

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-70218; File No. SR-NYSE-2013-33)

August 15, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1 to: (i) Delete the Sections in the Listed Company Manual (the “Manual”) Containing the Listing Application Materials (Including the Listing Application and the Listing Agreement) and Adopt Updated Listing Application Materials that will be Posted on the Exchange’s Website; and (ii) Adopt As New Rules Certain Provisions that are Currently Included in the Various Forms of Agreements That Are in the Manual, As Well As Some Additional New Rules that Make Explicit Existing Exchange Policies with Respect to Initial Listings

I. Introduction

On April 30, 2013, the New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “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> proposed rule changes (“Proposal”) to (i) delete the sections in the Listed Company Manual (the “Manual”) containing the listing application materials (including the listing application and the listing agreement) and adopt updated listing application materials that will be posted on the Exchange’s website; and (ii) adopt as new rules certain provisions that are currently included in the various forms of agreements that are in the Manual, as well as some additional new rules that make explicit existing Exchange policies with respect to initial listings. The proposed rule change was published for comment in the Federal Register on May 17, 2013.<sup>3</sup> The Commission received one comment letter on the proposal.<sup>4</sup> On June 27, 2013, the Commission extended the

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

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

<sup>3</sup> See Securities Exchange Act Release No. 69565 (May 13, 2013), 78 FR 29165 (“Notice”).

<sup>4</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from Shinichi Yuhara, dated June 4, 2013.

time period in which to either approve, disapprove, or to institute proceedings to determine whether to disapprove the Proposals, to August 15, 2013.<sup>5</sup> On August 14, 2013, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>6</sup> This order approves the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

## II. Background

The Exchange proposes to: (i) delete the sections in the Manual containing the listing application materials (including the listing application and the listing agreement) and adopt updated listing application materials that will be posted on the Exchange's website; and (ii) adopt as new rules certain provisions that are currently included in the various forms of agreements that are in the Manual, as well as some additional new rules that make explicit existing Exchange policies with respect to initial listings.

### Changes to the Listed Company Manual

The Exchange proposes changes to the Manual's requirements detailing the information an applicant is required to provide.<sup>7</sup> The Exchange has proposed to amend Sections 102.01C(F)

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<sup>5</sup> See Securities Exchange Act Release No. 69878, 78 FR 40260 (July 3, 2013) (SR-NYSE-2013-33) ("Notice"). This letter suggested changing the title of proposed Section 107.01 to "Accounting Standards", a change made by the Exchange in Amendment No. 1.

<sup>6</sup> Amendment No. 1, in pertinent part, corrects some minor errors in the marking of the rule text included in the initial filing (although these changes were accurately explained in the Purpose section to the notice), amends the title of proposed new rule 107.01, and deletes two provisions, amends one provision included in the proposed forms of listing agreements included in the initial filing, and amends the statutory basis section of the initial rule filing to specify that Section 904.03 ("Due Bill" Form Letter) will be renumbered as Section 904.01. This change was correctly reflected in the purpose section of the initial filing, however the statutory basis section of the initial filing inadvertently stated that Section 904.03 was being deleted rather than renumbered.

<sup>7</sup> All rule references in this filing are to sections of the Manual unless otherwise specified. In addition to the changes discussed herein, the Exchange proposes to amend the following sections of the Manual to remove cross-references therein to sections that are proposed to be deleted or amended and to state that the required documents are on the Exchange's website or available from the Exchange upon request: Sections 102.01C(F)

and 103.01B(C) by adding language stating that the form of listing application and information regarding support documents required in connection with adjustments to historical financial data will be available on the Exchange’s website or from the Exchange upon request. Similar changes are proposed for Sections 103.04 (with respect to American Depository Receipts), 104.01 (Domestic Companies), and 104.02 (Non-U.S. Companies).

New Section 104.00 would describe a free confidential review of the eligibility for listing undertaken by the Exchange of any company that: (i) requests such a review; and (ii) provides the documents listed in Section 104.01 (domestic companies) or Section 104.02 (non-U.S. companies). A company may submit an original listing application only after it has been cleared to do so by the Exchange following the completion of a confidential eligibility review.

New Section 107.00 (“Financial Disclosure and Other Information Requirements”) would specifically set forth in the Manual certain financial requirements that NYSE states it currently requires of companies listing on the Exchange. Specifically, (i) new Section 107.01 would outline the accounting standards applicable to listed companies, (ii) new Section 107.02 would require all companies applying for initial listing to be audited by an independent public accountant registered with the Public Company Accounting Oversight Board, (iii) new Section 107.03 would stipulate that no security will be approved for listing if the issuer has not, for the 12 months immediately prior to the date of listing, timely filed all periodic reports required to be filed with the Commission or Other Regulatory Authority (as defined in the rule), and (iv) new

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(Minimum Numerical Standards—Domestic Companies—Equity Listings); 103.01B(C) (Minimum Numerical Standards Non-U.S. Companies Equity Listings); 103.04 (Sponsored American Depository Receipts or Shares (“ADRS”)); 204.00(B) (Notice to and Filings with the Exchange); 204.04 (Business Purpose Changed); 204.13 (Form or Nature of Listed Securities Changed); 204.18 (Name Change); and 204.23 (Rights or Privileges of Listed Security Changed Last Modified: 8/21/2006). See Notice, supra note 3.

Section 107.04 would require all companies applying to list on the Exchange to provide the Exchange with any information or documentation necessary to make a determination regarding the initial listing.

The Exchange proposes to amend Sections 204.00, 204.04, 204.13, 204.18 and 204.23 to include a statement that the form of listing application and information regarding supporting documents required in connection with the listing application would be available on the Exchange's website or from the Exchange upon request.

The Exchange proposes to add a requirement to Section 311.01 that would stipulate that partial redemptions of listed securities must be done on a pro rata basis or by lot. In conjunction with this change, the Exchange has proposed to delete this requirement from the listing agreements for domestic and non-U.S. companies.

