

staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or her designee, has certified that, in her opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(7), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matter at the Closed Meeting.

Commissioner Piwowar, as duty officer, voted to consider the items listed for the Closed Meeting in closed session.

The subject matter of the Closed Meeting will be:  
Institution and settlement of injunctive actions;  
Institution and settlement of administrative proceedings;  
Resolution of litigation claims; and  
Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted, or postponed, please contact the Office of the Secretary at (202) 551-5400.

Dated: June 18, 2015.

**Brent J. Fields,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-75191; File No. SR-NYSEArca-2014-117]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Disapproving Proposed Rule Change To Remove the Exchange's Quote Mitigation Plan as Provided in Commentary .03 to Exchange Rule 6.86

June 17, 2015.

#### I. Introduction

On October 2, 2014, 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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to remove the Exchange's quote mitigation plan as provided by Commentary .03 to NYSE Arca Rule 6.86. The proposed rule change was published for comment in the **Federal**

**Register** on October 21, 2014.<sup>3</sup> On December 2, 2014, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.<sup>5</sup> On January 8, 2015, the Exchange submitted a comment letter in further support of its proposal.<sup>6</sup> On January 16, 2015, the Commission issued an Order Instituting Proceedings to Determine Whether to Approve or Disapprove the proposed rule change.<sup>7</sup> On February 27, 2015 and June 4, 2015, the Exchange submitted comment letters in further support of its proposal.<sup>8</sup> No additional comment letters were submitted. This order disapproves the proposed rule change.

#### II. Description of the Proposal

In 2007, the Exchange adopted a quote mitigation plan in connection with the Options Penny Pilot Program ("Penny Pilot").<sup>9</sup> According to the

<sup>3</sup> See Securities Exchange Act Release No. 73362 (October 15, 2014), 79 FR 62983 ("Notice").

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 73720, 79 FR 72747 (December 8, 2014). The Commission designated January 19, 2015, as the date by which it should approve, disapprove, or institute proceedings to determine whether to approve or disapprove the proposed rule change.

<sup>6</sup> See Letter from Elizabeth King, Secretary & General Counsel, Exchange, to Kevin O'Neill, Deputy Secretary, Commission, dated January 8, 2015 ("NYSE Arca Letter 1") available at <http://www.sec.gov/comments/sr-nysearca-2014-117/nysearca2014117.shtml>.

<sup>7</sup> See Securities and Exchange Release No. 74088, 80 FR 3687 (January 23, 2015) (Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposal Rule Change to Remove the Exchange's Quote Mitigation Plan as Provided by Commentary .03 to Exchange Rule 6.86) ("OIP").

<sup>8</sup> See Letters from Elizabeth King, Secretary & General Counsel, Exchange, to Kevin O'Neill, Deputy Secretary, Commission, dated February 27, 2015 ("NYSE Arca Letter 2") available at <http://www.sec.gov/comments/sr-nysearca-2014-117/nysearca2014117-2.pdf> and to Brent Fields, Secretary, Commission, dated June 4, 2015 ("NYSE Arca Letter 3") available at <http://www.sec.gov/comments/sr-nysearca-2014-117/nysearca2014117-3.pdf>.

<sup>9</sup> See Securities and Exchange Release No. 55156 (January 23, 2007), 72 FR 4759 (February 1, 2007) (Order Granting Approval of SR-NYSEArca-2006-73) ("Quote Mitigation Approval Order"). In this Order, the Commission approved a proposed rule change to amend the NYSE Arca rules to (i) permit thirteen options classes to be quoted in pennies on a pilot basis and (ii) adopt a quote mitigation plan. In approving the Penny Pilot, the Commission analyzed data provided by the options exchanges to assess the potential impact the Penny Pilot would have on, among other things, the increase in quotation message traffic. According to the Exchange, the quote mitigation plan was designed to mitigate the volume of data processed and disseminated by OPRA. See Securities and Exchange Release No. 55590 (October 12, 2006), 72 FR 4759 (October 18, 2006) (Notice of SR-NYSEArca-2006-73). In approving the Exchange's

