

compensation based on the REIT's earnings.

In a limited number of cases, a single entity or affiliated entities may externally manage more than one REIT. As an incentive for all of the REITs in such a group to list on the Exchange, the Exchange proposes to offer a group discount on Annual Fees when there are at least three REITs under common management. The Exchange believes that this will be attractive to management companies that externally manage multiple REITs as it will increase the REITs' earnings and therefore also increase the performance-based management fees received by the external manager. The Exchange expects that external managers and their board representatives will be highly incentivized to encourage the boards of their managed REITs to avail themselves of the discount and that it will therefore motivate eligible REITs to remain listed on the Exchange or to transfer their listing to the Exchange.

The Exchange does not believe that the limitation of the proposed discount to groups of three or more REITs under common management is unfairly discriminatory. While the Exchange perceives a competitive benefit to be obtained by providing the discount, we are also cognizant of the fact that the discount will cause us to lose revenue. We are concerned that the revenue loss we could sustain over time if we applied the discount to circumstances where two REITs shared common management would far exceed the benefit in terms of retaining listings or obtaining new listings, as the number of eligible REITs could broaden significantly. The small reduction in revenue the Exchange expects as a result of the discount will not hinder the Exchange's ability to fulfill its regulatory responsibilities. The Exchange also notes that the Annual Fees applicable to all other REITs and operating companies are remaining unchanged, so no company that is not qualified for the discount is being asked to pay higher Annual Fees than it is currently paying.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act<sup>3</sup> in general and Section 6(b)(4)<sup>4</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges

among its members and other persons using its facilities.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

Written comments were neither solicited nor received.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- A. By order approve such proposed rule change, or
- B. Institute proceedings to determine whether the proposed rule change should be disapproved.

## 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-2007-113 on the subject line.

### *Paper Comments*

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-NYSE-2007-113. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's

Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2007-113 and should be submitted on or before January 25, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>5</sup>

Nancy M. Morris,  
Secretary.

[FR Doc. E7-25625 Filed 1-3-08; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57058; File No. SR-NYSE-2007-102]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to NYSE Rule 1500 (NYSE MatchPoint<sup>SM</sup>)

December 28, 2007.

## I. Introduction

On November 8, 2007, the New York Stock Exchange LLC ("NYSE") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt NYSE Rule 1500 to establish NYSE MatchPoint<sup>SM</sup> ("MatchPoint"), an electronic facility that matches aggregated orders at predetermined, one-minute sessions

<sup>5</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> 15 U.S.C. 78f.

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

throughout regular hours and after hours of the Exchange. The proposed rule change was published for comment in the **Federal Register** on November 23, 2007.<sup>3</sup> On December 27, 2007, NYSE filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 1 thereto.

## II. Description of the Proposal

NYSE proposes to adopt NYSE Rule 1500 to establish NYSE MatchPoint, an electronic facility that matches aggregated orders at seven predetermined, one-minute matching sessions during regular trading hours and one matching session during the after hours of the Exchange.<sup>5</sup> MatchPoint will trade securities listed on NYSE as well as securities listed on other exchanges and admitted to unlisted trading privileges ("UTP") on NYSE.<sup>6</sup> MatchPoint is an anonymous trading platform and no order

information will be displayed and clearance and settlement of executions will be anonymous. Trade reports will be disseminated after each matching session.

### A. Participation Eligibility

All NYSE members, member organizations and sponsored participants of sponsoring member organizations are automatically eligible for access to MatchPoint.<sup>7</sup> Before access is granted to MatchPoint users, all users must go through a connectivity authorization process.<sup>8</sup> Specialists on the floor of the Exchange are not authorized to access MatchPoint.<sup>9</sup> The off-floor operations of specialist firms may obtain authorized access to MatchPoint provided they have policies and procedures and barriers in place that preclude improper information sharing between the specialist firm and the firm's specialist on the floor of the Exchange.<sup>10</sup>

Members who have authorized access to MatchPoint are not permitted to enter orders into the MatchPoint system from the floor of the Exchange when such orders are for their own accounts, the accounts of associated persons, or accounts over which it or an associated person exercises investment discretion.<sup>11</sup> Similarly, members on the floor may not have such orders entered into MatchPoint by sending them to an off-floor facility for entry. Members with authorized access to MatchPoint may only enter customer orders into MatchPoint from the floor of the Exchange. Members that have authorized access to MatchPoint may enter proprietary and customer orders

into MatchPoint from off the floor of the Exchange.<sup>12</sup>

### B. MatchPoint Order Parameters

MatchPoint participants ("users") transmit their market and limit orders, which are undisplayed, by means of an electronic interface. MatchPoint users may enter, correct or cancel orders beginning at 3:30 a.m. until 4:45 p.m.<sup>13</sup> The MatchPoint system will not accept any orders before 3:30 a.m. or after 4:45 p.m. MatchPoint will accept and execute single orders and NYSE MatchPoint Portfolios ("portfolios").

