

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58857; File No. SR-NYSE-2008-52)

October 24, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change, as Modified by Amendment Nos. 1, 2 and 3 Thereto, to Modify the Method by which Securities Are Allocated and Reallocated to Designated Market Maker Units and to Establish an Allocation System Based on a Single Objective Measure to Determine a Designated Market Maker Unit's Eligibility to Participate in the Allocation Process

I. Introduction

On August 11, 2008, the New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to modify its process for allocating and reallocating securities to DMM units. On August 13, 2008, NYSE filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on August 21, 2008.³ The Commission received no comments on the proposed rule change, as modified by Amendment No. 1. On October 8, 2008, NYSE filed Amendment No. 2 to the proposed rule change.⁴ On October 24, 2008, NYSE filed Amendment No. 3 to the proposed rule change.⁵ This order approves the proposed rule change, as amended.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 58363 (August 14, 2008), 73 FR 49514 ("Notice").

⁴ Amendment No. 2 corrects a minor bracketing error in Section IX of the rule text of the proposed rule change. Because Amendment No. 2 is technical in nature, the Commission is not publishing it for comment.

⁵ Amendment No. 3 updates the rule text to replace references to specialist and specialist units with references to designated market makers ("DMMs") and DMM units respectively, which is consistent with changes recently approved by the Commission relating to the Exchange's new market model. See Securities Exchange Act Release No.

II. Description of the Proposed Rule Change

The Exchange proposes amending NYSE Rules 103A (Specialist Stock Reallocation and Member Education and Performance) and 103B (Specialist Stock Allocation) to be more closely reflective of the Exchange's increased electronic trading environment.⁶ Generally, the Exchange proposes modifying the current Allocation Policy to establish a single quantifiable objective measure to determine a DMM unit's eligibility to participate in the allocation process and provide issuers with more choice in the selection of its DMM unit. The Exchange further proposes to allow the issuer to select the DMM units it chooses to interview directly. The Exchange therefore seeks to eliminate the Allocation Committee as the overseer of the allocation process and the Allocation Panel from which the Allocation Committee members are selected. The Exchange also proposes to eliminate the allocation decision criteria that are, in part, based on subjective measures of DMM performance by discontinuing the use of the Specialist Performance Evaluation Questionnaire ("SPEQ"). In doing so, the Exchange seeks to replace the SPEQ with an objective measure designed to set a minimum standard that would be used to determine a DMM unit's eligibility to participate in the new security allocation process.

In connection with the amendment of NYSE Rule 103A, the Exchange also proposes to eliminate the Market Performance Committee as the entity that is responsible for reallocating securities, as well as eliminate performance improvement actions. NYSE Regulation, Inc. ("NYSER") would replace the Market Performance Committee as the entity responsible for developing procedures and standards with respect to the qualification and performance of

58845 (October 24, 2008) (order approving SR-NYSE-2008-46). Because Amendment No. 3 is technical in nature, the Commission is not publishing it for comment.

⁶ The Exchange has indicated that the proposed rule change will become operative concurrently with the implementation of its new market model. See supra note 5.

members active on the Floor of the Exchange. Current sections of NYSE Rule 103A that address DMM security reallocation are amended and incorporated into NYSE Rule 103B.

A. Amendments to NYSE Rule 103A

The Exchange seeks to amend NYSE Rule 103A to eliminate the concept of a performance improvement action. Instead, the Exchange recently has amended its system of variable payments to DMM units to create a liquidity provision payment (“LPP”) to incentivize DMM unit performance. The payment is based, in part, on the DMM unit’s trading performance by measuring its liquidity enhancing behavior. LPPs are based on two revenue sources in NYSE-listed securities: (1) the Exchange’s share of market data revenue derived from quoting shares; and (2) the Exchange’s transaction fee revenue.⁷ The payments derived from transaction revenue are based on Exchange reviews of the DMM unit’s executed volume in four categories: (1) price improvement; (2) size improvement; (3) providing liquidity from posting bids or offers on the book; and (4) matching better bids or offers published by other market centers to reduce client routing cost.⁸ Moreover, the Exchange proposes to amend NYSE Rule 103A to vest the overview of member education programs with NYSER⁹ since the day to day administration of member education is currently performed by the Market Surveillance Division staff of NYSER.