Exchange, the quote mitigation plan was designed to reduce the number of quotation messages sent by the Exchange to the Options Price Reporting Authority ("OPRA") by only submitting quote messages for "active" series.<sup>10</sup> The Exchange defines active series under the quote mitigation plan in Commentary .03 to Exchange Rule 6.86 as: (i) Series that have traded on any options exchange in the previous 14 calendar days; or (ii) series that are solely listed on the Exchange; or (iii) series that have been trading ten days or less; or (iv) series for which the Exchange has received an order.<sup>11</sup> In addition, under the Exchange's quote mitigation plan, the Exchange may define a series as active on an intraday basis if: (i) The series trades at any options exchange; (ii) the Exchange receives an order in the series; or (iii) the Exchange receives a request for quote from a customer in that series.<sup>12</sup>

The Exchange proposes to remove its quote mitigation plan from its rules by deleting Commentary .03 to Exchange Rule 6.86.<sup>13</sup> The Exchange states that its quote mitigation plan is no longer necessary primarily for three reasons. First, the Exchange states that its incorporation of select provisions of the Options Listing Procedures Plan ("OLPP")<sup>14</sup> in Exchange Rule 6.4A serves to reduce the potential for excess quoting because the OLPP limits the number of options series eligible to be listed, which, according to the Exchange, reduces the number of options series a market maker would be obligated to quote.<sup>15</sup> Second, the

quote mitigation plan the Commission stated that "because the Commission expects that the Penny Pilot Program will increase quote message traffic, the Commission is also approving the Exchange's proposal to reduce the number of quotations it disseminates." See Quote Mitigation Approval Order at 4760.

<sup>10</sup> See Notice, *supra* note 3, at 62983.

<sup>11</sup> See Exchange Rule 6.86, Commentary .03, and Notice, *supra* note 3, at 62983.

<sup>12</sup> See *id.*

<sup>13</sup> See Notice, *supra* note 3, at 62984. In addition, the Exchange proposes to amend paragraphs (b)(1) and (b)(2) of Exchange Rule 6.86 to delete references to the "Quote Mitigation Plan," which refer to the quote mitigation plan set forth in Commentary .03 to Exchange Rule 6.86. See *id.*

<sup>14</sup> See Amendment to Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act available at <http://www.theocc.com/clearing/industry-services/olpp.jsp> (providing for the most current OLPP). See also Securities and Exchange Release No. 44521 (July 6, 2001), 66 FR 36809 (July 13, 2001) (order approving the OLPP).

<sup>15</sup> See Notice, *supra* note 3, at 62983. See also Securities and Exchange Release No. 61977 (April 23, 2010), 75 FR 22884 (April 30, 2010) (SR-NYSEArca-2010-30) (in which the Exchange

Continued

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

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

Exchange states its view that Exchange Rule 6.37B Commentary .01, which removes certain options series from market makers' continuous quoting obligations, reduces the number of quote messages that the Exchange sends to OPRA.<sup>16</sup> The Exchange states that reliance on the OLPP, via Exchange Rule 6.4A, and the refined market maker quoting obligations, pursuant to Commentary .01 to Exchange Rule 6.37B, is sufficient as a quote mitigation plan.<sup>17</sup> Third, the Exchange states that both the Exchange's systems capacity and OPRA's systems capacity are more than sufficient to accommodate any additional increase in quote message traffic that might be sent to OPRA as a result of the deletion of the quote mitigation plan.<sup>18</sup> The Exchange represents that it continually assesses its capacity needs and ensures that the capacity that it requests from OPRA is sufficient and compliant with the requirements established in the OPRA Capacity Guidelines.<sup>19</sup>

The Exchange further represents that it has in place certain measures that act as additional safeguards against excessive quoting.<sup>20</sup> According to the Exchange, these safeguards include monitoring and alerting market makers disseminating an unusual number of quotes, a business plan designed to ensure that new listings are actively traded,<sup>21</sup> and a ratio threshold fee designed to encourage the efficient use of orders.<sup>22</sup>

### III. Summary of Comment Letters

NYSE Arca submitted three comment letters in which it: (1) Supports its position that Rule 6.4A of the OLPP

together with the current exceptions from a market maker's continuous quoting obligations for certain options series would be sufficient as a quote mitigation plan;<sup>23</sup> (2) provides additional information to support its argument that relying on the OLPP requirements in Rule 6.4A would suffice as a quote mitigation plan; and (3) supports its argument that the Exchange and OPRA have sufficient capacity to accommodate an increase in quote message traffic resulting from elimination of the Exchange's quote mitigation plan.<sup>24</sup>

