

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96261; File No. SR-NYSEARCA-2022-73)

November 8, 2022

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Expiration Date of the Temporary Amendments to Rules 10.9261 and 10.9830

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on October 28, 2022, 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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes extending the expiration date of the temporary amendments to Rules 10.9261 and 10.9830 as set forth in SR-NYSEArca-2020-85 from October 31, 2022 to January 31, 2023, in conformity with recent changes by the Financial Industry Regulatory Authority, Inc. (“FINRA”). The proposed rule change would not make any changes to the text of NYSE Arca Rules 10.9261 and 10.9830. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 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 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 extending the expiration date of the temporary amendments as set forth in SR-NYSEArca-2020-85⁴ to Rules 10.9261 (Evidence and Procedure in Hearing) and 10.9830 (Hearing) from October 31, 2022 to January 31, 2023, to harmonize with recent changes by FINRA to extend the expiration date of the temporary amendments to its Rules 9261 and 9830. SR-NYSEArca-2020-85 temporarily granted to the Chief or Deputy Chief Hearing Officer the authority to order that hearings be conducted by video conference if warranted by the current COVID-19 public health risks posed by in-person hearings. The proposed rule change would not make any changes to the text of Exchange Rules 10.9261 and 10.9830.⁵

Background

In 2019, NYSE Arca adopted disciplinary rules based on the text of the Rule 8000 and

⁴ See Securities Exchange Act Release No. 90088 (October 5, 2020), 85 FR 64186 (October 9, 2020) (SR-NYSEArca-2020-85) (“SR-NYSEArca-2020-85”).

⁵ The Exchange may submit a separate rule filing to extend the expiration date of the proposed extension beyond January 31, 2023 if the Exchange requires additional temporary relief from the rule requirements identified in SR-NYSEArca-2020-85. The amended NYSE Arca rules will revert back to their original state at the conclusion of the temporary relief period and any extension thereof.

Rule 9000 Series of its affiliate NYSE American LLC (“NYSE American”), with certain changes. The NYSE American disciplinary rules are, in turn, substantially the same as the Rule 8000 Series and Rule 9000 Series of FINRA and the New York Stock Exchange LLC.⁶ The NYSE Arca disciplinary rules were implemented on May 27, 2019.⁷

In adopting disciplinary rules modeled on FINRA’s rules, NYSE Arca adopted the hearing and evidentiary processes set forth in Rule 10.9261 and in Rule 10.9830 for hearings in matters involving temporary and permanent cease and desist orders under the Rule 10.9800 Series. As adopted, the text of Rule 10.9261 and Rule 10.9830 are substantially the same as the FINRA rules with certain modifications.⁸

In response to the COVID-19 global health crisis and the corresponding need to restrict in-person activities, on August 31, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness, SR-FINRA-2020-027, which allowed FINRA’s Office of Hearing Officers (“OHO”) to conduct hearings, on a temporary basis, by video conference, if warranted by the current COVID-19-related public health risks posed by an in-person hearing. Among the rules FINRA amended were Rules 9261 and 9830.⁹

Given that FINRA and OHO administers disciplinary hearings on the Exchange’s behalf, and that the public health concerns addressed by FINRA’s amendments apply equally to Exchange disciplinary hearings, on September 23, 2020, the Exchange filed to temporarily amend Rule 10.9261 and Rule 10.9830 to permit FINRA to conduct virtual hearings on its

⁶ See Securities Exchange Act Release No. 85639 (April 12, 2019), 84 FR 16346 (April 18, 2019) (SR-NYSEArca-2019-15) (“2019 Notice”).

⁷ See NYSE Arca Equities RB-19-060 & NYSE Arca Options RB-19-02 (April 26, 2019).

⁸ See 2019 Notice, 84 FR at 16365 & 16373-4.

⁹ See Securities Exchange Act Release No. 89737 (September 2, 2020), 85 FR 55712 (September 9, 2020) (SR-FINRA-2020-027) (“SR-FINRA-2020-027”).

behalf.¹⁰ In December 2020, FINRA filed a proposed rule change, SR-FINRA-2020-042, to extend the expiration date of the temporary amendments in SR-FINRA-2020-027 from December 31, 2020, to April 30, 2021.¹¹ On December 22, 2020, the Exchange similarly filed to extend the temporary amendments to Rule 10.9261 and Rule 10.9830 to April 30, 2021.¹² On April 1, 2021, FINRA filed a proposed rule change, SR-FINRA-2021-006, to extend the expiration date of the temporary rule amendments to, among other rules, FINRA Rule 9261 and 9830 from April 30, 2021, to August 31, 2021.¹³ On April 20, 2021, the Exchange filed to extend the temporary amendments to Rule 10.9261 and Rule 10.9830 to August 31, 2021.¹⁴ On August 13, 2021, FINRA filed a proposed rule change, SR-FINRA-2021-019, to extend the expiration date of the temporary amendments to, among other rules, FINRA Rule 9261 and 9830 from August 31, 2021, to December 31, 2021.¹⁵ On August 27, 2021, the Exchange filed to extend the temporary amendments to Rule 10.9261 and Rule 10.9830 to December 31, 2021.¹⁶ On December 7, 2021, FINRA filed a proposed rule change, SR-FINRA-2021-031, to extend the expiration date of the temporary amendments to, among other rules, FINRA Rule 9261 and 9830

¹⁰ See note 4, *supra*.

