

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-2008-80 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-2008-80. 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 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at NYSE Arca's principal office and on its Internet Web site at <http://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-NYSEArca-2008-80, and should be submitted on or before September 2, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-18382 Filed 8-8-08; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58295; File No. SR-NYSEArca-2008-75]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Schedule of Fees and Charges for Exchange Services In Order To Revise Certain Transaction Fees

August 4, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 14, 2008, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") 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 Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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 Schedule of Fees and Charges for Exchange Services ("Schedule") in order to revise certain Transaction Fees. The text of the proposed rule change is available at NYSE Arca, the Commission's Public Reference Room, and <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 Exchange 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 these 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 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 amend the existing Schedule in order to (i) make changes to Transaction Fees assessed on certain executions in issues that trade as part of the Penny Pilot,<sup>5</sup> and (ii) eliminate the Market Maker Post Liquidity Incentive Credit. A description of the proposed change follows.

##### Post/Take Pricing

NYSE Arca offers market participants a Post/Take pricing model for electronically executed transactions in issues that are included in the Penny Pilot. Under the present rate schedule, all electronic orders that "take" liquidity from the Consolidated Book (incoming electronic quotes and orders that are executed upon receipt) are charged a fee of \$0.45 per contract. NYSE Arca now proposes to revise the Post/Take pricing it applies to transactions in selected Penny Pilot issues that the Exchange has designated as "Tier 1" issues. Specifically the Exchange will: (a) Raise the Take Liquidity fee, in certain highly active issues, from \$0.45 to \$0.55 per contract for all market participants; (b) raise the Post Liquidity credit, in certain highly active issues, from \$0.30 to \$0.40 for Lead Market Makers and NYSE Arca Market Makers; and (c) raise the Post Liquidity credit, in certain highly active issues, from \$0.25 to \$0.35 for both electronic broker-dealer and electronic customer transactions.

The new fee will initially apply to transactions in the following ten (10) option issues that the Exchange has designated as Tier 1 Penny Pilot issues.

AAPL Apple Inc  
CSCO Cisco Systems, Inc.  
DIA Diamonds Trust  
MSFT Microsoft Corporation  
IWM iShares Russell 2000 Index  
QQQQ PowerShares QQQ Trust  
RIMM Research in Motion

<sup>5</sup> The Exchange may trade option contracts in one cent increments in certain approved issues as part of the Penny Pilot, through March 27, 2009. See Securities Exchange Act Release No. 56568 (September 27, 2007), 72 FR 56422 (October 3, 2007) (Order approving SR-NYSEArca-2007-88).

<sup>10</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b-4.

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

<sup>4</sup> 17 CFR 240.19b-4(f)(2).

XLFF Financial Select Sector SPDR  
 SPY S&P 500 Depository Receipts  
 YHOO Yahoo! Inc.

The Exchange may periodically review the list of securities included in the Penny Pilot and will make a determination as to the appropriateness of the Tier 1 designation for certain issues. NYSE Arca notes that the primary criteria for designating a Tier 1 is overall cleared national options volume, however, the Exchange notes that this list is not necessarily limited to, or inclusive of, the most active issues. The Exchange may take into consideration other factors, including but not limited to, transactions and options volume at NYSE Arca for a given issue (both electronic and manual), the implied volatility of the underlying issue and the per-share price of the underlying issue. Any future changes to the list of Tier 1 issues would only be effective pursuant to a subsequent Rule 19b-4 filing with the Commission.

#### Market Maker Post Liquidity Incentive Credit

The Exchange offers Market Makers, who reach a certain level of trade activity in Penny Pilot issues, a reduced transaction rate by offering a fee credit on contracts executed over and above certain volume thresholds. The Exchange established the fee credit as a way to incentivize Market Making firms to transact a larger share of their overall options business on NYSE Arca.

Since its inception, the fee credit has failed to meet the expected results that the Exchange was looking for. Therefore, NYSE Arca now proposes to eliminate the Market Maker Post Liquidity Incentive Credit.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,<sup>6</sup> in general, and Section 6(b)(4) of the Act,<sup>7</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

#### 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 foregoing proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>8</sup> and Rule 19b-4(f)(2) thereunder,<sup>9</sup> because it establishes or changes a due, fee, or other charge applicable only to a member imposed by the Exchange. 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. In addition, the Commission seeks comment on the following:

1. The Commission requests comment generally on the impact, if any, of the increased Take Liquidity fee on the ability of members and other market participants to obtain fair and efficient access to NYSE Arca quotations in the Tier 1 classes.

2. Broker-dealers have a duty of best execution when executing customer orders.<sup>10</sup> In addition, the options exchanges are required under the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Linkage Plan") to have in place rules that require their members to avoid trade-throughs.<sup>11</sup> The Commission requests comment on the impact of exchange fees on the ability of

members to satisfy these regulatory obligations. More specifically, the Commission requests comment on the impact of NYSE Arca's increase to the Take Liquidity fee, if any, on the ability of broker-dealers and other market participants to fulfill these responsibilities.

