

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-73665; File No. SR-NYSEArca-2014-133)

November 21, 2014

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 6.1A to Adopt a Definition of “Professional Customer” on the Exchange

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 November 17, 2014, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“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 amend Rule 6.1A (Definitions and References – OX) to adopt a definition of “Professional Customer” on the Exchange. The text of the proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and the 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

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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.

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 is proposing to amend Rule 6.1A (Definitions and References – OX) to include a definition of “Professional Customer” and to amend Commentary .03 of Rule 6.69 to specify how all Professional Customer orders should be marked.

As proposed, the new term, “Professional Customer” would be defined in Exchange Rule 6.1A(a)(4A), 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). In connection with this new definition, the Exchange proposes to add to Commentary of Rule 6.69 the origin code OTP Holders would be required to use to properly represent orders of a “Professional Customer.”<sup>4</sup> To determine whether an order is a Professional Customer order, OTP Holders would 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.<sup>5</sup>

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<sup>4</sup> 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 “PC.”

<sup>5</sup> 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. OTP 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 Exchange believes that identifying Professional Customer accounts based upon the average number of orders entered in qualified accounts is an appropriate, objective approach that will reasonably distinguish such persons and entities from non-professional, retail investors or market participants. The Exchange believes that the proposed threshold of 390 orders per day on average over a calendar month far exceeds the number of orders that are entered by retail investors in a single day and therefore is an appropriate threshold for identifying non-retail Customers.<sup>6</sup> In addition, basing the standard on the number of orders that are entered in listed options for a qualified 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. The Exchange also proposes to make corresponding changes to Rule 6.69 regarding the marking of orders.

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the OTP Holder and the OTP Holder would be required to change the manner in which it is representing the customer's orders within five business days.

<sup>6</sup> In approving a similar filing of the International Securities Exchange, LLC ("ISE"), the Commission referenced statements made by ISE that 390 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 market 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 of Charles Schwab, Fidelity, TD Ameritrade and OptionsXpress all define "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 note 14 of Securities Exchange Act Release No. 59287 (January 23, 2009), 74 FR 5694, 5695 (January 30, 2009) (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 5,922 different customer accounts. There was only one order entered with respect to 3,765 of the 5,922 different customer accounts on this day, and there were only 17 customer accounts with respect to which more than ten orders were entered. The highest number of orders entered with respect to any one account over the course of an entire week was 27).

The Professional Customer definition proposed by the Exchange, including the 390 orders per day threshold, is similar to designations that have been adopted by all other options exchanges.<sup>7</sup> The Exchange is not proposing at this time to revise any order execution or processing rules, including its priority rules, to change the treatment of Professional Customers.<sup>8</sup> Instead, Professional Customer orders will be treated as Customer orders under Exchange rules for all purposes, except those related to order marking.<sup>9</sup> As the only options Exchange to have not yet adopted the Professional Customer definition, the Exchange's proposal will allow OTP Holders to mark their Professional Customer orders similarly regardless of whether the order is placed on the Exchange or another options exchange. Moreover, with the proposed Professional Customer designation in place, the Exchange's rules will facilitate cross-market initiatives (such as harmonizing rules relating to Obvious Errors).

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<sup>7</sup> See BATS Exchange, Inc. ("BATS") Rule 16.1(a)(45), Boston Options Exchange LLC ("BOX") Rule 100(a)(5), NASDAQ OMX BX, Inc. ("BX") Chapter I, Section 1(a)(49), Chicago Board Options Exchange, Incorporated, ("CBOE") Rule 1.1(ggg), C2 Options Exchange, Incorporated ("C2") Rule 1.1, the International Securities Exchange, LLC ("ISE") Rule 100(a)(37A), Miami International Securities Exchange, LLC ("MIAX") Rule 100, the Nasdaq Stock Market LLC on behalf of the NASDAQ Options Market ("NOM") Chapter I, Section 1(a)(48), NYSE MKT LLC on behalf of NYSE Amex Options ("NYSE Amex Options") Rule 900.2NY(18A), NASDAQ OMX PHLX, Inc. ("PHLX") Rule 1000(b)(14), and Topaz Exchange, LLC (d/b/a ISE Gemini) ("Topaz") Rule 100(a)(37A).

<sup>8</sup> The Exchange's proposed definition of Professional Customer is the same as in the rules of BATS and NOM. In addition, like the Exchange's proposal, BATS and NOM do not treat Professional Customers differently than Customers for purposes of execution or processing. See Securities Exchange Act Release Nos. 65500 (October 6, 2011), 76 FR 63686 (October 13, 2011) (SR-BATS-2011-041) and 63028 (October 1, 2010), 75 FR 62443 (October 8, 2010) (SR-NASDAQ-2010-099).

<sup>9</sup> While the Exchange is not proposing to change the priority rules applicable to orders of Professional Customers, it may, in the future, propose to change its rules to differentiate between Professional Customer orders and other orders for purposes of priority or fees. The Exchange would not implement such changes until proposed rule changes were appropriately filed with the Commission and effective under Commission rules.

The Exchange will announce by Trader Update when it will implement this proposed rule change and when the functionality to support the marking of Professional Customer orders is available. In order to provide sufficient time for OTP Holders to prepare any system changes, the date of implementation shall be no sooner than 30 calendar days after the publication of the Trader Update.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>10</sup> of the Act, in general, and furthers the objectives of Section 6(b)(5),<sup>11</sup> in particular, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change, by defining Professional Customer, will remove impediments to, and perfect the mechanism of, a free and open market and a national market system, by providing consistent regulation for OTP Holders that are members of other SROs with analogous rules, thus allowing market participants to route orders to all markets using the same capacity. Further, the Exchange believes that, by harmonizing its rules with every other options market to add the term Professional Customer, it will promote just and equitable principles of trade by better allowing the market participants to be treated similarly across exchanges. In requiring market participants to identify their orders, the Exchange believes it promotes just and equitable principles of trade by allowing it a better understanding of the trading activity on its market.

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<sup>10</sup> 15 U.S.C. § 78f(b).

<sup>11</sup> 15 U.S.C. § 78f(b)(5).

Finally, the Exchange believes that amending Rule 6.69 to conform with the addition of the Professional Customer designation will protect investors and the public interest by providing guidance to OTP Holders regarding the marking of Professional Customer orders.

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 not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any aspect of competition, whether between the Exchange and its competitors, or among market participants. Instead, the proposed rule change is designed to adopt a category of market participant on the same terms as that of every other options exchange.

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>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</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.

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<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

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

A proposed rule change filed under Rule 19b-4(f)(6)<sup>14</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),<sup>15</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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>16</sup> of the Act to determine whether the proposed rule change should be approved or 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](mailto:rule-comments@sec.gov). Please include File No. SR-NYSEArca-2014-133 on the subject line.

##### Paper comments:

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

<sup>15</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>16</sup> 15 U.S.C. 78s(b)(2)(B).

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

All submissions should refer to File Number SR-NYSEArca-2014-133. 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 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 offices 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-2014-133, and should be submitted on or before [insert date 21 days from the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

Kevin M. O'Neill  
Deputy Secretary

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