⁷ See Securities Exchange Act Release No. 56591 (October 1, 2007), 72 FR 57371 (October 9, 2007) (SR-NYSE-2007-89).

⁸ NYSE Rule 104 sets forth quoting messages that DMM are permitted to send as part of their quoting functionality.

⁹ NYSE Rule 103A, Section I.

B. Amendments to NYSE Rule 103B

1. Proposed Objective Measure for Eligibility for Allocation Process

The Exchange proposes establishing a single objective measure to determine a DMM unit's eligibility to participate in the allocation process.¹⁰ A DMM unit would be eligible to participate in the allocation process of a listed security when the DMM unit meets the quoting requirements for "Less Active" and "More Active" securities.¹¹ A "Less Active Security" is defined as any listed security that has a consolidated average daily volume of less than one million shares per calendar month.¹² A "More Active Security" is defined as any listed security that has a consolidated average daily volume equal to or greater than one million shares per calendar month.¹³

For Less Active Securities, a DMM unit must maintain a bid and an offer at the National Best Bid ("NBB") and National Best Offer ("NBO") (collectively herein "NBBO") for an aggregate average monthly NBBO of 10% or more during a calendar month.¹⁴ For More Active Securities, a DMM unit must maintain a bid and an offer at the NBBO for an aggregate average monthly NBBO of 5% or more during a calendar month.¹⁵ DMM units must satisfy the quoting requirement for both categories (Less Active and More Active) of their assigned securities.¹⁶

¹⁰ Proposed NYSE Rule 103B, Section II(A).

¹¹ Id.

¹² Proposed NYSE Rule 103B, Section II(B).

¹³ Proposed NYSE Rule 103B, Section II(C).

¹⁴ Proposed NYSE Rule 103B, Section II(D).

¹⁵ Proposed NYSE Rule 103B, Section II(E).

¹⁶ A more detailed description, as well as an example, of how the quoting requirement is calculated is contained in the Notice, supra note 3.

If a DMM unit fails to satisfy the requirements of proposed NYSE Rule 103B, Section II(D) and (E) for a one-month period, the Exchange would issue an initial warning letter to the DMM unit, advising it of its deficiency.¹⁷ The DMM unit would provide in writing an explanation and articulation of corrective action.¹⁸ If the DMM unit fails to meet the requirement of proposed NYSE Rule 103B, Section II(D) and (E) for a second consecutive month, the DMM unit would be ineligible to participate in the allocation process for a minimum of two months following the second consecutive month of its failure to meet its quoting requirement (“Penalty Period”).¹⁹

The DMM unit would have to satisfy the quoting requirement for the two consecutive months of the Penalty Period in order to become eligible to participate in the allocation process. In the event a DMM unit fails to satisfy its quoting requirement for the two consecutive months of the Penalty Period, the DMM unit would remain ineligible to participate in the allocation process until it has met the quoting requirement for a consecutive two calendar month period.²⁰ The Exchange would review each DMM unit’s trading on a monthly basis to determine whether the DMM unit has satisfied its quoting requirement.²¹

The Exchange Strategic Analysis Department would be responsible for generating and monitoring the DMM units’ performance data to determine those DMM units that are eligible to be allocated securities.

¹⁷ Proposed NYSE Rule 103B, Section II(J)(1). The Exchange Specialist Liaison Department would be responsible for issuing the warning letter to a DMM unit that fails to meet its requirement. It also would be responsible for advising a DMM unit of its eligibility or ineligibility to participate in the allocation process.

¹⁸ Proposed NYSE Rule 103B, Section II(J)(1).

¹⁹ Proposed NYSE Rule 103B, Section II(J)(2).

²⁰ Proposed NYSE Rule 103B, Section II(J)(3).

²¹ Proposed NYSE Rule 103B, Section II(J)(4).

2. Elimination of the SPEQ

The Exchange proposes to permanently eliminate the use of the SPEQ. According to the Exchange, while the SPEQ has been an important mechanism to evaluate DMM performance for allocation and performance improvement action purposes, recent moves by the Exchange to adopt a more electronic trading environment have rendered the SPEQ less reliable as an assessment tool.