The Exchange proposes to add a requirement to Section 501.01 that would require listed companies to issue new certificates for listed securities replacing lost ones upon notification of loss of the original certificate and receipt of proper indemnity. In conjunction with this change, the Exchange has proposed to delete this requirement from the listing agreements for domestic and non-U.S. companies.

The Exchange further proposes to add a requirement to Section 501.02 that would require that, in the event of the issuance of any duplicate bond to replace a bond which has been alleged to be lost, stolen or destroyed and the subsequent appearance of the original bond in the hands of an innocent bondholder, either the original or the duplicate bond must be taken up and cancelled and the issuer must deliver to such holder another bond. In conjunction with this change, the Exchange has proposed to delete this requirement from the listing agreements for domestic and non-U.S. companies.

The Exchange has proposed to add certain requirements to Section 601.01 that were not previously embodied in any other rule. Provisions being added to Section 601.01(A) would require a transfer agent to comply with the rule of the Exchange, maintain officer for the purposes of transfer activities that are staffed by experienced personnel, provide adequate facilities for the safekeeping of securities, maintain facilities to expedite transfers, and appoint an agent for service of process. A provision added to Section 601.01(B) would require the transfer agent to take immediate corrective action if the transfer agent's independent auditor specifies any material weaknesses, and provide a letter to the Exchange indicating that the material weaknesses have been corrected. The Exchange further proposes to delete Section 601.03 in its entirety, as it relates solely to the transfer agent and registrar agreements which the Exchange has also proposed to eliminate.

The Exchange proposes to amend Section 702.00 (Original Listing Application Securities of Other than Debt Securities) to replace the information currently in that section with a general outline of the listing process designed to be more descriptive of the listing process.<sup>8</sup> If, upon completion of this review, the Exchange determines that a company is eligible for listing, the Exchange will notify that company in writing (the "clearance letter") that it has been cleared to submit an original listing application.<sup>9</sup>

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<sup>8</sup> The revised description states that a company that does not have any other class of securities listed on the Exchange must first seek a free confidential review of its listing eligibility as set forth in Section 104.00.

<sup>9</sup> A clearance letter is valid for nine months from its date of issuance. If a company does not list within the nine month period, but wishes to list thereafter, the Exchange will perform another confidential listing eligibility review as a condition to the issuance of a new clearance letter.

Upon receiving a clearance letter, a company choosing to list must file an original listing application.<sup>10</sup> Section 702.00 states that a company should submit drafts of the original listing application and other required documents as far in advance as possible of the time it seeks Exchange authorization of its application. Promptly after making a determination that a company is eligible to list but subject to payment of the Initial Application Fee, the Exchange shall inform such company in writing that it is entitled to receive a clearance letter upon payment of the applicable Initial Application Fee.<sup>11</sup>

In addition to the changes to Section 702.00 discussed above, the Exchange has proposed to delete Sections 702.01 (Introduction), 702.02 (Timetable for Original Listing of Securities Other than Debt Securities), 702.03 (Submission of Listing Application), 702.04 (Supporting Documents) and 702.05 (Printing of Application) and renumber subsequent sections. Section 702.01 describes the listing application as historically used, which was not on a set form and required companies to provide a narrative of the information relevant to the particular issue. The listing application form used going forward will be in the form of a questionnaire and the Exchange has stated that it will not require the sort of narrative that was historically included in the listing application, as this information, according to the Exchange, is typically all readily available in the company's Commission filings. In its filing, the NYSE stated that Section 702.02 is being eliminated because the timeline provided in that Section does not necessarily

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<sup>10</sup> The original listing application and other required supporting documents can be found on [www.nyx.com](http://www.nyx.com).

<sup>11</sup> Section 902.03 requires certain categories of listing applicants to pay an Initial Application Fee as a prior condition to receipt of eligibility clearance. In its filing, the NYSE stated that the purpose of the notification in Section 702.00 is to assure any such company that it will not have to pay a non-refundable Initial Application Fee subject to any risk that it will not subsequently receive a clearance letter. Applicants that are not subject to the Initial Application Fee will not receive any similar notification, but rather will receive a clearance letter promptly after the Exchange has made an eligibility determination.

bear any relation to the listing experience of any individual company and, according to NYSE, is of limited practical value. Section 702.03 (Submission of Listing Application) is being deleted as the Exchange's requirements with respect to the submission of copies of the listing application will, as a result of the NYSE's proposal, now be set forth in detail in listing checklists posted on the Exchange's website. Section 702.04 (Supporting Documents) is also being deleted since, to the extent that the documents described in Section 702.04 continue to be relevant to the listing process, the Exchange will request them from issuers pursuant to the listing application checklists that will be available on the NYSE's website.

The following supporting documents currently required by Section 702.04, in its current form, and a brief discussion of whether each individual document will continue to be required under the NYSE's proposal and, if not, why not is discussed below:

- Signed Application: The Exchange will continue to require copies of the signed application but will require two signed copies of the application going forward rather than the signed copy and five conformed copies specified in Section 702.04 as fewer copies are needed for internal record keeping purposes.
- Charter and By-Laws: The charter and by-laws will continue to be required, but the copies will no longer need to be certified as certification is not necessary for the Exchange's review.
- Resolutions: The Exchange will continue to require copies of the applicable board resolutions, although they will no longer need to be certified, as certification is not necessary to the Exchange's review.
- Opinions of Counsel/Certificate of Good Standing: These documents will continue to be required.

- Stock Distribution Schedule: The Exchange proposes to eliminate the stock distribution schedule requirement as the Exchange believes it is obsolete because distribution information is available from the applicant's public filings and from its transfer agent.
- Certificate of Transfer Agent/Certificate of Registrar: The Exchange proposes to no longer require these documents because, according to the Exchange, the information about the applicant's outstanding shares is available in its prospectus or periodic Commission reports, as well as the report of the applicant's outstanding shares that will be required to be delivered to the Exchange once a quarter after listing.
- Notice of Availability of Stock Certificates: The Exchange proposes to no longer require this document as all transactions in listed securities in the national market system are conducted electronically through Depository Trust & Clearing Corporation ("DTCC").
- Specimens of the Securities for Which Listing Application is Made: The Exchange proposes to continue to require copies of specimen certificates, if any.
- Public Authority Certificate: The Exchange proposes to continue to require public authority certificates, where applicable.
- Prospectus: The Exchange does not propose to continue to require applicants to provide copies of their final prospectuses, as they are publicly available through the Commission's EDGAR system.
- Financial Statements: The Exchange does not propose to continue to require applicants to provide copies of their financial statements, as they are included in



the applicant's Commission filings which are publicly available through the Commission's EDGAR system.

