

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61156; File No. SR-NYSEArca-2009-109]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Revising Its Telephone Policies

December 11, 2009.

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 December 3, 2009, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders it effective upon filing with the Commission. 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 revise its policies governing the use of telephones on the Trading Floor. The text of the proposed rule change is attached as Exhibit 5 to the 19b-4 form. The text of the proposed rule change is available on the Exchange's Web site at <http://www.nyse.com>, on the Commission's Web site at <http://www.sec.gov>, at the Exchange's principal office, 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 self-regulatory organization 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 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 Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The purpose of this filing is to revise NYSE Arca Rule 6.2(h) governing the use of telephones on the Trading Floor. The proposed revisions of Rule 6.2(h) are modeled on NYSE Amex Options Rule 902NY(i).<sup>5</sup>

The Exchange proposes to simplify and expedite its telephone registration process by allowing OTP Holder representatives to register their telephones by submitting an e-mail to the NYSE Arca Options Operations Department. This policy is consistent with NYSE Amex Options Rule 902NY(h)(i)(1).

In addition, the Exchange notes that separate from the registration and use of telephones, the Exchange shall retain the authority to review and approve, prior to their use, any alternative communication device (including but not limited to devices offering capabilities such as e-mail, instant messaging, texting, or Internet-supported communications). Therefore, according to proposed Rule 6.2(h)(1): No OTP Holder, OTP Firm, or employee thereof may employ any alternative communication device (other than telephones as described herein) on the Trading Floor without prior approval of the Exchange.

The Exchange also proposes to combine the various designations in Rule 6.2(h)(4)-(7) into a single section applying to all OTP Holders and Employees of OTP Firms. In doing so, the Exchange seeks to clarify and simplify its policy without substantively altering the scope of the rule.<sup>6</sup> This change will also result in the renumbering of the subsections under Rule 6.2(h). This change is consistent with NYSE Amex Options Rule 902NY(i).

The Exchange also proposes to modify Rule 6.2(h)(5)(C) in order to adopt the recently approved structure of NYSE

<sup>5</sup> See Securities Exchange Act Release No. 59939 (May 19, 2009), 74 FR 25779 (May 29, 2009) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change, SR-NYSEAmex-2009-17, and Amendment No. 1 Thereto Revising Rules Governing the Use of Telephones on the Options Trading Floor).

<sup>6</sup> The Exchange is not proposing to require OTP Holders and OTP Firms to register by category of user. Such a requirement is inapplicable since (i) the proposed rule applies to OTP Holders, OTP Firms, and all employees thereof, regardless of category and (ii) such a requirement was a historical response to capacity limitations (which no longer apply) thereby allowing the Exchange to restrict use by certain categories of users if capacity issues arose.

Amex Rule 902NY(i)(4)(C) pertaining to broker representations of telephonic orders to the trading crowd. Currently, Section (h)(5)(C) sets forth that a Floor Broker in a trading crowd who receives a telephonic order may represent the order in the trading crowd only if an order ticket was first time-stamped in the OTP Holder or OTP Firm's booth. The order ticket must also be taken to the Floor Broker in the trading crowd immediately after it is prepared. The new policy avoids this unnecessary process by allowing Floor Brokers to represent a telephonic order to the trading crowd so long as the order is immediately recorded into the EOC or the Electronic Tablet. However, in cases where the exception set forth in Rule 6.67(d)(1) applies, the EOC/Electronic Tablet Contingency Reporting Procedures will be in effect in accordance with Rule 6.67(d)(2).<sup>7</sup> In implementing this new policy, the Exchange seeks to keep pace with the technologies utilized on its options floor.

The Exchange proposes to remove all obsolete references to LMM phones and General Access Phones. These phones were provided by the Exchange and located at various locations on the options floor. The Exchange no longer supports these phones, and as such, they are no longer in operation.

In addition, the Exchange proposes to update Rule 6.2(h)(9), Telephone Records, in order to increase the record retention period to three years. The Exchange proposes to require that OTP Holders and OTP Firms retain said records in an accessible place for the first two years. This requirement is consistent with the retention period of Securities and Exchange Commission Rule 17a-4.<sup>8</sup> The Rule will also be renumbered as 6.2(h)(5).

Consistent with NYSE Amex Rule 902NY(i)(6), the Exchange further proposes to add Rule 6.22(h)(6) [sic],<sup>9</sup> Revocation of Registration, which establishes the Exchange's authority to deny, limit or revoke an OTP Holder's permission to use of any registered telephone on the Trading Floor. Although an OTP Holder need only register with the Exchange, prior to use, any telephone to be used on the Trading Floor, the Exchange retains the right to

<sup>7</sup> Rule 6.67(d)(1) states in pertinent part, "The EOC or Electronic Tablet entry requirement provision of subsection (c) will not apply to any EOC or Electronic Tablet system disruption or malfunction as confirmed by a Trading Official." Rule 6.67(d)(2) provides a procedure for reporting during periods of system disruption or malfunction.

<sup>8</sup> This proposed rule is modeled on NYSE Amex Rule 902(i)(5).

<sup>9</sup> The Exchange intended to refer to Rule 6.2(h)(6).

<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. 78s(b)(3)(A).

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

deny, limit, or revoke an OTP Holder's permission. Specifically, according to the proposed rule, the Exchange may deny, limit or revoke registration of any telephone whenever it determines that use of such device is inconsistent with the public interest, the protection of investors, or just and equitable principles of trade, or such device has been or is being used to facilitate any violation of the Securities Exchange Act of 1934, as amended, or rules thereunder, or the Exchange rules.