MatchPoint orders must be designated for only one of the matching sessions during regular hours of the Exchange or for the single after hours matching session.<sup>14</sup> A user must designate an order for only one matching session at a time. All MatchPoint orders, single and portfolio, must have the following parameters: (1) List name;<sup>15</sup> (2) matching session (if a user fails to designate a specific matching session, the system will provide a default function and direct the order to the next eligible matching session); (3) side of the market (*i.e.*, buy, sell or short side); (4) symbol; and (5) minimum and maximum amount of shares available for execution.<sup>16</sup> Additionally, a user may include an optional constraint (*i.e.*, net cash and internal match constraints) for a MatchPoint order.<sup>17</sup> Orders may be either market or limit orders and must have a minimum size of one round lot. MatchPoint will permit odd lot and partial round lot orders to be entered into the system; however, odd lot orders and the odd lot portion of partial round lot orders will not be executed.<sup>18</sup>

Orders may not be cancelled or replaced while a matching session is in progress or when trading in the

<sup>3</sup> See Securities Exchange Act Release No. 56798 (November 15, 2007), 72 FR 65787 ("Notice").

<sup>4</sup> In Amendment No. 1, NYSE proposed technical and clarifying amendments to the proposed rule change. In Amendment No. 1, NYSE proposes to: (1) Clarify that allocation of orders in the MatchPoint system may, during regular trading hours of the Exchange, occur some seconds before or after the end of the one-minute matching session; (2) clarify which securities may be traded on the MatchPoint system and that MatchPoint will not trade securities that are not listed on any securities exchange; (3) clarify that for purposes of the MatchPoint system the "primary market" is the listing market and if a security is dually listed, the "primary market" will be the market in which the particular security is trading the greatest volume of shares; (4) clarify that partial round lots (*i.e.*, "mixed lots") may be entered into MatchPoint as single orders or as part of a portfolio, but the odd lot portion of the order will not be executed; (5) clarify that the NYSE is requesting that the Commission concur with the NYSE's interpretation that MatchPoint orders entered from off the Floor of the Exchange comply with the provisions of Rule 11a2-2(T) of the Act; (6) represent that participation in MatchPoint would be voluntary and open to all eligible NYSE market participants and would not result in any advantage to market participants that participate in matching sessions over those that do not participate; and (7) make conforming technical and clarifying changes to the proposed rule text. Because Amendment No. 1 is technical in nature, the Commission is not publishing it for comment.

<sup>5</sup> MatchPoint matching sessions will occur during the Exchange trading hours at 9:45 a.m., 10 a.m., 11 a.m., 12 p.m., 1 p.m., 2 p.m. and 3 p.m. A MatchPoint after hours matching session will occur at 4:45 p.m. See proposed Rule 1500(a)(1). NYSE will need to file a proposed rule change with the Commission if it plans to alter the times of the MatchPoint matching sessions and/or add or eliminate matching sessions.

<sup>6</sup> See proposed Rule 1500(b)(2)(E). Securities admitted to unlisted trading privileges could be listed on NYSE Arca, Inc. ("NYSE Arca"), the NASDAQ Stock Market, Inc. ("Nasdaq"), the American Stock Exchange ("Amex"), or other stock exchanges. MatchPoint will not trade securities that are not listed on any securities exchange.

<sup>7</sup> In Amendment No. 1, NYSE represented that participation in MatchPoint will be voluntary and open to all eligible NYSE market participants, and will not result in any advantage to market participants that participate in matching sessions over those market participants that do not participate.

<sup>8</sup> MatchPoint can only be accessed through an electronic Financial Information exchange ("FIX") application and/or an internet based password-protected order entry application. Users must fill out an application for connectivity through either of these two electronic connectivity capabilities. Once granted connectivity through the authorization process, eligible users may access MatchPoint.

<sup>9</sup> See proposed Rule 1500(g)(4)(A).

<sup>10</sup> The Exchange stated that, currently, all specialist organizations on the Exchange utilize information barrier procedures pursuant to NYSE Rule 98 (Restrictions on Approved Person Associated with a Specialist's Member Organization). The Exchange has represented that the information barrier procedures that would be utilized to block access by a specialist to any MatchPoint trading information generated by the off-floor personnel of the specialist organization would be similar in design and utilization.

<sup>11</sup> See proposed Rule 1500(g)(4)(B).

<sup>12</sup> *Id.*

<sup>13</sup> See proposed Rule 1500(d)(1).

<sup>14</sup> If a MatchPoint order does not execute in the designated matching session, it will be cancelled back to the user immediately upon completion of the matching session. If a user fails to designate a particular matching session for a MatchPoint order, the order, by default, will be available for execution in the next scheduled matching session. If an undesignated order does not execute in the next scheduled regular hours matching session it will be cancelled back to the user immediately upon completion of such matching session. If a user fails to designate an order and enters the order after 3 p.m., which is the last regular hours matching session, the order will participate in the after hours matching session at 4:45 p.m. If the order does not execute in the after hours matching session it will be cancelled back to the user immediately upon completion of the after hours matching session.

<sup>15</sup> A portfolio must have a unique portfolio name that is distinct from the names of other portfolios of the same user.

<sup>16</sup> See proposed Rule 1500(d)(2)(A).

