

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-67244; File No. SR-NYSEArca-2012-67)

June 22, 2012

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Amending NYSE Arca Rule 3.2 and NYSE Arca Equities, Inc. Rule 3.2, Which Concern the Nomination and Election of Fair Representation Directors

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 June 18, 2012, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NYSE Arca. 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 to amend NYSE Arca Rule 3.2 and NYSE Arca Equities, Inc. (“NYSE Arca Equities”) Rule 3.2, which concern the nomination and election of fair representation directors. The text of 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.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

The Exchange proposes to amend NYSE Arca Rule 3.2 and NYSE Arca Equities Rule 3.2, which concern the nomination and election of fair representation directors.

Background

Section 6(b)(3) of the Securities Exchange Act of 1934, as amended (the “Act”), requires that the rules of an exchange shall “assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.”³ Exchange members who serve on exchange boards thus are sometimes referred to as “fair representation directors.” NYSE Arca Rule 3.2 sets forth a process for the nomination and selection of fair representation directors for the NYSE Arca Board of Directors (“NYSE Arca Board”), and NYSE Arca Equities Rule 3.2 sets forth a similar process for the nomination and selection of fair representation directors for the NYSE Arca Equities Board of Directors (“Equities Board”).⁴

The Exchange proposes to amend both rules to streamline those processes and make them more similar to the processes used by the New York Stock Exchange LLC (“NYSE”)⁵ and NYSE MKT LLC (“NYSE MKT”).⁶

³ 15 U.S.C. 78f(b)(3).

⁴ NYSE Arca Equities is a wholly-owned subsidiary of NYSE Arca.

⁵ See Section 2.03(a) of the Third Amended and Restated Operating Agreement of New York Stock Exchange LLC (“NYSE Operating Agreement”), available at

Amendments to NYSE Arca Rules

Under Section 3.02(a) of the NYSE Arca Bylaws, the NYSE Arca Board must have 8-12 Directors, and at least 20 percent of the Directors must be individuals nominated by trading permit holders, with at least one director nominated by the Equities Trading Permit Holders (“ETP Holders”) of NYSE Arca Equities, and at least one director nominated by the Options Trading Permit Holders (“OTP Holders”) of the Exchange.⁷ The exact number of Permit Holder Directors is determined from time to time by the NYSE Arca Board, subject to the percentage restrictions described above.

Nominating Committee Composition and Appointment

The Exchange proposes to amend NYSE Arca Rule 3.2(b)(2)(A) and (B) to change the composition of, and the appointment process for, the Nominating Committee for fair representation directors. Currently, the Nominating Committee has seven members, consisting of six OTP Holders and one member of the public. Sixty-five days prior to the expiration of the

<http://usequities.nyx.com/sites/corporate.nyx.com/files/thirdamendedandrestatedoperatingagreementofnewyorkstockexchangellc.pdf> [sic]; Article III, Sections 1(C) and 5 of the Amended and Restated Bylaws of NYSE Market, Inc. (“NYSE Market Bylaws”), available at http://usequities.nyx.com/sites/usequities.nyx.com/files/final_second_amended_and_resta ted_bylaws_of_nyse_market_inc_0.pdf and Article III, Sections 1(C) and 5 of the Third Amended and Restated Bylaws of NYSE Regulation, Inc. (“NYSE Regulation Bylaws”), available at <http://www.nyse.com/pdfs/SecondAmendedandRestatedBylawsofNYSERegulationInc.PDF>.

⁶ See Second Amended and Restated Operating Agreement of NYSE MKT LLC (“NYSE MKT Operating Agreement”), Section 2.03(a) and (h), available at http://nyseamextrules.nyse.com/AMEX/pdf/operating_agreement.pdf.

⁷ In addition, at least 50 percent of the directors must be directors who represent the public. The Nominating Committee of NYSE Arca Holdings, Inc. (“NYSE Arca Holdings”) nominates the directors for election to the NYSE Arca Board (other than the fair representation directors) at the annual meeting of NYSE Arca Holdings. NYSE Arca is a non-stock corporation with one authorized membership interest; the sole member is NYSE Arca Holdings. See Sections 2.01 and 3.02 of the NYSE Arca Bylaws.

term of its members, the Nominating Committee publishes a slate of six eligible nominees to fill the positions during the next annual term of the Nominating Committee. OTP Holders in good standing may submit a petition to the Exchange to nominate additional eligible candidates to fill the OTP positions on the Nominating Committee, and the Chief Executive Officer of NYSE Arca appoints the public member to the Nominating Committee. If there are more than six nominees to the Nominating Committee, the Nominating Committee submits the nominees to the OTP Holders for an election.

