

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-65166; File No. SR-NYSEArca-2011-57)

August 18, 2011

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Deleting the Text of NYSE Arca Equities Rules 6.16 and 6.16A, and Adopting New NYSE Arca Equities Rule 5320 that is Substantially the Same as Financial Industry Regulatory Authority Rule 5320 to Prohibit Trading Ahead of Customer Orders with Certain Exceptions (commonly known as the Manning Rule)

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 August 11, 2011, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) 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 delete the text of NYSE Arca Equities Rules 6.16 and 6.16A, which limit trading ahead of customer limit and market orders, and adopt new NYSE Arca Equities Rule 5320 that is substantially the same as Financial Industry Regulatory Authority (“FINRA”) Rule 5320. The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room, and [www.nyse.com](http://www.nyse.com).

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

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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.

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 proposes to delete the text of NYSE Arca Equities Rules 6.16 and 6.16A, which limit trading ahead of customer limit and market orders, and adopt new NYSE Arca Equities Rule 5320 that is substantially the same as FINRA Rule 5320.<sup>4</sup> As with FINRA Rule 5320, proposed NYSE Arca Equities Rule 5320 would prohibit trading ahead of customer orders with certain exceptions, including large order and institutional account exceptions, a no-knowledge exception, a riskless principal exception, an intermarket sweep order (“ISO”) exception, and odd lot and bona fide error transaction exceptions, discussed in detail below. Proposed NYSE Arca Equities Rule 5320 also provides the same guidance as FINRA Rule 5320 on minimum price improvement standards, order handling procedures, and trading outside normal market hours.

Background

NYSE Arca Equities Rule 6.16 generally prohibits an ETP Holder from trading on a proprietary basis ahead of an unexecuted customer order. However, NYSE Arca Equities Rule 6.16 allows an ETP Holder to negotiate specific terms and conditions applicable to the

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<sup>4</sup> See Securities Exchange Act Release No. 63895 (February 11, 2011), 76 FR 9386 (February 17, 2011) (SR-FINRA-2009-090). The Exchange’s affiliates, New York Stock Exchange LLC and NYSE Amex LLC, also have filed substantially similar rule filings. See SR-NYSE-2011-43 and SR-NYSEAmex-2011-59.

acceptance of limit orders pursuant to certain conditions of the rule, and NYSE Arca Equities Rule 6.16A allows an ETP Holder to negotiate specific terms and conditions applicable to the acceptance of market orders pursuant to certain conditions of the rule. NYSE Arca Equities Rule 6.16 is based on NASD Interpretive Material 2110-2 and NYSE Arca Equities Rule 6.16A is based on NASD Rule 2111.<sup>5</sup>

#### Proposal to Adopt Text of FINRA Rule 5320

In conjunction with its rules harmonization with FINRA, the Exchange proposes to delete the text of NYSE Arca Equities Rules 6.16 and 6.16A and adopt the text of FINRA Rule 5320, with certain technical changes, as NYSE Arca Equities Rule 5320. FINRA Rule 5320 generally provides that a FINRA member that accepts and holds an order in an equity security from its own customer or a customer of another broker-dealer without immediately executing the order is prohibited from trading that security on the same side of the market for its own account at a price that would satisfy the customer order, unless it immediately thereafter executes the customer order up to the size and at the same or better price at which it traded for its own account.

Proposed NYSE Arca Equities Rule 5320 permits an ETP Holder to trade a security on the same side of the market for its own account at a price that would satisfy a customer order in certain circumstances.

#### Large Orders and Institutional Accounts

The most notable exception to the customer order protection rule is to allow ETP Holders to negotiate terms and conditions on the acceptance of certain large-sized orders (orders of 10,000 shares or more unless such orders are less than \$100,000 in value) or orders from institutional accounts as defined in NASD Rule 3110. Such terms and conditions would permit

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<sup>5</sup> See Securities Exchange Act Release No. 64780 (June 30, 2011), 76 FR 39960 (July 7, 2011) (SR-NYSEArca-2011-40).

the ETP Holder to continue to trade alongside or ahead of such customer orders if the customer agrees.