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

<sup>18</sup> See proposed Rule 1500(d)(2)(C).

applicable security is halted in the MatchPoint system.<sup>19</sup> MatchPoint orders will not be available for execution until the next eligible matching session. All orders must be available for automatic execution. MatchPoint has no order delivery capability and will not route to other market centers. Users, however, would be able to enter eligible orders into MatchPoint through a FIX<sup>20</sup> application and/or an Internet based order entry system provided the orders are available for automatic execution. The Exchange stated that MatchPoint orders will not trade-through a protected bid or protected offer as defined in Regulation NMS.<sup>21</sup>

### C. MatchPoint Order Allocation

MatchPoint matching sessions occur through an automated matching mechanism. During the matching sessions, the MatchPoint Reference Price ("Reference Price")<sup>22</sup> is determined and eligible orders are executed at the designated hour at the randomly selected time during the predetermined one-minute trading session.<sup>23</sup> The matching and execution of orders occurs immediately after the algorithm selects a Reference Price.<sup>24</sup> If

an order is not executed in a particular matching session it will be immediately cancelled back to the user upon completion of the matching session. The user may resubmit the order in any one of the subsequent matching sessions.

MatchPoint orders will be allocated on a *pro rata* basis.<sup>25</sup> Shares will be allocated *pro rata* in round lots (rounded down to the nearest 100 shares) to eligible orders based on the original size of the order.<sup>26</sup> In this process MatchPoint will honor all user-directed constraints. If the allocation to an eligible order is less than the minimum acceptable execution quantity for that order, the order will not be eligible for execution in that matching session. If additional shares remain after the initial *pro rata* allocation, those shares will continue to be allocated *pro rata* to eligible orders. If additional shares remain thereafter that are the same size or are unexecuted because of rounding or minimum trade size constraints, the remaining shares will be allocated in 100 share lots to the oldest eligible orders.<sup>27</sup>

#### 1. Portfolio Trading

A MatchPoint user may submit NYSE MatchPoint Portfolios into the MatchPoint system for execution.<sup>28</sup> An NYSE MatchPoint Portfolio is a group of linked orders with user-directed parameters and a unique, user-defined portfolio name.<sup>29</sup> The portfolio orders may represent separate and distinct broker-dealer-customer orders and separate and distinct proprietary broker-dealer orders. A user may enter one portfolio of buy and sell/short orders or many portfolios of buy and sell/short orders.

#### 2. Internal Match Constraints

MatchPoint portfolio users may effectuate internal matches and simultaneously match residual shares

against orders from other users within a single matching session when using an optional internal match constraint. This type of constraint enables the user to execute trades between the same user's portfolios first before trading with other available orders in a particular matching session. If any residual orders remain after an internal match occurs, the residual portfolios will trade with all other orders. Single orders may be designated for internal matches as well.

Internal matches have priority over other executions. MatchPoint will first process internal matches and then process all other orders in the matching session. All user-directed constraints will be honored in the internal match. An internal match constraint, like a MatchPoint order, is active only for a single matching session. A user may resubmit a new internal match constraint when resubmitting an order for a different matching session.

All orders that are designated with an internal match designation and entered by the same user are eligible for matching with all such orders. For example, single orders that have an internal match designation are capable of matching with all other orders entered by the same user that have an internal match designation. Portfolio orders within a portfolio that are designated for internal matches are also capable of matching with one another when entered by the same user. Such orders are allocated on a *pro rata* basis.<sup>30</sup>

#### 3. Net Cash Constraints

MatchPoint portfolio users may utilize an optional "net cash" constraint.<sup>31</sup> A user entering a single order may also place a net cash constraint on that order. To execute a net cash constraint, a user must enter a specific net buy dollar amount and a specific net sell dollar amount for a portfolio. A net cash constraint is active only for a single matching session. A user may resubmit a new net cash constraint when resubmitting an order for a different matching session.

When calculating a customer's net cash constraint position, the matching algorithm takes into account the eligible portfolio order shares in a specific security, the Reference Price of the security and the customer's net cash constraint. MatchPoint first processes the stock with the largest orders in the largest portfolios. In order to honor all cash constraints, the matching algorithm processes all single and portfolio orders

<sup>19</sup> See proposed Rule 1500(d)(2).

<sup>20</sup> FIX Protocol is a messaging standard developed specifically for the real-time electronic exchange of securities transactions.

<sup>21</sup> See 17 CFR 242.600(b)(57).

<sup>22</sup> The Reference Price is the single trading price at which MatchPoint orders will execute during a predetermined one-minute "matching session." During the regular hours of the Exchange, the Reference Price will be the midpoint of the national best bid and national best offer ("NBBO") which is randomly selected during a predetermined one-minute pricing period. See proposed Rule 1500(b)(2)(I). For the after hours MatchPoint matching session, the Reference Price will be the official closing price of the primary market (*i.e.*, the listing market) for securities listed on the NYSE, NYSE Arca, Amex, Nasdaq, and regional stock exchanges. If, however, there is no official closing price for a particular security, the Reference Price will be the last sale price of the primary market for a particular security. See proposed Rule 1500(c)(1)(A) and (c)(2)(A).

<sup>23</sup> See proposed Rule 1500(c)(1)(A).