The Exchange proposes to eliminate the public member position from the Nominating Committee and eliminate the nomination process for the Nominating Committee members and instead have the NYSE Arca Board appoint the members of the Nominating Committee. This change would be consistent with the fair representation nominating committee composition and selection processes followed by NYSE and NYSE MKT; each of those exchanges utilizes an appointed Director Candidate Recommendation Committee, which serves the same purpose as the Nominating Committee, and which does not include a public member.⁸

Petition Process for Fair Representation Director Nominees

Under current NYSE Arca Rule 3.2(b)(2)(C)(ii), the Nominating Committee publishes the names of the fair representation director nominees to the NYSE Arca Board no later than 65 days prior to the expiration of the term of its directors. OTP Holders may submit a petition to add another nominee within 10 business days after the Nominating Committee publishes its nominees to the NYSE Arca Board. If a written petition of the lesser of 35 OTP Holders or 10 percent of OTP Holders in good standing is submitted to the Nominating Committee, such

⁸ See Section 2.03(a)(iii) and (iv) of the NYSE Operating Agreement; Article III, Section 5 of the NYSE Market Bylaws; Article III, Section 5 of the NYSE Regulation Bylaws; and Section 2.03(h) of the NYSE MKT Operating Agreement.

person also is nominated by the Nominating Committee. The Board of Directors of NYSE Arca Holdings has 10 business days to object to the nominees in its sole discretion and may object to the nomination of a nominee if the nominee has been disciplined by any self-regulatory organization or is subject to a statutory disqualification under Section 3(a)(39) of the Act. If the Board of Directors of NYSE Arca Holdings objects to all the proposed nominees, the Nominating Committee must publish the names of eligible alternative nominees.

The Exchange proposes to amend this process to make it more efficient and more consistent with the petition process for fair representation directors for NYSE and NYSE MKT. Under proposed NYSE Arca Rule 3.2(b)(2)(C)(ii), the Nominating Committee would publish the names of the nominees to the Board of Directors on an “Announcement Date” each year sufficient to accommodate the nomination and petition processes of the proposed rule. OTP Holders in good standing would be permitted to nominate additional eligible candidates if a written petition of at least 10 percent of OTP Holders in good standing were submitted to the Nominating Committee within two weeks after the Announcement Date. The Exchange believes that the current 65-day period is unnecessarily long, and that instead using the Announcement Date with petitions due two weeks thereafter would be more efficient while preserving OTP Holders’ rights and creating consistency with the processes used by NYSE and NYSE MKT.⁹ The proposed rule differs from the current rule in that it eliminates the option for 35 OTP Holders, if they represent less than 10 percent of OTP Holders, to submit a petition. The Exchange believes that setting a minimum of 10 percent is appropriate and consistent with current NYSE and NYSE MKT processes as well as current NYSE Arca Equities Rule 3.2(b)(2)(C)(i). The current deadline for submitting petition nominations is 10 business days,

⁹ See Section 2.03(a)(iv) of the NYSE Operating Agreement and Section 2.03(a)(iv) of the NYSE MKT Operating Agreement.

which generally will be the same as the proposed deadline of two weeks, but the proposed change will make the time periods identical for all three exchanges.

Under the proposed rule, each petition candidate would be required to include a completed questionnaire used to gather information concerning director candidates, and the Nominating Committee would determine whether the petition candidate is eligible to serve on the NYSE Arca Board (including whether such person was free of a statutory disqualification under Section 3(a)(39) of the Act), and such determination would be final and conclusive. The Exchange believes that, similar to the NYSE and NYSE MKT processes,¹⁰ the Nominating Committee, rather than the Board of Directors of NYSE Arca Holdings, should determine the qualifications of a petition candidate. The questionnaire would be a new requirement to assist the Nominating Committee in reaching its decision. Such a questionnaire is already used by NYSE and NYSE MKT.¹¹

Contested Nominations

Under current NYSE Arca Rule 3.2(b)(2)(C)(iii), in the event that the OTP Holder position is nominated by the Nominating Committee pursuant to petition by the OTP Holders, and there are two or more nominees for the NYSE Arca Board, the Nominating Committee must submit the contested nomination to the OTP Holders for selection. The nominee for the NYSE Arca Board selected by the most OTP Holders is submitted by the Nominating Committee to the NYSE Arca Board. The Exchange proposes to amend this text to simplify it and provide that if the number of nominees exceeds the number of available seats, the Nominating Committee would submit the contested nomination to the OTP Holders for selection, and the nominee for

¹⁰ The NYSE Euronext nominating and governance committee evaluates the qualifications of petition candidates. Id.