The Exchange also proposes to update subsections (h)(13) and (k)(i)(13) of Rule 10.12, Minor Rule Plan, in order to replace obsolete references to prior Exchange policy and to add text designed to specifically address violations of Exchange Rule 6.2(h) as revised herein.

Finally, the Exchange proposes to delete Rule 11.15 as it is duplicative of proposed Rule 6.2(h)(1) which states:

No OTP Holder, OTP Firm, or employee thereof may employ any alternative communication device (other than telephones as described herein) on the Trading Floor without prior approval of the Exchange.

The Exchange also proposes to remove the reference to Rule 11.15 in Rule 6.1(e).

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)<sup>10</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5),<sup>11</sup> in particular, in that it is designed to facilitate transactions in securities, to promote just and equitable principles of trade, to enhance competition, and to protect investors and the public interest, in that it proposes to modernize and clarify rules for the use of telephones and other communication devices on the Trading Floor.

### 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

No written comments were solicited or received with respect to the proposed rule change.

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

Because the foregoing 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 for 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, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</sup>

The Exchange has requested the Commission to waive the 30-day operative delay to the extent that the proposal will allow NYSE Arca to: (i) Modernize its rules regarding telephones, consistent with other market centers; and (ii) eliminate any unnecessary discrepancies among affiliated markets governing the use of telephones by their respective market participants, without delay. The Commission notes that the proposal is closely based on NYSE Amex Rule 902NY(i).<sup>14</sup> The Commission hereby grants the Exchange's request and believes that such waiver is consistent with the protection of investors and the public interest.<sup>15</sup> Accordingly, the Commission designates the proposed rule change operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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.

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its 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.

<sup>14</sup> See Securities Exchange Act Release No. 59939 (May 19, 2009), 74 FR 25779 (May 29, 2009) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Revising Rules Governing the Use of Telephones on the Options Trading Floor).

<sup>15</sup> For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

## 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-2009-109 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.

All submissions should refer to File Number SR-NYSEArca-2009-109. 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 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-NYSEArca-2009-109 and should be submitted on or before January 8, 2010.

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

<sup>11</sup> 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61160; File No. SR-FINRA-2009-088]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Waiver and Credit of Certain FINRA/Nasdaq Trade Reporting Facility and OTC Reporting Facility Fees

December 14, 2009.

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 December 7, 2009, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as “establishing or changing a due, fee or other charge” under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon receipt of this filing by the Commission. 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

FINRA is proposing to waive and issue a credit for fees that were charged to FINRA members under FINRA Rules 7620A and 7710 for the submission of “as/of” trade reports to the FINRA/Nasdaq Trade Reporting Facility (“FINRA/Nasdaq TRF”) and the OTC Reporting Facility (“ORF”), respectively, for eight days in the months of August and September 2009. The proposed rule change does not require amendments to any FINRA rules.

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

In its filing with the Commission, FINRA 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. FINRA 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

Pursuant to FINRA Rules 7620A and 7710, members are charged fees for trade reporting to the FINRA/Nasdaq TRF and ORF, respectively, and the fee for the submission of late trade reports, including “as/of” reports, is higher than the fee for the submission of timely trade reports. “As/of” reports are reports of trades that were executed on a date prior to the date they were reported.

During the months of August and September 2009, various Automated Confirmation Transaction Service (“ACT”) technology issues impacted trade reporting to the FINRA/Nasdaq TRF and the ORF for a period of eight days: August 3, August 4, August 5, August 17, August 21, September 16, September 25 and September 28. Due to the ACT technology issues, members were unable to report trades on trade date and thus incurred higher than normal reporting charges due to the higher number of “as/of” reports that they were compelled to submit.

Because the higher charges were the result of an ACT technology issue and not the fault of the member, FINRA is proposing to waive the fees for “as/of” trade reports submitted on each day following the day on which the ACT technology issues occurred. Specifically, FINRA will waive the “as/of” report fees for the following days in 2009: August 4, August 5, August 6, August 18, August 24, September 17, September 28 and September 29. Members will be issued a credit for the “as/of” trade report fees charged on these dates on a future invoice.<sup>5</sup> FINRA

<sup>5</sup> FINRA notes that a similar proposal to waive and issue a credit for certain cancel fees was the subject of a recent filing by NASDAQ OMX PHLX, Inc. See Securities Exchange Act Release No. 60853 (October 21, 2009), 74 FR 55594 (October 28, 2009) (Notice of Filing and Immediate Effectiveness of File No. SR-PHLX-2009-89).

has filed the proposed rule change for immediate effectiveness. The operative date will be the date of filing.

###### 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with Section 15A(b)(5) of the Act,<sup>6</sup> which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. FINRA believes that the proposed waiver and credit of the “as/of” reporting fees is fair and equitable in that it will apply uniformly to all FINRA members that submitted “as/of” trade reports to the FINRA/Nasdaq TRF and ORF on the designated dates.

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

FINRA does not believe that the proposed rule change will impose any burden on competition 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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>7</sup> and paragraph (f)(2) of Rule 19b-4 thereunder.<sup>8</sup> At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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:

<sup>6</sup> 15 U.S.C. 78o-3(b)(5).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>8</sup> 17 CFR 240.19b-4(f)(2).

<sup>16</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. 78s(b)(3)(A)(ii).

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