- Adjustments to Historical Financial Data: The Exchange proposes to continue to require companies to provide copies of any adjusted financial data used in connection with the financial qualification for listing of the applicant.
- Listing Agreement: The Exchange proposes to require the applicable form of the proposed revised listing agreement as set forth in amended Exhibit 3 of the filing.
- Memorandum with Respect to Unpaid Dividends, Unsettled Rights and Record Dates: The Exchange proposes to no longer require this document, as all of the required information is included in the proposed revised listing application detailed in amended Exhibit 3 of the filing.
- Registration form under the Securities Exchange Act of 1934: The Exchange proposes to continue to require applicants to supply this document.

The Exchange noted that the second paragraph of Section 702.04 requires applicants to provide required documents at least one week prior to listing or, if this is not possible because of the nature of the document in question, as soon as practicable thereafter, but in any event prior to the first day of trading subject to the Exchange's conditional listing approval. Although the Exchange has proposed to delete Section 702.04, amended Section 702.00 will contain a similar requirement, with the exception of specifying the supporting documents be submitted one week before the Exchange needs to take action.

Section 702.05 (Printing of Application) is being deleted as it is obsolete and the Exchange has not distributed printed copies of approved listing applications for many years. In addition, the Exchange believes that the listing application has lost its relevance as a disclosure

document in recent decades due to the development of the SEC's own comprehensive disclosure system.

Section 703.00 is being amended by modifying subsections 703.01 through 703.14, relating to the application process and the filing of the listing application and any supplemental, or supporting, documents. References to the form of supplemental listing application set forth in Section 903.02 and also the lists of documents required to be submitted in connection with the relevant supplemental listing application are being deleted from these subsections. Various subsections will no longer contain a listing of the supplemental documents to be provided to the Exchange, but will state that the form of listing application and information regarding supporting documents required in connection with supplemental listing applications and debt securities applications are available on the Exchange's website or from the Exchange upon request. Section 703.01 Parts 1(A) and 2(B) and (C) currently require, respectively, that the application be in the form of a memo from the company and four signed typewritten copies of the supplemental listing applications provided to the Exchange. Section 703.01 Part 2(B) is being revised to remove an obsolete reference to the Exchange's weekly bulletin. Furthermore, Section 703.01 Part 2 (D) and (E), which refer to data that is to be provided in any subsequent listing application and a statement that the application need not be typed, are being removed from the Manual.

Section 802.01D is being revised with a provision explicitly providing that the Exchange may delist a company for a breach of the terms of its listing agreement.

In addition to the above described changes, various sections of the Manual are being revised to remove, or update, obsolete or incorrect cross-references.<sup>12</sup>

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<sup>12</sup> See, Notice, supra note 3

### Proposed Changes to Listing Agreements

The Exchange proposes to remove from the Manual the current form of listing agreements for various types of company. In addition, the Exchange seeks to update the listing agreements used to reflect current practices at the exchange. According to the NYSE, the current form of listing agreements contained in the Manual reflect practices at the Exchange and in the securities markets generally that are no longer prevalent, such as the transfer of physical securities in Exchange transactions rather than the contemporary system of book entry transfer through DTCC. Consequently, NYSE believes that there are provisions in the listing agreements that are obsolete and the Exchange has proposed to delete these provisions.

The Exchange proposes to eliminate the Listing Securities Fee Agreement set forth in Section 902.01 of the Manual in its entirety.

The form of original listing application supplemental listing application, and summary of such applications contained in Section 903.01, Section 903.02, and 903.03, respectively, are being deleted from the Manual in their entirety. A revised form of the original listing application and the existing forms of the supplemental listing applications for certain issuances were provided in Exhibit 3 as part of the filing and these forms will be provided on the Exchange's website.

The Stock Distribution Schedule in Section 904.01 is being deleted as the Exchange obtains the distribution information required in Section 904.01 from the company's transfer agent. Exchange proposes to require applicants to provide the information in Section 904.02 (Unpaid Dividends, Unsettled Rights, and Record Dates—Memorandum) in the revised form of original listing application and, therefore, is deleting Section 904.02. In addition, Sections 904.03 ("Due Bill" Form Letter) and 904.04 (Foreign Currency Warrants and Currency Index

Warrants and Stock Index Warrants membership Circular) will be renumbered Sections 904.01 and 904.02, respectively.

### Listing Agreements

In addition to changes to the various Section of the Manual, the Exchange has also proposed to make changes to the various Listing Agreements contained in the Manual. The revised listing agreements will be available on the Exchange's website and were submitted as part of the rule filing in Exhibit 3, and the amended forms submitted in the Exhibit 3 to Amendment No. 1. Specifically, the Exchange is removing Sections 901.01 (Listing Agreement for Domestic Companies), 901.02 (Listing Agreement for Foreign Private Issuers), 901.03 (Listing Agreement for Depository of a Foreign Private Issuer), 901.04 (For Japanese Companies – Free Share Distribution Understanding), and 901.05 (Listing Agreement for Voting Trusts). Although the Exchange is removing each of these agreements from the Manual, the Exchange will still be using each of these agreements, although in the listing agreements for domestic companies in 901.01 and foreign companies in 901.02 will be modified.