¹¹ Id.

the NYSE Arca Board receiving the most votes of OTP Holders would be submitted by the Nominating Committee to the NYSE Arca Board. The current rule does not describe the voting process. The Exchange proposes to amend the rule to explicitly provide that OTP Holders would be afforded no less than 20 calendar days to submit their votes on a confidential basis.

Amendments to NYSE Arca Equities Rules

Similar to the NYSE Arca Bylaws, Section 3.02(a) of the NYSE Arca Equities Bylaws (“Equities Bylaws”) requires that at least 20 percent of the Equities Board, but no fewer than two Directors, must be nominees of the Nominating Committee of the Equities Board (“Equities Nominating Committee”) selected in accordance with NYSE Arca Equities Rule 3.2. Under Section 3.02(e) of the Equities Bylaws, the Equities Board nominates directors for election at the annual meeting of stockholders, and such nominations must comply with Section 3.02(a) of the Equities Bylaws and NYSE Arca Equities Rules.¹²

Nominating Committee Composition and Appointment

Current NYSE Arca Equities Rule 3.2(b)(2)(A) and (B) are similar to the counterpart NYSE Arca rules described above. Under current NYSE Arca Equities Rule 3.2(b)(2)(A), the Equities Nominating Committee has seven members, consisting of six ETP Holders and one member of the public. Under current NYSE Arca Equities Rule 3.2(b)(2)(B), 65 days prior to the expiration of the term of its members, the Equities Nominating Committee publishes a slate of six eligible nominees to fill the positions of the Equities Nominating Committee during the

¹² A 10-member Equities Board must include two nominees of the Nominating Committee, five from the public (including at least three from the NYSE Arca Board), one individual from a firm employing an ETP or Equity ASAP holder (which individual serves concurrently on the NYSE Arca Board), the chief executive officer of the NYSE Arca, and the current president of NYSE Arca Equities (unless the president has notified the Corporation of his or her intention to resign or retire, in which case, the designated successor president shall be nominated.) See Section 3.02(e) of the Equities Bylaws.

next annual term. ETP Holders in good standing may submit a petition to the Exchange to nominate additional eligible candidates to fill the ETP positions on the Equities Nominating Committee, and the Chief Executive Officer of NYSE Arca Equities appoints the public member to the Equities Nominating Committee.¹³ If there are more than six nominees to the Equities Nominating Committee, the Equities Nominating Committee submits the nominees to the ETP Holders for an election.

As proposed with respect to NYSE Arca Rule 3.2(b)(2)(A) and (B), and consistent with current NYSE and NYSE MKT processes described above, the Exchange proposes to amend NYSE Arca Equities Rule 3.2 to eliminate the public member position from the Equities Nominating Committee and eliminate the nomination process for the Equities Nominating Committee members and instead have the Equities Board appoint the members of the Equities Nominating Committee.

Petition Process for Fair Representation Director Nominees

Although current NYSE Arca Rule 3.2(b)(2)(C) and current NYSE Arca Equities Rule 3.2(b)(2)(C) are also substantially similar with respect to the petition process for fair representation director nominees, there are certain differences in processes for NYSE Arca Equities. The NYSE Arca Equities Nominating Committee publishes the names of two nominees to the Equities Board and one nominee to the NYSE Arca Board, and ETP Holders select two nominees for any contested seat on the Equities Board and one nominee for any contested seat on the NYSE Arca Board.¹⁴

¹³ The NYSE Arca and NYSE Arca Equities rules differ with respect to how many trading permit holders are required to submit a petition.

¹⁴ By comparison, the NYSE Arca Nominating Committee publishes the name of one nominee to the NYSE Arca Board, and OTP Holders may select one nominee for the contested seat on the NYSE Arca Board.

