

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61818; File No. SR-NYSEAmex-2010-18)

March 31, 2010

Self-Regulatory Organizations; NYSE Amex LLC; Order Granting Accelerated Approval of the Proposed Rule Change Relating to the Designation of a “Professional Customer”

I. Introduction

On February 25, 2010, the NYSE Amex LLC (“NYSE Amex” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder² to designate any Customer³ that places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) as a “Professional Customer.” The proposed rule change was published for comment in the Federal Register on March 9, 2010.⁴ The Commission did not receive any comments on the proposed rule change. This order approves the proposal on an accelerated basis.

II. Description of NYSE Amex’s Proposal

NYSE Amex proposes to adopt a new term, “Professional Customer,” which would be defined in NYSE Amex Rule 900.2NY(18A) as a person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). Under the proposal, a Professional Customer would be treated in the same manner as a broker or dealer in securities for purposes of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Under NYSE Amex rules, “Customer” is defined as “an individual or organization that is not a Broker/Dealer.” See NYSE Amex Rule 900.2NY(18).

⁴ See Securities Exchange Act Release No. 61629 (March 2, 2010), 75 FR 10851 (March 9, 2010) (“Notice”).

certain execution rules of the Exchange. Specifically, the orders of a Professional Customer generally would be treated in the same manner as a broker-dealer in securities for the purposes of NYSE Amex Rules 900.3NY(j)(Facilitation Order), 904G(f) (FLEX Trading Procedures and Principles – Crossing Limitations), 934NY(Crossing), 934.1NY (Facilitation Cross Transactions), 934.2NY(At-Risk Cross Transactions), 934.3NY(Solicitation), 963NY(Priority and Order Allocation Procedures – Open Outcry), 963.1NY (Complex Order Transactions), 964NY (Display, Priority and Order Allocation – Trading Systems), 964.2NY(b)(1)(iii)(Participation Entitlement of Specialists and e-Specialists), 964.2NY(b)(3)(B)(Allocation Of Participation Entitlement Amongst Specialist Pool), 980NY(b) (Electronic Complex Order Trading), Rule 995NY(b)(Prohibited Conduct – Limit Orders) and the Exchange’s schedule of fees.

Under the proposal, a Professional Customer would participate in NYSE Amex’s allocation process on equal terms with broker-dealers – i.e., Professional Customers would not receive priority over broker-dealers in the allocation of orders on the Exchange. The Exchange states that the proposal would not otherwise affect non-broker-dealer individuals or entities under NYSE Amex rules. All Customer orders, including non-broker-dealer orders included in the definition of “Professional Customers,” would continue to be treated equally for purposes of the Exchange’s rules concerning away market protection.

The proposal requires ATP holders to indicate whether Customer orders are “Professional Customer” orders.⁵ To comply with this requirement, ATP holders would be required to review

⁵ The Exchange intends to require firms to identify Professional Customer orders submitted electronically to the system by identifying them with the number “8” in the customer type field – a mandatory field required for order entry. Manual orders submitted outside the electronic system would be marked with an origin code of “PC.”

their customers' activity on at least a quarterly basis to determine whether orders that are not for the account of a broker or dealer should be represented as Customer orders or Professional Customer orders.⁶ The Exchange states that it intends to file a separate proposed rule change to adopt fees for professional orders.⁷

III. Commission Findings and Order Granting Approval of the Proposed Rule Change

After careful consideration of the proposed rule change, the Commission finds that the proposed rule change is consistent with the Act. Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)⁸ of the Act and the rules thereunder,⁹ and in particular with:

Section 6(b)(5) of the Act, which requires that the rules of a national securities exchange, among other things, be designed to promote just and equitable principles of trade, to remove

These Professional Customer identifiers would also flow through Exchange systems into audit trail and trade reporting data. See Notice, supra note 4 at 10852.

