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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69963; File No. SR-NYSE-2013-49)

July 10, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Several NYSE Rules to Reflect Changes to Rules and Adopt Guidance of the Financial Industry Regulatory Authority

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 26, 2013, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend and adopt several NYSE rules<sup>3</sup> to reflect changes to rules of the Financial Industry Regulatory Authority (“FINRA”). Specifically, the Exchange proposes to: (1) amend Rule 8210 to conform to changes recently adopted by FINRA for FINRA Rule 8210, which concerns the provision of information and testimony and inspection and copying of books and records; (2) adopt certain FINRA guidance on the Rule 8000–9000 Series; and (3) amend Rule 8320 with respect to the non-payment of fines. The text of the proposed rule changes is available on the

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

<sup>2</sup> 17 CFR 240.19b-4 (2013).

<sup>3</sup> All references to rules herein are to NYSE rules, unless otherwise specified.

Exchange's website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule changes and discussed any comments it received on the proposed rule changes. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to: (1) amend Rule 8210 to conform it to changes recently adopted by FINRA for FINRA Rule 8210, which concerns the provision of information and testimony and inspection and copying of books and records; (2) adopt certain FINRA guidance on the Rule 8000–9000 Series; and (3) amend Rule 8320 with respect to the non-payment of fines.

Background

On July 30, 2007, the National Association of Securities Dealers, Inc. ("NASD"), NYSE, and NYSE Regulation, Inc. ("NYSE") consolidated their member firm regulation operations into a combined organization, FINRA, and entered into a plan to allocate to FINRA regulatory responsibility for common rules and common members ("17d-2 Agreement").<sup>4</sup> In 2007, the parties also entered into a Regulatory Services

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<sup>4</sup> See Securities Exchange Act Release No. 56148 (July 26, 2007), 72 FR 42146 (Aug. 1, 2007) (File No. 4-544) (Notice of Filing and Order Approving and Declaring Effective a

Agreement (“RSA”), whereby FINRA was retained to perform certain regulatory services on behalf of NYSE for non-common rules. On June 14, 2010, the Exchange, NYSE, and FINRA amended the RSA and retained FINRA to perform the market surveillance and enforcement functions that had previously been performed by NYSE up to that point.<sup>5</sup> Accordingly, since June 14, 2010, FINRA has been performing all NYSE enforcement-related regulatory services on behalf of NYSE, including disciplinary proceedings relating to NYSE-only rules and against dual members and non-FINRA members. To facilitate FINRA’s performance of these enforcement functions under the RSA and to further harmonize the rules of NYSE with those of FINRA, NYSE recently adopted the text of the FINRA Rule 8000–9000 Series, which set forth rules for conducting investigations and enforcement actions, with certain modifications.<sup>6</sup> The new rules were implemented on July 1, 2013.<sup>7</sup>

#### Proposed Rule Change

FINRA recently amended FINRA Rule 8210, effective February 25, 2013.<sup>8</sup> The Exchange proposes to amend the text of Rule 8210 to conform to FINRA Rule 8210.

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Plan for the Allocation of Regulatory Responsibilities). The 17d-2 Agreement was entered into in accordance with the requirements of Rule 17d-2 of the Commission, which permits self-regulatory organizations to allocate regulatory responsibilities with respect to common members and common rules. See 17 CFR 240.17d-2 (2013).

<sup>5</sup> See Securities Exchange Act Release No. 62355 (June 22, 2010), 75 FR 36729 (June 28, 2010) (SR-NYSE-2010-46).

<sup>6</sup> See Securities Exchange Act Release Nos. 68678 (Jan. 16, 2013), 78 FR 5213 (Jan. 24, 2013) (SR-NYSE-2013-02), and 69045 (Mar. 5, 2013), 78 FR 15394 (Mar. 11, 2013).

<sup>7</sup> See NYSE Information Memorandum 13-8 (May 24, 2013).

<sup>8</sup> See Securities Exchange Act Release No. 68386 (Dec. 7, 2012), 77 FR 74253 (Dec. 13, 2012) (SR-FINRA-2009-060) and FINRA Regulatory Notice 13-06. When the Exchange submitted the Notice to the Commission, FINRA had not yet announced the effective date of the amendments to FINRA Rule 8210.

The Exchange's Rule 8210 became operative on July 1, 2013, which was the date that the Exchange had announced as the operative date of the Rule 8000–9000 Series.<sup>9</sup> The text of the rule is substantially the same as the text of FINRA's rule, except for technical and conforming amendments.<sup>10</sup>

Rule 8210 confers on Exchange staff the authority to compel a member organization or covered person to produce documents, provide testimony, or supply written responses or electronic data in connection with an investigation, complaint, examination, or adjudicatory proceeding. The proposed rule change would clarify the scope of the Exchange's authority under the rule to inspect and copy the books, records, and accounts of such member organizations or covered persons, specify the method of service for certain unregistered persons under the rule, and authorize service on attorneys who are representing clients.

