

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61629; File No. SR-NYSEAmex-2010-18)

March 2, 2010

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing of Proposed Rule Change Relating to the Designation of a “Professional Customer”

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on February 25, 2010, NYSE Amex LLC (“NYSE Amex” 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.

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

The Exchange proposes to designate any Customer 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 text of the proposed rule change is attached as Exhibit 5 to the 19b-4 form. A copy of this filing is available on the Exchange’s Web site at 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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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

Under NYSE Amex rules, a “Customer” is an individual or organization that is not a Broker/Dealer.⁴ This term is used in specific NYSE Amex rules that provide certain marketplace advantages to Customer orders over non-customer orders (e.g., orders for the account of ATP holders or broker/dealers). In particular, under NYSE Amex rules, subject to certain exceptions, (i) Customer orders are given priority over non-customer orders and Market-Maker quotes at the same price,⁵ and (ii) ATP holders are generally not charged a transaction fee for the execution of Customer orders. The purpose of providing these marketplace advantages to Customer orders is to attract retail investor order flow to the Exchange by leveling the playing field for retail investors over market professionals⁶ and to provide competitive pricing.

With respect to these NYSE Amex marketplace advantages, the Exchange does not believe the definition of Customer versus a non-Customer properly distinguishes between non-professional retail investors and certain professionals. The Exchange believes that providing marketplace advantages based upon whether the order is for the account of a participant that is a

⁴ See NYSE Amex Rule 900.2NY(18)

⁵ See, e.g., NYSE Amex Rule 963NY Priority and Order Allocation Procedures – Open Outcry, 963.1NY Complex Order Transactions, 964NY Display, Priority and Order Allocation – Trading Systems, and 980NY(b)Priority of Complex Orders in the Consolidated Book.

⁶ Market professionals have access to sophisticated trading systems that contain functionality not available to retail investors, including things such as continuously updated pricing models based on real-time streaming data, access to multiple markets simultaneously, and order and risk management tools.

registered Broker/Dealer is no longer appropriate in today's marketplace because some non-broker-dealer individuals and entities have access to information and technology that enables them to professionally trade listed options in the same manner as a broker or dealer in securities.⁷ These individual traders and entities (collectively, "Professional Customers") have the same technological and informational advantages over retail investors as broker-dealers trading for their own account, which enables them to compete effectively with broker-dealer orders and market maker quotes for execution opportunities in the NYSE Amex marketplace.⁸

The Exchange therefore does not believe that it is consistent with fair competition for these professional account holders to continue to receive the same marketplace advantages as retail investors over Broker/Dealers trading on NYSE Amex. Moreover, because Customer orders at the same price are executed in time priority, retail investors are prevented from fully

⁷ For example, some Broker/Dealers provide professional customers with multi-screened trading stations equipped with trading technology that allows the trader to monitor and place orders on all seven options exchanges simultaneously. These trading stations also provide compliance filters, order management tools, the ability to place orders in the underlying securities, and market data feeds. See Securities Exchange Act Releases 59287 (January 23, 2009), 74 FR 5694 (January 30, 2009)(SR-ISE-2006-26)(order approving International Securities Exchange ("ISE") proposal to introduce priority customer and professional orders) and 57254 (February 1, 2008), 73 FR 7345(February 7, 2008)(SR-ISE-2006-26)(notice of ISE proposal to introduce priority customer and professional orders) at note 8, See also Securities Exchange Act Release 61198 (December 17, 2009), 74 FR 68880 (December 29, 2009) (SR-CBOE-2009-078)(order approving CBOE proposal to introduce Professional Customers).

⁸ Market Makers enter quotes based on the theoretical value of the option, which moves with various factors in their pricing models, such as the value of the underlying security. Professional customers place and cancel orders in relation to an option's theoretical value in much the same manner as a Market Maker. This is evidenced by the entry of limit orders that join the best bid or offer and by a very high rate of orders that are entered and cancelled. In contrast, retail investors who enter orders as part of an investment strategy (such as a buy/write or directional trade) most frequently enter marketable orders or limit orders that they do not cancel and replace. See, e.g., Securities Exchange Act Release 57254 at note 9.

benefiting from the priority advantage when Professional Customers are afforded Customer order priority.

Accordingly, the Exchange is seeking to adopt a new term that will be used to more appropriately provide NYSE Amex marketplace advantages to retail investors on NYSE Amex. Under the proposal, a “Professional Customer” will be defined in proposed 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 will be treated in the same manner as a broker or dealer in securities for 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.

The use of this new term for purposes of the above-referenced execution rules will result in Professional Customer account holders participating in NYSE Amex’s allocation process on equal terms with Broker/Dealer orders. The proposal will not otherwise affect non-Broker/Dealer individuals or entities under NYSE Amex rules. For example, NYSE Amex will provide the same away-market protection for all Customer orders, including non-Broker/Dealer orders that are included in the definition of “Professional Customer” orders.