The Exchange proposes to delete from the domestic and foreign private issuers listing agreement certain requirements contained elsewhere in either the Manual or SEC Rules.<sup>13</sup> Such provisions, among other things, relate to: (i) changes in the general character or nature of the company's business; (ii) changes in the company's officers or directors; (iii) disposition of any property or of any stock interest in any subsidiary or controlled companies; and (iv) change in, or removal of, collateral deposited under any mortgage or trust indenture, under which securities of a company listed on the Exchange has been issued. The Exchange has also proposed to remove

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<sup>13</sup> See Notice, *supra* note 3. The Commission notes that although these items are being removed from the listing agreement, the underlying obligation to provide this information continues to exist in some form either through NYSE rules or Commission requirements.

from the listing agreement the requirement that a company file with the Exchange: (i) four copies of all material mailed by a company to its stockholders with respect to any amendment or proposed amendment to its Certificate of Incorporation; (ii) a copy of any amendment to a company's Certificate of Incorporation, or resolution of Directors in the nature of an amendment, certified by the Secretary of the state of incorporation, as soon as such amendment or resolution shall have been filed in the appropriate state office; and (iii) a copy of any amendment to a company's By-Laws. The Exchange has also proposed to remove from the listing agreement the requirement that a company disclose: (i) in its annual report to shareholders certain information relating to options and options plan;<sup>14</sup> and (ii) certain information relating to the reacquisition or disposition of previously issued stock for the company's account, within ten days after the close of a fiscal quarter.<sup>15</sup>

In addition, the Exchange is proposing to delete the requirement that a company notify the Exchange of all facts relating to the purchase, direct or indirect, of any of its securities listed on the Exchange at a price in excess of the market price of such security prevailing on the Exchange at the time of such purchase.<sup>16</sup> The requirement prohibiting a company from selecting any of its securities listed on the Exchange for redemption otherwise than by lot or pro rata, and from setting a redemption date earlier than fifteen days after the date corporate action is taken to authorize the redemption is also being deleted.<sup>17</sup> The Exchange is further proposing to delete the

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<sup>14</sup> According to the NYSE, this information is no longer necessary because Commission rules provide for comprehensive disclosure regarding options as the Commission previously approved removal of a similar requirement in an NYSE rule for that reason.

<sup>15</sup> According to the Exchange, this is no longer needed in the agreement because it is identical to requirement 204.25 of the Manual.

<sup>16</sup> See Notice, supra note 3, which discusses why the Exchange believes this isn't necessary.

<sup>17</sup> The Commission notes that the Exchange has proposed to add a requirement to Section 311.01 that would stipulate that partial redemptions of listed securities must be done on a

requirement that a company give notice of any corporate action which will result in the redemption, cancellation or retirement, in whole or in part, of any of its securities listed on the Exchange. The requirement that a company notify the Exchange at least 10 days in advance of action taken to fix a stockholders' record date, or to close the transfer books, for any purpose, is being deleted because it already is contained in Sections 204.06, 204.17, 204.21 and 401.02 of the Manual.

The Exchange is also proposing to delete the requirement that, in case the securities to be listed are in temporary form, the company agrees to order permanent engraved securities within thirty days after the date of listing because all securities traded through the facilities of the Exchange are now traded electronically. The requirement prohibiting a company from making any change in the form or nature of any of its securities listed on the Exchange, nor in the rights or privileges of the holders thereof, without having given twenty days' prior notice to the Exchange of the proposed change, and having made application for the listing of the securities as changed if the Exchange shall so require, is being removed from the listing agreement.<sup>18</sup> The Exchange also proposes to delete the requirement that a company make available to the Exchange, upon request, the names of member firms of the Exchange which are registered owners of stock of the Corporation listed on the Exchange.

The requirement to notify the Exchange of any diminution in the supply of stock available for the market occasioned by deposit of stock under voting trust agreements or other

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pro rata basis or by lot. The other provisions being deleted are already in existing Section 204.22 and 311.01.

<sup>18</sup> The Commission notes that this requirement will continue to exist in Section 204.13 of the Manual.

deposit agreements is also being deleted.<sup>19</sup> The Exchange has proposed to delete the requirement that a company make application to the Exchange for the listing of additional amounts of securities listed on the Exchange sufficiently prior to the issuance thereof to permit action in due course upon such application.<sup>20</sup>

The Exchange proposes to delete the provision requiring a company publish at least once a year and submit to its stockholders at least fifteen days in advance of the annual meeting of such stockholders, and not later than three months after the close of the last preceding fiscal year of the Corporation, certain balance sheets, a surplus and income statements.<sup>21</sup> As noted by the Exchange, this requirement is in some respects duplicative of Commission rules. In addition, the Exchange is deleting the requirement, in the listing agreement, that: (i) all financial statements contained in annual reports of a company to its stockholders be audited by independent public accountants qualified under the laws of some state or country, and will be accompanied by a copy of the certificate made by them with respect to their audit of such statements showing the scope of such audit and the qualifications, if any, with respect thereto;<sup>22</sup> and (ii) the company promptly notify the Exchange if it changes its independent public

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<sup>19</sup> The Commission notes that this requirement will continue to exist in Section 204.09 of the Manual.

<sup>20</sup> The Commission notes that this requirement will continue to exist in Section 703.01 Part 2 of the Manual.

<sup>21</sup> For foreign private issuers, the NYSE notes that eliminating this requirement is a substantive change. However, in its original filing, NYSE stated that the SEC's proxy rules are not applicable to foreign private issuers and, in conformity with that position, the NYSE does not intend to impose such requirements itself. The Commission notes that certain companies will still be required to comply with the Commission's proxy rules, applicable to domestic listed companies, contained in Regulation 14A – Solicitation of Proxies, which requires issuers to distribute annual reports when soliciting proxies. See also, note 38, infra, and accompanying text.

<sup>22</sup> The Commission notes that this requirement will continue to exist in new Section 107.02 of the Manual.

accountants regularly auditing the books and accounts of the company. The Commission notes that this requirement will continue to exist in Section 204.03. The requirement that all financial statements contained in a company's annual reports to its stockholders be in the same form as the corresponding statements contained in the company's listing application, and disclose any substantial items of unusual or non-recurrent nature, is also being deleted.