Rule 8210 applies to all member organizations and covered persons over whom the Exchange has jurisdiction, including former covered persons subject to the Exchange's jurisdiction as described in Rule 8130. Rule 8210(c) provides that a member organization's or covered person's failure to provide information or testimony or to permit an inspection and copying of books, records, or accounts is a violation of the rule.

Information in a Member Organization's or Covered Person's Possession, Custody or Control

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<sup>9</sup> See supra note 7.

<sup>10</sup> The Exchange uses the terms member organization and covered person rather than member and associated person, which FINRA uses. The term covered person includes anyone subject to the Exchange's jurisdiction. See Notice, supra note 6, at 5219–5220. Also, unlike FINRA, the Exchange does not enforce Municipal Securities Rulemaking Board rules, so reference to those rules is not included in the Exchange's text.

Rule 8210(a)(2) currently provides that Exchange staff shall have the right to inspect and copy the books, records, and accounts of all member organizations and covered persons with respect to any matter involved in an investigation, complaint, examination, or proceeding. The proposed rule change would clarify that the information that Exchange staff shall have the right to inspect and copy must be in the member organization's or covered person's "possession, custody or control." This language parallels the Federal Rules of Civil Procedure regarding document requests and subpoenas for documents.<sup>11</sup>

#### Notice to Associated but Unregistered Persons

Rule 8210 addresses the legal concept of service of a written request by using the term "notice" of a request. Currently, Rule 8210(d) states that, with respect to member organizations and covered persons, notice shall be deemed received by the member organization or covered person when a copy of the notice is mailed or otherwise transmitted to the last known relevant address of the member organization or covered person as reflected in the Central Registration Depository ("CRD"). The CRD system contains information concerning registered member organizations and certain covered persons,<sup>12</sup> but in most instances it does not contain information concerning unregistered persons who are or were associated with a member organization.<sup>13</sup>

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<sup>11</sup> See Fed. R. Civ. P. 34.

<sup>12</sup> Member organizations and registered persons will have an affirmative duty to update CRD with their current address for at least two years after they have had their registration terminated. See *infra* note 18.

<sup>13</sup> In some limited instances, CRD may contain information concerning unregistered persons who were required to submit information, including fingerprint information, to CRD in connection with their employment.

Although not routine, some investigations require Exchange examiners or investigators to request information from persons currently or formerly associated with a member organization in an unregistered capacity.<sup>14</sup> The current rule is unclear as to what would constitute proper notice on such persons for whom information is not available in CRD. The proposed rule change would explicitly address the methods by which notice would be deemed received by persons currently or formerly associated with a member organization in an unregistered capacity.

With respect to unregistered persons currently associated with a member organization, the proposed rule change would provide that notice shall be deemed received by mailing or otherwise transmitting the notice to the last known business address of the member organization as reflected in CRD. In addition, the proposed rule change would retain the provision that if Exchange staff responsible for transmitting the notice has actual knowledge that the member organization's address provided through CRD is out of date or inaccurate, then a copy of the notice must be transmitted to both the address provided through CRD, as well as any more current address known to Exchange staff.

With respect to unregistered persons formerly associated with a member organization, the proposed rule change would provide that notice shall be deemed received

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<sup>14</sup> Unregistered persons may include persons exempt from registration, e.g., personnel performing the mechanical function of recording an order and passing it along the usual communication channels, telephoning reports of executions or reading quotations when the person handling the account is unavailable. See NYSE Interpretation Handbook, Rule 345(a)/01. For purposes of Rule 8210, unregistered persons associated with a member organization may also include direct owners and executive officers listed in Schedule A of Form BD of a member organization whose job functions do not otherwise require them to register; such persons would fall under the definition of covered person. See Rule 9120(g).

upon personal service, which is described in Rule 9134(a)(1).<sup>15</sup> FINRA Rule 9134(a)(1) is based on traditional concepts for serving a summons under Rule 4 of the Federal Rules of Civil Procedure.<sup>16</sup>

Notice to Member Organizations and Covered Persons Represented by Counsel

The proposed rule change would amend Rule 8210(d) to explicitly address issues of service on member organizations or covered persons that are known to be represented by counsel. Currently, the rule does not explicitly permit Exchange staff to serve notice on a member organization's or covered person's counsel in situations in which Exchange staff knows that the member organization or covered person is represented by counsel regarding the matter in question. The proposed rule change would allow Exchange staff to recognize that counsel can act as an authorized agent on behalf of a member organization or covered person. It would provide that, if Exchange staff knows that a member organization or covered person is represented by counsel regarding the matter in question, then notice shall be provided to counsel rather than to the member organization or covered person. The proposed rule change would harmonize the Exchange's rule in this regard with Codes of Professional Conduct in many states regarding service on counsel.<sup>17</sup>

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<sup>15</sup> Rule 9134(a)(1) provides that personal service may be accomplished by handing a copy of the papers to the person required to be served, leaving a copy at the person's office with an employee or other person in charge thereof, or leaving a copy at the person's dwelling or usual place of abode with a person of suitable age and discretion then residing therein.