The Exchange states that at least one other options exchange primarily relies on the OLPP requirements in Rule 6.4A as a quote mitigation plan.<sup>25</sup> The Exchange explains that the OLPP Rule 6.4A puts a restriction on the range of permissible strike prices based on the price of the underlying security.<sup>26</sup> The Exchange states its view that reliance on the OLPP requirements is consistent with the Act and would sufficiently limit the number of options series listed on the Exchange.<sup>27</sup>

Next, the Exchange argues that eliminating its quote mitigation plan is consistent with the Act because refined market maker quoting obligations currently in place on the Exchange, which exempt certain options series from market makers' continuous quoting obligations, reduce the universe of series in which a market maker is required to quote.<sup>28</sup> The Exchange notes that these refined obligations were adopted following implementation of its quote mitigation plan,<sup>29</sup> and believes that as a result, market makers do not

need to quote in approximately 5,000 options series, thereby decreasing quote message traffic.<sup>30</sup>

The Exchange argues that it has sufficient capacity to handle quoting in all options series, including quotes in those series that are inactive and not currently disseminated pursuant to the Exchange's quote mitigation plan.<sup>31</sup> In support of this statement, the Exchange explains that although quotes in inactive series do not generate quote traffic from NYSE Arca, the Exchange must nonetheless receive and process quotes in such series, and perform additional processing to suppress quotes in these series to comply with their quote mitigation plan.<sup>32</sup> The Exchange states that because it is already processing the quotes it suppresses, it is "confident that its own systems capacity is more than sufficient to accommodate any increase in the traffic that might be sent to OPRA."<sup>33</sup> The Exchange notes that in its requests for capacity submitted to the Independent Systems Capacity Advisory ("ISCA") (which OPRA uses to ensure overall aggregate capacity), NYSE Arca assumes that (1) options series that are inactive at that time could become active in the future, thereby increasing overall message traffic sent to OPRA, and (2) that all options series that it lists, including those without continuous quoting obligations for market makers, will generate message traffic to OPRA.<sup>34</sup> The Exchange further states its belief that OPRA also would be able to accommodate any increase in quote message traffic resulting from NYSE Arca no longer suppressing quotes in inactive series.<sup>35</sup>

The Exchange further argues that eliminating its quote mitigation plan is consistent with the Act because the Exchange actively monitors market maker quoting activity and alerts market makers to heightened levels of quoting activity, which could result from systems issues or an incorrectly set parameter that generates erroneous quotes.<sup>36</sup> The Exchange notes that NYSE Arca's requests for capacity to the ISCA are adjusted to account for "some level" of erroneous quoting.<sup>37</sup>

The Exchange also states that the landscape regarding quote message traffic and capacity has changed since the adoption of the Penny Pilot.<sup>38</sup> NYSE

adopted select provisions of the OLPP into Exchange Rule 6.4A).

<sup>16</sup> Commentary .01 to Exchange Rule 6.37B provides that Exchange market makers continuous quoting obligations do not apply "to adjusted option series, and series with a time to expiration of nine months or greater, for options on equities and Exchange Traded Fund Shares, and series with a time to expiration of twelve months or greater for Index options." See also Notice, *supra* note 3, at 62984.

<sup>17</sup> See Notice, *supra* note 3, at 62984. The Exchange states its view that limiting the number of options series listed on the Exchange is preferable to suppressing the quotes of inactive options series, as required under current Exchange Rule 6.86, because all quotes sent by Exchange market makers are actionable even if not displayed. See *id.*

<sup>18</sup> See Notice, *supra* note 3, at 62984.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> See *id.* (citing to NYSE Arca Options Listing Policy Statement, available at, <http://www.nyse.com/pdfs/TraderNoticeArcaLOPSChanges092713.pdf>).

<sup>22</sup> See *id.* (citing to NYSE Arca Options Fee Schedule, available at, [https://www.theice.com/publicdocs/nyse/markets/arca-options/NYSE\\_Arca\\_Options\\_Fee\\_Schedule.pdf](https://www.theice.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf)).

<sup>23</sup> See NYSE Arca Letter 1, *supra* note 6, at 1. See also NYSE Arca Letter 2, *supra* note 8, at 1–2. The Exchange also supplies an actual illustration of how the Rule results in quote mitigation. *Id.* at 2.

<sup>24</sup> See NYSE Arca Letter 1, *supra* note 6.

