

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58888; File No. SR-NYSEArca-2008-100)

October 30, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Rules 6.100 and 6.82

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 October 20, 2008, 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 and II 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

NYSE Arca proposes to amend its rules governing Allocation of Options Issues and Lead Market Maker (“LMM”) Evaluations. The Exchange proposes to eliminate Rule 6.100 and revise Rule 6.82. The text of the proposed rule change is available on the Exchange’s Web site at [www.nyse.com](http://www.nyse.com), at the Exchange’s principal office and at the Public Reference Room of the Commission.

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. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has

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

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

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

prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to delete certain obsolete provisions of Rule 6.100. The Exchange then proposes to incorporate the remaining relevant provisions of Rule 6.100 into a revised Rule 6.82, so that all relevant provisions related to LMM issue allocation reside within one consolidated rule. Finally, the Exchange proposes to add new relevant provisions to Rule 6.82 and logically renumber the Rule.

History

Rule 6.100 was originally adopted from Options Floor Procedural Advice (“OFPA”) <sup>4</sup> B13, issued on April 2, 1988, which described Trading Crowd evaluations and the process for allocating option issues. On October 3, 1996 the Exchange revised OFPA-B13 to describe the process for evaluating LMMs for purposes of allocating option issues. OFPA-B13 was ultimately incorporated into the Exchange’s rules, as part of SR-PCX-1999-48. <sup>5</sup>

Prior to the Exchange’s conversion to its Lead Market Maker system (a conversion which is now 100% complete), options issues, or classes of options, on NYSE Arca were allocated to either a Trading Crowd, consisting of a group of individual Market Makers, or to LMMs. An allocation to a Trading Crowd simply designated the physical post on the trading floor where a particular issue would trade. Traditionally, a Market Maker’s Appointment was generally

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<sup>4</sup> OFPAs were previously issued by the Exchange as a way of distributing information such as committee decisions, policies and procedures, and rule interpretations. Such information is now conveyed through the issuance of Regulatory Bulletins.

<sup>5</sup> See Securities Exchange Act Release No. 44345 (May 23, 2001), 66 FR 30037 (June 4, 2001) (approval notice for SR-PCX-1999-48).

limited to issues allocated to a particular Trading Crowd.<sup>6</sup> The allocation did not convey any specific rights, nor confer any specific obligations on any individual Market Maker of the crowd, other than those already specified in NYSE Arca 6.37.<sup>7</sup> A Market Maker's obligations, conveyed as a condition of his or her Appointment, are not affected due to the allocation, or reallocation of an options issue. An allocation of a particular class of options to an LMM, which in turn becomes part of that Market Maker's Appointment, does however guarantee certain rights, in return for fulfilling certain obligations. Presently, these obligations and rights are detailed, in part, in Rule 6.82.

By the end of the period in which the Exchange allocated issues to both LMMs and Trading Crowds, the Exchange determined that most issues that were allocated to an LMM (as opposed to a Trading Crowd) had tighter bid/ask spreads, offered more liquidity and were generally thought to offer a better product for public investors. As a result, since 1999, all option issues on the Exchange have been allocated exclusively to LMMs.<sup>8</sup> Presently, there are no issues allocated to a Trading Crowd.

#### Delete Obsolete Provisions of Rule 6.100

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<sup>6</sup> Market Maker Appointments are governed by NYSE Arca Rule 6.35. Since the advent of electronic access to the Exchange in 2003, a Market Maker's "Appointment" is no longer necessarily bound by the physical layout of the Trading Floor.

<sup>7</sup> See NYSE Arca Rule 6.37 (Obligations of Market Makers).

<sup>8</sup> It should be noted that in mid-2007 the Exchange received approval to designate certain option issues as "non-LMM" issues. See Securities Exchange Act Release No. 56001 (July 2, 2007), 72 FR 37557 (July 10, 2007) (SR-NYSEArca-2007-34). To qualify for non-LMM status, the option issues must be highly liquid, highly active issues that have sufficient participation by OTP Holders that there is no need for an LMM. By their very definition, non-LMM issues are not allocated to an LMM, nor are they allocated to a Trading Crowd. The proposed changes described herein do not encompass or otherwise impact non-LMM issues.

Rule 6.100(b)-(c). The Exchange proposes to eliminate Rules 6.100(b)-(c) that relate solely to Trading Crowd questionnaires and evaluations. As described above, since options issues are no longer allocated to Trading Crowds, these rules are obsolete and unnecessary.

