

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-67923; File No. SR-NYSEARCA-2012-103)

September 25, 2012

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Amending NYSE Arca Rules 3.2 and 3.3 and NYSE Arca Equities, Inc. (“NYSE Arca Equities”) Rules 3.2 and 3.3 to Expand the Eligibility Requirements for Service on Boards of Directors and Committees

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on September 18, 2012, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III 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 to amend NYSE Arca Rules 3.2 and 3.3 and NYSE Arca Equities, Inc. (“NYSE Arca Equities”) Rules 3.2 and 3.3 to expand the eligibility requirements for service on boards of directors and committees. 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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 to amend NYSE Arca Rules 3.2 and 3.3 and NYSE Arca Equities Rules 3.2 and 3.3 to expand the eligibility requirements for service on boards of directors and committees.

Amendments to NYSE Arca Rules

Neither the Certificate of Incorporation nor the Bylaws of NYSE Arca restrict the eligibility of persons who can serve as a non-Public Director on the NYSE Arca Board of Directors or on committees.⁴ However, provisions of NYSE Arca Rules 3.2 and 3.3 require certain Board and committee members to be OTP Holders⁵ or Allied Persons of OTP Firms.⁶ An Allied Person is an individual who is (1) an employee of an OTP Firm who controls such firm, (2) an employee of an OTP Firm corporation who is a director or

⁴ See NYSE Arca Certificate of Incorporation and Sections 3.02, 4.01, and 4.02 of the NYSE Arca Bylaws.

⁵ OTP Holder means a natural person, in good standing, who has been issued an Options Trading Permit (“OTP”), or has been named as a nominee. See NYSE Arca Rule 1.1(q).

⁶ OTP Firm means a sole proprietorship, partnership, corporation, limited liability company, or other organization in good standing who holds an OTP or upon whom an individual OTP Holder has conferred trading privileges on the Exchange’s trading facilities. See NYSE Arca Rule 1.1(r).

a principal executive officer of such corporation, (3) an employee of an OTP Firm limited liability company who is a manager or a principal executive officer of such limited liability company, or (4) a general partner in an OTP Firm partnership; each of these persons must be approved by the Exchange as an Allied Person.⁷ The Exchange proposes to expand the eligibility to serve in these Board and committee positions so that it includes OTP Holders, Allied Persons of OTP Firms, and Associated Persons of OTP Firms. “Associated Person” is a broader term that means a person who is a partner, officer, director, member of a limited liability company, trustee of a business trust, employee of an OTP Firm, or any person directly or indirectly controlling, controlled by or under common control with an OTP Firm.⁸

Board of Directors

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.”⁹ 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 these directors. Specifically, NYSE Arca Rule 3.2(b)(2)(C)(ii) provides that the Nominating Committee may nominate OTP Holders or Allied Persons of OTP Firms to serve on the NYSE Arca

⁷ See NYSE Arca Rule 1.1(b).

⁸ See NYSE Arca Rule 1.1(d).

⁹ 15 U.S.C. 78f(b)(3).

Board of Directors. In addition, OTP Holders may submit a petition to the Exchange to nominate additional eligible candidates if certain requirements are met.

The Exchange proposes to expand the eligibility for fair representation directors to include Associated Persons of OTP Firms. The Exchange believes that current NYSE Arca Rule 3.2 is unnecessarily exclusive and that the Exchange would benefit by expanding the pool of candidates for these Board seats to include all employees of OTP Firms. There may be employees of an OTP Firm who fall outside the definition of Allied Person whose experience would significantly benefit the Board of Directors and the Exchange.

