

would not assess a fee for that port, and Nasdaq has not proposed to assess any transaction fees for purchases of EVI Securities.

### III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the 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)(5) of the Act,<sup>6</sup> which requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices; 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; and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposal offers a potentially useful service to issuers and does not appear to raise any issue under the Exchange Act.

The Commission believes that the proposed trading rules are consistent with the Act and notes that they are based on those of Nasdaq's crossing platforms that have previously been approved by the Commission.<sup>7</sup> The Commission finds that the proposed fees for the EVI Cross are consistent with Section 6(b)(4) of the Act,<sup>8</sup> which requires that the rules of an exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Commission notes that an issuer will not be charged a fee unless an auction is carried out, and that Nasdaq has not proposed any transaction fees on

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

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> See, e.g., Securities Exchange Act Release No. 50405 (September 16, 2004), 69 FR 57118 (September 23, 2004) (SR-NASD-2007-071) (approving Nasdaq's Opening Cross); Securities Exchange Act Release No. 49406 (March 11, 2004), 69 FR 12879 (March 18, 2004) (SR-NASD-2003-173) (approving Nasdaq's Closing Cross); Securities Exchange Act Release No. 53687 (April 20, 2006), 71 FR 24878 (April 27, 2006) (SR-NASD-2006-015) (approving the Nasdaq Halt Cross); Securities Exchange Act Release No. 54101 (July 5, 2006), 71 FR 39382 (July 12, 2006) (SR-NASD-2005-140) (approving the Nasdaq Crossing Network).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

members that purchase EVI Securities in an auction.

This order addresses only whether Nasdaq's rules and fees relating to the EVI Cross are consistent with the Act. The Commission is offering no opinion here as to whether prices of EVI Securities derived from auctions conducted pursuant to this proposal may be employed to value employee stock options consistent with FASB Statement of Financial Accounting Standards No. 123(R), or whether the offering of any particular EVI Securities is consistent with the federal securities laws.

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (SR-NASDAQ-2008-025), as modified by Amendment No. 2, be, and hereby is, approved.

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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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58522; File No. SR-NYSE-2008-83]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC To Resume the Operation of NYSE Rule 123D(3) With Respect to Trading in the Securities of Fannie Mae and Freddie Mac Beginning on September 11, 2008, Following the Suspension of That Rule Pursuant to SR-NYSE-2008-81

September 11, 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 September 11, 2008, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to

<sup>9</sup> 15 U.S.C. 78s(b)(2).

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

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

<sup>2</sup> 5 U.S.C. 78a.

<sup>3</sup> 17 CFR 40.19b-4.

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 resume the operation of NYSE Rule 123D(3) with respect to trading in the securities of Fannie Mae and Freddie Mac beginning on September 11, 2008, following the suspension of that rule pursuant to SR-NYSE-2008-81.<sup>4</sup>

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE 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. 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

Regulation NMS, adopted by the Securities and Exchange Commission ("SEC") in April 2005,<sup>5</sup> provides that each trading center intending to qualify for trade-through protection under Regulation NMS Rule 611<sup>6</sup> is required to have a Regulation NMS-compliant trading system fully operational by March 5, 2007 (the "Trading Phase Date").<sup>7</sup>

For stocks priced below \$1.00 per share, Regulation NMS Rule 612<sup>8</sup> permits markets to accept bids, offers, orders and indications of interest in increments smaller than \$0.01, but not less than \$0.0001, and to quote and trade such stocks in sub-pennies. Markets may choose not to accept such

<sup>4</sup> See Securities Exchange Act Release No. 58488 (September 8, 2008). For a complete list of the securities affected by this filing, see SR-NYSE-2008-81.

<sup>5</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 17 CFR Parts 200, 201, 230, 240, 242, 249 and 270.

<sup>6</sup> See 17 CFR 242.611.

<sup>7</sup> See Securities Exchange Act Release No. 55160 (January 24, 2007), 72 FR 4202 (January 30, 2007) (S7-10-04).