The requirement that a company or its subsidiaries not make any substantial charges against capital surplus, without notifying the Exchange is being removed from the listing agreement.<sup>23</sup> The requirement that a company or its subsidiaries not make any substantial change in accounting methods or policies as to depreciation and depletion, or in bases of valuation of inventories or other assets, without providing notice and disclosure of such change is being deleted. The Exchange also proposes to delete from the listing agreement the requirement that a company will maintain an audit committee in conformity with Exchange requirements.<sup>24</sup>

The requirement that a company maintain an office or agency for specified corporate purposes is being deleted along with the requirement that a company maintain registrar for specified corporate purposes. The requirement that a company have on hand at all times a sufficient supply of certificates to meet the demands for transfer and provide copies of preferences of stock classes in certain circumstances is being deleted. The Exchange proposes to delete certain requirements that a company publish information in connection with certain corporate actions along with the requirement for domestic companies that a company solicit

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<sup>23</sup> The Commission notes that this requirement will continue to exist in Section 204.05 of the Manual.

<sup>24</sup> The Commission notes that this requirement will continue to exist in Sections 303A.06 and 303A.07 of the Manual. See Notice, supra, note 3.



proxies for all meetings of stockholders.<sup>25</sup> The foreign listing agreement will, however, be modified as noted below to include a solicitation requirement.

Some of the key provisions that will be included in the reformulated listing agreements for domestic companies and foreign private issuers are: (i) a certification by the issuer that it understands and agrees to comply with all current and future rules, listing standards, procedures and policies of the Exchange; (ii) an agreement by the issuer to promptly notify the Exchange in writing of any corporate action or other event which will cause the issuer to cease to be in compliance with Exchange listing requirements; (iii) the issuer agrees to maintain a transfer agent and registrar which satisfies the requirements set forth in Section 601.00 of the Manual et seq.; (iv) the issuer agrees to file all required periodic financial reports with the SEC, including annual reports and, where applicable, quarterly or semi-annual reports, by due date established by the SEC; (v) the issuer agrees to comply with all requirements under the federal securities laws and applicable SEC rules; and (vi) that nothing contained in, or inferred from the listing agreement shall be construed as constituting a contract for the continued listing of the company's securities and that the company understands that the Exchange may suspend the company's securities and commence delisting proceedings with or without prior notice upon failure of the company to comply with one or more sections of the listing agreement. In addition to the above key provisions, foreign private issuers must also agree to: (i) solicit proxies from U.S. holders for all meetings of shareholders; and (ii) not appoint any successor or additional Depository unless such Depository has entered into a listing agreement with the Exchange.

#### Listing Application

The Exchange has proposed deleting from the Manual the form of original listing

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<sup>25</sup> The Commission notes that these requirements will continue to exist in Sections 202.05, 202.06, 202.12 and 402.04 of the Manual. See Notice, supra note 3.

application contained in Section 903.01 (Listing Applications). The revised form of original listing application will be provided on the Exchange's website. In general, the information the Exchange proposes to remove from the Listing Application is being removed because the Exchange believes such information is available in the applicant's filings with the SEC, made pursuant to the Exchange Act or the Securities Act of 1933.<sup>26</sup> Information being removed from the Listing Application includes the following: (i) a discussion of the history and present business of the company; (ii) for public utilities, a description of the services renders, territory and population covered, and other segmented information about the utility; (iii) a description of the physical property of the company; (iv) information related to affiliated companies; (v) information related to 10% owners of the company; (vi) a description of control held by another company; (vii) information related to the management of the company, including names and titles of all directors and officers; (viii) a summary of the authorized stock capitalization of the company since organization; (ix) a description of the funded debt of the company and any subsidiaries or controlled companies; (x) a summary of the rights, preferences, privileges and priorities of the stock of the company along with any indentures or restrictions related to the stock; (xi) a description of the number of employees along with a description of any work stoppages due to labor disagreements and any pension, retirement, bonus or other plans of benefit which may be in effect; (xii) a description of shareholder relations procedures that are followed; (xiii) a description of any dividends paid; (xiv) a description of the terms and conditions of any options, purchase warrants, conversion rights or other commitments which

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<sup>26</sup> 15 U.S.C. 77a. When listing a company in connection with its initial public offering or other securities offering, the Exchange relies on the company's Securities Act prospectus that registered the transaction. See Notice, supra note 3 for details of the types of filings NYSE relies on for companies transferring from another market or over-the-counter market, or listing in connection with certain transactions.

may require the company to issue its securities; (xv) a description of all pending litigation of a material nature; (xvi) information relating to the independent public accountants, Chief Executive Officer, Chief Financial Officer, any potential future commodity commitments the company may make, and other policies that could be material in determining the company's financial position; and (xvii) information relating to the financial statements of the company. Specific information that will continue to be required as part of the application, although in a different form, includes: (i) a statement that the application is the company's original listing application; and (ii) a description of the shares being offered (number, date of authorization, and purpose of authorized but unissued shares).

#### Transfer Agent Agreements

The Exchange has proposed to delete from the Manual the forms of transfer agent and registrar agreements currently set forth in Sections 906.01, 906.02 and 906.03 of the Manual. In both of its revised listing agreements, the Exchange has included an explicit agreement by the applicant issuer to abide by the transfer agent and registrar requirements set forth in Section 601.00 of the Manual et seq. The Exchange does not believe the use of transfer agent and registrar agreements is necessary because, as is detailed in the Notice, each provision contained in the transfer agent and registrar agreements can also be found in Section 601.00 of the Manual et seq. Furthermore, the Exchange does not believe it needs to enter into agreements with the transfer agent and registrar because any company whose transfer agent and registrar do not comply with Section 601.00 of the Manual et seq., would not be eligible for original, or continued, listing on the Exchange.

### III. Discussion and Commission Findings

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>27</sup> Specifically, the Commission finds that the Proposal is consistent with Section 6(b)(5) of the Act,<sup>28</sup> 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 mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, as discussed in more detail below, the Commission believes that the Proposal is consistent with the investor protection and public interest goals of the Exchange Act because the rules of the Exchange will continue to ensure that the NYSE has the information needed, whether through Commission filings or the applicant issuer, to conduct a rigorous review of an application for listing. In addition, among other things, and as discussed in more detail below, the rule changes should increase transparency in the listing process as well as further investor protection by codifying into the listing agreement the requirement that a listed company must comply with all the rules of the Exchange as well as the federal securities laws and rules thereunder.