Permitting Associated Persons of OTP Firms to serve on the NYSE Arca Board of Directors is consistent with the board composition standards of at least five other self-regulatory organizations (“SROs”). The Exchange’s affiliate, New York Stock Exchange LLC (“NYSE”) and NYSE MKT LLC (“NYSE MKT”) do not restrict fair representation directors to trading permit holders or Allied Persons.¹⁰ In addition, other exchanges specifically authorize the industry representatives on their exchanges to include member firm employees. For example, FINRA’s Board of Governors includes Industry Governors, who are defined as persons who are or have served in the prior year as an officer, director (other than as an independent director), employee or controlling person

¹⁰ See Article II, Section 2.03(a) of the Fourth Amended and Restated Operating Agreement of NYSE (“NYSE Operating Agreement”), available at https://usequities.nyx.com/sites/usequities.nyx.com/files/fourth_amended_and_restated_operating_agreement_of_nyse_llc.pdf, and Article II, Section 2.03(a) of the Third Amended and Restated Operating Agreement of NYSE MKT (“NYSE MKT Operating Agreement”), available at http://wallstreet.cch.com/MKT/pdf/operating_agreement.pdf.

of a broker-dealer.¹¹ Thus, any person who is an employee of a broker-dealer is eligible to be a member of FINRA's Board of Governors. The NASDAQ Stock Market, Inc. ("NASDAQ")¹² and BATS Exchange, Inc. ("BATS")¹³ have similar compositional structures that permit a broker-dealer employee to serve on their governing boards.

Committees

Currently, NYSE Arca Rule 3.2(a) sets forth general provisions for Options Committees. Specifically, NYSE Arca Rule 3.2(a)(8) states that any OTP Holder of the Exchange in good standing, Allied Person of an OTP Firm, or person from the public is eligible for appointment or election to Options Committees. The Chief Executive Officer ("CEO") of the Exchange appoints eligible OTP Holders, Allied Persons of an OTP Firm, and persons from the public to the positions so allocated on Options Committees for a term of one year. Under NYSE Arca Rule 3.2(a)(9), the CEO of the Exchange may designate one or more OTP Holders, an Allied Person of an OTP Firm, and persons from the public as alternate members of any Options Committee, who may replace any absent or disqualified member at any meeting of such committee.

Current NYSE Arca Rule 3.2(b) sets forth provisions for three specific Options Committees: the Ethics and Business Conduct Committee ("EBCC"), the Nominating

¹¹ See FINRA Bylaws, Article I(t) and Article VII, Section 4(a), available at http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4598&record_id=5998.

¹² See Bylaws of NASDAQ, Article I(j) and Article IV, Section 4.3, available at <http://www.nasdaq.com/investorrelations/Bylaws.pdf>.

¹³ See Amended and Restated Bylaws of BATS, Article I(o) and Article III, Section 2, available at http://www.batstrading.com/resources/regulation/by_laws/Amended&RestatedBy-LawsBATSEx.pdf.

Committee, and the OTP Advisory Committee. First, under NYSE Arca Rule 3.2(b)(1), the EBCC is made up primarily of OTP Holders and Allied Persons of an OTP Firm. The EBCC is responsible for and has the authority to examine the business conduct and financial condition of OTP Holders, OTP Firms, and associated persons; conduct hearings and render decisions in summary disciplinary actions and proceedings; impose appropriate sanctions of expulsion, suspension, fine, censure or any other fitting sanctions where the EBCC finds that a violation within the disciplinary jurisdiction of the Exchange has been committed; and require the production of detailed financial reports of an OTP Holder or OTP Firm and such other operational reports as it may deem relevant. Second, under NYSE Arca Rule 3.2(b)(2), the Nominating Committee, which is made up of six OTP Holders, is responsible for nominating fair representation directors for election to the Exchange Board of Directors as described above. Third, under NYSE Arca Rule 3.2(b)(3), the OTP Advisory Committee is made up of OTP Holders and acts in an advisory capacity regarding rule changes related to disciplinary matters and trading rules.

Current NYSE Arca Rule 3.3 sets forth provisions for the Board Appeals Committee, which is made up of the OTP Director(s), the ETP Director(s) and all of the Public Directors of the NYSE Arca Board of Directors. The Board Appeals Committee may appoint an Appeals Panel to conduct reviews of disciplinary proceedings or may decide to conduct review proceedings on its own.¹⁴ Under NYSE Arca Rule 3.3(a)(1)(B), if an Appeals Panel is appointed, it must include at least one public Director and at least one Director that is an OTP Holder or Allied Person of an OTP Firm.