<sup>8</sup> See 17 CFR 242.612. Rule 612 originally was to become effective on August 29, 2005, but the date was later extended to January 29, 2006. See Securities Exchange Act Release No. 52196 (Aug. 2, 2005), 70 FR 45529 (Aug. 8, 2005).

bids, offers, orders or indications of interest and the NYSE has done so, maintaining a minimum trading and quoting variation of \$0.01 for all securities trading below \$100,000. See NYSE Rule 62.

The SEC's interpretation of Rule 612 requires a market that routes an order to another market in compliance with Rule 611 and receives a sub-penny execution, to accept the sub-penny execution, report that execution to the customer, and compare, clear and settle that trade. The SEC, however, provided a limited exemption to Rule 611's proscription against trade-throughs to protected quotes that include a sub-penny component to such quotes that are better-priced by a minimum of \$0.01.<sup>9</sup>

In March 2007, the Exchange amended Rule 123D to provide for a "Sub-penny trading" condition because the Exchange's trading systems did not then accommodate sub-penny executions on orders routed to better-priced protected quotations, nor could it recognize a quote disseminated by another market center if such quote had a sub-penny component and, therefore, could have inadvertently traded through better protected quotations. The amended rule automatically halts trading on the Exchange in a security whose price was about to fall below \$1.00, without delisting the security, so that the security could continue to trade on other markets that deal in bids, offers, orders or indications of interest in sub-penny prices, until the price of the security had recovered sufficiently to permit the Exchange to resume trading in minimum increments of no less than one penny or the issuer is delisted for failing to correct the price condition within the time provided under NYSE rules.<sup>10</sup> A subsequent amendment established that any orders received by the NYSE in a security subject to a "Sub-penny trading" condition would be routed to NYSE Arca, Inc. and handled in accordance with the rules governing that market.<sup>11</sup>

#### Suspension of NYSE Rule 123D(3)

On September 7, 2008, Secretary of the Treasury Henry Paulson announced that the federal government would force Fannie Mae and Freddie Mac into a

conservatorship that will result in the companies issuing warrants to the federal government representing approximately 80% ownership of the entities. Details of the plan are available at the Department of the Treasury's Web site, at [http://www.treas.gov/press/releases/reports/pspa\\_factsheet\\_090708%20hp1128.pdf](http://www.treas.gov/press/releases/reports/pspa_factsheet_090708%20hp1128.pdf).

The NYSE was concerned that the Treasury Department's action could cause securities of Fannie Mae and Freddie Mac to trade below \$1.00, and that as a result, trading on the NYSE in such securities would have been halted automatically under the NYSE Rule 123D(3), which governs Sub-penny trading halts. The NYSE was further concerned that, given the scope of the government's action, it would have been deleterious to the overall depth and quality of the market if the NYSE halted NYSE trading in those issues. As a result, the NYSE filed with the SEC for immediate effectiveness a proposal to suspend the operation of NYSE Rule 123D with respect to the securities of Fannie Mae and Freddie Mac. That rule filing proposed suspending the rule through the end of the primary trading session on September 15, 2008.

Notwithstanding that proposal, the NYSE now believes that the impact of the Treasury Department's action has been fully absorbed by the market, and that as a result, the need to continue trading on the NYSE below \$1.00 is significantly less, while the potential for NYSE trades below \$1.00 to cause the Exchange to violate its obligations under Reg NMS remains constant. As a result, commencing on September 11, 2008, the NYSE is proposing to lift the suspension of its Rule 123D(3) and to halt trading in securities of Fannie Mae and Freddie Mac any time they trade, or would open below \$1.05 per share, as prescribed by the rule.

#### 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>12</sup> of the Securities Exchange Act of 1934 (the "Act"), in general, and furthers the objectives of Section 6(b)(5)<sup>13</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 foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

In particular, the NYSE notes that the proposed rule change reinstates a rule whose initial purpose was to ensure that the NYSE did not inadvertently violate Reg NMS; the rule was only suspended in order to respond to a highly unusual market situation. The NYSE believes that reinstating the rule before September 15 is warranted since the need underlying the suspension request appears to have dissipated, and therefore it is appropriate to resume applying NYSE Rule 123D(3) as a prophylactic.