<sup>25</sup> See NYSE Arca Letter 1, *supra* note 6, at 1–2. The comment letter further notes that the Miami International Securities Exchange, LLC ("MIAX") stated in a response to comments on a proposed rule change relating to increasing the number of options series associated with Short Term Options Series that it was not using a quote mitigation strategy, but instead employs a listing policy that mitigates the number of classes and series listed on its exchange by not listing illiquid options classes and products that are not already trading on another market. (See NYSE Arca Letter 1, *supra* note 6, at 2 (citing Letter to Elizabeth Murphy, Secretary, U.S. Securities Exchange Commission, from Brian O'Neill, VP and Senior Counsel, MIAX, dated June 2, 2013, available at <http://www.sec.gov/comments/sr-miax-2013-23/miax201323-2.pdf>)). NYSE Arca notes that it has a similar policy designed to help ensure that the Exchange does not list options that generate quote volume without providing the benefit of trading volume. See NYSE Arca Letter 1, *supra* note 6, at 2 and 4.

<sup>26</sup> See NYSE Arca Letter 2, *supra* note 8, at 1–2.

<sup>27</sup> See NYSE Arca Letter 1, *supra* note 6, at 1.

<sup>28</sup> See NYSE Arca Letter 1, *supra* note 6, at 1.

<sup>29</sup> See *id.*

<sup>30</sup> *Id.*

<sup>31</sup> See NYSE Arca Letter 1, *supra* note 6, at 2.

<sup>32</sup> See NYSE Arca Letter 1, *supra* note 6, at 2.

<sup>33</sup> See NYSE Arca Letter 1, *supra* note 6, at 2–3.

<sup>34</sup> *Id.*

<sup>35</sup> See NYSE Arca Letter 1, *supra* note 6, at 2.

<sup>36</sup> See NYSE Arca Letter 1, *supra* note 6, at 3–4.

<sup>37</sup> *Id.* at 4.

<sup>38</sup> See NYSE Arca Letter 3, *supra* note 8, at 2.

Arca represents that in January 2007, 15% of quotes received by the Exchange were not sent to OPRA, compared to 5.8% as of April 2015.<sup>39</sup> The Exchange also states that at the time the Penny Pilot was adopted, OPRA's total capacity was set to 359,000 messages per seconds ("mps"), and that by July 2015, OPRA's peak capacity is anticipated to be 42,100,000 mps.<sup>40</sup> In addition, the Exchange states, based on peak message traffic figures on the Exchange for one day in May 2015,<sup>41</sup> that if the quotes the Exchange suppressed on that day had been sent to OPRA, industry quotes published by OPRA would have increased by no more than 1%, and that this would use less than .05% of total OPRA capacity.<sup>42</sup>

#### IV. Discussion

Under Section 19(b)(2)(C) of the Act, the Commission shall approve a proposed rule change of a self-regulatory organization if the Commission finds that such proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to such organization.<sup>43</sup> The Commission shall disapprove a proposed rule change if it does not make such a finding.<sup>44</sup> Rule 700(b)(3) of the Commission's Rules of Practice states that the "burden to demonstrate that a proposed rule change is consistent with the [Act] . . . is on the self-regulatory organization that proposed the rule change" and that a "mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient."<sup>45</sup>

After careful consideration, the Commission cannot find that the

proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>46</sup> In particular, the Commission cannot find that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>47</sup> which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest.

In conjunction with the adoption of the Penny Pilot in 2007 that permitted the options exchanges to quote certain options series in one and five cent increments, and in response to a letter sent by the then Chairman of the Commission,<sup>48</sup> the options exchanges, including NYSE Arca, adopted quote mitigation plans.<sup>49</sup> The Commission emphasized the importance of options exchanges' quote mitigation strategies in connection with the Penny Pilot in its orders approving an expansion of the Penny Pilot in 2007. In those orders, the Commission noted that options exchanges participating in the Penny Pilot would continue to use quote mitigation strategies.<sup>50</sup> Likewise, when the Commission approved NYSE Arca's proposal to again expand the Penny Pilot in 2009, the Commission reiterated that the Exchange would retain and

continue to employ its quote mitigation strategy.<sup>51</sup>

When considering whether the Exchange's quote mitigation plan was consistent with the Act, the Commission relied upon supporting data and analysis provided by the Exchange.<sup>52</sup> In its proposal to provide for a quote mitigation plan, NYSE Arca represented that the quote mitigation plan was intended to reduce the number of quotations generated by the Exchange for all option issues traded at NYSE Arca, not just options on issues included in the Penny Pilot, and that the Exchange anticipated the quote mitigation plan would reduce quote message traffic by 20–30%.<sup>53</sup> In approving NYSE Arca's proposal in February 2007, the Commission stated that because it expected that the Penny Pilot would increase quote message traffic, the Commission also approved the Exchange's proposal to reduce the number of quotations it disseminates.<sup>54</sup>