Rule 6.100(d)-(g). The Exchange proposes to eliminate Rules 6.100(d)-(g) that establish a certain procedures related to informal meetings regarding LMM evaluations. The Exchange, however, will retain certain procedures related to informal hearings regarding LMM evaluations. As set forth more fully below, in a revised Rule 6.82(g), the Exchange may afford LMMs an opportunity to informal hearings prior to a final determination regarding their performance – consistent with the current rule. The Exchange will also afford LMMs an opportunity to appeal allocation decisions pursuant to the Exchange’s formal appeals process codified in Rule 10.14.

#### Delete Obsolete Provisions of Rule 6.82

Rule 6.82(a)(1) Lead Market Maker Defined. The Exchange proposes to remove the reference to “nominee.” The concept of nominee, as it pertains to the definition of LMMs, is obsolete and unnecessarily confusing. To clarify who must be registered with the Exchange as a Market Maker, the Exchange is replacing the reference to “nominee” and will refer instead to individuals trading on behalf of the LMM, as follows: Each individual trading on behalf of an LMM must be registered with the Exchange as a Market Maker or Market Maker Authorized Trader.

Rule 6.82(e)(1) Allocation. The Exchange proposes to delete the obsolete and unnecessary reference to “trading crowd”. The Exchange also proposes to remove the reference to “Rule 6.100” and replace it with a reference to “subparagraph (g) of this Rule”. As described more fully below, this change relates to the Exchange’s effort to consolidate all provisions relating to issue allocation into one rule.

Rule 6.82(e)(2) Transfer of Issues. The Exchange proposes removing the reference to “nominees.” The reference to nominees is historic and obsolete. Since issues are allocated to LMMs and not to nominees, this restriction on transferring issues between nominees is both confusing and unnecessary.

Rule 6.82(e)(3) Evaluation of LMM’s. The Exchange proposes to eliminate this provision and replace it with a revised Rule 6.82(g), which will incorporate Rule 6.82(e)(3) as well as certain provision of Rule 6.100. As set forth more fully below, the revised Rule 6.82(g) will clarify the performance standards by which LMMs will be evaluated, the process by which LMMs will be evaluated, and the LMMs’ right to appeal such evaluation.

Rule 6.82(f)(1) Reallocation. The Exchange proposes to remove obsolete references to Trading Crowds and Nominees. The Exchange is not otherwise amending or altering the substance of this rule.

Rule 6.82(f)(2) Continued Quality and Service. The Exchange proposes to eliminate Rule 6.82(f)(2), which governs the reallocation of issues to the Market Maker system (Trading Crowd). Since option issues are no longer allocated to Trading Crowds, this provision is obsolete and unnecessary.

Rule 6.82(f)(3) LMM Compensation. The Exchange also proposes to eliminate Rule 6.82(f)(3), which states that in the event an LMM has an option issue(s) reallocated, the Exchange may award compensation to that LMM based on various factors. Option issues are generally reallocated in situations where LMMs either fail to meet certain performance standards or have been otherwise disqualified to act as an LMM by the Exchange. As a result, the Exchange has determined that compensating LMMs in these circumstances is not appropriate and therefore proposes to eliminate this provision.

Rule 6.82(g) Review of Exchange Decisions. The Exchange proposes remove Rule 6.82(g), which generally sets forth that a LMM may appeal allocation decisions pursuant to Rule 10. In its place, the Exchange proposes to add new Rule 6.82(b)(5), which affords LMMs an opportunity to appeal allocation decisions pursuant to the Exchange's formal appeals process codified in Rule 10.14.

Move the Remaining Relevant Provisions of Rule 6.100 to Rule 6.82

NYSE Arca proposes to move the remaining relevant portions of Rule 6.100 to new Rule 6.82(g). This will eliminate all text associated with Rule 6.100. The Exchange also proposes to amend certain procedures contained in Rule 6.82 and eliminate confusing references to historic practices as detailed below.