3. Elimination of the Allocation Committee

The Exchange proposes to allow an issuer to select the DMM units it chooses to interview directly from the DMM units that are eligible to participate in the allocation process, which obviates the need for an Allocation Committee.²²

C. Administration of the New Allocation Policy

Once the list of DMM units that meet the objective standard established by the Exchange is generated, the list would be provided to the listing company and the listing company may proceed under one of two options.

1. Issuer Selects DMM Unit

Under the first option, the listing company would select the DMM units it wishes to interview. The issuer would then proceed to conduct interviews of the selected units. A DMM unit's eligibility to participate in the allocation process would be determined at the time the interview is scheduled, *i.e.*, if it has met the quoting requirements set forth above at the time of the interview, it would be eligible to be considered for allocation.²³

²² Proposed NYSE Rule 103B, Section III(A)(1)-(3).

²³ Proposed NYSE Rule 103B, Section II(I).

If the issuer selects the DMM unit, the issuer would select a minimum of three DMM units to interview from the pool of DMM units eligible to participate in the allocation process.²⁴ DMM units selected for an interview may provide material to the Exchange, which would be given to the issuer the day before the scheduled interview. Such material may include a corporate overview of the DMM unit and the trading experience of the designated DMM. DMM units would be prohibited from giving issuers information about other DMM units or any additional market performance data.²⁵

Within five business days after the issuer selects the DMM units to be interviewed (unless the Exchange has determined to permit a longer time period in a particular case), the issuer would meet with representatives of each of the DMM units. At least one representative of the listing company must be a senior official of the rank of Corporate Secretary or above of that company. In the case of the listing of a structured product, a senior officer of the issuer may be present in lieu of the Corporate Secretary. No more than three representatives of each DMM unit may participate in the meeting, each of whom must be employees of the DMM unit, and one of whom must be the individual DMM who is proposed to trade the company's security, unless that DMM is unavailable to appear, in which case a telephone interview is permitted. Meetings would normally be held at the Exchange, unless the Exchange has agreed that they may be held elsewhere.²⁶

Following its interview, a DMM unit may not have any contact with an issuer. If an issuer has a follow-up question regarding any DMM unit(s) it interviewed, it must be conveyed

²⁴ Proposed NYSE Rule 103B, Section III(A)(1).

²⁵ Proposed NYSE Rule 103B, Section III(A)(2)(a).

²⁶ Proposed NYSE Rule 103B, Section III(A)(2)(b).

to the Exchange. The Exchange would contact the unit(s) to which the question pertains and would provide any available information received from the unit(s) to the listing company.²⁷

Within two business days of the issuer's interviews with the DMM units, the issuer would select its DMM unit in writing, signed by a senior official of the rank of Corporate Secretary or higher, or in the case of a structured product listing, a senior officer of the issuer, duly authorized to so act on behalf of the company. The Exchange then would confirm the allocation of the security to that DMM unit, at which time the security would be deemed to have been so allocated. An issuer may request an extension from the Exchange if the issuer is unable to complete its selection within the specified period.²⁸

2. Issuer Delegates Selection to the Exchange

If the issuer delegates authority to the Exchange to select its DMM unit, three members of the Exchange's Senior Management, as designated by the Chief Executive Officer ("CEO") of the Exchange or his or her designee, one non-DMM Executive Floor Governor and two non-DMM Floor Governors ("Exchange Selection Panel"), would select a DMM unit based on a review of all information that would be available to the issuer. The non-DMM Executive Floor Governor and non-DMM Floor Governors would be designated on a rotating basis.

The Exchange Selection Panel would select the DMM unit pursuant to the provisions of NYSE 103B Section III(A) ("DMM Unit Selected by the Issuer") with the Exchange Selection Panel acting on behalf of the issuer. The Exchange Selection Panel would be responsible for informing the issuer of the DMM unit.

²⁷ Proposed NYSE Rule 103B, Section III(A)(2)(d).

²⁸ Proposed NYSE Rule 103B, Section III(A)(3)(a).