In 2007 and 2009, the Commission approved rule changes submitted by NYSE Arca expanding the number of classes eligible to participate in the Penny Pilot.<sup>55</sup> In so approving, the Commission reviewed data provided by the options exchanges, including data relating to OPRA's capacity to process the increase in quotes resulting from the expansion of the Penny Pilot and the effectiveness of its quote mitigation plan.<sup>56</sup> In approving each of these expansions, the Commission noted that

<sup>39</sup> *Id.*  
<sup>40</sup> *Id.*  
<sup>41</sup> *Id.* The Exchange represents that as of Friday May 29, 2015, peak message traffic for the Exchange was 1,707,820 mps, measured over a 100 millisecond period. Based on this, the Exchange believes that if the highest percentage of quotes suppressed by the Exchange during this period (8.3%) had been published at the same rate as quotes the Exchange had not suppressed during this time, the mps rate would instead be 1,849,569. *Id.*  
<sup>42</sup> *Id.*  
<sup>43</sup> 15 U.S.C. 78s(b)(2)(C)(i).  
<sup>44</sup> 15 U.S.C. 78s(b)(2)(C)(i); see also 17 CFR 201.700(b)(3) and note 45 *infra*, and accompanying text.  
<sup>45</sup> 17 CFR 201.700(b)(3). The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. See *id.* Any failure of a self-regulatory organization to provide the information solicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization. *Id.*

<sup>46</sup> In disapproving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>47</sup> 15 U.S.C. 78f(b)(5).

<sup>48</sup> In a letter sent to the options exchanges on June 7, 2006, encouraging the implementation of a penny pilot program, then Chairman Cox noted that quoting options in pennies would increase quote message traffic, which the systems of exchanges, market data vendors, and securities firms must be able to manage, and for that reason, quoting options in pennies would begin in a small number of options. To assist in managing the anticipated increase in quote traffic, Chairman Cox asked that options exchanges include a workable quote mitigation strategy in any proposal to allow quoting in pennies. See Commission Press Release 2006-91, "SEC Chairman Cox Urges Options Exchanges to Start Limited Penny Quoting," June 7, 2006.

<sup>49</sup> See Quote Mitigation Approval Order, *supra* note 9.

<sup>50</sup> See Securities Exchange Act Release No. 56568, 72 FR 56422 (October 3, 2007) (SR-NYSEArca-2007-88); 56567 (September 27, 2007), 72 FR 56307 (October 3, 2007) (Amex-2007-96); 56565 (September 27, 2007), 72 FR 56403 (October 3, 2007) (CBOE-2007-98); 56564 (September 27, 2007), 72 FR 56412 (October 3, 2007) (ISE-2007-74); 56563 (September 27, 2007), 72 FR 56429 (October 3, 2007) (Phlx-2007-62); and 56566 (September 27, 2007), 72 FR 56400 (October 3, 2007) (BSE-2007-40).

<sup>51</sup> See Securities Exchange Act Release No. 60711, 74 FR 49419 (September 28, 2009) (SR-NYSEArca-2009-44). See also Securities Exchange Act Nos. 60373 (October 23, 2009), 74 FR 56675 (November 2, 2009) (Phlx-2009-91); 60864 (October 22, 2009), 74 FR 55876 (October 29, 2009) (CBOE-2009-076); 60865 (October 22, 2009), 74 FR 55880 (ISE-2009-82); 60886 (October 27, 2009), 74 FR 56897 (November 3, 2009); 60874 (October 23, 2009), 74 FR 56682 (November 2, 2009) (NASDAQ-2009-091); and 61106 (December 3, 2009), 74 FR 65193 (December 9, 2009) (NYSEAmex-2009-74).

<sup>52</sup> See Quote Mitigation Approval Order, *supra* note 9.

<sup>53</sup> See Quote Mitigation Approval Order, *supra* note 9, at 4760.

<sup>54</sup> See Quote Mitigation Approval Order, *supra* note 9, at 4760.