<sup>16</sup> See Fed. R. Civ. P. 4.

<sup>17</sup> See, e.g., American Bar Association model Rule of Professional Conduct 4.2 ("ABA Rule 4.2"). ABA Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Id. Many states have

### Supplementary Material

The proposed rule change would add supplementary material to Rule 8210. The supplementary material would state that Rule 8210 requires Exchange member organizations and covered persons to provide Exchange staff and adjudicators with requested books, records, and accounts. In specifying the books, records and accounts “of such member organization or covered person,” paragraph (a) of the rule refers to books, records, and accounts that the broker-dealer or its associated persons make or keep relating to its operation as a broker-dealer or relating to the person’s association with the member. This includes but is not limited to records relating to an Exchange investigation of outside business activities, private securities transactions or possible violations of just and equitable principles of trade, as well as other Exchange rules and the federal securities laws. It does not ordinarily include books and records that are in the possession, custody or control of a member organization or covered person, but whose bona fide ownership is held by an independent third party and the records are unrelated to the business of the member organization. The rule requires, however, that an Exchange member organization or covered person make available its books, records, or accounts when the books, records, or accounts are in the possession of another person or entity, such as a professional service provider, but the Exchange member organization or covered person controls or has a right to demand them.

### Adoption of FINRA Guidance

The Exchange has determined that all interpretive guidance issued by FINRA with respect to the Rule 8000–9000 Series for which the Exchange has adopted

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rules regarding communication with a person represented by counsel that are based on ABA Rule 4.2.

substantially the same rule text would be equally applicable in NYSE investigations and disciplinary proceedings as a stated policy and practice of the Exchange.<sup>18</sup> The Exchange notes that it has not adopted the text of certain FINRA rules, which are marked “Reserved” in the Exchange’s rulebook. The text of Rule 9217 and the Rule 9300 Series are not substantially the same as FINRA’s counterpart rules because the Exchange has retained its own list of minor rule violations and its own appellate process. As such, FINRA guidance concerning such rules and “Reserved” rules would not be applicable. The Exchange believes that this policy and practice would help ensure that there is consistency in the application of substantially similar rules.

#### Amendment to Rule 8320

To facilitate the transition from the Exchange’s former disciplinary rules to the new FINRA-based disciplinary rules, the Exchange amended Rule 309 to provide that any member, member organization or principal executive who fails to pay a fee or any other sums due to the Exchange, within 45 days after the same is payable, shall be reported to the Chief Financial Officer of the Exchange or designee who, after notice has been given to such member, member organization or principal executive of such arrearages, may suspend access to some or all of the facilities of the Exchange until

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<sup>18</sup> See, e.g., FINRA Rule 8210 Frequently Asked Questions, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p250124.pdf>; Notice to Members 99-77 (noting that requests for information and disciplinary complaints issued during the period of retained jurisdiction will be mailed to a person’s last address in CRD, and thus there is an affirmative duty to update CRD with a current address for at least two years after a member organization or registered person has had its registration terminated); Notice to Members 04-19 (noting that a minor rule violation letter may be appropriate to address more than one violation in a single action, and in cases where two or more rule violations are disposed of in one letter, the maximum penalty will be \$2,500); Regulatory and Compliance Alerts, Vol. 12, No. 4, Winter 1998 (allowing respondents to submit a “Correction Action Statement” and “Mitigation Statement” with an executed acceptance, waiver, and consent letter).

payment is made. The rule provides an exception for failing to pay a fine levied in connection with a disciplinary action, which would be governed by Rule 8320. Rule 8320 permits summary suspensions for the non-payment of fines, monetary sanctions, and costs.

Rule 8320 cross-references to sanctions imposed under Rule 8310, which in turn references sanctions imposed under the Rule 9000 Series. The Exchange notes that if a disciplinary action was ongoing at the time that the Rule 9000 Series became effective on July 1, 2013, it would be concluded under Rule 476. To prevent any potential gap in the rules and clarify the transitional rules, the Exchange proposes to amend Rule 8320 to add a new paragraph (d) that would provide that the Exchange may exercise the authority set forth in Rule 8320 with respect to non-payment of a fine, monetary sanction, or cost assessed in a disciplinary action initiated under Rule 476 for which a decision was issued on or after July 1, 2013.