<sup>24</sup> During the Exchange's regular trading hours, the allocation of orders in the matching sessions may occur some seconds after the end of the one-minute matching session, depending on when within the one-minute pricing window the MatchPoint algorithm randomly selects the Reference Price. For example, if the algorithm selects the Reference Price (*i.e.*, the midpoint of the NBBO) early in the one-minute pricing window, the algorithm has sufficient time to allocate all of the orders before the end of the one-minute matching session. If the algorithm selects the Reference Price late in the one-minute pricing window, the one-minute matching session may be extended a few seconds to allow the algorithm to allocate all MatchPoint orders. In any case, execution takes place immediately after the Reference Price is randomly selected, and all orders are executed at the same Reference Price in a given matching session.

During the after hours matching session, the Reference Price is the official closing price or the last sale price of a particular security. Because this price is static, there is no need to randomly select a time during the one-minute pricing window to determine the Reference Price. Therefore, the allocation of orders in the after hours matching session will always be completed within the one-minute matching session.

<sup>25</sup> See proposed Rule 1500(d)(3).

<sup>26</sup> MatchPoint will execute orders only in round lots. The MatchPoint system will accept odd lot orders but not execute them. Similarly, orders containing partial round lots (*i.e.*, "mixed lots") may be entered into MatchPoint but the odd lot portion of the order will not be executed. The system will permit the entry of odd lot and partial round lot orders to accommodate portfolio orders.

<sup>27</sup> For an example of how MatchPoint allocates shares on a *pro rata* basis, see Notice, *supra* note 3, at 65790.

<sup>28</sup> See proposed Rule 1500(d)(2)(D).

<sup>29</sup> See proposed Rule 1500(b)(2)(g).

<sup>30</sup> For an example of how an internal match is executed, see Notice, *supra* note 3, at 65791.

<sup>31</sup> See proposed Rule 1500(b)(2)(C) and (d)(2)(D).

in a particular security that have net cash constraints and calculates share allocation by applying a percentage of the original order size to contra side shares that are available to fill the order. The algorithm takes this percentage calculation and multiplies it by the Reference Price. This calculation is then compared to the order's net cash constraint and determines if the allocation of the available contra side shares will violate the order's net cash constraint. If the calculation violates the net cash constraint, these shares will not be allocated to the contra side order but may be allocated to other eligible orders. This algorithmic process continues until all eligible orders are executed.<sup>32</sup> A net cash constraint placed on a portfolio may affect the execution of other orders in the matching session by generally allowing additional shares for such other orders to be executed. In addition, net cash constraints will generally result in fewer executions of a portfolio and may inhibit the maximum order execution potential of a particular security in a particular matching session.

#### 4. Price Collar Threshold in the After Hours Matching Session

In the after hours matching session, the Exchange will place parameters called a "Price Collar Threshold" on the prices of all MatchPoint eligible securities in order to dampen volatility and provide accurate pricing for executions. A Price Collar Threshold is an after hours market price beyond which a MatchPoint order will not be executed.<sup>33</sup> In a situation in which the market has moved significantly from the official closing price of the primary market based on information that becomes available after the market close, the Exchange will cancel the after hours MatchPoint matching session rather than execute the matching session at a price that no longer reflects the market accurately. All unexecuted orders will be immediately cancelled back to the user upon completion of the matching session. The Price Collar Threshold will be set at two percent (2%) initially, and may later be adjusted by the Exchange, up to a maximum of five percent (5%) of the MatchPoint after hours Reference Price.<sup>34</sup>

<sup>32</sup> For examples of (1) how portfolios, with and without a net cash constraint, are executed in MatchPoint and (2) a chart comparing the post match customer net cash position results (*i.e.*, total dollars raised and total dollars spent), *see* Notice, *supra* note 3, at 65791–92.

<sup>33</sup> *See* proposed Rule 1500(a)(2)(f) and (c)(2)(B).

<sup>34</sup> The Exchange has represented that it will inform its users of any such adjustment via the NYSE MatchPoint Web site at <http://>

#### 5. Locked and Crossed Markets

If the NBBO for a particular security is locked at the time of a MatchPoint matching session during the regular trading hours of the Exchange, the matching session will execute orders at the locked price.<sup>35</sup> Unexecuted MatchPoint orders in that security will be cancelled back to the user immediately upon completion of the matching session.

If the NBBO for a particular security is crossed at the time of a MatchPoint matching session during the regular trading hours of the Exchange, the matching session in that particular security will not occur.<sup>36</sup> Unexecuted MatchPoint orders in that security will be cancelled back to the user immediately upon completion of the matching session.

#### D. Regulatory

##### 1. Halting, Suspending and Closing of MatchPoint Trading on NYSE

Trading on MatchPoint will be halted, suspended or closed<sup>37</sup> when necessary in order to maintain a fair and orderly market, and in certain other conditions, as described below.<sup>38</sup> If trading in a particular security is halted, suspended or closed due to regulatory or unusual market conditions at the time a matching session commences, the matching session will not occur in that security and all unexecuted orders will be immediately cancelled back to the user upon completion of the matching session.