<sup>55</sup> The Commission approved thirteen classes to participate in the Penny Pilot on January 23, 2007. See Quote Mitigation Approval Order, *supra* note 9. On September 27, 2007, the Commission approved an expansion of Penny Pilot, which raised the number of participating classes to 63. See Securities Exchange Act Release No. 56568, 72 FR 56422 (October 3, 2007) (SR-NYSEArca-2007-88) ("Order Approving Expansion 1"). On September 23, 2009, the Commission approved another expansion, raising the number of participating classes to 363. See Securities Exchange Act Release No. 60711, 74 FR 49419 (September 28, 2009) (SR-NYSEArca-2009-44) ("Order Approving Extension 2").

<sup>56</sup> See Order Approving Expansion 1 and Order Approving Expansion 2, *supra* note 55 at 56423-24 and 49422-23, respectively.

it relied, in part, on the Exchange's representation that it would continue to use its quote mitigation plan to suppress certain quotation traffic that would otherwise be sent to OPRA.<sup>57</sup> The Commission also relied on data provided by the options exchanges to support representations that capacity was not a concern, and that the quote mitigation plans in place were successful.<sup>58</sup> For example, NYSE Arca, provided the Commission with data supporting its claim that the Exchange's quote mitigation plan mitigated 12.1 million quotes a day or 13 percent of NYSE Arca's daily quote traffic sent to OPRA.<sup>59</sup> In another report, NYSE Arca provided data on OPRA's then-current capacity, future capacity, and peaks in message traffic sent to OPRA to support its argument that quote traffic increases were manageable.<sup>60</sup>

As noted above, the Exchange believes that its quote mitigation plan is no longer necessary because: (1) the Exchange has incorporated select provisions of the OLPP in Exchange Rule 6.4A, which the Exchange believes limits the number of series eligible to be traded; (2) current Exchange Rule 6.37B Commentary .01 removes certain options series from market makers' continuous quoting obligations, which the Exchange believes reduces the number of quote messages that the Exchange sends to OPRA; and (3) both the system capacity at the Exchange and at OPRA are more than sufficient to accommodate any additional increase in quote message traffic that might be disseminated if NYSE Arca's quote mitigation plan is eliminated. However, the Exchange has not provided the Commission with sufficient data regarding potential changes in quote message traffic if the Commission approves its proposal.

For example, the Exchange does not provide sufficient data about the number of quote messages that its quote mitigation plan currently suppresses relative to capacity at OPRA. Specifically, the Exchange provided data from May 29, 2015 that purports to show that if all quote messages suppressed by the Exchange were instead sent to OPRA, industry quotes

published by OPRA would increase by no more than 1%. The Exchange asserts that this increase would use less than .05% of total OPRA capacity across all option exchanges. Importantly, however, the Exchange does not provide data that shows the excess capacity between peak quote message traffic sent from all options exchanges and OPRA's Peak Capacity for the May 29, 2015 sample. If peak quote message traffic sent to OPRA by all the options exchanges was at or approached OPRA's Peak Capacity, then potentially even a small increase in quote message traffic from one exchange could result in OPRA's capacity being exceeded.

In addition, the Exchange does not provide data or analysis demonstrating the potential impact the Exchange's proposal would have on market participants who consume the OPRA and/or the Exchange's quotation message feeds.<sup>61</sup> Nor does the Exchange quantify the number or percentage of quote messages that have been and would continue to be suppressed as a result of the implementation of Exchange Rule 6.4A<sup>62</sup> or current Exchange Rule 6.37B Commentary .01.<sup>63</sup>

<sup>61</sup> See Order Approving Expansion 2, *supra* note 55 at 49421 (The Commission noted that several commenters expressed concerns that increased quotation message traffic imposes costs on exchanges and other market participants to process and store the additional quotations and they questioned the ability of market systems to effectively handle the increased quote message traffic that would likely result from the expansion of the Penny Pilot to 363 classes. In approving the expansion, the Commission noted that NYSE Arca "had adopted and [would] continue to utilize quote mitigation strategies that should continue to mitigate the expected increase in quotation traffic.") *Id.* at 49422–23.