Under current NYSE Arca Equities Rule 3.2(b)(2)(C)(ii), the Equities Nominating Committee publishes the names of the fair representation director nominees no later than 65 days prior to the expiration of the term of the directors. ETP Holders may submit a petition to add another nominee within 10 business days after the Equities Nominating Committee publishes its nominees. If a written petition of at least 10 percent of ETP Holders in good standing is submitted to the Equities Nominating Committee within 45 days preceding the expiration of the current term, such person is also nominated by the Equities Nominating Committee. Unlike NYSE Arca Rule 3.2(b)(2)(C), there is no objection process for petition candidates.

The Exchange proposes to amend this process to align it with the NYSE and NYSE MKT processes and proposed NYSE Arca Rule 3.2(b)(2)(C) for the same reasons stated above with respect to proposed NYSE Arca Rule 3.2. Under proposed NYSE Arca Equities Rule 3.2(b)(2)(C)(ii), the Nominating Committee would publish the names of the nominees on an “Announcement Date” each year sufficient to accommodate the nomination and petition processes of the proposed rule. ETP Holders in good standing would be permitted to nominate additional eligible candidates if a written petition of at least 10 percent of ETP Holders in good standing were submitted to the Equities Nominating Committee within two weeks after the Announcement Date. Each petition candidate would be required to include a completed questionnaire used to gather information concerning director candidates, and the Equities Nominating Committee would determine whether the petition candidate is eligible to serve on the NYSE Arca Board (including whether such person was free of a statutory disqualification under Section 3(a)(39) of the Act), and such determination would be final and conclusive.

Contested Nominations

Under current NYSE Arca Equities Rule 3.2(b)(2)(C)(ii), if there is a contested

nomination, the Equities Nominating Committee submits it to the ETP Holders, which may select two nominees for the contested seat on the Equities Board and one nominee for the contested seat on the NYSE Arca Board. The Exchange proposes to simplify this text to align it with the proposed changes to NYSE Arca Rule 3.2(b)(2)(C)(iii).

Current NYSE Arca Equities Rule 3.2(b)(2)(C)(ii) does not describe the voting process. The Exchange proposes to amend the rule to explicitly provide that ETP Holders would be afforded no less than 20 calendar days to submit their votes on a confidential basis.

Technical and Conforming Changes

NYSE Arca Equities Rule 3.2 refers to the governing body of NYSE Arca as the Board of Governors; the Rule should instead refer to the NYSE Arca Board of Directors.¹⁵ As such, the Exchange proposes to change references to the NYSE Arca Board of Governors to the NYSE Arca Board of Directors.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(3) of the Act,¹⁶ which requires that the rules of an exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. The Exchange believes that it is not necessary to have a public member on its Nominating Committees under NYSE Arca Rule 3.2 and NYSE Arca Equities Rule 3.2 because the purpose is to represent the interests of the membership, not the public, and NYSE and NYSE MKT do not include a public member on their equivalent nominating

¹⁵ See Article III of the NYSE Arca Bylaws.

¹⁶ 15 U.S.C. 78f(b)(3).

committees and appoint, rather than elect, their nominating committees that serve the same purpose.

The proposed petition process will continue to assure a fair representation of OTP and ETP Holders in the selection of directors that is consistent with the processes for NYSE and NYSE MKT and allows a reasonable period of time for trading permit holders to submit a petition and to vote on a contested nomination. The Exchange further believes that it is appropriate to remove the option for 35 OTP Holders to submit a petition because the total number of OTP Holders varies from time to time and instead requiring at least 10% of the current OTP Holders support the petition assures that only candidates that have a consistent minimum level of support can trigger a contest. The Exchange believes that the proposed petition process will continue to allow trading permit holders to have a voice in the administration of the Exchange and thus help to ensure that the Exchange is administered in a way that is equitable to all participants who trade on the Exchange.

Finally, the Exchange notes that the proposed rule change would not affect the number of fair representation candidates on the boards or any other aspect of the boards' composition or the remainder of the boards' nomination process. The proposed rule change also would continue to ensure that persons subject to a statutory disqualification under the Act could not serve on the Exchange's boards.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- A. by order approve or disapprove such proposed rule change; or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

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-2012-67 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-2012-67. 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; 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-2012-67 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.¹⁷

Kevin M. O'Neill
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).