The Commission finds that the changes proposed to Sections 102.01C, 103.01B, 103.04, 104.01, 104.02, 204.00, 204.04, 204.13, 204.18, 204.23, 703.01 (part 1), 703.02 (part 3), 703.04, 703.05, 703.06, 703.07, 703.08, 703.09, 703.10, 703.11, 703.12, 703.13, 703.14, each of which provide that the form of listing application and information regarding supporting documents are available on the Exchange's website or from the Exchange upon request, are consistent with the act in that they make the necessary forms widely available. The Commission notes, and the Exchange acknowledged in its original filing, that in the event that the Exchange makes any

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<sup>27</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>28</sup> 15 U.S.C. 78f(b)(5).

substantive changes to the documents being removed from the Manual,<sup>29</sup> the Exchange will be required, under Section 19b(1) of the Act, to submit a rule filing to obtain approval of such changes.<sup>30</sup> Furthermore, the Commission notes that the Exchange has represented that it will maintain all historical versions of those documents on its Web site after changes have been made in order to make it possible to review how each document has changed over time.<sup>31</sup>

The Exchange proposed to add new Section 104.00 describing the Exchange's free confidential review process. The application process is further described in Section 702.00 which describes the steps an issuer must follow in obtaining a clearance letter. Among other clarifications about the confidential review and listing process, the new language states that if a company has to pay an initial application fee, that it will be informed in writing that upon payment of the fee, it will receive a clearance letter to list. This process should give issuers certainty that they will not have to pay a non-refundable initial application fee if they will not be receiving a clearance letter to list. The Commission finds the addition of rule language describing the application process to be consistent with the protection of investor and the public interest in that it makes the listing application process more transparent for issuers.

The Exchange has proposed to amend Sections 104.01 and 104.02 to remove the requirement that the copy of the charter and by-laws (or equivalent constitutional documents) be

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<sup>29</sup> As noted in the Notice, these documents include the listing application and the listing agreement. See 78 FR 29165. These documents were submitted as part of the NYSE's rule filing as Exhibit 3 and amended Exhibit 3 to the filing.

<sup>30</sup> See 78 FR 29165. The Exchange represented that in the event that the Exchange makes any substantive changes (including changes to the rights, duties, or obligations of the applicant or the Exchange, or that would otherwise require a rule filing), it will submit a rule filing to the Commission to obtain approval of such changes. The Exchange noted that it would not submit a rule filing if the changes made to a document are typographical or stylistic in nature.

<sup>31</sup> The Commission notes that this should allow it to monitor for compliance with Section 19(b) of the Act.

certified and to require that specimens of bonds or stock certificates be provided only if they exist. The Commission finds these changes to be consistent with the protection of investors and the public interest in that they make it easier for issuers to comply with the listing application requirements without weakening the quality of information provided to the Exchange.

The Exchange believes that the provisions the Exchange proposes to include in new Section 107.00 are consistent with the protection of investors and the public interest. The requirements included in proposed Section 107.00 are all policies the Exchange has long applied as part of its initial listing process and they are important in ensuring that only qualified companies are admitted to listing. These provisions specify the accounting standards upon which a listing determination will be made, require the issuer's auditor to be PCAOB registered, require the timely filing of periodic reports, and comply with any Exchange requests for additional information and documentation. The Commission finds these provisions to be consistent with the Act in that they provide the Exchange with additional abilities to ensure that only qualified companies are listed on the Exchange.

The Exchange further proposed to change Section 501.01 to require listed companies to issue new certificates for securities listed on the Exchange, replacing lost ones upon notification of the loss and receipt of proper indemnity. Amended Section 501.02(c) would require that, following the issuance of a duplicate bond issued to replace a lost, stolen or destroyed bond, should the original bond subsequently appear in the hands of an innocent bondholder, the original or duplicate bond must be taken up and cancelled. The Commission notes that these provisions are identical to those currently set forth in the existing forms of listing agreements, which the Exchange is proposing now to delete from the Manual in this filing. The Commission

believes these provisions are consistent with the Act in that they are intended to protect shareholders and innocent bondholders.

The Exchange has proposed to delete Sections 906.01, 906.02 and 906.03 from the Manual and will no longer be entering into contracts with transfer agents. As a result, the Exchange proposed to amend Sections 601.01(A) and (B) to reflect the addition of certain provisions currently found in Sections 906.01, 906.02 and 906.03. The provisions being added to Sections 601.01(A) would require that the transfer agent: (i) comply with the rules of the Exchange; (ii) maintain offices for the purposes of transfer activities that are staffed by experienced personnel; (iii) maintain adequate facilities for the safekeeping of securities; (iv) maintain facilities to expedite transfers; (v) appoint an agent for service of process. The provision being added to Section 601.01(B) would require the transfer agent to take immediate corrective action on any material weakness specified in the auditor's report and submit a subsequent letter indicating that the material weakness has been corrected. The provision also notes that no approval to act in a dual capacity as transfer agent or registrant will be approved until the auditor's report has been delivered. The Exchange is deleting Section 601.03 in its entirety since it merely contains cross-references to Sections 906.01, 906.02 and 906.03. The listing agreement will also require the issuer to maintain a registered transfer agent and a registrar, as necessary, which satisfies the requirements of Section 601.00. The Commission believes these changes are consistent with the protection of investors and the public interest since the specific requirements being deleted will still be included in Section 601.01 of the Manual. Furthermore, if a listed company does not use a transfer agent that is in compliance with the provisions contained in Section 601.01, which includes capital surplus requirements, such company would no longer meet the requirements set forth in the Manual and the listing

agreement and could be delisted from the Exchange. The Commission believes this will ensure that a listed company will have a qualified transfer agent and registrar at all times while listed on the Exchange, protecting investors and the public interest.