<sup>62</sup> In 2009, the OLPP Participants, including NYSE Arca, represented that the new strategy they were proposing as Amendment No. 3 to the OLPP (which was subsequently codified as Rule 6.4A on the Exchange's rulebook) would be "an additional strategy" to be used to address overall capacity concerns in the industry. See Securities Exchange Act Release No. 60365 (July 22, 2009), 74 FR 37266 (July 28, 2009) (Notice of Filing of Amendment No. 3 to the OLPP proposing uniform standards to the range of options series exercise prices available for trading). Although it was anticipated that the exercise price limitation bands set forth in Amendment No. 3 would also have the attendant benefit of further reducing increases in quote message traffic, nothing in the language in the exchanges' OLPP filings suggest that the methodology set forth in Amendment No. 3 (to limit the number of options series available for trading) was intended to replace the options exchanges' quote mitigation strategies, nor does the language in those filings suggest that it was contemplated at the time that the options exchanges would eliminate their existing exchange-specific quote mitigation strategies.

<sup>63</sup> While NYSE Arca stated in its proposed rule change to adopt Exchange Rule 6.37B Commentary .01 that the burden of continuous quoting in adjusted series is counter to efforts to mitigate the number of quotes collected and disseminated, and that the proposal would further the goal of quote mitigation, this was not a basis given for the

The Commission notes that the Exchange's comment letter stated its belief that as a result of refined quoting obligations, market makers do not need to quote in approximately 5,000 options series, and that this has resulted in a decrease in message traffic,<sup>64</sup> however, the Exchange did not provide data to quantify the decrease in message traffic for the Commission to consider. Absent sufficient information and data of this type, the Commission is not able to adequately evaluate the Exchange's assertion that "reliance on the OLPP, via Rule 6.4A, together with the refined market maker obligation, pursuant to Commentary .01 to Rule 6.37B, is sufficient as a quote mitigation strategy and obviates the need for Rule 6.86."<sup>65</sup> Other information or data may also be helpful for the Commission's consideration of the proposed rule change. Without sufficient supporting data and analysis, the Commission is not able to adequately assess the impact of NYSE Arca's proposed rule change to eliminate its quote mitigation plan and make a determination that the proposed rule change is consistent with the Act.

Given the limitations in the data provided by NYSE Arca, as described above, the Commission cannot find a sufficient basis to conclude that the proposal is consistent with the Act. The Commission notes, however, that the Penny Pilots for each of the options exchanges are anticipated to be extended for an additional year, until June 30, 2016. In connection with any future requests to extend the Penny Pilots after that date, the Commission intends to require each exchange to submit detailed information to allow for permanent approval or disapproval by the Commission. Such proposals should, among other things, provide detailed data and analysis to support the efficacy, or any proposed modification or elimination, of any exchanges' quote mitigation plan.<sup>66</sup>

For the foregoing reasons, the Commission does not believe that NYSE

proposed rule change, and the Exchange did not provide any data on what the impact of the proposal on quote volume would be. See Securities Exchange Act Release No. 65210 (August 26, 2011), 76 FR 54516 (September 1, 2011) (SR–NYSEArca–2011–59). Additionally, the Commission did not consider the potential impact of the proposal on quote mitigation as a basis for approving the elimination of continuous quoting obligation in certain series. See Securities Exchange Act Release No. 65573 (October 14, 2011), 76 FR 65305 (October 20, 2011) (SR–NYSEArca–2011–59).

<sup>64</sup> See NYSE Arca Letter 1, *supra* note 6, at 3.

<sup>65</sup> See Notice, *supra* note 3, at 62984.

<sup>66</sup> In reviewing the quote mitigation plans in this manner, the Commission would be able to consider the market-wide impact of any proposed modification to or elimination of an exchange's quote mitigation practices.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* For example, in Order Approving Expansion 2, the Commission noted that on June 2, 2009, the sustained message traffic peak of 852,350 messages per second reported by OPRA is still well below the OPRA's current message per second capacity limit of 2,050,000. See Order Approving Expansion 2, *supra* note 55 at 49422.

<sup>59</sup> See *Understanding Economic and Capacity Impacts of the Penny Pilot*, NYSE ARCA Options, May 31, 2007.

<sup>60</sup> See *The Options Penny Pilot*, NYSE ARCA, received August 18, 2009.

Arca has met its burden to demonstrate that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder, including that the rules of an exchange be designed to promote just and equitable principles of trade, to 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.<sup>67</sup>

#### IV. Conclusion

For the reasons set forth above, the Commission does not believe that NYSE Arca has met its burden to demonstrate that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, Section 6(b)(5) of the Act.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NYSEArca-2014-117) be, and hereby is, disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>68</sup>

**Brent J. Fields,**  
*Secretary.*

[FR Doc. 2015-15341 Filed 6-22-15; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 31679; 812-14358]

### Academy Funds Trust and Innovator Management LLC; Notice of Application

June 17, 2015.

