

enhancing competition among market participants, to the benefit of investors and the marketplace.

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

NYSE 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*

The Exchange has neither solicited nor received written comments on the proposed rule change.

### III. 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 ([www.sec.gov/rules/sro.shtml](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 Number SR-NYSE-2008-35 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File Number SR-NYSE-2008-35. 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, 100 F Street, NE., Washington, DC 20549, on official business days

between the hours of 10 a.m. and 3 p.m. Copies of the 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 Number SR-NYSE-2008-35 and should be submitted on or before June 13, 2008.

### IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, 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>7</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>8</sup> which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission finds good cause for approving this proposal before the 30th day after the publication of notice thereof in the **Federal Register**. The proposal seeks to clarify that the Exchange's listing and trading of ELDS under Section 703.21 of the Manual is subject to Rule 19b-4(e) under the Act. The proposal also clarifies the process for listing and trading ELDS that do not meet the standards of paragraphs (A) through (D) of Section 703.12 of the Manual. The Commission does not believe that these clarifications raise any novel regulatory issues.

Therefore, the Commission believes that accelerating approval of this proposal is appropriate and would ensure that the Exchange's rules clearly reflect the standards for listing and trading of ELDS and conform the NYSE's rules to those of other exchanges without delay.<sup>9</sup>

<sup>7</sup> In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> See e.g., Chicago Board Options Exchange Rule 31.5(I) and NYSE Arca Rule 5.2(j)(2).

### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (SR-NYSE-2008-35), be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E8-11550 Filed 5-22-08; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57827; File No. SR-NYSEArca-2008-49]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of a Proposed Rule Change Relating to Rule 10.12 (Minor Rule Plan) and Underlying Rules

May 15, 2008.

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 May 14, 2008, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission ("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 Rule 10.12 (Minor Rule Plan) ("MRP") and other related rules that underlie the minor rules violations, including Rules 9.2(c) (Customer Records), 11.1 (Adherence to Law), and 11.18 (Supervision).

The text of the proposed rule change is available at NYSE Arca's principal office, the Commission's Public Reference Room, and <http://www.nyse.com>.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</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.

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

In its filing with the Commission, NYSE Arca 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 IV 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 Minor Rule Plan fosters compliance with applicable rules and also helps to reduce the number and extent of rule violations committed by Options Trading Permit ("OTP") Holders, OTP Firms, and associated persons. The Exchange's enforcement staff has found that the MRP is particularly useful in reducing both the number and extent of rule violations because Rule 10.12 enables staff to promptly impose a limited but meaningful financial penalty soon after the violations are detected. The prompt imposition of a financial penalty helps to quickly educate and improve the conduct of OTP Holders, OTP Firms, and associated persons that have engaged in inadvertent or otherwise minor violations of the Exchange's rules, particularly those parties who may not pay attention to mere warnings that they are violating Exchange rules. By promptly imposing a meaningful financial penalty for such violations, the MRP focuses on correcting conduct before it gives rise to more serious enforcement action.

The Exchange has observed that new and altered patterns of activity by OTP Holders and Firms as well as numerous additions and amendments to other Exchange rules have created the need for revisions to the MRP as well as the underlying rules, which are described in greater detail below. The changes are designed to update Rule 10.12 to encompass new types of violations as well as update or otherwise correct existing MRP provisions and further clarify the circumstances when use of the MRP is appropriate.

The MRP will continue to be used for inadvertent and occasional rule violations. Serious violations of Exchange rules will continue to be

addressed through formal enforcement action.

#### Rule 10.12—Minor Rule Plan

##### Rule 10.12(e)—Minor Rule Plan

The Exchange proposes to clarify that any person or organization found in violation of a minor rule under Rule 10.12 is not required to report such violation on SEC Form BD or Form U-4.

##### Rule 10.12(h)—Minor Rule Plan: Options Floor Decorum and Minor Trading Rule Violations

The Exchange proposes to amend Rule 10.12(h) to reflect recent changes in options trading requirements, remove obsolete rule references, and create consistency with other exchanges in the imposition of fines.

