

with Section 6(b)(5) of the Act<sup>8</sup> which requires, among other things, that the rules of a national securities exchange be designed 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, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.<sup>9</sup>

The Commission believes that the Exchange's proposal to append an Aberrant Report Indicator to certain trade reports is a reasonable means to alert investors and others that the Exchange believes that the trade price for a trade executed in its market does not accurately reflect the prevailing market for the security. In addition, the Commission notes that the Exchange will use objective numerical thresholds in determining whether a trade report is eligible to have an Aberrant Trade Indicator appended to it. The Commission further notes that the Exchange's appending the Aberrant Trade Indicator to a trade report has no effect on the validity of the underlying trade. The Commission previously found a similar proposal by the NYSE to be consistent with the Act.<sup>10</sup> Finally, the Commission notes that the retroactive application of this proposal to January 1, 2008 is similar to the retroactive period approved for the NYSE.<sup>11</sup>

For the reasons set forth above, the Commission finds that the proposed rule change is consistent with the Act.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (SR-NYSEArca-2009-24) be, and hereby is, approved.

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

<sup>9</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>10</sup> See *supra* note 4.

<sup>11</sup> *Id.*

<sup>12</sup> 15 U.S.C. 78s(b)(2).

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

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 59947; File No. SR-FINRA-2009-017]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Adopt Incorporated NYSE Rule 406 (Designation of Accounts) as a FINRA Rule in the Consolidated FINRA Rulebook

May 20, 2009.

#### I. Introduction

On March 26, 2009, the Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")), filed with the Securities and Exchange Commission ("SEC" or "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 Incorporated NYSE Rule 406 (Designation of Accounts) as a FINRA rule in the consolidated FINRA rulebook ("Consolidated FINRA Rulebook")<sup>3</sup> with the minor changes discussed below. The proposed rule change was published in the **Federal Register** on April 16, 2009.<sup>4</sup> The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

#### II. Description of the Proposed Rule Change

As part of the process of developing the Consolidated FINRA Rulebook,<sup>5</sup> FINRA proposed to adopt Incorporated NYSE Rule 406, with minor changes, as renumbered FINRA Rule 3250 in the Consolidated FINRA Rulebook. Incorporated NYSE Rule 406 provides that no member organization shall carry an account on its books in the name of a person other than that of the customer, except that an account may be designated by a number or symbol, provided that the member has on file a

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

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

<sup>3</sup> The current FINRA rulebook consists of two sets of rules: (1) NASD Rules and (2) rules incorporated from NYSE ("Incorporated NYSE Rules") (together referred to as the "Transitional Rulebook"). The Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). Dual members must also comply with NASD Rules. For more information about the rulebook consolidation process, see *FINRA Information Notice*, March 12, 2008 ("Rulebook Consolidation Process").

<sup>4</sup> See Exchange Act Release No. 59745 (April 10, 2009), 74 FR 17705 (April 16, 2009) ("notice" or "proposal").

<sup>5</sup> See *supra* note 3.

written statement signed by the customer attesting to the ownership of such account. In effect, this rule establishes a general requirement that a member must hold each customer account in the customer's name, except that a member may identify a customer's account with a number or symbol, as long as the member maintains documentation identifying the customer.<sup>6</sup> Currently, Incorporated NYSE Rule 406 applies only to Dual Members.

NYSE's enforcement of the rule has addressed, among other things, sales practice abuses such as co-mingling of funds, the failure to disclose ownership interests in accounts and unauthorized trading.<sup>7</sup> In the notice, FINRA proposed to adopt Incorporated NYSE Rule 406 as FINRA Rule 3250, stating it believes that the rule will continue to be an important enforcement tool and should be expanded to apply to the entire FINRA membership. In the notice, FINRA stated that Incorporated NYSE Rule 406 could provide members' customers with a level of anonymity within the member and with certain external relationships that they find useful, while still allowing customers' identities to be clearly known to members and available to regulators. In the proposal, FINRA indicated that Incorporated NYSE Rule 406 would be renumbered as FINRA Rule 3250 with minor changes to replace references to "member organization" or "organization" with the term "member."<sup>8</sup>

#### III. Discussion and Findings

After careful review of the proposal, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities associations,<sup>9</sup> and in particular, with

<sup>6</sup> Members are subject to additional requirements regarding customer accounts. See, e.g., Rule 17a-3(a)(9) under the Act (requiring records indicating the name and address of the beneficial owner of each cash and margin customer account). 17 CFR 240.17a-3(a)(9).

<sup>7</sup> See, e.g., Robert S. Bartek, Exchange Hearing Panel Decision 73-60 (August 28, 1973); Jeffrey Alan Schultz, Exchange Hearing Panel Decision 82-23 (March 18, 1982); Kery Shane Hutner, Exchange Hearing Panel Decision 02-27 (January 31, 2002). See also NYSE *Information Memo* 78-80, Members' Accounts and Initiating Orders on the NYSE Floor (November 10, 1978) (addressing, among other things, NYSE Rule 406(1), now Rule 406).

<sup>8</sup> FINRA also stated that it will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval.

<sup>9</sup> In approving this proposal, the Commission has considered the proposed rule's impact on

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.