

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60604; File No. SR-NYSEArca-2009-78)

September 1, 2009

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Eliminating NYSE Arca Equities Rule 7.26, Adding New NYSE Arca Equities Rule 6.7 and Amending NYSE Arca Equities Rule 6.18

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 25, 2009, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by NYSE Arca. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to (i) eliminate the requirement of NYSE Arca Equities Rule 7.26 that Market Makers establish and maintain certain specifically prescribed information barriers, (ii) add new NYSE Arca Equities Rule 6.7 regarding trading ahead of research reports, and (iii) revising NYSE Arca Equities Rule 6.18 to incorporate compliance with NASD Rule 3010. The text of the proposed rule change is attached as Exhibit 5 to the 19b-4 form. A copy of this filing is available on the Exchange’s Web site at www.nyse.com, at the Exchange’s principal office and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 III 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to eliminate the requirement set forth in NYSE Arca Equities Rule 7.26 that Market Makers on the Corporation maintain certain specifically prescribed information barrier procedures. At the same time, the Exchange further proposes new NYSE Arca Equities Rule 6.7, which (i) prohibits ETP Holders from trading ahead of research reports and (ii) requires each ETP Holder to establish, maintain and enforce procedures regarding the flow of information between research department personnel and trading department personnel. Finally, the Exchange proposes to revise NYSE Arca Equities Rule 6.18 to incorporate compliance with NASD Rule 3010.

All Members Must Maintain Policies Concerning the Misuse of Material Non-Public Information

Presently, NYSE Arca requires that each ETP Holder³ establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material, non-public information by the ETP Holder or persons associated with the ETP Holder.⁴ For purposes of this requirement, conduct constituting the misuse of material, non-public information includes, but is not limited to, the following:

a) trading in any securities issued by a corporation, or in any related securities or related options or other derivative securities, while in possession of material, non-public information concerning that issuer; or

b) trading in a security or related options or other derivative securities, while in possession of material, non-public information concerning imminent transactions in the security or related securities; or

c) disclosing to another person or entity any material, non-public information involving a corporation whose shares are publicly traded or an imminent transaction in an underlying security or related securities for the purpose of facilitating the possible misuse of such material, non-public information.

The Exchange also has several rules prohibiting ETP Holders from disadvantaging their customers or other market participants by improperly capitalizing on the ETP Holders' access to or receipt of material, non-public information. For example, NYSE Arca Equities Rule 6.16

³ See NYSE Arca Equities Rule 1.1(n).

⁴ See NYSE Arca Equities Rule 6.3.

prohibits an ETP Holder from trading ahead of its customer's limit orders.⁵ In addition, the Exchange prohibits the practice of "front-running" block transactions.⁶

Members Retain Responsibility for Compliance

In this context, by prohibiting the misuse of material, non-public information, the Exchange has appropriately defined the behavior that its participants must avoid. In the Exchange's view, prescribing the form that these policies and procedures must take is unnecessarily burdensome. By defining certain prohibited behavior (e.g., Rules 6.3, 6.16, and 6.6) the Exchange has placed its participants on notice as to their specific compliance burdens with respect to preventing the misuse of material, non-public information. Further, NYSE Arca Equities Rule 6.18 requires each ETP Holder to (i) establish and maintain a system to supervise the activities of its associated persons and (ii) establish, maintain, and enforce written procedures to supervise the business in which it engages and to supervise the activities of its associated persons that are reasonably designed to achieve compliance with applicable federal securities laws and regulations, and with the NYSE Arca Equities Rules.

⁵ See NYSE Arca Equities Rule 6.16: "No ETP Holder may accept and hold an unexecuted limit order from its customer . . . and continue to trade on the Corporation the subject security for its own account at prices that would satisfy the customer's limit order without executing that limit order."