The selection of the DMM unit would be made by majority vote with any tie votes being decided by the CEO of the Exchange or his or her designee. The Exchange would notify the DMM unit and the issuer immediately of its decision. The DMM unit would then be responsible for providing the issuer with the name of the DMM with the requisite experience and skill it believes is appropriate to trade the issuer's security.²⁹

Whether the issuer or the Exchange selects the DMM unit to receive the security allocation, the individual DMM ultimately assigned the proposed security would be required to remain the assigned DMM for one year from the date that the issuer begins trading on the Exchange. The DMM unit may designate a different individual DMM within the year by notifying the Exchange of the change in DMM and setting forth the reasons for the change with the consent and approval of the issuer.³⁰

D. Reallocation

When an issuer has requested and confirmed a change of DMM unit pursuant to Section 806.01 of the Exchange Listed Company Manual, the security would be put up for reallocation as soon as practicable, in accordance with the allocation process set forth in proposed NYSE Rule 103B, Section III.³¹

E. Egregious Situations

The Exchange proposes moving current provisions codified in NYSE Rule 103A, which provide for the reallocation of a security when a DMM unit's performance is so egregiously deficient as to call into question the Exchange's integrity or impair the Exchange's reputation for

²⁹ Proposed NYSE Rule 103B, Section III(B)(1).

³⁰ Proposed NYSE Rule 103B, Section III(B)(2).

³¹ Proposed NYSE Rule 103B, Section IV.

maintaining an efficient, fair and orderly, market to proposed NYSE Rule 103B. Currently, NYSE Rule 103A states that, in such an instance, the Market Performance Committee may immediately initiate a reallocation proceeding upon written notice to the DMM unit, specifying the reasons for the initiation of the proceeding. The Exchange proposes to incorporate this concept in NYSE Rule 103B and to transfer the authority to initiate a reallocation proceeding upon written notice to the DMM unit from the Market Performance Committee to the CEO or his or her designee.³²

Following this decision, if the CEO or his or her designee makes a final determination that a security should be referred for reallocation, the Exchange proposes that the CEO or his or her designee would, in his or her expert business judgment, be responsible for reallocating the security to one of the remaining DMM units eligible for allocation. The CEO or his or her designee would then make a final determination as to which one or more of the DMM unit's securities would be referred for reallocation. All determinations made by the CEO or his or her designee would be communicated in writing to the DMM unit, with a statement of the reasons for such determinations. DMM units would have the right to have this decision reviewed by the Exchange's Board of Directors.³³

F. DMM Unit Communication Policies and Procedures with Listing Company

Currently, NYSE Rule 106 requires, among other things, that DMM units make themselves available for contact with their listing companies periodically throughout the year. NYSE Rule 106 was adopted in 1989 at a time when orders entered with the DMM were handled manually and contact between a DMM unit and its listed companies was necessary to ensure that

³² Proposed NYSE Rule 103B, Section V, based on Exchange Rule 103A(f).

³³ Proposed NYSE Rule 103B, Section V(E).

listed companies were informed about the trading in its listed security on the Floor.³⁴ The Exchange believes that the requirements of NYSE Rule 106 are no longer necessary.³⁵ As such, the Exchange seeks to rescind NYSE Rule 106 that sets forth the DMM unit's obligation to communicate with the aforementioned entities.

G. Exchange-Traded Funds

The Exchange proposes to delete from NYSE Rule 103B the section related to the allocation of Exchange-Traded Funds ("ETFs") admitted to trading on the Exchange on an Unlisted Trading Privileges ("UTP") basis. In 2007, the Exchange completed a transfer of all ETFs admitted to trading on the Exchange on an UTP basis to NYSE ArcaSM NYSE Euronext's fully electronic U.S. listing and trading platform. Accordingly, the Exchange proposes to delete this provision from the rule.

H. Closed-End Management Investment Companies ("Funds")

The Exchange further proposes that Funds listing on the Exchange would be subject to the allocation process pursuant to proposed NYSE Rule 103B, Section III. If the issuer of an initial Fund lists additional funds within nine months from the date of its initial listing, the issuer

³⁴ See Securities Exchange Act Release No. 27292 (September 26, 1989), 54 FR 41193 (October 5, 1989) (SR-NYSE-89-13). As a result, NYSE Rule 106 mandates interaction between a DMM unit and representatives of listed companies. The rule requires that one or more senior officials of the rank of Corporate Secretary or higher at the listing company have an opportunity to have contact with the DMM unit on a quarterly basis. Further, the rule mandates that at least one of the quarterly meetings be in-person.