¹⁴ See NYSE Arca Rule 10.8.

As proposed above with respect to the Board of Directors, the Exchange proposes to amend these provisions of NYSE Arca Rules 3.2 and 3.3 so that Associated Persons of OTP Firms would be eligible for membership on the EBCC and Appeals Panels of the Board Appeals Committee and both Allied Persons and Associated Persons of OTP Firms would be eligible for membership on the Nominating Committee and OTP Advisory Committee. The Exchange believes that the current Rules are unnecessarily exclusive and that the Exchange would benefit by expanding the pool of eligible candidates for these positions.

Permitting Allied Persons and Associated Persons of OTP Firms to serve in these positions also is consistent with the composition standards of at least five other SROs. For example, committees of FINRA's Board of Governors¹⁵ and FINRA appeals panels¹⁶ may include employees of broker-dealers. Other exchanges, including NYSE,¹⁷ NYSE MKT,¹⁸ NASDAQ,¹⁹ and BATS,²⁰ have similar committee composition provisions that do not prohibit a broker-dealer employee to serve on committees and appeals panels. The proposed rule change would make the Exchange's committee composition requirements

¹⁵ See FINRA Bylaws, Article IX, supra note 11.

¹⁶ See FINRA Bylaws, Article I(x) and (nn) and Article V, Section 5.2(a), supra note 11.

¹⁷ See Article II, Section 2.03(h) of NYSE Operating Agreement, supra note 10.

¹⁸ See Article II, Section 2.03(h) of the NYSE MKT Operating Agreement, supra note 10.

¹⁹ See Bylaws of NASDAQ, Article I(j) and Article IV, Section 4.13, supra note 12, which provide for the appointment of "Industry Directors" to committees.

²⁰ See Amended and Restated Bylaws of BATS, Article I(p) and Article V, Section 2, supra note 13, which provides for the appointment of "Industry members" to committees.

consistent with these other SROs by permitting Allied Persons and Associated Persons to serve on the above-referenced Exchange committees and panels.

Amendments to NYSE Arca Equities Rules

The Exchange proposes to make parallel changes to the NYSE Arca Equities Rules. Neither the Certificate of Incorporation nor the Bylaws of NYSE Arca Equities restrict the eligibility of persons who can serve as a non-Public Director on the NYSE Arca Equities Board of Directors or on committees.²¹ However, provisions of NYSE Arca Equities Rules 3.2 and 3.3 require certain Board and committee members to be ETP Holders²² or Allied Persons²³ of ETP Holders. The Exchange proposes to expand the eligibility to serve in these Board and committee positions so that it includes ETP Holders, Allied Persons of ETP Holders, and Associated Persons²⁴ of ETP Holders.

Board of Directors

NYSE Arca Equities Rule 3.2 sets forth a process for the nomination and selection of fair representation directors. Specifically, NYSE Arca Equities Rule

²¹ See NYSE Arca Equities Certificate of Incorporation and Sections 3.02, 4.01, and 4.02 of the NYSE Arca Equities Bylaws.

²² ETP Holder means a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that has been issued an Equities Trading Permit. See NYSE Arca Equities Rule 1.1(n).

²³ An Allied Person is an individual who is (1) an employee of an ETP Holder who controls such firm, (2) an employee of an ETP Holder corporation who is a director or a principal executive officer of such corporation, (3) an employee of an ETP Holder limited liability company who is a manager or a principal executive officer of such limited liability company, or (4) a general partner in an ETP Holder partnership; each of these persons must be approved by NYSE Arca Equities as an Allied Person. See NYSE Arca Equities Rule 1.1(c).

²⁴ “Associated Person” is a broader term that means a person who is a partner, officer, director, member of a limited liability company, trustee of a business trust, employee of an ETP Holder or any person directly or indirectly controlling, controlled by or under common control with an ETP Holder. See NYSE Arca Equities Rule 1.1(f).