⁶ See NYSE Arca Equities Rule 6.6: "An ETP Holder or associated person obtaining information of an immediate pending transaction or a transaction executed but not yet reported on any national securities exchange or association involving 5,000 shares or more of a security including an equivalent number of option contracts admitted to dealings on the NYSE Arca, Inc., or securities underlying the options so admitted, shall not initiate or transmit an order in the security involved, or options relating to that security, through the facilities of the Corporation for any account in which he or she or his or her organization are participants until after the transaction appears on the ticker or is otherwise disclosed, in the case of orders pertaining to equities, or until two minutes after such disclosure, in the case of orders pertaining to options. Exceptions will require prior approval from the Corporation."

The Exchange, therefore, proposes to eliminate, in their entirety, the requirements set forth in NYSE Arca Equities Rule 7.26 that Market Makers on the Corporation maintain certain specifically prescribed information barrier procedures. This proposal is consistent with the approach currently employed by the Nasdaq Stock Market, L.L.C. (“Nasdaq”), which does not generally require its members to establish or maintain information barriers.

Comparison to Nasdaq’s Framework

By amending its rules in accordance with this proposal, the Exchange reinforces a regulatory structure that clearly identifies prohibited conduct (e.g., misuse of material, non-public information) without further requiring Market Makers to establish and maintain specific compliance mechanisms (e.g., information barriers). For example, Nasdaq prohibits the misuse of material, non-public information but does not generally require that its members establish and maintain information barriers.⁷ Similar to NYSE Arca Equities Rule 6.18, however, Nasdaq Rule 3010 requires its members to establish and maintain a system to supervise the activities of its associated persons that are reasonably designed to achieve compliance with applicable federal securities laws and regulations, and with applicable Nasdaq Rules. Nasdaq Rule 3010 further incorporates by reference NASD Rule 3010, requiring compliance with that rule as if it were part of Nasdaq’s rules.⁸ The Exchange believes that the approach proposed herein is consistent with Nasdaq’s structure. First, NYSE Arca has similar requirements concerning the maintenance of a

⁷ See Nasdaq Rules 2110-2, 2110-3, and 2110-4.

⁸ In Regulatory Notice 07-59, FINRA recognized that policies and procedures may differ among entities depending on their business model (e.g., size, structure, customer base and product mix). In this context, it is important to note the need for flexibility and fluidity—should an entity’s business model change or expand, it may also be appropriate to revise its supervisory policies and procedures so as to better reflect its new business model. Further, although NASD Rule 3010 does not specifically require firms to establish specific information barriers, NTM 07-59 identifies information barrier procedures as a relevant process by which to manage conflicts of interest or to prevent communications of material non-public information between certain individuals or groups.

supervisory system and written supervisory procedures. The Exchange's rules governing supervision are similar to Nasdaq's rules (which in-turn incorporate compliance with NASD Rule 3010). The Exchange notes that FINRA and NYSE Arca have previously acknowledged, pursuant to the provisions of Rule 17d-2 under the Securities Exchange Act of 1934 ("17d-2 Agreement"), that, collectively, NYSE Arca Equities Rules 6.18, 9.1(c), 9.1(d), and 9.2(b) are substantially similar to NASD Rule 3010. In this context, the Exchange proposes to amend NYSE Arca Equities Rule 6.18 in order to clarify that the Exchange construes the Supervisory System and Written Procedures requirements of this rule in a manner consistent with the similar requirements of NASD Rule 3010. Accordingly, the Exchange proposes adding the following (in addition to certain definitional references) as Commentary .01:

"ETP Holders shall comply with NASD Rule 3010(a)(1), (b)(1), and (c)(1) as if such rule were part of NYSE Arca's Rules."

