

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57158; File No. SR-NYSEArca-2007-120)

January 15, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change Relating to Restrictions on Acting as Market Makers and Floor Brokers

On November 27, 2007, the NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend certain Exchange rules to restrict an OTP Holder from concurrently registering as both a Market Maker and a Floor Broker. The proposed rule change was published for comment in the Federal Register on December 11, 2007.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

Presently, OTP Holders may be registered as either a Market Maker or a Floor Broker, or in certain situations, both. An OTP Holder that wished to act in both capacities must apply for and receive approval from the Exchange.⁴ The Exchange represented that presently there are no OTP Holders registered in the dual capacity of Market Maker and Floor Broker, nor does the Exchange have any pending applications from existing OTP Holders.

The Exchange further represented that the practice of dual registration dates back to the early days of floor-based, open outcry trading. Open outcry trading was for the most part a manual process, necessitating the need for a large number of Floor Brokers. On occasion, often in periods of unusually active market conditions, there might have been a shortage of brokers on

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 56899 (December 5, 2007), 72 FR 70367 (“Notice”).

⁴ See NYSE Arca Rule 6.38(b)(4).

the floor, and in the interest of maintaining a fair and orderly market, Market Makers might be called upon to act as a Floor Broker. The vast majority of trades on NYSE Arca now occur electronically, and thus, there is a dramatic decrease in open outcry trading executions done by Floor Brokers.

For the reasons stated above, the Exchange proposes to establish new Rule 6.33(b) stating that an OTP Holder registered as a Market Maker on NYSE Arca may not be concurrently registered as a Floor Broker on NYSE Arca. Accordingly, the Exchange also proposes establishing new Rule 6.44(b), stating that an OTP Holder presently registered as a Floor Broker on NYSE Arca cannot be concurrently registered as a Market Maker on NYSE Arca. The Exchange also proposes making non-substantive changes regarding the numbering of existing rules in order to accommodate the new rules.

Pursuant to NYSE Arca Rule 6.82(h)(3), Lead Market Makers (“LMM”) may perform the functions of a Floor Broker. Historically, LMMs might perform the duties of a Floor Broker and represent public customer orders when there was a shortage of Floor Brokers available. As stated above, due to increased automation in the marketplace, the Exchange does not anticipate a shortage of Floor Brokers such that it would necessitate an LMM to have to act as a Floor Broker. As such, the Exchange proposes deleting Rule 6.82(h)(3) in its entirety. The Exchange also proposes deleting Commentary .02 to Rule 6.82 relating to a LMMs handling of public customer orders.

Presently, OTP Holders acting as both Floor Broker and Market Maker are subject to certain restrictions under NYSE Arca Rule 6.38. Upon approval of the above mentioned rule changes, these restrictions will become obsolete. Since Market Makers will be prohibited from

acting as a Floor Broker, and visa-versa, there is no need to have specific restrictions governing their trading activity. Therefore, the Exchange proposes eliminating Rule 6.38 in its entirety.

The Exchange noted that LMMs and InterMarket Linkage Maker Makers (“IMM”) are exempt from certain provisions contained in NYSE Arca Rule 6.38. Currently, LMMs and IMMs may be called upon to send Principal Acting as Agent (“P/A”) Orders through the InterMarket Linkage System (“Linkage”) pursuant to NYSE Arca Rules 6.92 and 6.93. Linkage is a fully automated process on NYSE Arca, and while the IMM or LMM may be acting in an agency capacity, as the responsible party for sending the order, they are not acting in the capacity of a Floor Broker. Thus, the Exchange proposes to add language to Rule 6.33(b) stating that a prohibition on concurrent registration as both a Market Maker and Floor Broker will not prevent an IMM or LMM from acting in an agency capacity for Linkage purposes.

The Commission finds that the proposed rule change is consistent with the requirements of Section 6(b) of the Act⁵ and the rules and regulations thereunder applicable to a national securities exchange.⁶ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,⁷ which requires that a national securities exchange’s rules be designed to facilitate transactions in securities, to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest. The Commission notes that the practice of OTP Holders registering in the dual capacity of Market Maker and Floor Broker dates back to the days of floor-based, open outcry trading environment. The Commission also notes that the vast majority of trades on NYSE Arca

⁵ 15 U.S.C. 78(f)(b).

⁶ In approving this rule change, the Commission notes that it has considered the proposal’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁷ 15 U.S.C. 78f(b)(5).

now occur electronically, such that the need for dual registration by the OTP Holders may no longer be necessary. Further, the Commission notes that the Exchange stated that currently, there are no OTP Holders registered in this dual capacity, and the Exchange does not have any pending applications from existing OTP Holders to be dually registered in such capacity.

The Commission believes that it is reasonable and consistent with the Act for the Exchange to delete Rule 6.38, and also promulgate new rule provisions within Rules 6.33 and 6.44 to prohibit dual registration by OTP Holders as Market Makers and Floor Brokers. The Commission recognizes that eliminating the dual registration of OTP Holders as Market Makers and Floor brokers will not affect the ability of LMMs and IMMs, who may continue to be called upon today, to act in an agency capacity, to send P/A Orders through Linkage.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁸ that the proposed rule change (SR-NYSEArca-2007-120) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹

Florence E. Harmon
Deputy Secretary

⁸ 15 U.S.C. 78s(b)(2).

⁹ 17 CFR 200.30-3(a)(12).