Specifically, under the proposed rule, an ETP Holder would be permitted to trade a security on the same side of the market for its own account at a price that would satisfy a customer order provided that the ETP Holder provides clear and comprehensive written disclosure to each customer at account opening and annually thereafter that (a) discloses that the ETP Holder may trade proprietarily at prices that would satisfy the customer order, and (b) provides the customer with a meaningful opportunity to opt in to the NYSE Arca Equities Rule 5320 protections with respect to all or any portion of its order.

If a customer does not opt in to the protections with respect to all or any portion of its order, the ETP Holder may reasonably conclude that such customer has consented to the ETP Holder trading a security on the same side of the market for its own account at a price that would satisfy the customer's order.<sup>6</sup>

In lieu of providing written disclosure to customers at account opening and annually thereafter, the proposed rule would permit ETP Holders to provide clear and comprehensive oral disclosure to, and obtain consent from, a customer on an order-by-order basis, provided that the ETP Holder documents who provided such consent and that such consent evidences the customer's understanding of the terms and conditions of the order. In addition, where a customer has opted in to the NYSE Arca Equities Rule 5320 protections, an ETP Holder may still obtain consent on an order-by-order basis to trade ahead of or along with an order from that

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<sup>6</sup> As is always the case, customers retain the right to withdraw consent at any time. Therefore, an ETP Holder's reasonable conclusion that a customer has consented to the ETP Holder trading along with such customer's order is subject to further instruction and modification from the customer.

customer, provided that the ETP Holder documents who provided such consent and that such consent evidences the customer's understanding of the terms and conditions of the order.

#### No-Knowledge Exception

The Exchange is also proposing to include a "no-knowledge" exception to its customer order protection rule. The proposed exception would allow a proprietary trading unit of an ETP Holder to continue trading in a proprietary capacity and at prices that would satisfy customer orders that were being held by another, separate trading unit at the ETP Holder. The no-knowledge exception would be applicable with respect to NMS stocks, as defined in Rule 600 of SEC Regulation NMS. In order to avail itself of the no-knowledge exception, an ETP Holder must first implement and utilize an effective system of internal controls (such as appropriate information barriers) that operate to prevent the proprietary trading unit from obtaining knowledge of the customer orders that are held at a separate trading unit.

An ETP Holder that structures its order handling practices in NMS stocks to permit its proprietary and/or market-making desk to trade at prices that would satisfy customer orders held by a separate trading unit must disclose in writing to its customers, at account opening and annually thereafter, a description of the manner in which customer orders are handled by the ETP Holder and the circumstances under which the ETP Holder may trade proprietarily at its market-making desk at prices that would satisfy the customer order.

#### Riskless Principal Exception

The Exchange's proposal also provides that the obligations under this rule shall not apply to an ETP Holder's proprietary trade if such proprietary trade is for the purposes of facilitating the execution, on a riskless principal basis, of another order from a customer (whether its own customer or the customer of another broker-dealer), provided that the ETP Holder (a) submits a

report, contemporaneously with the execution of the facilitated order, identifying the trade as riskless principal to the Exchange and (b) has written policies and procedures to ensure that riskless principal transactions relied upon for this exception comply with applicable Exchange rules. At a minimum these policies and procedures must require that the customer order was received prior to the offsetting principal transaction, and that the offsetting principal transaction is at the same price as the customer order exclusive of any markup or markdown, commission equivalent or other fee and is allocated to a riskless principal or customer account in a consistent manner and within 60 seconds of execution.

ETP Holders must have supervisory systems in place that produce records that enable the ETP Holder and the Exchange to reconstruct accurately, readily, and in a time-sequenced manner all orders on which an ETP Holder relies in claiming this exception.