The Exchange further proposes adding new NYSE Arca Equities Rule 6.7, prohibiting ETP Holders from establishing, increasing, decreasing or liquidating an inventory position in a security or a derivative of such security based on non-public advance knowledge of the content or timing of a research report in that security. Similar to FINRA Rule 5280, NYSE Arca hereby proposes to require that ETP Holders must establish, maintain and enforce procedures reasonably designed to restrict or limit the information flow between research department personnel and trading department personnel, so as to prevent trading department personnel from utilizing non-public advance knowledge of the issuance or content of a research report.⁹

Second, like Nasdaq, market makers and Lead Market Makers on NYSE Arca do not have any advantages regarding relevant trading information provided by the Exchange, either at,

⁹ The Exchange understands that Nasdaq will similarly amend its rules regarding trading ahead of research reports to reflect this requirement.

or prior to, the point of execution vis-à-vis other market participants. The Exchange notes that NYSE Arca ETP Holders, Market Makers, and Lead Market Makers have equal access to the relevant trading information coming from or provided by the Exchange. Accordingly, it is appropriate for the Exchange to establish the same approach with respect to information barriers as employed by Nasdaq.¹⁰

Conclusion: Flexibility and Accountability

Eliminating NYSE Arca Equities Rule 7.26, adding NYSE Arca Equities Rule 6.7 and clarifying NYSE Arca Equities Rule 6.18, as proposed herein, offers Exchange participants both certainty and flexibility. NYSE Arca participants are on notice as to their obligations to maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material, non-public information. Like Nasdaq, NYSE Arca participants will now be afforded the same flexibility to maintain compliance mechanisms of their own design. The Exchange believes that this approach fosters a fair and orderly marketplace without being overly burdensome upon its members.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)¹¹ of the Securities Exchange Act of 1934 (the “Act”), in general, and furthers the objectives of Section 6(b)(5),¹² in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms

¹⁰ NYSE Arca notes that its current examination procedure regarding its review for appropriate supervisory systems and procedures will remain in place.

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

of a free and open market and a national market system. Eliminating NYSE Arca Equities Rule 7.26, while establishing new NYSE Arca Equities Rule 6.7 and revising NYSE Arca Equities Rule 6.18, should eliminate unnecessary regulatory burdens while at the same time retaining an appropriate mechanism designed to ensure that material, non-public information continues to be protected.

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. 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. Please include File Number SR-NYSEArca-2009-78 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSEArca-2009-78. 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 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NYSE Arca. 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 publicly available. All submissions should refer to File Number SR-NYSEArca-2009-78 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, the Commission finds 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.¹³ The Commission believes that the proposal is consistent with Section 6(b)(5)¹⁴ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove

¹³ In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁴ 15 U.S.C. 78f(b)(5).

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 is proposing to eliminate NYSE Arca Equities Rule 7.26 and the specifically prescribed information barriers described therein, and to adopt a more principles-based approach that would permit a Market Maker to develop and apply its own policies and procedures to, among other things, prohibit the misuse of material nonpublic information. NYSE Arca Equities Rule 7.26 addresses concerns arising from the potential for the sharing of material non-public information between a Market Maker's market making activities and Other Business Activities of the Market Maker or its affiliates.¹⁵ For instance, one such concern is that the Market Maker or affiliate engaging in Other Business Activities might use non-public information that was acquired by the Market Maker through its role as a market maker, such as trading based on information on the Market Maker's book. Another concern is that the Market Maker might use material non-public information received from the entity engaging in Other Business Activities, such as trading based on a change in the firm's buy or sell recommendation.¹⁶

While the proposed rules will no longer specify policies and procedures a Market Maker must establish, the proposal will require that the policies and procedures be reasonably designed to ensure compliance with applicable federal securities law and regulations, and with Exchange rules. The Commission believes that, with adequate oversight by the Exchange of its members,

¹⁵ Other Business Activities include conducting an investment banking or public securities business, making markets in the options overlying the security in which the Market Maker makes markets, and, subject to certain specified exceptions, functioning as a General Authorized Trader. See NYSE Arca Equities Rule 7.26.

¹⁶ See Securities Exchange Act Release No. 58328 (August 7, 2008), 73 FR 48260 (August 18, 2008) (SR-NYSE-2008-45) (articulating concerns in the context of approving changes to NYSE Rule 98).

elimination of prescriptive information barrier requirements should not reduce the effectiveness of NYSE Arca rules requiring ETP Holders to establish and maintain systems to supervise the activities of ETP Holders, and written procedures that are reasonably designed to comply with applicable securities laws and Exchange rules, including the prohibition on misuse of material nonpublic information.