MatchPoint trading may be halted, suspended or closed when: (1) In the exercise of its regulatory capacity, the Exchange determines such action is necessary or appropriate to maintain a fair and orderly market, to protect investors, or otherwise is in the public interest due to extraordinary circumstances or unusual market conditions; (2) in the case of a particular security whenever, for regulatory purposes, trading in the related security has been halted, suspended or closed on the Exchange or the primary listing exchange; (3) in the case of a particular

[www.nyse.com/MatchPoint](http://www.nyse.com/MatchPoint) and the Member Firm Notice, and will provide notice of such adjustments to all users reasonably in advance of any such adjustment. For an example of how the Price Collar Threshold is calculated, *see* Notice, *supra* note 3, at 65793.

<sup>35</sup> *See* proposed Rule 1500(c)(1)(B).

<sup>36</sup> *See* proposed Rule 1500(c)(1)(C).

<sup>37</sup> The use of the word "close" in the context of this rule refers to the intentional closing of the market due to regulatory or other unusual circumstances as described above, and does not refer to the predetermined "close" or end of the regular trading day at 4 p.m.

<sup>38</sup> *See* proposed Rule 1500(f).

security trading on the Exchange pursuant to UTP, whenever, for regulatory purposes, trading in that security has been halted, suspended or closed on the primary listing exchange; (4) with respect to a particular security trading on the Exchange pursuant to UTP, if the authority under which a security trades on the Exchange or its primary market is revoked (*i.e.*, because it is delisted); or (5) in the after hours matching session, news reports and/or corporate actions are disclosed after the close of the regular hours of the market that have a material impact on a particular security, which may include the following situations: (a) New corporate earnings; (b) major market index company deletions or additions; (c) corporate takeovers; (d) other significant corporate actions; (e) court decisions and injunctions; and (f) governmental announcements.<sup>39</sup> No terms or conditions specified in the proposed rule would be interpreted to be inconsistent with any other rules of the Exchange.

##### 2. Clearance and Settlement of MatchPoint Executions

Details of each MatchPoint trade will be automatically matched and compared by the Exchange and will be submitted to a registered clearing agency for clearing and settlement on a locked-in basis.<sup>40</sup> All executions effected by a member or member organization will be cleared and settled using the member's and member organization's account, and all executions effected by a sponsored participant will be cleared and settled using the relevant sponsoring member organization's account.

MatchPoint transaction reports will indicate the details of the transaction but not to reveal contra party and clearing firm identities, except under the following circumstances: (1) In the event the NSCC<sup>41</sup> ceases to act for a member or member organization, which is the unidentified contra side of any such trade processing, and/or the relevant clearing firm, the NYSE would have the responsibility to identify to members or member organizations the trades included in reports produced by the NSCC which are with the affected member or member organization, and (2) for regulatory purposes or to comply with an order of a court or arbitrator.<sup>42</sup>

<sup>39</sup> *Id.*

<sup>40</sup> *See* proposed Rule 1500(e)(1).

<sup>41</sup> Completed MatchPoint trades will be submitted for clearance and settlement to National Securities Clearing Corporation ("NSCC"), which is a subsidiary of the Depository Trust and Clearing Corporation.

<sup>42</sup> *See* proposed Rule 1500(e)(2) and (e)(3).

The trade reports that the NSCC will receive from MatchPoint for anonymous trades will contain the identities of the parties to the trade. This measure will enable the NSCC to conduct its risk management functions and settle anonymous trades. The trade report sent to the NSCC will contain an indicator noting that the trade is anonymous. On the contract sheets the NSCC issues to its participants, the NSCC will substitute "ANON" for the acronym of the contra-party.

### 3. Dissemination of Trading Information

The MatchPoint system will report trade information to the Securities Information Processors for all MatchPoint eligible securities. Trades will be reported as one print for each security with the total volume of the transaction reported with the price. Market data for NYSE-listed securities will be disseminated via the consolidated tape pursuant to the Consolidated Tape Association Plan ("CTA Plan").<sup>43</sup> Trade reports of securities that are governed by the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on an Unlisted Trading Privilege Basis ("UTP Plan") will be disseminated pursuant to the UTP Plan.<sup>44</sup> All trades will indicate the market of execution as the NYSE for CTA and UTP purposes.

### 4. Member Organization and Non-Member Access to MatchPoint

Members and member organizations of the Exchange are automatically eligible for access to MatchPoint by their membership on the Exchange. A non-member who wishes to trade securities on MatchPoint may do so as a "Sponsored Participant" of a member organization, *i.e.*, "Sponsoring Member Organization," and must enter into a written agreement with the Sponsoring Member Organization and with the Exchange.<sup>45</sup> All members, member organizations, and Sponsored Participants of Sponsoring Member Organizations must first obtain connectivity authorization before they can access MatchPoint.<sup>46</sup>

The proposed rule requires the Sponsoring Member Organization and the Sponsored Participant to enter into a sponsorship arrangement and maintain a written "sponsorship agreement." The sponsorship agreement

must be agreed to by both the Sponsoring Member Organization and the Sponsored Participant and include provisions for "Authorized Traders."<sup>47</sup> Such written agreement must include the Sponsoring Member's consent to sponsor the Sponsored Participant.<sup>48</sup>