The Exchange proposes moving Rule 6.100(a) Evaluation of Options Trading Crowd Performance to new Rule 6.82(g)(1) and renaming the Rule: Evaluation of Lead Market Maker Performance. In addition to renumbering and renaming the rule, the Exchange will clarify the performance standards by which LMMs will be evaluated, the process by which LMMs will be evaluated, and the LMMs' right to appeal such evaluation. Upon revision, this provision will combine, in one rule, certain relevant aspects of Rule 6.82(e)(3), as well as certain relevant provisions of Rule 6.100. Relevant criteria such as quality of markets and adherence to ethical standards remain. On the other hand, items such as competition among Market Makers, which was a criterion used solely in connection with allocating issues to a Trading Crowd is no longer relevant and will be deleted. In addition, all references to Trading Crowd evaluations and questionnaires will be removed since they are obsolete and unnecessary.<sup>9</sup>

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<sup>9</sup> The Exchange notes that while Market Makers will no longer be evaluated for purposes of participating in a Trading Crowd, Market Makers will continue to be evaluated as a condition of their Appointment under Rule 6.35(j). The Exchange will periodically evaluate LMMs, in practice this may be as frequent as monthly and no less than

## Add New Relevant Provisions to Rule 6.82

Rule 6.82(b)(5) Appeals. As Described above, the Exchange proposes adding this new provision which replaces Rule 6.82(g)(1) and affords LMMs an opportunity to appeal allocation decisions pursuant to the Exchange's formal appeals process codified in Rule 10.14.

Rule 6.82(g)(1)(A). The Exchange proposes adding new Rule 6.82(g)(1)(A), which explains how NYSE Arca market share shall be calculated. A minimum percentage of total national market volume shall be established at the time an issue is allocated and will be identified on the Request for Issue Allocation form that an LMM is required to complete.<sup>10</sup> Failure to maintain the minimum percentage of national volume identified and agreed to at the time the issue is allocated to the LMM will be considered a failure to meet minimum performance standards.

Rule 6.82(g)(1)(B). The Exchange proposes adding new Rule 6.82(g)(1)(B), which states that the Exchange will provide LMMs with information related to their national market share in each of their allocated issues. According to the new provision, LMMs shall have the ability to meet with Exchange staff, upon request, to discuss such findings.

Rule 6.82(g)(1)(C). The Exchange proposes adding new Rule 6.82(g)(1)(C), which outlines the informal hearing process the Exchange may undertake in the event an LMM has failed to meet performance standards pursuant Rule 6.82(g)(1). This section is generally consistent with current Rule 6.100(e)-(f) and (h).

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semiannually. The Exchange notes, that pursuant to Rule 6.41, the Exchange provides Market Makers, on a monthly basis, with statistical reports designed to measure trading volume and participation in trading activity in each option issue traded on the Exchange.

<sup>10</sup> Presently, the standard minimum acceptable total national market volume is 5%. The Exchange determines this minimum acceptable percentage based on NYSE Arca's percentage of total national contract volume per security.

Rule 6.82(g)(1)(D). The Exchange proposes adding new Rule 6.82(g)(1)(D), which outlines the process the Exchange will undertake in the event an LMM has failed to meet performance standards pursuant Rule 6.82(g)(1), including the right to appeal pursuant to Rule 10.14.

### Conclusion

NYSE Arca Rules 6.100 and 6.82 contain numerous obsolete and outdated provisions. The Exchange proposes eliminating those obsolete provisions of Rules 6.100 and 6.82 and renumbering the remaining relevant provisions of Rule 6.100 as part of the newly reconstituted Rule 6.82. The Exchange also proposes to add new relevant rules pertaining to the allocation of option issues and the evaluation of LMMs. Taken together, these changes will simplify and clarify the Exchange's rules regarding option issues allocation.

### 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>11</sup> of 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 proposes eliminating obsolete provisions of Rules 6.100 and 6.82 while adding new relevant rules pertaining to the allocation of option issues and the evaluation of LMMs. Taken together, these changes will simplify and clarify the Exchange's rules regarding option issues allocation.

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

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

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>13</sup> and Rule 19b-4(f)(6) thereunder.<sup>14</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>15</sup> and Rule 19b-4(f)(6)(iii) thereunder.<sup>16</sup>

The Exchange further asserts that the proposed changes simply serve to clarify the rules of NYSE Arca regarding option issues allocation by eliminating obsolete provisions of Rules 6.100 and 6.82 while adding new relevant rules pertaining to the allocation of option issues and

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>16</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the pre-filing requirement.

the evaluation of LMMs. For the foregoing reasons, the Exchange has designated this rule filing as a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4.<sup>17</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### 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-2008-100 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2008-100. 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

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<sup>17</sup> 17 CFR 240.19b-4(f)(6).

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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the self-regulatory organization. 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-2008-100 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

Florence E. Harmon  
Acting Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).