Specifically, NYSE Arca Equities Rule 6.3, which requires ETP Holders¹⁷ to establish, maintain and enforce written policies and procedures reasonably designed to prevent the misuse of material non-public information by the ETP Holder or persons associated with the ETP Holder, will continue to apply. The misuse of material non-public information includes trading in a security or related options or other derivative securities, while in possession of material non-public information concerning imminent transactions in the security or related securities.¹⁸ The Exchange also proposes to add NYSE Arca Equities Rule 6.7, which will prohibit an ETP Holder from establishing, increasing, decreasing or liquidating an inventory position in a security or derivative of that security based on advance non-public knowledge of the content or timing of a research report concerning that security. Further, NYSE Arca Equities Rule 6.18, which sets forth an ETP Holder's responsibilities or obligations related to conduct or supervision, will continue to apply and will be strengthened and clarified by explicitly requiring ETP Holders to comply with NASD Rule 3010(a)(1), (b)(1), and (c)(1) as if such rules were part of NYSE Arca's Rules. As incorporated by the Exchange, NASD Rule 3010(a)(1), (b)(1), and (c)(1) provide additional clarification that the supervisory systems and internal inspections of ETP Holders must be reasonably designed to achieve compliance with applicable securities laws and

¹⁷ Market Makers are a type of ETP Holder. See NYSE Arca Equities Rule 7.20. The Commission believes that the information-sharing concerns regarding Market Makers applies equally to ETP Holders.

¹⁸ See NYSE Arca Equities Rule 6.3, Commentary .01.

regulations and with applicable NYSE Arca rules, including those relating to the misuse of material non-public information.

Pursuant to this proposal rule change, ETP Holders may utilize the flexible, principles-based approach to modify their policies and procedures as appropriate to reflect changes to their business model, business activities, or to the securities market itself. An ETP Holder should be proactive in assuring that its policies and procedures reflect the current state of its business and continue to be reasonably designed to achieve compliance with applicable federal securities law and regulations, and with applicable Exchange rules. In addition, the Commission notes that, while information barriers are not specifically required under the proposal, an ETP Holder's business model or business activities may dictate that an information barrier or a functional separation be part of the appropriate set of policies and procedures that would be reasonably designed to achieve compliance with applicable securities law and regulations, and with applicable Exchange rules.

The Commission believes that the regulatory approach in this proposed rule change is substantially similar to the regulatory approach of Nasdaq. In particular, the NYSE Arca approach, like the Nasdaq approach, (i) enumerates the conduct that is prohibited by its members, including the potential misuse of material non-public information and (ii) provides for the policies and procedures that must be reasonably designed to ensure compliance with the same. In addition, the Commission notes that the Exchange has represented that its current examination procedure for the review of appropriate supervisory systems and procedures will remain in place.

The Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,¹⁹ for approving the proposed rule change prior to the 30th day after the date of publication of notice in the Federal Register. Although this proposed rule change does not require that members maintain specifically-prescribed information barriers, it will continue to mandate that members establish and maintain a set of policies and procedures reasonably designed to achieve compliance with applicable securities law and regulations, and with applicable Exchange rules. As such, the Exchange is adopting an approach that is substantially similar to the approach currently employed by Nasdaq.²⁰

¹⁹ 15 U.S.C. 78s(b)(2).

²⁰ See Securities Exchange Act Release No. 53128 (Jan. 13, 2006), 71 FR 3550 (January 23, 2006) (adopting Nasdaq IM-2110-2; IM-2110-3; IM-2110-4, and Rule 3010).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²¹ that the proposed rule change (SR-NYSEArca-2009-78) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Florence E. Harmon
Deputy Secretary

²¹ 15 U.S.C. 78s(b)(2).

²² 17 CFR 200.30-3(a)(12).