The Exchange's proposed deletion of Section 702.01 of the Manual in its current form, as described above, is consistent with the protection of investors and the public interest, as it simply eliminates a description which is not accurate as it relates to the listing application process proposed to be adopted pursuant to this filing. The indicative timeline for the original listing of securities proposed to be deleted from Section 702.02 is very approximate and, according to NYSE, does not necessarily bear any relation to the listing experience of any individual company. The proposed changes to Sections 702.03, 702.04 and 702.05 of the Manual are consistent with the protection of investors and the public interest, as the information required to be included in the listing application that is detailed in these Sections will either continue to be required, or is readily available from another source (such as the Commission's EDGAR system).<sup>32</sup> As a result, the Exchange does not feel that it is necessary to include those requirements in the Manual. The Commission believes that the elimination of these Sections from the Manual is consistent with the protection of investors and the public interest as it simplifies the listing process without sacrificing any of the substantive information available to the Exchange. Furthermore, the elimination of these provisions could result in a cost savings for the issuer, and therefore investors, while not resulting in any significant weakening in the regulatory requirements.

The Commission believes that the proposed deletions from Sections 703.01 through

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<sup>32</sup> See Notice, *supra* note 3, for a detailed discussion of these items and whether they are retained or not and, if not, why. In addition the list of supporting documents to be retained was submitted as part of the rule filing in Exhibit 3, as amended.



703.14, relating to the application process and the filing of the listing application and any supplemental, or supporting, documents, is consistent with the Act as the information required to be provided by these Sections would still be required as part of the Listing Application or are readily available from other sources (such as the Commission's EDGAR system).<sup>33</sup> In addition, the Exchange has retained certain language in its rules covering the listing application process and a suggested timetable for filing an application.<sup>34</sup>

The Commission believes that the proposed addition to the Exchange's continued listing criteria, Section 802.01D, of the stipulation that a listed company could face delisting if it breaches the terms of its listing agreement is consistent with the Act as it sets forth specifically in the Manual the Exchange's ability to remove unsuitable companies from its market for such violations. While, as NYSE notes, it currently has broad discretion to delist a company when its continued listing is inadvisable, the Commission believes that explicitly stating that a violation of the listing agreement may result in delisting provides transparency to listed companies and investors, and is consistent with the terms of the listing agreement. The Commission also believes that the removal of unsuitably listed companies serves to protect investors and the public interest.

The proposed modifications to the domestic and foreign listing agreements, and their removal from the Manual, are consistent with the protection of investors and the public interest because: (i) certain provisions are duplicative and are already included elsewhere in the

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<sup>33</sup> See Notice, supra note 3. In its filing, NYSE noted that each subsection of Section 703.00 would be modified to state that the form of listing application and the information regarding supporting documents required in connection with supplemental listing applications and debt securities applications would be available on the Exchange's website or from the Exchange upon request.

<sup>34</sup> See, for example, changes to 703.01 (Part 1) and 703.01 (Part 2) being proposed in the Exhibit 5 to the rule filing.

Manual;<sup>35</sup> (ii) certain provisions are no longer applicable and their removal is consistent with previous actions by the Commission to eliminate similar requirements; (iii) certain provisions are no longer relevant in light of changes to the structure and practices in the securities markets;<sup>36</sup> or (iv) certain provisions, as is discussed above, have been added to the Manual or new agreements. Removing Sections 901.00-901.05, 902.01 and 903 of the Manual and adding them to the Exchange's website are consistent with the protection of investors and the public interest, as the proposed changes streamline the Exchange's listing process, making it more easily understood, while at the same time do not result in a weakening of the Exchange's regulatory requirements.<sup>37</sup>

The Commission notes that certain key provisions, discussed above, are either being added or will remain in the reformulated listing agreements. These provisions include: (i) an acknowledgement by the issuer that a violation of all current and future rules, listing standards, procedures and policies of the Exchange along with a failure by the issuer to promptly notify the Exchange of any corporation action or other event that causes the issuer to cease to be in compliance with the Exchange's listing requirements could result in removal of the issuer's securities from listing and trading on the Exchange; (ii) a requirement that the issuer file all required periodic financial reports with the Commission, including annual reports and, where applicable, quarterly or semi-annual reports by the due dates established by the Commission; and

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<sup>35</sup> See Exhibit 3 for a full list of supporting documents still required. We note that other Exchanges do not list the supporting documents required to be included with an application for listing.

<sup>36</sup> For example, public companies now make a significant number of disclosure via the Commission's EDGAR system, including the disclosure of the public company's annual and quarterly financial statements. NYSE has represented that, in addition to its other surveillance activities, it relies, in part, on information available in EDGAR when monitoring companies for compliance with listing standards and other Exchange rules, and when evaluating a prospective company for listing.

<sup>37</sup> The Commission notes that making certain agreements available via the Exchange's website would be consistent with the manner in which similar agreement are made available by other national securities exchanges.

(iii) a requirement that the issuer agrees to comply with all requirements under the federal securities laws and applicable Commission rules. The Commission believes that the inclusion of these provisions is consistent with the Act in that each of these provisions aids in the protection of investors and the public interest. In addition, the Commission notes that the listing agreement for foreign private issuers includes the requirement that foreign private issuers solicit proxies from U.S. holders for all meetings of shareholders.<sup>38</sup> The Commission believes that this is an important provision consistent with the Act as it provides U.S. investors with information relating to the meetings of shareholders for companies that are not required to follow U.S. proxy rules, thus aiding in the protection of investors and the public interest.<sup>39</sup> The Commission believes that a listed company should deliver the proxy statement in a sufficient period of time before the shareholder meeting so as to allow shareholders time to receive, review and vote on the information set forth in the proxy materials and annual report.<sup>40</sup> In other words, the Commission expects that, in order to satisfy this requirement of the listing agreement, foreign private issuers would solicit proxies from U.S. investors sufficiently in advance of the shareholder meeting so as to allow U.S. investors a reasonable opportunity to vote.<sup>41</sup>

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<sup>38</sup> See also, NYSE Rule 402 and Section 203.01 of the Manual which applies to all listed companies, foreign and domestic.