¹¹ See Securities Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (SR-FINRA-2020-042).

¹² See Securities Exchange Act Release No. 90820 (December 30, 2020), 86 FR 647 (January 6, 2021) (SR- NYSEArca-2020-116).

¹³ See Securities Exchange Act Release No. 91495 (April 7, 2021), 86 FR 19306 (April 13, 2021) (SR-FINRA-2021-006).

¹⁴ See Securities Exchange Act Release No. 91633 (April 22, 2021), 86 FR 22474 (April 28, 2021) (SR-NYSEArca-2021-27).

¹⁵ See Securities Exchange Act Release No. 92685 (August 17, 2021), 86 FR 47169 (August 23, 2021) (SR-FINRA-2021-019).

¹⁶ See Securities Exchange Act Release No. 92909 (September 9, 2021), 86 FR 51415 (September 15, 2021) (SR-NYSEArca-2021-76).

from December 31, 2021, to March 31, 2022.¹⁷ On December 27, 2021, the Exchange filed to extend the temporary amendments to Rule 10.9261 and Rule 10.9830 to March 31, 2022, after which the temporary amendments will expire absent another proposed rule change filing by the Exchange.¹⁸ On March 7, 2022, FINRA filed to extend the expiration date of the temporary rule amendments to, among other rules, FINRA Rule 9261 and 9830 from March 31, 2022, to July 31, 2022.¹⁹ On March 29, 2022, the Exchange filed to extend the temporary amendments to Rule 9261 and Rule 9830 to July 31, 2022.²⁰ On July 8, 2022, FINRA filed to extend the expiration date of the temporary rule amendments to, among other rules, FINRA Rule 9261 and 9830 from July 31, 2022 to October 31, 2022.²¹ On July 29, 2022, the Exchange filed to extend the temporary amendments to Rule 9261 and Rule 9830 to October 31, 2022, after which the temporary amendments will expire absent another proposed rule change filing by the Exchange.²²

According to FINRA, although there has been a downward trend in the number of COVID-19 cases since July 2022 -- when FINRA last filed to extend the temporary relief,

¹⁷ See Securities Exchange Act Release No. 93758 (December 13, 2021), 86 FR 71695 (December 17, 2021) (SR-FINRA-2021-31).

¹⁸ See Securities Exchange Act Release No. 93918 (January 6, 2022), 87 FR 1810 (January 12, 2022) (SR-NYSEArca-2021-107).

¹⁹ See Securities Exchange Act Release No. 94430 (March 16, 2022), 87 FR 16262 (March 22, 2022) (SR-FINRA-2022-004).

²⁰ See Securities Exchange Act Release No. 94663 (April 11, 2022), 87 FR 22587 (April 15, 2022) (SR-NYSEARCA-2022-18).

²¹ See Securities Exchange Act Release No. 95281 (July 14, 2022), 87 FR 43335 (July 20, 2022) (SR-FINRA-2022-018).

²² See Securities Exchange Act Release No. 95474 (August 11, 2022), 87 FR 50665 (August 17, 2022) (SR-NYSEAMER-2022-34).

COVID-19 still remains a public health concern.²³ For example, according to the Centers for Disease Control and Prevention (“CDC”), the 7-day moving average of new deaths from COVID-19 in the United States during September 2022 ranged from approximately 300 to 500 deaths per day,²⁴ and approximately 23 percent of counties in the United States have a medium or high COVID-19 Community Level based on the CDC’s most recent calculations.²⁵ Much uncertainty also remains as to whether there will be a significant increase in the number of cases of COVID-19 in the future given the emergence of new Omicron variants that the CDC currently is tracking²⁶ and the dissimilar vaccination rates (completed primary series and a first booster dose) throughout the United States.²⁷ Due to the continued presence and uncertainty of COVID-19, FINRA believes that there is a continued need for temporary relief beyond October 31, 2022.²⁸ On October 17 2022, FINRA accordingly filed to extend the expiration date of the temporary rule amendments to, among other rules, FINRA Rule 9261 and 9830 from October 31,

²³ See Securities Exchange Act Release No. 96107 (October 19, 2022), 87 FR 64526 (October 25, 2022) (SR-FINRA-2022-029) (“SR-FINRA-2022-029”).

