

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60766; File No. SR-NYSEArca-2009-86)

October 1, 2009

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Activity Assessment Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Exchange Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that, on September 28, 2009, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. NYSE Arca filed the proposed rule change as a “non-controversial” proposal pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ 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, among other changes, (1) amend NYSE Arca Equities Rule 2.17(a) to provide for an Activity Assessment Fee to be paid by ETP Holders in connection with the Exchange’s required payments to the Commission under Section 31 of the Exchange Act⁵; (2) add Commentary .01 to NYSE Arca Equities Rule 2.17 to allow ETP Holders to voluntarily submit to the Exchange, on or before December 31, 2009, funds that may have been previously

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ 15 U.S.C. 78ee.

accumulated by them to satisfy their, and subsequently NYSE Arca's, obligation to remit Section 31-related fees; and (3) amend NYSE Arca Options Rule 2.18(a) to provide for an Activity Assessment Fee to be paid by OTP Firms and Holders in connection with the required payments to the Commission under Section 31 of the Exchange Act.

The text of the proposed rule change is available on the Exchange's Web site at www.nyse.com, at the Exchange's principal office and at the Public Reference Room of the Commission.

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to Section 31 of the Exchange Act and Rule 31 thereunder⁶, national securities exchanges and associations (collectively, "SROs") are required to pay a transaction fee to the SEC that is designed to recover the costs related to the government's supervision and regulation of the securities markets and securities professionals. To offset this obligation, the ETP Holders (under NYSE Arca Equities Rule 2.17) and OTP Firms and OTP Holders (under NYSE Arca Options Rule 2.18) are assessed charges in connection with satisfaction of the Exchange's

⁶ 17 C.F.R. 240.31.

payment obligations under Section 31. The Exchange calculates such fees by multiplying the aggregate dollar amount of “covered sales” (as defined in Section 31 of the Exchange Act) effected on the Exchange during the appropriate period by the Section 31(b) fee rate in effect during that period. Clearing members may in turn seek to charge a fee to their customers or correspondent firms. Any allocation of the fee between the clearing member and its correspondent firm or customer is the responsibility of the clearing member.

NYSE Arca Equities Rule 2.17 and NYSE Arca Options Rule 2.18 relate to payment by ETP Holders (pursuant to NYSE Arca Equities Rule 2.17) and by OTP Firms and OTP Holders (pursuant to NYSE Arca Options Rule 2.18) of charges imposed by the Exchange in connection with the Exchange’s payment to the Commission of amounts required under Section 31 of the Exchange Act. The Exchange proposes to (1) provide for an Activity Assessment Fee to be paid by ETP Holders in connection with the Exchange’s required payments to the Commission under Section 31 of the Exchange Act; (2) add Commentary .01 to NYSE Arca Equities Rule 2.17 to allow ETP Holders to voluntarily submit to the Exchange, on or before December 31, 2009, funds that may have been previously accumulated by them to satisfy their, and subsequently NYSE Arca’s, obligation to remit Section 31-related fees; and (3) amend NYSE Arca Options Rule 2.18(a) to provide for an Activity Assessment Fee to be paid by OTP Firms and Holders in connection with the required payments to the Commission under Section 31 of the Exchange Act.

Proposed Amendments to NYSE Arca Equities Rule 2.17

The Exchange proposes to amend NYSE Arca Equities Rule 2.17(a) to delete outdated language regarding amounts payable under Section 31. The rule, as amended, characterizes the fees payable under such rule as Activity Assessment Fees. The proposed rule states that each

ETP Holder that effects securities transactions on the Corporation that are defined in Section 31 of the Exchange Act as "covered sales" of securities shall pay to the Corporation Activity Assessment Fees based upon all of their covered sales. The proposed rule provides that the Exchange shall calculate Activity Assessment Fees by multiplying the aggregate dollar amount of covered sales effected on the Corporation by the ETP Holder during the appropriate computational period by the Section 31(b) fee rate in effect during that computational period. The proposed rule provides that Activity Assessment Fees shall be due and payable at such times and intervals as prescribed by the Exchange, and that ETP Holders that cease to effect securities transactions on the Corporation shall promptly pay to the Corporation any sum due pursuant to the rule. In addition, the Exchange proposes to add paragraph (c) to NYSE Arca Equities Rule 2.17 to provide that, to the extent that there may be excess monies collected under NYSE Arca Equities Rule 2.17(a), the Corporation may retain those monies to help fund its regulatory expenses.

