the error is greater than the amount of the error, the customer will likely tell the broker to keep the error.

<sup>12</sup> An "Exchange system failure" is defined by NYSE Alternext Equities Rule 18 as "a malfunction of the Exchange's physical equipment, devices and/or programming which results in an incorrect execution of an order or no execution of an order that was received in Exchange systems."

NYSE Rule 18, Supplemental Material .10 provides that NYSE Alternext is permitted to file claims pursuant to NYSE Rule 18. NYSE Alternext shall submit claims for payment on behalf of its members to the NYSE for compensation for valid claims. NYSE Alternext members are not permitted to file claims for payment directly to the NYSE. NYSE Alternext will submit a separate claim to the NYSE for each claim made by its members.

<sup>13</sup> Exchange services that are outsourced to third-party vendors but that are part of the core functionality of Exchange systems are considered "systems and facilities of the Exchange" even though they are not physically provided by the Exchange. By contrast, additional services provided to members and member organizations by a third-party vendor that are not part of the core functionality of the Exchange's systems and not required to function as a member or member organization are not considered "systems and facilities" of the Exchange. As a result, any malfunction of those additional services would constitute a third-party vendor system malfunction, not an Exchange malfunction.

The Exchange proposes these amendments to conform the rules of NYSE Alternext regarding third-party vendor liability, third-party vendor system malfunction and the avenue of recourse for members and member organizations as a result of this third-party vendor system malfunction to the rules of its affiliated Exchange, the New York Stock Exchange LLC.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>18</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>19</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, 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 Exchange believes that the proposed rule change promotes just and equitable principles of trade and protects investors and the public interest because it creates a mechanism that adequately addresses issues of liability for all parties concerned.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change would 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*

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

The proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act.<sup>20</sup> The Exchange asserts that the proposed rule change (i) will not significantly affect the protection of investors or the public interest, (ii) will not impose any significant burden on competition, and (iii) by its terms, will not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, if

consistent with the protection of investors and the public interest.<sup>21</sup>

The Exchange believes that the instant filing is non-controversial. The Commission has approved a third-party vendor liability provision that was filed by the American Stock Exchange which required members and member organizations to indemnify the Exchange and its vendors and/or subcontractors and provided that such vendor and its subcontractors shall not be liable to the member or member organization for any damages sustained by a member or member organization from use of these third-party vendor systems.<sup>22</sup> The Exchange submits that its proposed rule change is less expansive than Amex Rule 60—AEMI and affords a member or member organization the ability to recover from a loss sustained by use of a third-party vendor system. The proposed rule change offers its members and member organizations two layers of recourse in the event of a third-party vendor system malfunction, *i.e.*, filing a claim pursuant to NYSE Alternext Equities Rule 18 and then filing a claim directly against the third-party vendor for any remaining balance of the loss amount. Therefore, the Exchange submits that this proposed rule filing, in light of the more restrictive vendor liability disclaimer rules previously approved by the Commission, is non-controversial.

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 Exchange 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:

<sup>21</sup> In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give 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 Exchange has satisfied this requirement. 17 CFR 240.19b-4(f)(6)(iii).

<sup>22</sup> Amex Rule 60—AEMI ("Vendor Liability Disclaimer"). AEMI ("Auction & Electronic Market Integration") System was Amex's Hybrid Market Structure for equities and exchange-traded funds prior to the merger with NYSE.

## *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-NYSEALTR-2009-13 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-NYSEALTR-2009-13. 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 available publicly. All submissions should refer to File Number SR-NYSEALTR-2009-13 and should be submitted on or before March 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Florence E. Harmon,**

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<sup>23</sup> 17 CFR 200.30-3(a)(12).

<sup>18</sup> 15 U.S.C. 78f(b).

<sup>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> 15 U.S.C. 78s(b)(3)(A).