²⁴ See CDC, COVID Data Tracker - Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory, https://covid.cdc.gov/covid-data-tracker/#trends_dailydeaths_select_00 (last visited Oct. 11, 2022).

²⁵ See CDC, COVID Data Tracker – COVID-19 Integrated County View, https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=all_states&list_select_county=all_counties&data-type=CommunityLevels&null=CommunityLevels (last visited Oct. 11, 2022).

²⁶ These new Omicron variants include BA.4.6, BF.7, and BA.2.75. See CDC, COVID Data Tracker – Variant Proportions, <https://covid.cdc.gov/covid-data-tracker/#variant-proportions> (last visited Oct. 11, 2022).

²⁷ A state-by-state comparison of vaccination rates is available at https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-people-additional-dose-totalpop.

²⁸ See SR-FINRA-2022-029, 87 FR 64526-28.

2022, to January 31, 2023.²⁹

Proposed Rule Change

Consistent with FINRA’s recent proposal, the Exchange proposes to extend the expiration date of the temporary rule amendments to NYSE Arca Rules 10.9261 and 10.9830 as set forth in SR-NYSEArca-2020-85 from October 31, 2022 to January 31, 2023.

As set forth in SR-FINRA-2022-029, although there has been a downward trend in the number of COVID-19 cases since July 2022 -- when FINRA last filed to extend the temporary relief, that COVID-19 still remains a public health concern. For example, according to the Centers for Disease Control and Prevention (“CDC”), the 7-day moving average of new deaths from COVID-19 in the United States during September 2022 ranged from approximately 300 to 500 deaths per day,³⁰ and approximately 23 percent of counties in the United States have a medium or high COVID-19 Community Level based on the CDC’s most recent calculations.³¹ Much uncertainty also remains as to whether there will be a significant increase in the number of cases of COVID-19 in the future given the emergence of new Omicron variants that the CDC currently is tracking³² and the dissimilar vaccination rates (completed primary series and a first booster dose) throughout the United States.³³ Due to the continued presence and uncertainty of COVID-19, FINRA believes that there is a continued need for temporary relief beyond July 31,

²⁹ See generally SR-FINRA-2022-029.

³⁰ See supra note 24 (CDC, COVID Data Tracker - Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory).

³¹ See supra note 25 (CDC, COVID Data Tracker – COVID-19 Integrated County View).

³² See supra note 27 (regarding the new Omicron variants include BA.4.6, BF.7, and BA.2.75 described in CDC, COVID Data Tracker – Variant Proportions).

³³ See supra note 27 (regarding state-by-state comparison of COVID-19 vaccination rates).

2022.³⁴ FINRA accordingly proposed to extend the expiration date of the temporary rule amendments from October 31, 2022 to January 31, 2023.

The Exchange proposes to similarly extend the expiration date of the temporary rule amendments to NYSE Arca Rules 10.9261 and 10.9830 as set forth in SR-NYSEArca-2020-85 from October 31, 2022 to January 31, 2023. The Exchange agrees with FINRA that, although there has been a downward trend in the number of COVID-19 cases since July 2022 -- when FINRA last filed to extend the temporary relief, that COVID-19 still remains a public health concern. The Exchange also agrees that, due to the continued presence and uncertainty of COVID-19, for the reasons set forth in SR-FINRA-2022-029, there is a continued need for this temporary relief beyond October 31, 2022. The proposed change would permit OHO to continue to assess, based on critical COVID-19 data and criteria and the guidance of health and security consultants, whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference. As noted in SR-FINRA-2022-029, in deciding whether to schedule a hearing by video conference, OHO may consider a variety of other factors in addition to COVID-19 trends. Similarly, as noted in SR-FINRA-2022-029, in SR-FINRA-2020-027, FINRA provided a non-exhaustive list of other factors OHO may take into consideration, including a hearing participant's individual health concerns and access to the connectivity and technology necessary to participate in a video conference hearing.³⁵ The Exchange believes that this is a reasonable procedure to continue to follow for hearings under Rules 10.9261 and 10.9830 chaired by a FINRA employee.

As noted below, the Exchange has filed the proposed rule change for immediate

³⁴ See SR-FINRA-2022-018, 87 FR at 64526-28.

³⁵ See SR-FINRA-2022-029, 87 FR at 87 FR 64527, n. 15.

effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so the Exchange can implement the proposed rule change immediately.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,³⁶ in general, and furthers the objectives of Section 6(b)(5),³⁷ in particular, because 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, 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. Additionally, the Exchange believes the proposed rule change is designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.³⁸

The Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between Exchange rules and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance. As such, the proposed rule change will foster cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposed rule change, which extends the expiration date of the temporary

³⁶ 15 U.S.C. 78f(b).