## 2. Statutory Basis

The Exchange believes that the proposed rule changes are consistent with Section 6(b) of the Act,<sup>19</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>20</sup> in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. In addition, the Exchange believes that the proposed rule changes further

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

<sup>20</sup> 15 U.S.C. 78f(b)(5).

the objectives of Section 6(b)(7) of the Act,<sup>21</sup> in particular, in that it provides fair procedures for the disciplining of members<sup>22</sup> and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange or a member thereof.

The proposed change to Rule 8210 would provide greater harmonization between Exchange and FINRA rules of similar purpose, resulting in greater uniformity in investigative rules and less burdensome and more efficient regulatory compliance. As previously noted, the proposed rule text is substantially the same as FINRA's recently adopted rule text, which already has been approved by the Commission.<sup>23</sup> As such, the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposed change to Rule 8320 would prevent any potential gap in the rules concerning non-payment of fines, monetary sanctions, and costs and clarify the transition from the old to the new disciplinary rules. The Exchange believes that the proposed rule change will provide respondents with better notice of potential sanctions, thereby improving the fairness of its disciplinary proceedings.

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

The Exchange does not believe that the proposed rule change would result in any

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<sup>21</sup> 15 U.S.C. 78f(b)(7).

<sup>22</sup> The Exchange's equivalent to the term member in this context is member organization.

<sup>23</sup> See supra note 8.

burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather is designed to provide greater harmonization among Exchange and FINRA rules of similar purpose for investigations, resulting in less burdensome and more efficient regulatory compliance for common members and facilitating FINRA's performance of its regulatory functions under the RSA. The proposed rule changes are also intended to provide greater clarity and notice to respondents during the transition from the old disciplinary rules to the new disciplinary rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>24</sup> and Rule 19b-4(f)(6) thereunder.<sup>25</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

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<sup>24</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>25</sup> 17 CFR 240.19b-4(f)(6) (2013). In addition, Rule 19b-4(f)(6) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>26</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>27</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange stated its belief that this proposal is non-controversial and will not significantly affect the protection of investors because the Exchange is not proposing any substantive changes and is merely amending its rule text to mirror FINRA's rules. Further, the Commission has previously considered the amendments to FINRA Rule 8210, which this proposed rule change mirrors, as well as comments responding to the amendments to FINRA Rule 8210.<sup>28</sup> Based on the Exchange's statements and the Commission's previous experiences with FINRA Rule 8210 amendments, the Commission believes that waiving the operative delay is

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<sup>26</sup> 17 CFR 240.19b-4(f)(6) (2013).

<sup>27</sup> 17 CFR 240.19b-4(f)(6)(iii) (2013).

<sup>28</sup> See Securities Exchange Act Release No. 68386 (Dec. 7, 2012), 77 FR 74253 (Dec. 13, 2012) (SR-FINRA-2009-060). FINRA initially filed its proposed rule change to FINRA Rule 8210 with the Commission on September 10, 2009. The proposed rule change was published for comment in the Federal Register on October 22, 2009. See Exchange Act Release No. 60836 (Oct. 16, 2009), 74 FR 54614 (Oct. 22, 2009). The Commission received seven comment letters on the proposed rule change. See Securities Exchange Act Release No. 68386 (Dec. 7, 2012), 77 FR 74253 (Dec. 13, 2012) (SR-FINRA-2009-060). On December 22, 2009, FINRA filed a letter with the Commission responding to these comments, and on December 21, 2011, FINRA filed Amendment No. 1 with the Commission to further respond to the comments and to propose amendments in response. See letter from Stan Macel, Assistant General Counsel, Regulatory Policy and Oversight, FINRA, to Elizabeth M. Murphy, Secretary, SEC, dated December 22, 2009, available at <http://www.sec.gov/comments/sr-finra-2009-060/finra2009060.shtml>. On December 5, 2012, FINRA filed Amendment No. 2 with the Commission to modify a phrase that was included in Amendment No. 1. The Commission published notice of the filing on December 7, 2012 and solicited comments on Amendments Nos. 1 and 2. See Securities Exchange Act Release No. 68386 (Dec. 7, 2012), 77 FR 74253 (Dec. 13, 2012) (SR-FINRA-2009-060). The Commission did not receive comments in response to the amendments.

consistent with the protection of investors and the public interest. Accordingly, the Commission hereby grants the Exchange's request and waives the 30-day operative delay.<sup>29</sup>

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSE-2013-49 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,  
Securities and Exchange Commission, 100 F Street, NE, Washington, DC  
20549-1090.

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<sup>29</sup> For purposes only of waiving the operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

All submissions should refer to File No. SR-NYSE-2013-49. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NYSE-2013-49 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>30</sup>

Elizabeth M. Murphy  
Secretary

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<sup>30</sup> 17 CFR 200.30-3(a)(12) (2013).

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