### III. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange<sup>49</sup> and, in particular, the requirements of section 6 of the Act.<sup>50</sup> Specifically, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,<sup>51</sup> which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. MatchPoint, via both single order and portfolio trading, would provide market participants and investors with an additional mechanism for order execution. The Commission, in relying on NYSE's representation that participation in the matching session would be voluntary and open to all eligible NYSE market participants and would not result in any advantage to market participants that participate in matching sessions over those market participants that do not choose to participate, believes that MatchPoint is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

NYSE has proposed to execute matching session orders at a predetermined Reference Price at a randomly selected point in time during

a one-minute trading window. The Commission notes that using the automated and random matching mechanism to execute a matching session cross should minimize the opportunity for manipulation. In addition, the Commission notes that, should NYSE desire to institute additional matching sessions or to modify the time of matching sessions in the future, it must submit a rule change to the Commission pursuant to 19(b) of the Act.<sup>52</sup>

#### A. Trading Ahead

Because matching session orders that are executed during the regular hours session would be executed at the midpoint of the NBBO, it is possible that a NYSE member would trade ahead of a held customer order by less than \$0.01 (*i.e.*, \$ 0.005). In the event a MatchPoint order executes at the midpoint of the NBBO and results in a member or member organization's trading ahead of a held customer order at the same price, NYSE Rule 92 (Limitations on Member's Trading Because of Customers' Orders) may be implicated. Rule 92(a) generally restricts a member or member organization from entering a proprietary order while in possession of a customer order. Rule 92(b) through (d) provides several exceptions to the general restrictions of Rule 92(a). The Commission notes that the Exchange has stated that all users must comply with Rule 92(a) when trading on the MatchPoint system unless such trading falls within an applicable exception in NYSE Rule 92(b) through (d).

#### B. Section 11(a) of the Act

Section 11(a) of the Act prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion ("Covered Accounts") unless an exception applies.<sup>53</sup> Rule 11a2-2(T), known as the "effect versus execute" rule, provides exchange members with an exemption from the section 11(a) prohibition. To comply with Rule 11a2-2(T)'s conditions, a member: (1) Must transmit the order from off the exchange floor; (2) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution; (3) may not be affiliated with the executing member; and (4) with respect to an account over which the member has investment discretion,

<sup>47</sup> See proposed Rule 1500(g)(3)(D).

<sup>48</sup> The provisions that must be included in the proposed sponsorship agreement are outlined in the Notice, *supra* note 3. See proposed Rule 1500(g)(3)(B).

<sup>49</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>50</sup> 15 U.S.C. 78f.

<sup>51</sup> 15 U.S.C. 78f(b)(5).

<sup>52</sup> 15 U.S.C. 78s(b).

<sup>53</sup> 15 U.S.C. 78k(a).

<sup>43</sup> See proposed Rule 1500(c)(1).

<sup>44</sup> *Id.*

<sup>45</sup> See proposed Rule 1500(g)(1).

<sup>46</sup> See proposed Rule 1500(g)(2).

neither the member nor its associated person may retain any compensation in connection with effecting the transaction without express written consent from the person authorized to transact business for the account in accordance with the Rule. NYSE requests that the Commission concur with its interpretation that MatchPoint orders entered from off the floor of the Exchange comply with these provisions of Rule 11a2-2(T).

### 1. Off-Floor Transmission

The requirement in Rule 11a2-2(T) for orders to be transmitted from off the exchange floor reflects Congress's intent that section 11(a) should operate to put member money managers and non-member money managers on the same footing for purposes of their transactions for covered accounts. In considering other automated systems, the Commission and the staff have stated that the off-floor transmission requirement would be met if a covered account order is transmitted from off the floor directly to the exchange floor by electronic means.<sup>54</sup> Because all orders for Covered Accounts sent to MatchPoint will be electronically submitted directly to the system from locations other than on the Exchange floor,<sup>55</sup> the Commission believes that

orders transmitted for execution on MatchPoint satisfy the off-floor transmission requirement.

### 2. Non-Participation in Order Execution

Rule 11a2-2(T) further provides that the exchange member and its associated persons may not participate in the execution of the transaction once the order has been transmitted to the exchange floor.<sup>56</sup> This requirement was included to prevent members with their own brokers on the exchange floor from using those persons to influence or guide their orders' execution. This requirement does not preclude members from canceling or modifying orders, or from modifying the instructions for executing orders, after they have been transmitted to the floor. Such cancellations or modifications, however, also must be transmitted from off the exchange floor.<sup>57</sup>

The Commission has stated that the non-participation requirement is satisfied by automated systems when the member's use of such a system entails relinquishing the ability to influence or guide the execution of a covered account order once transmitted into the system.<sup>58</sup> In MatchPoint, matching sessions commence automatically at a predetermined time. Matching, trading and pricing of orders is effectuated through a fixed algorithm,

which does not permit entry, correction or cancellation of orders during the matching session. Once a member submits an order to the MatchPoint system, the order will be executed pursuant to the MatchPoint algorithm and in accordance with Exchange rules. Although a member will still have the ability to modify or cancel an order entered into the MatchPoint system (prior to the commencement of the matching session), they will not otherwise have control over their order. Because MatchPoint users will relinquish control of their orders upon transmission to the MatchPoint system, and will not be able to influence or guide the execution of their orders, the Commission believes that the non-participation requirement is met with respect to orders that are executed automatically in MatchPoint.