⁶ Orders for any customer that had an average of more than 390 orders per day during any month of a calendar quarter must be represented as Professional Customer orders for the next calendar quarter. ATP Holders would be required to conduct a quarterly review and make any appropriate changes to the way in which they are representing orders within five business days after the end of each calendar quarter. While members only would be required to review their accounts on a quarterly basis, if during a quarter the Exchange identifies a customer for which orders are being represented as Customer orders but that has averaged more than 390 orders per day during a month, the Exchange would notify the ATP Holder and the ATP Holder would be required to change the manner in which it is representing the customer's orders within five business days. The Exchange confirmed that references to "five days" in footnote 10 of the Notice should be read as "five business days." E-mail from Matthew Vaughn, Counsel, NYSE Euronext to Ronessa Butler, Special Counsel, Division of Trading and Markets, dated March 31, 2010.

⁷ See Notice, supra note 4 at 10852.

⁸ 15 U.S.C. 78f(b).

⁹ In approving the proposed 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).

impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest; and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;¹⁰ and

Section 6(b)(8) of the Act, which requires the rules of an exchange not to impose any burden on competition not necessary or appropriate in furtherance of the Act.¹¹

Under the proposed rule change, customers who place orders on the level of frequency specified in proposed NYSE Amex Rule 900.2NY(18A) would be deemed Professional Customers and would no longer receive the priority treatment currently granted to all public customers. The Commission has previously approved similar proposals to give the orders of certain customers, identified as “Professional Orders”¹² or “Professionals”,¹³ no greater priority than that given to broker-dealer orders.¹⁴ Under the Professional Customer Approval Orders, the orders of public customers that are deemed Professional orders are no longer accorded the priority granted to the orders of all other public customers.¹⁵ While NYSE Amex Rule 900.2NY (18A) differs slightly from the rules adopted in the Professional Customer Approval Orders, the Commission believes that the Exchange’s proposed rule change is comparable to rules of the ISE, CBOE and Phlx, which the Commission found to be consistent with the Act.

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 15 U.S.C. 78f(b)(8).

¹² See International Securities Exchange, LLC (“ISE”) Rule 100 (a)(37C).

¹³ See Chicago Board Options Exchange, Incorporated (“CBOE”) Rule 1.1 (ggg). See also NASDAQ OMX PHLX, Inc. (“Phlx”) Rule 1000(b)(14).

¹⁴ See Securities Exchange Act Release Nos. 59287 (January 23, 2009), 74 FR 5694 (January 30, 2009) (“ISE Approval Order”); 61198 (December 17, 2009), 74 FR 68880 (December 29, 2009) (“CBOE Approval Order”); 61802 (March 30, 2010) (“Phlx Approval Order”) (together, the “Professional Customer Approval Orders”).

¹⁵ Id.

In the ISE Approval Order, the Commission reviewed the background and history of customer order priority rules on national securities exchanges, and analyzed the role played in the shaping of these rules by various considerations and principles. In this regard, the Commission discussed the requirement of Section 6(b)(5) of the Act that the rules of an exchange be designed to protect investors and the public interest; traditional notions of customer priority in exchange trading; the agency obligations of exchange specialists; and the requirements of Section 11(a) of the Act.¹⁶ In approving the ISE proposal, the Commission articulated its view that priority for public customer orders is not an essential attribute of an exchange,¹⁷ and noted that in the past it has approved trading rules at options exchanges that do not give priority to orders of public customers that are priced no better than the orders of other market participants.¹⁸

In the ISE Approval Order, the Commission concluded that Section 6(b)(5) of the Act does not require an exchange to treat the orders of public customers who place orders at the frequency of more than 390 orders per day on average identically to the orders of public customers who do not meet that threshold.¹⁹ For the same reason, the Commission believes that the Exchange's proposed rule change is consistent with Section 6(b)(5) of the Act.

The Commission believes that its view with respect to the ISE Approval Order is equally applicable to the NYSE Amex proposal. In this regard, the Commission does not believe that the Act requires that the orders of a public customer or any other market participant be granted

¹⁶ ISE Approval Order, supra note 14. For a brief synopsis of the requirements of Section 11(a), see infra, note 20.