³⁷ 15 U.S.C. 78f(b)(5).

³⁸ 15 U.S.C. 78f(b)(7) & 78f(d).

amendments to Exchange rules consistent with FINRA’s extension to its Rules 9261 and 9830 as set forth in SR-FINRA-2022-029, will permit the Exchange to continue to effectively conduct hearings given the continued presence and uncertainty of COVID-19. Given that COVID-19 remains a public health concern and the uncertainty around a potential spike in cases of the disease, without this relief allowing OHO to proceed by video conference, some or all hearings may have to be postponed. The ability to conduct hearings by video conference will permit the adjudicatory functions of the Exchange’s disciplinary rules to continue unabated, thereby avoiding protracted delays. The Exchange believes that this is especially important in matters where temporary and permanent cease and desist orders are sought because the proposed rule change would enable those hearings to continue to proceed without delay, thereby enabling the Exchange to continue to take immediate action to stop significant, ongoing customer harm, to the benefit of the investing public.

As set forth in detail in the SR-NYSEArca-2020-85, the temporary relief to permit hearings to be conducted via video conference maintains fair process and will continue to provide fair process consistent with Sections 6(b)(7) and 6(d) of the Act³⁹ while striking an appropriate balance between providing fair process and enabling the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets while avoiding the COVID-19-related public health risks for hearing participants. The Exchange notes that this proposal, like SR-NYSEArca-2020-85, provides only temporary relief. As proposed, the changes would be in place through January 31, 2023. As noted in SR-NYSEArca-2020-85 and above, the amended rules will revert back to their original state at the conclusion of the temporary relief period and, if applicable, any extension thereof.

³⁹ 15 U.S.C. 78f(b)(7) & 78f(d).

Accordingly, the proposed rule change extending this temporary relief is in the public interest and consistent with the Act's purpose.

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

The Exchange does not believe that the proposed temporary rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but is rather intended solely to extend temporary relief necessitated by the continued presence and uncertainty of COVID-19 and the related health and safety risks of conducting in-person activities. The Exchange believes that the proposed rule change will prevent unnecessary impediments to critical adjudicatory processes and its ability to fulfill its statutory obligations to protect investors and maintain fair and orderly markets that would otherwise result if the temporary amendments were to expire on October 31, 2022.

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 Act⁴⁰ and Rule 19b-4(f)(6) thereunder.⁴¹ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to

⁴⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴¹ 17 CFR 240.19b-4(f)(6).

Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)⁴² normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),⁴³ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange has indicated that there is a continued need to extend the temporary relief because the Exchange agrees with FINRA that the COVID-19 related health concerns necessitating this relief will continue beyond October 31, 2022.⁴⁴ The Exchange also states that extending the temporary relief provided in SR-NYSEArca-2022-44 immediately upon filing and without a 30-day operative delay will allow the Exchange to continue critical adjudicatory and review processes so that the Exchange may continue to operate effectively and meet its critical investor protection goals, while also protecting the health and safety of hearing participants.⁴⁵ The Commission also notes that this proposal extends without change the temporary relief previously provided by SR-NYSEArca-2020-85.⁴⁶ As proposed, the temporary changes would be in place through January 31, 2023 and the amended rules will revert back to their original state at the conclusion of the temporary relief period and, if applicable, any extension thereof.⁴⁷

⁴² 17 CFR 240.19b-4(f)(6).

⁴³ 17 CFR 240.19b-4(f)(6)(iii).

⁴⁴ See supra Item II; see also SR-FINRA-2022-029, 87 FR 64526, at 64527.

⁴⁵ See 87 FR 64526, at 64528-29 (noting the same in granting FINRA's request to waive the 30-day operative delay so that SR-FINRA-2022-029 would become operative immediately upon filing).

⁴⁶ See supra note 4.

⁴⁷ See supra note 5. As noted above, the Exchange states that if it requires temporary relief from the rule requirements identified in this proposal beyond January 31, 2023, it may

For these reasons, the Commission believes that waiver of the 30-day operative delay for this proposal is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.⁴⁸

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)⁴⁹ of the Act to determine whether the proposed rule change should be approved or disapproved.

submit a separate rule filing to extend the effectiveness of the temporary relief under these rules.

⁴⁸ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁴⁹ 15 U.S.C. 78s(b)(2)(B).

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-2022-73 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-2022-73. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m.

Copies of 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEARCA-2022-73 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.⁵⁰

J. Matthew DeLesDernier,
Deputy Secretary.

⁵⁰ 17 CFR 200.30-3(a)(12).