<sup>39</sup> The Commission notes that other exchanges do not have specific requirements relating to the timeframes under which proxies must be provided to investors. Instead, exchanges generally rely on the rules of the Commission or the jurisdiction under which they have been incorporated.

<sup>40</sup> See Securities Exchange Act Release No. 33768 (March 16, 1994).

<sup>41</sup> The Commission notes that domestic issuers already have to do so under Commission proxy rules. The Commission, however, also notes that while foreign private issuers are not required to follow proxy rules promulgated by the Commission, Section 4 of the Listing Manual contains certain provisions regarding shareholders' meetings and proxies. See 17 CFR 240.3a-12-3(b).

One key change being made to the listing agreements is the removal of certain requirements relating to disclosures about the issuers business, financial and accounting policies. Specifically, the Exchange has proposed to remove from the listing agreement the requirement that an issuer disclose how long the independent public accountant has audited the company's accounts; whether their audit is continuous or periodic, or the extent of their authority. However, the Commission notes that Regulation S-X contains requirements relating to auditor independence that provide assurances as to the independence and qualifications of the auditor that, in the Commission's opinion, more than adequately replace the requirements being deleted by the proposal. As a result, the Commission believes that these changes are consistent with the Act.

Many of the provisions that are being removed from the listing agreement, as noted above, are being removed because they are already included in other sections of the Manual or NYSE believes it no longer needs the issuer to provide additional information because it is obsolete or already receives the information through Commission filings and its monitoring of such through EDGAR. For example, one eliminated provision had required companies to provide four copies of all material mailed to stockholders with respect to amendments or proposed amendments to its certificate of incorporation. NYSE indicated that it has other rules that require companies to provide it with copies of notices to shareholders concerning charter amendments. In addition, NYSE noted that its rules require listed companies to submit to it copies of all proxy material submitted to shareholders. While the Commission notes that the current requirement in the listing agreement requires copies of all communications to shareholders concerning an amendment to its certificate of incorporation, we are satisfied that the requirements in NYSE's rules should provide it with adequate notice of changes to a company's

certificate of incorporation for purposes of monitoring compliance with Exchange rules and corporate actions that could impact the trading of the company's securities. Another example concerns the deletion, from the listing agreement, of the requirement that a listed company promptly notify the Exchange of any action to fix a stockholders' record date, or to close the transfer books, and that it will give the Exchange at least ten days' notice in advance of such record date or closing of the books. In support of deleting these from the listing agreement the Exchange cited several existing Sections of the Manual that contain these requirements and also stated that it notifies companies of these requirements in a letter sent annually to all listed companies. The Commission continues to believe that notification to the Exchange 10 days in advance of fixing a date for taking a record of shareholders and the closing of the transfer books is important. As a result, the deletion from the listing agreement simply recognizes that this is already covered elsewhere in NYSE's rules.

Other provisions of the listing agreement that are being permitted to be deleted, such as a requirement that a listed company will not make any substantial change in accounting methods without notifying the Exchange and disclosing the effect of any such change in its next interim and annual report to its stockholders, are being done in recognition of the fact that, under Commission disclosure rules, any changes in accounting methods and its effect on the company would have to be disclosed in Commission filings, such as 10-Ks and 10-Qs. Exchange monitoring of such filings, as well as material news requirements under Exchange rules, should give the Exchange the information necessary to monitor for compliance with Exchange rules, and listing standards, along with any potential trading impact. As a result, the Commission believes it is consistent with investor protection and the public interest to remove this provision from the listing agreement. Finally, some of the requirements in the current listing agreement are

being updated to reflect current requirements. For example, in terms of publishing quarterly statements of earnings to the same degree of consolidation as in the annual report, the Exchange is adding a provision that the listed company agrees to file all required periodic financial reports with the Commission, including annual reports and, where applicable, quarterly or semi-annual reports, by the due dates established by the Commission. In summary, the Commission notes that provisions being deleted from the Manual because they are covered elsewhere under Exchange rules, or under Commission requirements, are not meant to provide support that the Commission no longer believes these provisions are necessary. Rather, based on the NYSE's filing, we are satisfied these substantive provisions are covered elsewhere in Exchange or Commission rules.

The proposed deletions of Sections 904.01 through 904.03 of the Manual are consistent with the protection of investors and the public interest, as: (i) the Stock Distribution Schedule in Section 904.01 is obsolete because the Exchange has indicated it obtains the distribution information it needs from the company's transfer agent; (ii) the information required by Section 904.02 would still be required in the revised listing application.

The proposed modifications to the listing application are consistent with the protection of investors and the public interest, because the Exchange is simply eliminating from the application information requirements that are duplicative of disclosure requirements under the Federal securities laws or where similar disclosure provisions under the Federal securities laws provide information sufficient for the Exchange to make informed determinations about the suitability of issuers for listing.

A significant number of changes are technical in nature and relate to updating internal cross-references and rule numbering as a result of the changes described above. As a result, the

Commission finds these changes consistent with the act as they work to protect investors and the public interest by removing confusion in the application and organization of the Manual.

IV. Accelerated Approval of Proposed Rule Changes, as Modified by Amendment No. 1

The Amendment No. 1 revised the proposal to, among other things, ensure that the rule text provided is properly marked, therefore reducing confusion when determining which rule changes have been proposed and remove unnecessary provisions from the listing agreements. In addition, changes proposed in Amendment No. 1 will clarify and strengthen the Exchange's proposal and listing application process, and avoid redundancies and ambiguities that exist in the original filing, thereby making the listing process more streamlined and efficient. Accordingly, the Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>42</sup> for approving the proposal, as modified by Amendment No. 1, prior to the 30<sup>th</sup> day after the date of publication of notice in the Federal Register.

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<sup>42</sup> 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>43</sup> that the proposed rule changes (SR-NYSE-2013-33), as modified by the Amendment No. 1, be, and hereby are, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>44</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>43</sup> 15 U.S.C. 78s(b)(2).

<sup>44</sup> 17 CFR 200.30-3(a)(12).