In order to properly represent orders entered on the Exchange according to the new definitions, ATP holders will be required to indicate whether Customer orders are “Professional Customer” orders.⁹ To comply with this requirement, ATP holders will be required to review 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.¹⁰

Lastly, the Exchange intends to establish, via a separate rule filing, transaction fees applicable to Professional Customers. The Exchange will not commence the Professional Customer program until such fees are in place.

Section 11(a) of the Act prohibits any 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 persons exercises discretion unless an exception applies.¹¹ Section 11(a)(1) contains a number of exceptions for principal transactions by members and their associated persons. One such exception, set forth in subparagraph (G) of

⁹ 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 will be marked with an origin code of “PC.” These Professional Customer identifiers will also flow through Exchange systems into audit trail and trade reporting data.

¹⁰ 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 will be required to conduct a quarterly review and make any appropriate changes to the way in which they are representing orders within five days after the end of each calendar quarter. While members only will 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 will notify the ATP Holder and the ATP Holder will be required to change the manner in which it is representing the customer’s orders within five days.

¹¹ 15 U.S.C. 78k(a).

Section 11(a)(1) and in Rule 11a1-1(T),¹² permits any transaction for a member's own account provided, among other things, that the transaction yields priority, parity, and precedence to orders for the account of persons who are not member or associated with members of the exchange. Exchange rules, therefore, may require members to yield priority to the orders of non-ATP Holders, including Customers, to satisfy this exception to Section 11(a).¹³ Another exception permits market makers to effect transactions on exchanges in which they are members.¹⁴

In addition to the exceptions noted above, Rule 11a2-2(T) under the Act¹⁵ provides exchange members with an exception from the prohibitions in Section 11(a). Rule 11a2-2(T), known as the "effect versus execute" rule, permits an exchange member, subject to certain conditions, to effect transactions for its own account, the account of an associated person, or an account with respect to which it or an associated person thereof exercises investment discretion (collectively "covered accounts") by arranging for an unaffiliated member to execute the transaction on the exchange.

To comply with the "effect versus execute" rule's conditions, a member: (i) must transmit the order from off the exchange floor; (ii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;¹⁶ (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member has

¹² 17 CFR 240.11a1-1(T).

¹³ See, NYSE Amex Rule 910NY.

¹⁴ Section 11(a)(1)(A).

¹⁵ 17 CFR 240.11a2-2(T).

¹⁶ The ATP Holder, however, may participate in clearing and settling the transaction.

investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the rule.¹⁷

The Exchange does not believe that its proposal relating to Professional Customer orders would 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.¹⁸

The Exchange believes that identifying Professional Customer account holders based upon the average number of orders entered for a beneficial account is an appropriately objective approach that will reasonably distinguish such persons and entities from retail investors. The Exchange proposes the threshold of 390 orders per day on average over a calendar month because it believes it far exceeds the number of orders that are entered by retail investors in a single day,¹⁹ while being a sufficiently low number of orders to cover the Professional account holders that are competing with Broker/Dealers in the NYSE Amex marketplace. In addition, basing the standard on the number of orders that are entered in listed options for a beneficial

¹⁷ 17 CFR 240.11a2-2(T).

¹⁸ See Securities Exchange Act Release No. 59546 (March 10, 2009), 74 FR 11144 (March 16, 2009)(SR-CBOE-2009-016).

¹⁹ Three hundred ninety orders is equal to the total number of orders that a person would place in a day if that person entered one order every minute from market open to close. Many of the largest retail-oriented electronic brokers offer lower commission rates to customers they define as “active traders.” Publicly available information from the websites for Charles Schwab, Fidelity, TD Ameritrade and optionsXpress all define an “active trader” as someone who executes only a few options trades per month. The highest required trading activity to qualify as an active trader among these four firms was 35 trades per quarter. See Securities Exchange Act Release 57254 at note 11 (which also notes that a study of one of the largest retail-oriented options brokerage firms indicated that on a typical trading day, options orders were entered with respect to 5922 different customer accounts. There was only one order entered with respect to 3765 of the 5922 different customer accounts on this day, and there were only 17 customer accounts with respect to which more than 10 orders were entered. The highest number of orders entered with respect to any one account over the course of an entire week was 27).

account(s) assures that Professional Customer account holders cannot inappropriately avoid the purpose of the rule by spreading their trading activity over multiple exchanges, and using an average number over a calendar month will prevent gaming of the 390 order threshold.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act,²¹ 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 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. In particular, the proposal will assure that retail investors continue to receive the appropriate marketplace advantages in NYSE Amex marketplace, while furthering fair competition among marketplace professionals by treating them equally within the NYSE Amex marketplace.

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

²⁰ 15 U.S.C. 78f(b).

²¹ 15 U.S.C. 78f(b)(5).

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 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. Please include File Number SR-NYSEAmex-2010-18 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-NYSEAmex-2010-18. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing will also be available for inspection and copying at NYSE's principal office and on its Internet Web site at 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-NYSEAmex-2010-18 and should be submitted on or before [insert date 21 days after publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Florence E. Harmon
Deputy Secretary

²² 17 CFR 200.30-3(a)(12).