### 3. Execution Through Unaffiliated Member

Although Rule 11a2-2(T) contemplates having an order executed by an exchange member who is unaffiliated with the member initiating the order, the Commission has recognized that the requirement is not applicable when automated exchange facilities are used, if the execution of the order is automatic once it has been transmitted into the system, and if the design of the system ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the system.<sup>59</sup> In such instances, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2-2(T).<sup>60</sup> The Commission notes that NYSE has represented that the MatchPoint system is designed to ensure that members using MatchPoint

<sup>54</sup> See Securities Exchange Act Release Nos. 54552 (September 29, 2006), 71 FR 59546 (October 10, 2006) (order approving proposed rule change of the American Stock Exchange LLC to establish new hybrid market); 29237 (May 31, 1991) (regarding NYSE's Off-Hours Trading Facility); and 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) (regarding the Amex Post Execution Reporting System, the Amex Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX's Communications and Execution System, and the Phlx's Automated Communications and Execution System) ("1979 Release"). See also Letter from Paula R. Jensen, Deputy Chief Counsel, Division of Market Regulation, Commission, to Angelo Evangelou, Senior Attorney, Chicago Board Options Exchange ("CBOE"), dated March 31, 2003 (regarding CBOE's CBOEdirect system) ("CBOEdirect Letter"); Letter from Paula R. Jensen, Deputy Chief Counsel, Division, Commission, to Jeffrey P. Burns, Assistant General Counsel, American Stock Exchange LLC ("Amex"), dated July 9, 2002 (regarding Amex's auto-ex system for options); Letter from Paula R. Jensen, Deputy Chief Counsel, Division, Commission, to Richard S. Rudolph, Counsel, Philadelphia Stock Exchange, Inc. ("Phlx"), dated April 15, 2002 (regarding Phlx's AUTOM System and its automatic execution feature AUTO-X); Letter from Paula R. Jensen, Deputy Chief Counsel, Division, Commission, to Kathryn L. Beck, Senior Vice President, Special Counsel and Antitrust Compliance Officer, Pacific Exchange, Inc. ("PCX"), dated October 25, 2001 (regarding Archipelago Exchange ("ArcaEx")) ("ArcaEx Letter"); and Letter from Brandon Becker, Director, Division, Commission, to George T. Simon, Foley & Lardner, dated November 30, 1994 (regarding Chicago Match) ("Chicago Match Letter").

<sup>55</sup> The Commission notes that NYSE Rule 1500(g)(4)(B) will prohibit members from entering orders into the MatchPoint system from the floor of

the Exchange when such orders are for their own accounts, the accounts of associated persons, or accounts over which it or an associated person exercises investment discretion. Further, the rule also prohibits members from having such orders entered into MatchPoint by sending them to an off-floor facility for entry. Members with authorized access to MatchPoint may only enter customer orders into the MatchPoint system from the floor of the Exchange.

<sup>56</sup> See Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (Order approving ArcaEx as the equities trading facility of PCX Equities Inc.); 1979 Release, *supra* note 54. See also CBOEdirect Letter, *supra* note 54; Letter from Larry E. Bergmann, Senior Associate Director, Division, Commission, to Edith Hallahan, Associate General Counsel, Phlx, dated March 24, 1999 (regarding Phlx's VWAP Trading System); Letter from Catherine McGuire, Chief Counsel, Division, to David E. Rosedahl, PCX dated November 30, 1998 (regarding OptiMark); Chicago Match Letter, *supra* note 54.

<sup>57</sup> See Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978); see also Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (order approving Nasdaq Stock Market LLC's registration as a national securities exchange) ("Nasdaq Exchange Order").

<sup>58</sup> See 1979 Release, *supra* note 54; see also, e.g., Securities Exchange Act Release Nos. 54422 (September 11, 2006), 71 FR 54537 (September 15, 2006) (order approving proposed rule change of CBOE to establish a screen based trading system for non-option securities) ("CBOE STOC Order"); 51666 (May 9, 2005), 70 FR 25631, 25633 (May 13, 2005) (order approving proposed rule change by International Securities Exchange, Inc. to establish facilitation, block order and solicited order mechanism).

<sup>59</sup> In considering the operation of automated execution systems operated by an exchange, the Commission has noted that while there is no independent executing exchange member, the execution of an order is automatic once it has been transmitted into the system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2-2(T). See 1979 Release, *supra* note 54; see also, e.g., Securities Exchange Act Release No. 54365 (August 25, 2006), 71 FR 52192 (September 1, 2006) (order approving initial phase of the Boston Stock Exchange, Inc.'s proposed rule change to establish Boston Equities Exchange Trading System) ("BeX Phase I Order"); CBOE STOC Order, *supra* note 58.

<sup>60</sup> See 1979 Release, *supra* note 54; see also, e.g., Securities Exchange Act Release No. 54238 (July 28, 2005), 71 FR 44758 (August 7, 2006) (order approving proposed rule change of NYSE Arca, Inc. to establish the OX trading platform); Nasdaq Exchange Order, *supra* note 57.

will not possess any special or unique trading advantages in the handling of their orders after transmitting them to the MatchPoint system.