¹⁷ See ISE Approval Order, supra note 14, at 5697.

¹⁸ See ISE Approval Order, supra note 14, at 5697, n. 41-44.

¹⁹ See ISE Approval Order, supra note 14, at 5697. See also CBOE Approval Order and Phlx Approval Order, supra note 14.

priority. Historically, in developing their trading and business models, exchanges have adopted rules, with Commission approval, that grant priority to certain participants over others, in order to attract order flow or to create more competitive markets. However, the Act does not entitle any participant to priority as a right. The requirement of Section 6(b)(8) of the Act that the rules of an exchange not impose an unnecessary or inappropriate burden upon competition does not necessarily mandate that a Professional Customer (as defined in the NYSE Amex proposal) be granted priority at a time that a broker-dealer is not granted the same right. The NYSE Amex proposal simply restores the treatment of persons who would be deemed Professional Customers to a base line where no special priority benefits are granted.²⁰ Thus, the Commission believes that it is consistent with the Act for the Exchange to amend its rules so that Professional Customer orders, like the orders of broker-dealers, are not granted special priority.²¹

²⁰ In its proposal, the Exchange addressed compliance with Section 11(a) of the Act. Section 11(a) 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 unless an exception applies. Section 11(a)(1) and the rules thereunder contain a number of exceptions for principal transactions by members and their associated persons, including the exceptions in subparagraph (G) of Section 11(a)(1) and in Rule 11a1-1(T), as well as Rule 11a2-2(T) under the Act. The Exchange represents that the proposal would not affect the availability of the exceptions to Section 11(a) of the Act, including the exceptions in subparagraph (G) of Section 11(a) and in Rules 11a1-1(T) and 11a2-2(T), as are currently available. See Notice, supra note 4 at 10852.

²¹ The Commission notes that certain trading practices that could be affected by the proposed rule change may raise issues outside the scope of its review of the proposal itself. Specifically, any entity that acts as “dealer,” as defined in Section 3(a)(5) of the Act, 15 U.S.C. 78c(a)(5), is required to register with the Commission under Section 15 of the Act, 15 U.S.C. 78o, and the rules and regulations thereunder, or qualify for any exception or exemption from registration. Activity that may cause a person to be deemed a dealer includes “quoting a market in or publishing quotes for securities (other than quotes on one side of the market on a quotations system generally available to non-broker-dealers, such as a retail screen broker for government securities).” See Definitions of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Securities Exchange Act Release No. 47364, 68 FR 8686, 8689, note 26 (February

Pursuant to Section 19(b)(2) of the Act,²² the Commission may not approve any proposed rule change, or amendment thereto, prior to the 30th day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding. The Commission hereby finds good cause for approving the proposed rule change before the 30th day after the date of publication of notice of filing thereof in the Federal Register.²³ The Commission did not receive any comments on the proposed rule change. As noted above, the Commission previously found that exchange rules that distinguish between the orders of customers who place orders at the frequency of more than 390 orders per day on average during a calendar month for its own beneficial account(s) and the orders of customers who do not meet that threshold are consistent with the Act.²⁴ Accordingly, pursuant to Section 19(b)(2) of the Act,²⁵ the Commission finds good cause to approve the proposed rule change on an accelerated basis.

24, 2003) (quoting OTC Derivatives Dealers, Securities Exchange Act Release No. 40594 (October 23, 1998), 63 FR 59362, 59370, note 61 (November 3, 1998)).

²² 15 U.S.C. 78s(b)(2).

²³ See Notice, supra note 4.

²⁴ See Professional Customer Approval Orders, supra note 14.

²⁵ 15 U.S.C. 78s(b)(2).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁶ that the proposed rule change (SR-NYSEAmex-2010-18), be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

Florence E. Harmon
Deputy Secretary

²⁶ 15 U.S.C. 78s(b)(2).

²⁷ 17 CFR 200.30-3(a)(12).