Program for Payment of Accumulated Funds or Designation of Exchange Accumulated Excess

Reconciling the amounts billed by the Exchange and the amounts collected from the customers historically had been difficult for ETP Holders, possibly causing surpluses to accumulate at some broker-dealer firms (referred to herein as "accumulated funds"). Such accumulated funds may not have been remitted to the Exchange by certain firms, despite the fact that these charges may have been previously identified as "Section 31 Fees" or "SEC Fees" by

the firms.⁷ In addition, the Exchange has accumulated amounts remitted to the Corporation by ETP Holders collected by such ETP Holders in excess of their Rule 2.17 assessment, and in excess of amounts paid by the Corporation to the SEC pursuant to Section 31 of the Exchange Act (“Corporation accumulated excess”).

In November 2004, the Exchange and other self-regulatory organizations (“SROs”) received a letter from the SEC’s Division of Market Regulation (now the Division of Trading and Markets) requesting, among other things, that the Exchange conduct an analysis to ascertain the amount of accumulated funds and present a plan for broker-dealers to dispose of or otherwise resolve title to such accumulated funds. Following discussion among the SROs and staff of the Division of Market Regulation, in an effort to ascertain the amount of accumulated funds, the NASD (now FINRA) surveyed 240 member clearing and self-clearing firms to review their practices regarding the collection of such fees from customers. After compiling and analyzing the data provided by member firms, NASD staff found that over half of the firms surveyed did not have an accumulated funds balance. NASD worked with the other SROs to recommend a potential solution to allow NASD and other SRO member firms to resolve title to the accumulated funds. It was determined, based upon information provided in connection with NASD’s survey, that it would be virtually impossible to return customer-related accumulated funds to the customers that had paid these funds to the firms.⁸

⁷ The SEC stated in its release adopting new Rule 31 and Rule 31T that “it is misleading to suggest that a customer or an SRO member incurs an obligation to the Commission under Section 31.” See Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41060, 41072 (July 7, 2004).

⁸ NASD had asked all surveyed firms whether they could “identify and relate the funds to specific customers on a transaction by transaction basis.” The surveyed firms universally stated that tracking fractions of a penny to individual customers would be impossible and any over-collections could not be passed back at the customer level. See Securities

The proposed rule change is aimed at enabling those fees that may have been collected for purposes of paying an “SEC Fee” or “Section 31 Fee” to be used to pay such fees. The Exchange is proposing new NYSE Arca Equities Rule 2.17, Commentary .01 that will allow ETP Holders, on a one-time-only basis, voluntarily to remit historically accumulated funds to the Exchange. These funds then would be used to pay the Exchange’s current Section 31 fees in conformity with prior representations made by ETP Holders. In addition, an ETP Holder may designate all or part of the Exchange accumulated excess held by the Exchange and allocated to ETP Holder to be used by the Exchange in accordance with the terms of NYSE Arca Equities Rule 2.17, Commentary .01.

Finally, to the extent the payment of these historically accumulated funds or Exchange accumulated excess is in excess of the fees due the SEC from NYSE Arca under Section 31 of the Exchange Act, such surplus shall be used by the Exchange to offset Exchange regulatory costs. Specifically, the Exchange will subject such surplus to the same treatment utilized with respect to unused fine income that has accumulated beyond a level reasonably necessary for future contingencies. That is, the board of directors of NYSE Regulation, Inc. will utilize such surplus to fund one or more special projects of NYSE Regulation, Inc., to reduce fees charged by NYSE Regulation, Inc. to its member organizations or the markets that it serves, or for a charitable purpose.⁹

Exchange Act Release No. 34-55697 (May 2, 2007), 72 FR 26432 (May 9, 2007) (SR-NASD-2007-027).