#### 4. Non-Retention of Compensation for Discretionary Accounts

The Commission notes that MatchPoint users who intend to rely on Rule 11a2-2(T) in connection with transactions using the MatchPoint system must comply with the requirements of Section (a)(2)(iv) of the Rule.

In reliance on NYSE's representations and for the reasons set forth above, the Commission believes that members entering orders into the MatchPoint system would satisfy the requirements of Rule 11a2-2(T) under the Act.

#### C. Surveillance

The Commission notes that NYSE Regulation has represented that it has appropriate policies and procedures in place to adequately and effectively regulate the MatchPoint system, and that a surveillance plan will be implemented prior to any trading to monitor the operation of MatchPoint. Also, the Financial Industry Regulatory Authority, Inc. ("FINRA"), as agent for NYSE Group, will perform examinations of specialist firms that trade on MatchPoint.<sup>61</sup>

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>62</sup> that the proposed rule change (File No. SR-NYSE-2007-102), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>63</sup>

**Nancy M. Morris,**

*Secretary.*

[FR Doc. E7-25626 Filed 1-3-08; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>61</sup> As stated in the Notice, *supra* note 3, FINRA examiners will perform an on-site review of the combined specialist firm's written policies and procedures and determine if they are adequate in relation to trading on MatchPoint. In addition, FINRA will interview appropriate individuals both within the affected departments as well as other areas of the specialist firm to determine whether firm policies have been appropriately disseminated and appear to be followed in relation to MatchPoint trading. The examination will also determine whether there have been any apparent breaches of the information barriers.

<sup>62</sup> 15 U.S.C. 78s(b)(2).

<sup>63</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57059; File No. SR-NYSEArca-2006-76]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change as Modified by Amendment Nos. 1, 2 and 3 Thereto, Relating to Trading Shares of the Nuveen Commodities Income and Growth Fund Pursuant to Unlisted Trading Privileges

December 28, 2007.

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> notice is hereby given that on October 27, 2006, NYSE Arca, Inc. (the "Exchange"), through its wholly owned subsidiary, NYSE Arca Equities, Inc. ("NYSE Arca Equities"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. On March 8, 2007, May 4, 2007, and June 12, 2007, NYSE Arca submitted Amendment Nos. 1, 2 and 3, respectively, to the proposed rule change. This order provides notice of the proposed rule change as modified by Amendment Nos. 1, 2, and 3, and approves the proposal, as amended, on an accelerated basis.

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

The Exchange proposes to add new NYSE Arca Equities Rule 8.500 to permit the listing and trading of units of a trust or other similar entity ("Trust Units") that invests in the assets of a trust, partnership, limited liability company, corporation or other similar entity constituted as a commodity pool that holds investments comprising or otherwise based on futures contracts, options on futures contracts, forward contracts, commodities and high credit quality short-term fixed income securities or other securities. Pursuant to proposed new NYSE Arca Equities Rule 8.500, the Exchange seeks to trade Trust Units<sup>3</sup> of the Nuveen Commodities Income and Growth Fund ("Trust" or "Fund") pursuant to unlisted trading privileges ("UTP"). The text of the proposed rule change is available at the Exchange's principal

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

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

<sup>3</sup> The Trust Units of the Fund are referred to herein as the "Shares."

office, the Commission's Public Reference Room, and <http://www.nyse.com>.

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

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

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

###### 1. Purpose

The Exchange proposes to add new NYSE Arca Equities Rule 8.500 in order to permit trading, either by listing or pursuant to UTP, of Trust Units. When the Exchange is the listing market for the Trust Units, the Trust Units will be subject to the continued listing and trading criteria under proposed new NYSE Arca Equities Rule 8.500(d). In such an event, the Exchange would file a Form 19b-4 to list such Trust Units.

Pursuant to proposed NYSE Arca Equities Rule 8.500, the Exchange proposes to trade pursuant to UTP the Shares, which represent beneficial ownership interests in the assets of the Fund, consisting solely of units ("Master Fund Units") of the Nuveen Commodities Income and Growth Master Fund, LLC (the "Master Fund").<sup>4</sup> The Commission has approved the listing and trading of such Shares on the American Stock Exchange, LLC ("Amex").<sup>5</sup>

The Fund's primary investment objective is to seek total return through broad exposure to the commodities markets. The Fund's secondary objective is to provide investors with monthly income and capital

<sup>4</sup> The Fund and the Master Fund are commodity pools. The Master Fund is managed by Nuveen Commodities Asset Management, LLC (the "Manager"). The Manager is registered as a commodity pool operator (the "CPO") and a commodity trading advisor (the "CTA") with the Commodity Futures Trading Commission ("CFTC") and is a member of the National Futures Association ("NFA").

<sup>5</sup> See Securities Exchange Release No. 56880 (December 3, 2007), 72 FR 69259 (December 7, 2007) ("Amex Approval Order"). See also Securities Exchange Release No. 56465 (September 19, 2007), 72 FR 54489 ("Notice").