

Section 15A(b)(6) of the Act,<sup>10</sup> which requires, among other things, that FINRA's rules be designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, and in general, to protect investors and the public interest. FINRA's adoption of Incorporated NYSE Rule 406 as FINRA Rule 3250 in the Consolidated FINRA Rulebook, with the minor changes discussed above, will extend to all FINRA members the applicability of a rule that serves as an important tool to guard against behavior that may be manipulative and fraudulent and that may violate just and equitable principles of trade.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>11</sup> that the proposed rule change (SR-FINRA-2009-017) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59944; File No. SR-NYSEArca-2009-44]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Amending Rule 6.72 Governing Trading Differentials and Proposing To Expand the Penny Pilot

May 20, 2009.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on May 15, 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, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78o-3(b)(6).

<sup>11</sup> 15 U.S.C. 78s(b)(2).

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

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19-4.

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

The Exchange proposes to amend its option trading rules to (i) extend the Penny Pilot in options classes in certain issues ("Pilot Program") previously approved by the Securities and Exchange Commission ("Commission") through December 31, 2010, (ii) provide for additional classes to quote and trade all contracts in one cent (\$0.01) increments, and (iii) expand the number of issues included in the Pilot. The text of the proposed rule change is attached as Exhibit 5.<sup>4</sup> A copy of this filing is available on the Exchange's Web site at <http://www.nyse.com>, 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 the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange hereby proposes to extend the time period of the Pilot Program<sup>5</sup> which is currently scheduled to expire on July 3, 2009, through December 31, 2010.

###### Top 300

The Exchange also proposes to expand the number of issues included in the Pilot Program. Specifically, NYSE Arca proposes to add the top 300 most actively traded multiply listed options classes that are not yet included in the Pilot Program ("Top 300"). The

<sup>4</sup> The Commission notes that while provided in Exhibit 5 to the filing, the text of the proposed rule change is not attached to this notice, but is available at the Commission's Public Reference Room and at <http://www.nyse.com>.

<sup>5</sup> See Securities Exchange Act Release No. 34-55156 (January 23, 2007), 72 FR 4759 (February 21, 2007); Securities Exchange Act Release No. 34-56568 (September 27, 2007), 72 FR 56422 (October 3, 2007); Securities Exchange Act Release No. 34-59628 (March 26, 2009), 74 FR 15025 (April 2, 2009).

Exchange proposes to determine the identity of the Top 300 based on national average daily volume in the prior six calendar months immediately preceding their addition to the Pilot Program.<sup>6</sup> In determining the identity of the Top 300, the Exchange will exclude options classes with high premiums. Pursuant to Commentary .02 to NYSE Arca Rule 6.72, the Pilot Program issues will be announced to the Exchange's membership via Regulatory Bulletin and published by the Exchange on its website.<sup>7</sup> This will bring the total number of options classes traded pursuant to the Pilot Program to 363. NYSE Arca represents that the Exchange has the necessary system capacity to support any additional series listed as part of the Pilot Program.

#### Phased Implementation

The Exchange proposes to phase-in the additional classes to the Pilot Program over four successive quarters. Specifically, the Exchange proposes to add 75 classes in July 2009, October 2009, January 2010, and April 2010. In order to reduce operational confusion and provide for appropriate time to update databases, the Exchange proposes to add the eligible issues to the Pilot Program effective for trading on the Monday ten days after Expiration Friday. Thus, the quarterly additions would be effective on July 27, 2009; October 26, 2009; January 25, 2010; and April 26, 2010.<sup>8</sup>

#### Exchange Designations

The Exchange further proposes to designate two Pilot Program issues as eligible to quote and trade all options contracts in one cent increments, regardless of premium value. Specifically, the Exchange proposes to so designate SPY (SPDR S&P 500 ETF) and IWM (iShares Russell 2000 Index Fund). In selecting these issues, the Exchange considered, among other things, that these symbols are (a) among the most actively traded issues nationally, with a wide array of investor

<sup>6</sup> The Exchange will not include options classes in which the issuer of the underlying security is subject to an announced merger or is in the process of being acquired by another company, or if the issuer is in bankruptcy. For purposes of assessing national average daily volume, the Exchange will use data compiled and disseminated by the Options Clearing Corporation.

<sup>7</sup> The Exchange shall also identify the classes to be added to the Pilot Program, per each phase, in a filing with the Commission.

<sup>8</sup> For purposes of identifying the issues to be added per quarter, the Exchange shall use data from the prior six calendar months immediately preceding the implementation month. For example, the quarterly additions to be added on July 27, 2009 shall be determined using data from the sixth month period ending June 30, 2009.

interest, (b) have more series trading at a premium between \$3 and \$10, and (c) are trading at prices that are neither extremely low nor high, but are generally trading between \$15–\$50. The Exchange believes that issues that meet these criteria benefit the most from the ability to quote and trade all options in penny increments.

#### Delistings

Additionally, the Exchange proposes that any Pilot Program issues that have been delisted may be replaced on a semi-annual basis by the next most actively traded multiply listed options classes that are not yet included in the Pilot, based on trading activity in the previous six months. The replacement issues would be added to the Pilot on the second trading day following January 1, 2010 and July 1, 2010.<sup>9</sup>

#### Report

The Exchange agrees to submit semi-annual reports to the Commission that will include sample data and analysis of information collected from April 1 through September 30, and from October 1 through March 31, for each year, for the ten most active and twenty least active options classes added to the Pilot Program.<sup>10</sup> As the Pilot Program matures and expands, the Exchange believes that this proposed sampling approach provides an appropriate means by which to monitor and assess the Pilot Program's impact. The Exchange will also identify, for comparison purposes, a control group consisting of the ten least active options classes from the existing 63 Pilot Program classes. This report will include, but is not limited to: (1) Data and analysis on the number of quotations generated for options included in the report; (2) an assessment of the quotation spreads for the options included in the report; (3) an assessment of the impact of the Pilot Program on the capacity of the NYSE Arca's automated systems; (4) data reflecting the size and depth of markets, and (5) any capacity problems or other problems that arose related to the operation of the Pilot Program and how the Exchange addressed them.

The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

#### 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>11</sup> of the Securities Exchange Act of 1934 (the "Act"), in general, and furthers the objectives of Section 6(b)(5)<sup>12</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 foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. The Exchange believes that the Pilot Program promotes just and equitable principles of trade by enabling public customers and other market participants to express their true prices to buy and sell options.

#### *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**

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 the 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-2009-44 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-2009-44. 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 will also be available for inspection and copying at NYSE Arca's principal office and on its Internet Web site at [www.nyse.com](http://www.nyse.com). 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-2009-44 and should be submitted on or before June 17, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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<sup>9</sup> The replacement issues will be announced to the Exchange's membership via Regulatory Bulletin and published by the Exchange on its Web site.

<sup>10</sup> The Exchange will continue to provide data concerning the existing 63 Pilot Program classes.

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

<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> 17 CFR 200.30-3(a)(12).