In particular, the proposals include:

- (h)(2)—Amended to reflect that the violation includes all of Rule 6.67.
- (h)(9)—Amended to reflect that OTP Holders and Firms are no longer required to be physically present on the trading floor.
- (h)(12)—Amended to reflect that Rule 6.2 Commentary .02 is not related to the use of hand signals and also to remove an obsolete reference to Rule 6.67.
- (h)(13)—Amended to reflect reference to Rule 6.2(h) relating to registration of telephones on the trading floor.
- (h)(14)—Amended to remove the reference to Rule 6.69 because it is no longer relevant to the violation.
- (h)(15)—Removed because the provision is redundant with subsection (16).
- (h)(16)—Amended to consolidate certain violations of Rule 6.2.
- (h)(18)—Removed because the provision is redundant with subsection (16).
- (h)(20)—Amended to remove an obsolete rule reference due to all orders being electronically stamped.
- (h)(21)—Amended to include position and exercise limit violations.
- (h)(22)—Amended to remove the violation because it is incorporated in subsection (21).
- (h)(23)—Amended to remove reference to Rule 6.38(c) because the rule no longer exists.
- (h)(28)—Amended to remove reference to Rule 6.37(d) because the rule no longer relates to Market Makers' obligations to trade or update an existing market.
- (h)(29)—Amended to include failure to comply with certain trade-through provisions.
- (h)(30)—Amended (i) to delete a reference to the Trading Crowd/LMM

Questionnaire, which is no longer administered by the Exchange and (ii) to include violations of Authorized Trader Rules as contained in Rules 6.34 and 6.34A.

- (h)(34)—Amended to include order exposure requirement violations.
  - (h)(35)—Amended to include unlocking or uncrossing a market violations.
  - (h)(36)—Amended to clarify present rule and reflect correct rule reference.
  - (h)(37)—Amended to reflect that Market Makers no longer have a one-month grace period prior to applying for a primary appointment and reflect current rule.
  - (h)(38)—Amended to reflect correct rule text and expand scope of violation.
  - (h)(39)—Amended to reflect correct rule text.
  - (h)(40)—Amended to reflect correct rule reference.
  - (h)(42)—Amended to reflect correct rule reference.
  - (h)(43)—Amended to remove obsolete rule.
- Exchange systems now have a filter that electronically prevents Market Makers from entering quotes in issues outside their primary appointment.
- (h)(45)—Amended to reflect the addition of proposed Rule 11.1(b) and to remove obsolete rule text.
  - (h)(46)—Amended to reflect correct rule reference.

##### Rule 10.12(j)—Minor Rule Plan: Record Keeping and Other Minor Rule Violations

The Exchange proposes to amend Rule 10.12(j) to add several minor violations related to record keeping and other violations. Exchange staff frequently encounters inadvertent or otherwise minor violations of Rules 2.17, 2.23, 2.25, 9.2(a)–(c), 9.17, 11.3, 11.18(a)–(c), and 11.19. Such minor violations do not give rise to formal enforcement action. However, staff believes that it can further enhance compliance with these rules by imposing MRP fines, which will draw OTP Holders' and Firms' attention to the need for improved compliance by promptly imposing meaningful, but limited financial penalties for violations.

##### 10.12(k)—Minor Rule Plan: Recommended Fine Schedule

The Exchange proposes to change the procedure set forth in the MRP fine schedules to escalate MRP fine levels in cases involving multiple instances of the same offense.

This change will enhance the fair administration of the MRP in the context of higher speed and volume of

electronic trading on the NYSE Arca Marketplace.

Currently, the MRP Recommended Fine Schedule sets forth an initial MRP fine for a "First Violation," as well as a higher level for a "Second Violation" and a still higher level for a "Third Violation."

This escalation plan, which predates the widespread use of electronic trading on the Exchange, has led to several difficulties when applied to the much greater speed and volume of electronic trading.

While the fine escalation is meant to deter repeat offenses, it often fails to deliver this effect, because OTP Holders and Firms engaged in the high speed and volume of electronic trading can frequently incur "second" and "third" offenses before they are sanctioned or even notified of the initial violation.