³⁵ NYSE Rule 106 further mandates that the DMM unit make itself available to the Exchange's fifteen largest member organizations through required semi-annual "off the Exchange Floor" contact. According to the Exchange, the interpersonal relationship between DMM units and member organizations that once took front stage in the marketplace has been significantly replaced by automated trading initiatives and computerized market data reports. DMM units are generally in contact with member organizations, either through electronic and/or telephonic means on a regular basis, which similarly renders the requirements of NYSE Rule 106(b) unnecessary.

may choose to maintain the same DMM unit for those subsequently listed funds or it may select a different DMM unit from the group of eligible DMM units that the issuer interviewed in the allocation process for its initial Fund. The fund may also delegate the selection of its DMM unit to the Exchange if it so chooses pursuant to proposed NYSE Rule 103B, Section III(B).³⁶

If a DMM unit is ineligible from participating in an allocation as set forth in proposed NYSE Rule 103B, Section III, at the time of a subsequent new Fund listing (within the designated nine-month period), that DMM unit would not be included for consideration for subsequent listings.³⁷

I. Spin-Offs, Relistings, Common Stock, Target Stock, Warrants and Rights

The Exchange proposes to rename the section entitled “Spin-offs and listing of related companies” to also include “related securities” in order to address the assignment of warrants and rights.³⁸ Proposed NYSE Rule 103B, Section VI(A) continues to allow the listing company to remain with the DMM unit registered in the related spin-off or related company and also would allow the listing company to be referred for allocation through the allocation process pursuant to proposed NYSE Rule 103B, Section III, if it so chooses. If the spin-off company, company related to a listed company or the company relisting chooses to have its DMM unit selected by the Exchange pursuant to NYSE Rule 103B, Section III(B), and requests not to be allocated to the DMM unit that was its listed company’s DMM unit, such request would be honored.

³⁶ Proposed NYSE Rule 103B, Section VI(F).

³⁷ Id.

³⁸ Proposed NYSE Rule 103B, Section VI(A).

The Exchange further proposes that common stock (listed after preferred stock) be referred for allocation through the allocation process pursuant to proposed NYSE Rule 103B, Section III.³⁹

In addition, NYSE Rule 103B, Section VI(A) would be amended to codify that a warrant issued by a listed company and traded on the Exchange would be allocated to the DMM unit registered in the underlying security of the listed company.⁴⁰ Upon request by the issuer, the warrant may be allocated through the allocation process pursuant to proposed NYSE Rule 103B, Section III.⁴¹

Moreover, the Exchange proposes to codify that rights are not subject to the allocation process pursuant to proposed NYSE Rule 103B, Section III. Rights are considered short-term securities, which are exempt from registration under the Act.⁴² Accordingly, rights are not treated as listed securities on the Exchange and are not subject to the allocation process pursuant to proposed NYSE Rule 103B, Section III. Rights are assigned, when issued, to the DMM unit by the Exchange.⁴³

DMM units that are ineligible to receive a new allocation due to its failure to meet the requirements of proposed NYSE Rule 103B, Section (II)(D) and (E) would remain eligible to receive an allocation pursuant to NYSE Rule 103B, Section VI.

³⁹ Id.

⁴⁰ Proposed NYSE Rule 103B, Section VI(A)(2).

⁴¹ Id.

⁴² See Rule 12a-4 under the Act; 17 CFR 240.12a-4; See also NYSE Listed Company Manual, Section 703.03(O).

⁴³ Proposed NYSE Rule 103B, Section VI(A)(4). The Exchange Market Watch, Security Operations, Records Management Division is responsible for assigning rights to the DMM unit.

J. Listed Company Mergers

When two NYSE listed companies merge, the merged entity is assigned to the DMM in the company that is determined to be the survivor-in-fact (dominant company). Where no surviving/dominant company can be identified after two NYSE listed companies merge, the NYSE proposes that the merged company may select one of the DMM units trading the merging companies' security without the security being referred for reallocation, or it may request that the matter be referred for allocation through the allocation process pursuant to NYSE Rule 103B, Section III.⁴⁴ DMM units that are ineligible to receive a new allocation due to its failure to meet the requirements of NYSE Rule 103B, Section II(D) and (E) would remain eligible to receive an allocation pursuant to this section.⁴⁵

In situations involving the merger of a listed company and an unlisted company, where the unlisted company is determined to be the survivor-in-fact, such company may choose to remain registered with the DMM unit that had traded the security of listed company entity in the merger, or it may request that the matter be referred for allocation through the allocation process pursuant to proposed NYSE Rule 103B, Section III.⁴⁶ If the unlisted company chooses to have its DMM unit selected by the Exchange, the company may not request that the Exchange exclude from consideration the DMM unit that had traded the listed company's security.⁴⁷

K. Allocation Sunset Policy

The Exchange proposes to extend the effectiveness of allocation decisions with respect to any initial public offering listing company, which lists on the Exchange, from three months to six

⁴⁴ Proposed NYSE Rule 103B, Section VI(D)(1).