3. The Commission notes that, in addition to direct or indirect access to NYSE Arca systems by or through its members, market participants are able to access NYSE Arca quotations through the Intermarket Option Linkage ("Linkage").<sup>12</sup> The Commission requests comment on whether market participants currently are able to access NYSE Arca quotations in a reasonable and efficient manner through the Linkage. Would this analysis change if the fees charged for orders electronically executed through the Linkage ("Linkage Fees") were increased?<sup>13</sup>

4. As noted above, this proposal increases the Take Liquidity fee charged to members of NYSE Arca for the Tier 1 classes. The Exchange also has filed a companion proposed rule change to increase the Linkage Fee in Tier 1 classes to \$0.55.<sup>14</sup> That proposal will not be effective unless approved by the Commission. Thus, the Linkage Fee currently remains at \$0.45. The Commission requests comment on whether the analysis as to the impact of the increased Take Liquidity fee for members on the ability of broker-dealers and other market participants to satisfy their regulatory obligations would change if the Linkage Fee for executing orders in the Tier 1 classes also increased.

5. The Commission requests comment on the impact, if any, of the increased Take Liquidity fee on the usefulness and accuracy of displayed quotations in the Tier 1 classes. Do high fees for accessing quotations, as well as wide disparity in the level of fees for accessing quotations, detract from the usefulness and accuracy of the prices of the displayed quotations?

6. The Commission requests comment on whether there should be a limit on the maximum fee that NYSE Arca, or any other options exchange, can charge for access to its quotations.<sup>15</sup>

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>7</sup> 17 CFR 240.19b-4(f)(2).

<sup>10</sup> See, e.g., *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 269-70, 274 (3d Cir.), cert. denied, 525 U.S. 811 (1998); *Certain Market Making Activities on Nasdaq*, Securities Exchange Act Release No. 40900 (Jan. 11, 1999) (settled case) (citing *Sinclair v. SEC*, 444 F.2d 399 (2d Cir. 1971); *Arleen Hughes*, 27 SEC 629, 636 (1948), *aff'd sub nom. Hughes v. SEC*, 174 F.2d 969 (D.C. Cir. 1949)). See also Order Execution Obligations, Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290 (Sept. 12, 1996) ("Order Handling Rules Release").

<sup>11</sup> Linkage Plan Section 8(c) and NYSE Arca Rule 6.94.

<sup>12</sup> Linkage is governed by the Options Linkage Authority under the conditions set forth under the Linkage Plan. The registered U.S. options markets are linked together on a real-time basis through a network capable of transporting orders and messages to and from each market.

<sup>13</sup> See *infra* note 14.

<sup>14</sup> See SR-NYSEArca-2008-76 (submitted July 14, 2008).

<sup>15</sup> The Commission notes that Citadel has filed a Petition for Rulemaking to Address Excessive Access Fees in the Options Markets addressing this issue. See Letter from John C. Nagel, Managing

<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(4).

7. The Commission further requests comment on whether, if a commenter believes that a fee cap should be imposed, such fee cap should apply only to transactions effected by non-members through Linkage, or whether a fee cap should apply to member access as well. Would capping the maximum transaction fee that options exchanges charge non-members prevent or mitigate the negative consequences of unreasonably high access fees for members?

8. If a commenter believes that a fee cap should be imposed, the Commission specifically requests comment as to what level would be appropriate. For example, the Petition proposes an access fee limit of 20%, or \$0.20 per contract (\$0.002 per underlying share). Are there other fee cap structures that would be more appropriate for the options markets than the percentage of the minimum quoting increment model?

9. Further, the Commission requests comment as to whether such a fee cap should apply only to the best bid and offer of each exchange, or also to access to "depth of book" quotations.

10. The Commission requests comment as to whether the use of "maker-taker" pricing by options exchanges has led, or is likely to lead, to an increase in locked and crossed markets.

11. The Commission requests comment as to the impact, if any, on the use of the "maker-taker" pricing model on the quoted spread widths and sizes of registered options market makers in the classes subject to such pricing model. If a commenter believes that the "maker-taker" model has had an impact on the quality of quoted prices, the Commission requests comment as to whether there is sufficient liquidity in the classes subject to the model from market participants other than registered market makers. Would the analysis change if a similar pricing model were proposed for all options?

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-2008-75 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-2008-75. 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 inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing will also 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 No. SR-NYSEArca-2008-75 and should be submitted on or before September 2, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-18386 Filed 8-8-08; 8:45 am]

**BILLING CODE 8010-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-58297; File No. SR-NYSEArca-2008-78]

### **Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To Waive Annual Fees for Securities Transferring to NYSE Arca From NYSE Alternext U.S.**

August 4, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on July 23,

2008, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") 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 Exchange. The Commission is publishing this notice to solicit comments on the proposal from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend its rules governing NYSE Arca, LLC (also referred to as the "NYSE Arca Marketplace"), which is the equities trading facility of NYSE Arca Equities. The Exchange proposes that securities transferring to NYSE Arca from NYSE Alternext U.S.<sup>3</sup> after the closing of the purchase of the American Stock Exchange LLC by NYSE Euronext (the "Merger") will not be charged any prorated Annual Fee for the remainder of the year in which the Merger takes place. The fee waiver in the preceding sentence will be of no further effect if the closing of the Merger does not take place by March 31, 2009.

#### **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 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 that securities transferring to NYSE Arca from NYSE Alternext U.S. after the closing of the Merger will not be charged any prorated Annual Fee for the remainder of the year in which the Merger takes place. The fee waiver in the preceding sentence will be of no further effect if the closing of the Merger does not take place by March 31, 2009.

NYSE Euronext, the ultimate parent company of the Exchange, has agreed to

Director & Deputy General Counsel, Citadel, to Nancy M. Morris, Secretary, Commission, dated July 15, 2008 ("Petition").

<sup>16</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> After the closing of the Merger, the Amex will be renamed NYSE Alternext U.S. LLC.