**ACTION:** Notice of an application under section 6(c) of the Investment Company Act of 1940 (the “Act”) for an exemption from section 15(a) of the Act and rule 18f-2 under the Act.

**SUMMARY OF APPLICATION:** Applicants request an order that would permit them to enter into and materially amend subadvisory agreements without shareholder approval.

**APPLICANTS:** Academy Funds Trust (the “Trust”) and Innovator Management LLC (“Innovator” or the “Adviser”).

**FILING DATES:** The application was filed on September 12, 2014 and amended on January 28, 2015, May 12, 2015 and June 3, 2015.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission’s Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on July 8, 2015, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer’s interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission’s Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090. Applicants: 123 South Broad Street, Suite 1630, Philadelphia, PA 19109.

**FOR FURTHER INFORMATION CONTACT:** Bruce R. MacNeil, Senior Counsel, at (202) 551-6817, or James M. Curtis, Branch Chief, at (202) 551-6712 (Division of Investment Management, Chief Counsel’s Office).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission’s Web site by searching for the file number, or an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

#### Applicants’ Representations

1. The Trust is organized as a Delaware statutory trust and is registered as an open-end management investment company with multiple series. Each series of the Trust has its own investment objective, policies and restrictions, and each is managed by the Adviser and may be managed by various subadvisers.<sup>1</sup>

<sup>1</sup> Applicants also request relief with respect to any existing or future series of the Trust and any other existing or future registered open-end management investment company or series thereof that: (a) Is advised by Innovator or its successors, including any entity controlling, controlled by or under common control with Innovator or its successors (included in the term “Adviser”); (b) uses the manager-of-managers structure (“Manager of Managers Structure”) described in the application; and (c) complies with the terms and conditions of the application (each a “Fund” and together, the “Funds”). The only existing investment company that currently intends to rely on the requested order, the Trust, is named as an applicant. For purposes of the requested order, “successor” is limited to an entity that results from

2. Innovator is a Delaware limited partnership registered as an investment adviser under the Investment Advisers Act of 1940 (“Advisers Act”). Innovator provides investment management services to the Funds under an investment advisory agreement with the Trust (the “Advisory Agreement”).<sup>2</sup> The terms of the Advisory Agreement comply or will comply with section 15(a) of the Act. Each Advisory Agreement was or will be approved by the board of trustees of the relevant Fund (the board of trustees of any Fund, a “Board”), including by a majority of the trustees who are not “interested persons” (as defined in section 2(a)(19) of the Act) of the Trust or Adviser (the “Independent Trustees”), and by the shareholders of the respective Fund in the manner required by sections 15(a) and (c) of the Act and rule 18f-2 thereunder.<sup>3</sup>

3. Under the terms of each Advisory Agreement, Innovator is responsible for the overall management of the Funds’ business affairs and selecting investments in accordance with the Funds’ investment objectives, policies and restrictions. For the investment management services that it provides to the Funds, the Adviser receives the fee specified in the Advisory Agreements. In addition, pursuant to the Advisory Agreement, Innovator may retain one or more subadvisers (each, a “Subadviser”) for the purpose of managing all or a portion of the assets of the Funds. Pursuant to its authority under the Advisory Agreements, the Adviser intends to enter into subadvisory agreements (the “Subadvisory Agreements”) with certain unaffiliated Subadvisers to provide investment advisory services to the Funds. Each Subadvisory Agreement has been or will be approved by the Board, including by a majority of the Independent Trustees in accordance with Sections 15(a) and 15(c) of the Act. In addition, the terms of each Subadvisory Agreements comply or will comply fully with the requirements of Sections 15(a) and 15(c) of the Act other than the shareholder approval required under Section 15(a). Each Subadviser to a Fund will be an “investment adviser,” as defined in section 2(a)(20)(B) of the Act, and registered as an investment adviser

a reorganization into another jurisdiction or a change in the type of organization.

<sup>2</sup> Innovator or another Adviser will enter into substantially similar investment advisory agreements to provide investment management services to each future Fund (each included in the term “Advisory Agreement”). Each other Adviser will also be registered as an investment adviser under the Advisers Act.

<sup>3</sup> Applicants are not seeking any exemptions with respect to the Advisory Agreements.

<sup>67</sup> 15 U.S.C. 78f(b)(5).

<sup>68</sup> 17 CFR 200.30-3(a)(12).