⁴⁵ Id.

⁴⁶ Proposed NYSE Rule 103B, Section VI(D)(3).

⁴⁷ Proposed NYSE Rule 103B, Section VI(D)(4).

months.⁴⁸ In situations in which the selected DMM unit merges or is involved in a combination within the six-month period, the company may choose whether to stay with the selected DMM unit, or be referred to allocation. If a company approved for listing does not list within six months of its initial public offering, the matter would be referred for allocation through the allocation process pursuant to proposed NYSE Rule 103B, Section III.⁴⁹

L. Provisions for Allocation of Listing Companies Transferring from NYSE ARCA, Inc. ("NYSE ARCASM") to the NYSE

The Exchange further proposes that if a listing company transferring from NYSE ArcaSM to the NYSE was assigned a NYSE Arca Lead Market Maker unit, that is also a registered NYSE DMM unit, the listing company may waive the allocation process pursuant to Rule 103B and select as its registered DMM unit the same unit that was previously assigned as the NYSE Arca Lead Market Maker unit. Alternatively, the Exchange proposes that the listing company can choose to follow the regular allocation process and refer the matter for allocation through the allocation process pursuant to NYSE Rule 103B.⁵⁰

M. Conforming Changes to NYSE Rule 476a, NYSE Rule 123E and NYSE Listed Manual Section 106.02

1. NYSE Rule 476A

The Exchange seeks to make a conforming amendment to NYSE Rule 476A by removing failure to complete the SPEQ from the list of minor rule violations. NYSE Rule 476A provides for the imposition of fines for Minor Violation(s) of NYSE Rules. The Supplementary Material of NYSE Rule 476A enumerates the specific rules and conduct eligible for the imposition of a

⁴⁸ Proposed NYSE Rule 103B, Section VI(H).

⁴⁹ Id.

⁵⁰ Proposed NYSE Rule 103B, Section VIII.

fine. Included in this list is “Participation in the DMM Performance Evaluation Questionnaire (SPEQ) Process (Rule 103A).” Since the Exchange proposes the elimination of the SPEQ process in its new allocation policy, the Exchange further proposes to amend NYSE Rule 476A to reflect this rescission.

2. NYSE Rule 123E

The Exchange also seeks to make conforming amendments to NYSE Rule 123E to change DMM “organization” to DMM “unit” and “stock” to “security” throughout the rule. The Exchange further proposes to delete and replace all references to the Quality of Markets Committee and the Market Performance Committee with “the Exchange.”⁵¹ Given the proposed changes to NYSE Rule 103A that rescind the Market Performance Committee’s responsibility to monitor DMM performance, the Exchange proposes to assume responsibility for conducting a review of a proposed DMM combination. Similarly, the Exchange proposes to make a conforming amendment to eliminate the DMM performance measures from NYSE Rule 123E that also are proposed for deletion in connection with the proposed amendments to NYSE Rule 103B. The Exchange further proposes to correct a typographical error in Rule 123E.

3. NYSE Listed Company Manual

The Exchange proposes to make conforming changes to Section 106.02 of the NYSE Listed Company Manual. Currently Section 106.02 provides in pertinent part:

As soon as the Exchange makes the allocation decision, the company is immediately notified by telephone and in writing of the name of the specialist

⁵¹ In March 2006 after the NYSE’s business combination with Archipelago Holdings, Inc., the Quality of Markets Committee ceased to exist upon completion of the revised corporate structure.

unit, selected background information on the unit and the reasons why the unit was selected.

Section 106.02 gives the reader the impression that the Exchange is always responsible for the selection of the specialist unit (now DMM unit) to be allocated a listing company's security. The Exchange proposes to clarify Section 106.02 by amending it to acknowledge that the company can delegate the allocation decision to the Exchange.