⁹ See Securities Exchange Act Release No. 55003 (December 22, 2006), 71 FR 78497 (December 29, 2007) (SR-NYSE-2006-109) (approved in Securities Exchange Act Release No. 55216 (January 31, 2007), 72 FR 5779 (February 7, 2007), relating to NYSE Regulation, Inc. policies regarding exercise of power to fine NYSE member organizations and use of money collected as fines).

The Exchange proposes that the effective date of the proposed rule change would be the date of filing with the Commission pursuant to Rule 19b-4(f)(6) under the Exchange Act.¹⁰ In addition, NYSE Arca Equities Rule 2.17, Commentary .01 would automatically sunset on December 31, 2009.

Proposed Amendments to NYSE Arca Options Rule 2.18

Similar to the proposed changes to NYSE Arca Equities Rule 2.17, described above, the Exchange also proposes to delete outdated language regarding amounts payable under Section 31 in NYSE Arca Options Rule 2.18 and to characterize the fees payable under such rule as Activity Assessment Fees. The proposed rule states the current practice relating to collection and payment of Section 31-related fees for options transactions, namely, that Activity Assessment Fees are collected from OTP Firms and OTP Holders through their clearing firms by the Options Clearing Corporation on behalf of the Exchange. In addition, the Exchange proposes to add paragraph (c) to NYSE Arca Options Rule 2.18 to provide that, to the extent that there may be excess monies collected under NYSE Arca Equities Rule 2.18(a), the Corporation may retain those monies to help fund its regulatory expenses.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)¹¹ of the Exchange Act, in general, and furthers the objectives of Section 6(b)(4) of the Exchange Act,¹² which permits the rules of an Exchange to provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and issuers and other persons using its facilities. In addition, the

¹⁰ 17 CFR 240.19b-4(f)(6).

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4).

proposed rule change is consistent with Section 6(b)(5)¹³ of the Exchange Act 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 of a free and open market and a national market system. The Exchange believes that the proposed rule change will provide a transparent way of addressing the issue of accumulated funds held at the member firm level as well as the Corporation accumulated excess. As this proposed rule change would automatically sunset, it will be of a limited duration. Moreover, based on the reminder set forth in the proposed NYSE Arca Equities Rule 2.17, Commentary .01 and the issuance of prior Information Memos on this matter, any accumulation of funds that are collected and disclosed as “Section 31 Fees” or “SEC Fees” should not reoccur.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁴ and Rule 19b-4(f)(6) thereunder.¹⁵ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁵ 17 CFR 240.19b-4(f)(6).

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 Act¹⁶ and Rule 19b-4(f)(6)(iii) thereunder.¹⁷

The Exchange requests that the Commission waive the 30-day operative delay to allow for implementation of the proposed voluntary program in a timely manner to accommodate the proposed December 31, 2009 sunset date. The Commission has previously approved proposals for similar programs at other exchanges.¹⁸ Therefore, the Commission believes that waiving the 30-day operative delay to allow the Exchange to implement this proposed rule change without delay is consistent with the protection of investors and the public interest. The Commission hereby designates the proposal operative upon filing.¹⁹

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.

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the pre-filing requirement.

¹⁸ See, e.g., Securities Exchange Act Release Nos. 55886 (June 8, 2007), 72 FR 32935 (June 14, 2007) (SR-NASD-2007-027); 57829 (May 16, 2008), 73 FR 30173 (May 23, 2008) (SR-Amex-2007-107); and 58108 (July 7, 2008), 73 FR 40413 (July 14, 2008) (SR-NYSE-2007-64).

¹⁹ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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. Please include File Number SR-NYSEArca-2009-86 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSEArca-2009-86. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does

not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2009-86 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Florence E. Harmon
Deputy Secretary

²⁰ 17 CFR 200.30-3(a)(12).