#### ISO Exception

The proposed rule change also provides that an ETP Holder shall be exempt from the obligation to execute a customer order in a manner consistent with NYSE Arca Equities Rule 5320 with regard to trading for its own account that is the result of an intermarket sweep order routed in compliance with Rule 600(b)(30)(ii) of SEC Regulation NMS where the customer order is received after the ETP Holder routed the ISO. Where an ETP Holder routes an ISO to facilitate a customer order and that customer has consented to not receiving the better prices obtained by the ISO, the ETP Holder also shall be exempt with respect to any trading for its own account that is the result of the ISO with respect to the consenting customer's order.

#### Odd Lot and Bona Fide Error Exception

In addition, the Exchange proposes applying an exception for a firm's proprietary trade that (1) offsets a customer odd lot order (i.e., an order less than one round lot, which is typically

100 shares) or (2) corrects a bona fide error. With respect to bona fide errors, ETP Holders would be required to demonstrate and document the basis upon which a transaction meets the bona fide error exception.

#### Minimum Price Improvement Standards

The proposed rule change establishes the minimum amount of price improvement necessary for an ETP Holder to execute an order on a proprietary basis when holding an unexecuted limit order in that same security without being required to execute the held limit order.

#### Order Handling Procedures

The proposed rule change provides that an ETP Holder must make every effort to execute a marketable customer order that it receives fully and promptly. An ETP Holder that is holding a customer order that is marketable and has not been immediately executed must make every effort to cross such order with any other order received by the ETP Holder on the other side of the market up to the size of such order at a price that is no less than the best bid and no greater than the best offer at the time that the subsequent order is received by the ETP Holder and that is consistent with the terms of the orders. In the event that an ETP Holder is holding multiple orders on both sides of the market that have not been executed, the ETP Holder must make every effort to cross or otherwise execute such orders in a manner that is reasonable and consistent with the objectives of the proposed rule and with the terms of the orders. An ETP Holder can satisfy the crossing requirement by contemporaneously buying from the seller and selling to the buyer at the same price.

#### Trading Outside Normal Market Hours

An ETP Holder generally may limit the life of a customer order to the period of normal market hours of 6:30 a.m. to 1:00 p.m. Pacific Standard Time. However, if the customer and ETP Holder agree to the processing of the customer's order outside normal market hours, the protections of proposed NYSE Arca Equities Rule 5320 would apply to that customer's order(s) at all times the customer order is executable by the ETP Holder.

#### Conforming and Other Changes

For consistency with Exchange rules, NYSE Arca Equities Rule 5320 will have certain differences from FINRA Rule 5320. The Exchange proposes not to include Supplementary Material .02(b) and portions of Supplementary Material .06, which relate to OTC equity securities, in the Commentary of NYSE Arca Equities Rule 5320 and to change all references from "members" to "ETP Holders."

#### Implementation Date

The Exchange proposes to implement NYSE Arca Equities Rule 5320 on the same date that FINRA implements FINRA Rule 5320, which FINRA has announced will be September 12, 2011.<sup>7</sup> The Exchange will provide notice of the implementation date to ETP Holders via a Regulatory Information Bulletin.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>8</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5)<sup>9</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, to

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<sup>7</sup> See FINRA Regulatory Notice 11-24.

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

<sup>9</sup> 15 U.S.C. 78f(b)(5).

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. The Exchange believes that adopting the proposed rule at the same time that FINRA implements a substantially similar rule will contribute to investor protection by defining important parameters by which ETP Holders must abide when trading proprietarily while holding customer limit and market orders, and foster cooperation by harmonizing requirements across self-regulatory organizations.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>10</sup> and Rule 19b-4(f)(6) thereunder.<sup>11</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 and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>12</sup> normally does not become

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),<sup>13</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend 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-2011-57 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-NYSEArca-2011-57. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies

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<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii).

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 website 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 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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-2011-57 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>14</sup>

Elizabeth M. Murphy  
Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).