N. Provisions for Allocation of Securities Issued by NYSE or its Affiliates

Currently, Section IX of NYSE Rule 103B permits the NYSE, as the issuer of its own security, to select the pool of DMM units that it wishes to consider for allocation of its security, instead of having the DMM units be selected by the Allocation Committee. Because the Exchange proposes to eliminate the role of the Allocation Committee, and instead provide all issuers with the ability to select the pool of eligible DMM units that they wish to consider for allocation of their securities, this section of NYSE Rule 103B no longer is necessary.

III. Discussion and Findings

The Commission finds that the proposed rule change, as modified by Amendment Nos. 1, 2 and 3, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁵² Specifically, the Commission believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,⁵³ because it is designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

⁵² In approving this rule, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁵³ 15 U.S.C. 78(f)(b)(5).

The Commission believes that it is appropriate for the Exchange to establish rules and procedures governing the allocation of securities to its DMM units. In this regard, the Commission believes that the Exchange's proposal to establish an allocation system based on an objective measure, which would be used to determine a DMM unit's eligibility to participate in the allocation process based on its ability to meet a specific quoting requirement, is reasonable and consistent with the Act. The Commission believes that it is important for the Exchange to provide an inducement to its market makers that can help improve the quality of NYSE's market. By establishing objective criteria for allocations of securities that are based on the percentage that a DMM unit maintained a bid and an offer at the NBBO for a specified time period, the Exchange will provide DMM units with transparent and unambiguous standards that they need to attain, if they wish to receive security allocations. Moreover, the Commission believes that greater issuer participation in the allocation and reallocation process may provide the issuer with greater choice in the assignment of a DMM unit and the DMM unit with a greater incentive to perform optimally.

The Commission also believes that it is reasonable for the Exchange to eliminate the use of the SPEQ, along with several other performance measures, including SuperDot Turnaround and responses to administrative messages, since these performance criteria no longer are meaningful in the context of security allocations, given the Exchange's current electronic environment. The Commission believes that it is reasonable for the listed issuer to either select a DMM unit or delegate such selection to the Exchange Selection Panel. Further, in the event of an egregious situation that indicates a security is to be reallocated, the Commission notes that a DMM unit would have the right to appeal any reallocation decision to the Exchange's Board of

Directors. Accordingly, the Commission believes that the Exchange's proposed allocation and reallocation process is reasonable and consistent with the Act.

The Commission further believes that it is reasonable for the Exchange to codify its current practice in NYSE Rule 103B that a warrant issued by a listed company and traded on the Exchange is allocated to the DMM unit registered in the underlying security of the listed company. Further, the Commission believes that it is reasonable for rights, that are not considered by the Exchange to be listed securities, to not be subject to the NYSE Rule 103B, Section III allocation process.

Lastly, the Commission believes that it is reasonable and consistent with the Act for a DMM unit that is ineligible to receive a new allocation, pursuant to proposed NYSE Rule 103B, Section VI(A) through (D), due to its failure to meet the requirements of proposed NYSE Rule 103B, Sections II(D) and (E), to remain eligible to receive an allocation pursuant to proposed NYSE Rule 103B, Section VI. Specifically, a DMM unit that is ineligible to receive a new allocation due to its failure to meet the requirements of NYSE Rule 103B, Section II(D) and (E) would remain eligible to receive current allocation of the spin-off company or current allocation of the listing of related companies, or current allocation of the relisting of the listed company; or current allocation of the common stock listing after the preferred stock listing; or the current allocation of certain types of company listed mergers. The Commission believes that there may be less disruption to the allocation process if the DMM unit were able to remain eligible to receive securities allocations, pursuant to NYSE Rule 103B, Section VI, in those discreet instances discussed above, even though the DMM unit may not be otherwise eligible to receive new securities allocations.

The Commission notes, however, that if a DMM unit is ineligible from participating in an allocation as set forth in proposed NYSE Rule 103B, Section III, at the time of a subsequent new closed-end management fund investment company listing (within the designated nine-month period), that DMM unit would not be included for consideration for subsequent listings.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NYSE-2008-52), as modified by Amendment Nos.1, 2 and 3, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁴

Florence E. Harmon
Acting Secretary

⁵⁴ 17 CFR 200.30-3(a)(12).