#### 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

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 Exchange has designated the proposed rule change as one that: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Therefore, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>15</sup>

A proposed rule change filed under 19b-4(f)(6) normally does not become operative until 30 days after the date of filing.<sup>16</sup> However, Rule 19b-4(f)(6)(iii)<sup>17</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the

<sup>9</sup> Order Granting National Securities Exchanges a Limited Exemption from Rule 612 of Regulation NMS under the Securities Exchange Act of 1934 to Permit Acceptance by Exchanges of Certain Sub-Penny Orders. See Securities and Exchange Commission Release No. 54714 (November 6, 2006).

<sup>10</sup> See Securities and Exchange Commission Release No. 34-55398; File No. SR-NYSE-2007-25 (Mar. 5, 2007).

<sup>11</sup> See Securities and Exchange Commission Release No. 34-55537; File No. SR-NYSE-2007-30 (Mar. 27, 2007).

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f)(6).

<sup>16</sup> *Id.* 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. NYSE has satisfied this requirement.

<sup>17</sup> *Id.*

proposal may become operative, and the suspended rule may be reinstated, immediately upon filing. The Exchange believes that, while a suspension of Rule 123D(3) for Fannie Mae and Freddie Mac securities was warranted by the Treasury Department's actions, the immediate benefits of suspending that rule have diminished, and that therefore it is consistent with the Exchange Act that the rule be reinstated as expeditiously as possible, since the reinstated rule would prevent the Exchange from executing transactions in Fannie Mae and Freddie Mac securities at prices below \$1.00 that may violate Regulation NMS.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission therefore grants the Exchange's request and designates the proposal to be operative upon filing.<sup>18</sup>

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 No. SR-NYSE-2008-83 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-NYSE-2008-83. 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

<sup>18</sup> For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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 such filing also will be available for inspection and copying at the principal office of NYSE. 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-2008-83 and should be submitted on or before October 8, 2008.

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

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58517; File No. SR-NYSE-2008-61]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change Amending NYSE Rule 104(e) (Dealings by Specialists) To Modify the Conditions Governing the Specialists' Use of the Price Improvement Trading Message Pursuant to NYSE Rule 104(b)(i)(H)

September 11, 2008.

On July 25, 2008, the New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to modify the rule governing the specialists' use of the price improvement trading message. The

<sup>19</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.

proposed rule change was published for comment in the **Federal Register** on August 7, 2008.<sup>3</sup> The Commission received no comments regarding the proposal. This order approves the proposed rule change.

Pursuant to NYSE Rule 104(b), specialists may use algorithms to generate quoting and trading messages. Such trading messages may provide price improvement to an order, subject to the conditions set forth in Rule 104(e). In order to provide price improvement to a marketable incoming order, Rule 104(e)(i) requires that the specialist must be represented in the bid or offer in a "meaningful amount." Rule 104(e)(ii) defines "meaningful amount" as at least ten round-lots for the 100 most active securities on the Exchange, based on average daily volume, and at least five round-lots for all other securities on the Exchange. NYSE proposes to delete the requirement in Rule 104(e)(i) that specialists must be represented in a bid or offer in a meaningful amount to provide price improvement to the incoming order.<sup>4</sup>

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

As NYSE stated in its proposal, average quote sizes on the Exchange have decreased in recent years.<sup>7</sup> Because of this, the Exchange believes the meaningful amount requirement for price improvement is a deterrent to specialists' participation in price improvement. The Commission believes that deletion of the meaningful amount requirement should encourage greater participation by specialists in the Exchange's price improvement mechanism. At the same time, the Commission must carefully review

<sup>3</sup> See Securities Exchange Act Release No. 58278 (July 31, 2008), 73 FR 46124 ("Notice").

<sup>4</sup> As part of this rule change, NYSE also proposes deleting the definition of "meaningful amount" in Rule 104(e)(ii).

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

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> See Notice *supra* note 3, at 46125.