For the same reason, these OTP Holders and Firms complain that it is unfair for them to incur escalated fine levels for second and third violations before they learn of their first violations.

Additionally, the current fine schedule does not allow an MRP sanction for any more than three violations. In some cases, this is appropriate, but in other cases, it makes sense to impose an MRP fine for the fourth violation as for the first three.

The MRP can best assist the Exchange's regulatory and enforcement efforts if it provides Exchange officials with discretion to determine how to address particular instances of multiple violations, rather than implicitly requiring formal enforcement action whenever there are more than three violations.

To address these concerns, the Exchange proposes to modify the Recommended Fine Schedules in NYSE Arca Rule 10.12(k) so that MRP fines are escalated based not on the number of "violations," but upon the number of times the Exchange has imposed one or more MRP fines upon a Permit Holder for the violation of a particular rule. The three current column headers in the Fine Schedules that specify different fine levels for first, second, and third "violations" will be replaced with "First Level," "Second Level," and "Third Level."

With this change, the Fine Schedule will continue to specify the fine to be imposed for each violation, but the first time a Permit Holder is fined under the MRP for the violation of a given rule, the fine for each violation will be imposed at the "First Level," whether there is one or more than one such violation.

*Example:*

Due to a newly-employed floor broker's misunderstanding the requirements of NYSE Arca Rule 6.47 and not being corrected for an entire afternoon, the employing OTP Holder, which has no previous rules violations, executes three cross transactions that afternoon on the Exchange that do not satisfy all the requirements of NYSE Arca Rule 6.47. Under the current MRP Fine Schedule in NYSE Arca Rule 10.12(i)(3), the OTP Holder would be charged under the MRP with a first violation fine of \$1,000, a second violation fine of \$2,500, and a third violation fine of \$3,500, for a total MRP fine of \$7,000. The escalation for the second and third offenses would be imposed under the current Fine Schedule even though all the violations occurred in the same afternoon, and the second and third violations occurred before the OTP Holder became aware of the first violation.

By contrast, under the change in the Fine Schedule proposed here, the fines no longer escalate based upon the number of offenses, but instead based on the number of times the OTP Holder has been fined for the same offense. Because the OTP Holder here had not previously been fined for violations of Rule 6.47, the OTP Holder would receive the "First Level" of \$1,000 per violation for each of the three violations, for a total MRP fine of \$3,000.

If the OTP Holders and Firms were later fined again under the MRP for more such violations, the fine for each violation would then be \$2,500. This proposed new procedure for escalating MRP fines is largely the same as the escalation procedure specified by the New York Stock Exchange LLC ("NYSE") in its "List of Exchange Rule Violations and Fines" for imposing summary fines pursuant to NYSE Rule 476A.

It will continue to be the case that nothing in the MRP will require the imposition of a MRP fine when Exchange enforcement officials believe that repeat violations or other aggravating factors warrant formal enforcement action.

#### *Other Changes to Rule 10.12(k)*

The fines for the current and proposed minor rule violations in subsections (h) and (j) are reflected in the Recommended Fine Schedule in Rule 10.12(k). The Exchange staff believes that the proposed fines are fair in relation to the scope and occurrence of the MRP violation by OTP Holders and Firms.

The Exchange has also proposed to amend Rules 10.12(k)(i) and 10.12(k)(iii) to include new footnotes 1 and 3

respectively. Rules 6.94(a) and (c) require OTP Holders to avoid violations of the trade-through rules and, where such violation is unavoidable, to provide satisfaction orders. Proposed footnote 1 enables the Exchange to require that violators of these rules not only pay the specified MRP fine amounts for such violations, but also disgorge any quantifiable monetary gains attributable to these violations. The Exchange has based this proposed amendment on a very similar provision of the Boston Stock Exchange's MRP for violation of trade-through rules, which was recently approved by the Commission.<sup>3</sup>

NYSE Arca Rule 2.23 (employee registration) requires OTP Holders and Firms to continually disclose to the Exchange through the registration process personnel who are responsible for trading decisions on behalf of the OTP Holders or Firms. By requiring such disclosure, Rule 2.23, like the trade-through rules, substantially protects the Exchange's ability to regulate its marketplace and help ensure marketplace integrity. Exchange staff proposes to include the back-payment of registration fees in addition to a MRP fine so that the MRP can effectively deter OTP Holders and Firms from trying to save money and effort by not registering their appropriate personnel, in the same way that the Boston Stock Exchange's MRP revision in SR-BSE-2006-11<sup>4</sup> deters trade-through violations by requiring the violator to pay not only the specified fine amount, but also any quantifiable monetary gain resulting from the violation. Specifically, the Exchange proposes footnote 3 to enable the Exchange to require violators of Rule 2.23 to pay not only the specified MRP fine amount, but also to remit all fees that should have been paid to the Exchange pursuant to compliance with Rule 2.23.

In addition to the changes proposed to the MRP, the Exchange also proposes the following related changes.

#### **Rule 9.2(c)—Customer Records**

The Exchange proposes to change Rule 9.2(c) by adding the single word "current," to clarify and reiterate the obligation that firms with customer accounts must not only keep records of their customer accounts, but also keep them current.

<sup>3</sup> See Securities Exchange Act Release No. 55606 (April 10, 2007), 72 FR 19221 (April 17, 2007) (approving SR-BSE-2006-11).

<sup>4</sup> See *id.*

### Rule 11.1—Adherence to Law and Good Business Practices

The Exchange proposes to clarify the language of the newly designated Rule 11.1(a) by substituting the word “just” for “fair.”

The Exchange also proposes to add a new Rule 11.1(b) that will require all OTP Holders and Firms, their associated persons, and other participants to adhere to the principles of good business practice in the conduct of their business operations. This filing also proposes to make violations of Rule 11.1(b) eligible for MRP disposition.

The proposed new Rule 11.1(b) is patterned on the current NYSE Rule 401(a). Like NYSE Rule 401(a), it encompasses miscellaneous conduct that is inconsistent with the maintenance of a fair and orderly marketplace or that otherwise violates good business practices without also showing the bad faith or unethical conduct that have been found to be essential elements of “conduct inconsistent with just and equitable principles of trade,” as that standard has been clarified in decisions such as *In re. Calvin David Fox*.<sup>5</sup>

### Rule 11.18—Supervision

The Exchange proposes to amend Rule 11.18 to remove language that limits the reach of its supervisory rules. The current language of Rule 11.18(b) provides that only OTP Holders and Firms for whom the Exchange is the Designated Examining Authority (“DEA”) are subject to its supervisory requirements. The amendment removes the language limiting the scope of the rule so that all OTP Holders and Firms, regardless of DEA, are subject to maintaining systems to supervise activities of their associated persons and the operations of their business.

As noted above, this filing also proposes to make minor violations of Rule 11.18 eligible for disposition through an MRP fine. Exchange Market Regulation frequently encounters “minor” supervisory failures by OTP Holders and Firms, *i.e.*, supervisory failures whose consequences have not yet risen to a level justifying formal enforcement action, but which could have serious consequences if not remedied. By making such failures eligible for MRP fines, Exchange Market Regulation and Enforcement will have a greater ability to encourage OTP Holders and Firms to correct their supervisory problems before they lead to more serious violations.

### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>6</sup> in general, and with Section 6(b)(5) of the Act,<sup>7</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change would result in 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 NYSE Arca 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 Number SR-NYSEArca-2008-49 on the subject line.

### Paper Comments

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

All submissions should refer to File Number SR-NYSEArca-2008-49. 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 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, 100 F Street, NE., Washington, DC 20549, 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 Arca. 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-NYSEArca-2008-49 and should be submitted on or before June 13, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E8-11530 Filed 5-22-08; 8:45 am]

**BILLING CODE 8010-01-P**

<sup>5</sup> See Securities Exchange Act Release No. 48731, 81 SEC Docket 1511-31 (October 31, 2003).

<sup>6</sup> 15 U.S.C. 78f.

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> 17 CFR 200.30-3(a)(12).