3.2(b)(2)(C)(i) provides that the Nominating Committee may nominate ETP Holders or persons affiliated with such ETP Holders to serve on the NYSE Arca Equities Board of Directors and ETP Holders or Allied Persons of ETP Holders to serve on the NYSE Arca Board of Directors. In addition, ETP Holders may submit a petition to NYSE Arca Equities to nominate additional eligible candidates for the NYSE Arca Equities and NYSE Arca Boards if certain requirements are met.

The Exchange proposes to expand the eligibility for fair representation directors on the NYSE Arca Board to include Associated Persons of ETP Holders. As noted with respect to the proposed rule change to the NYSE Arca Rules, the Exchange believes that current NYSE Arca Equities Rule 3.2 is unnecessarily exclusive and that the Exchange would benefit by expanding the pool of candidates for these board seats to include all employees of ETP Holders. There may be employees of an ETP Holder who fall outside the definition of Allied Person whose experience would significantly benefit the boards of directors and the Exchange.

Permitting Associated Persons of ETP Holders to serve on the boards of directors is consistent with the board composition standards of at least five other SROs. The Exchange's affiliates, NYSE and NYSE MKT do not restrict fair representation directors to trading permit holders or Allied Persons.²⁵ In addition, other exchanges specifically authorize the industry representatives on their exchanges to include member firm employees, as noted above.²⁶

²⁵ See supra note 10.

²⁶ See supra notes 11-13.

Committees

Currently, NYSE Arca Equities Rule 3.2(a) sets forth general provisions for Equities Committees. Specifically, NYSE Arca Equities Rule 3.2(a)(8) states that any ETP Holder of NYSE Arca Equities in good standing, Allied Person of an ETP Holder, or person from the public is eligible for appointment or election to Equities Committees. The CEO of NYSE Arca Equities appoints eligible ETP Holders, Allied Persons of an ETP Holder, and persons from the public to the positions so allocated on Equities Committees for a term of one year. Under NYSE Arca Equities Rule 3.2(a)(9), the CEO of NYSE Arca Equities may designate one or more ETP Holders, an Allied Person of an ETP Holder, and persons from the public as alternate members of any Equities Committee, who may replace any absent or disqualified member at any meeting of such committee.

Current NYSE Arca Equities Rule 3.2(b) sets forth provisions for three specific Equities Committees: the Business Conduct Committee (“BCC”), the Nominating Committee, and the Member Advisory Committee. First, under NYSE Arca Equities Rule 3.2(b)(1), the BCC is made up primarily of ETP Holders and Allied Persons of an ETP Holder. The BCC is responsible for and has the authority to examine the business conduct and financial condition of ETP Holders and associated persons; conduct hearings and render decisions in summary disciplinary actions and proceedings; impose appropriate sanctions of expulsion, suspension, fine, censure or any other fitting sanctions where the BCC finds that a violation within the disciplinary jurisdiction of NYSE Arca Equities has been committed; and require the production of detailed financial reports of an ETP Holder and such other operational reports as it may deem relevant. Second,

under NYSE Arca Equities Rule 3.2(b)(2), the Nominating Committee, which is made up of six ETP Holders, is responsible for nominating fair representation directors for election to the boards of directors as described above. Third, under NYSE Arca Equities Rule 3.2(b)(3), the Member Advisory Committee acts in an advisory capacity regarding rule changes related to disciplinary matters and off-board trading rules.

Current NYSE Arca Equities Rule 3.3 sets forth provisions for the Board Appeals Committee, which is made up of at least one public director and at least one director that is an ETP Holder or Allied Person of an ETP Holder. The Board Appeals Committee may conduct reviews of disciplinary proceedings.²⁷

As proposed above with respect to the boards of directors, the Exchange proposes to amend these provisions of NYSE Arca Equities Rules 3.2 and 3.3 so that Associated Persons of ETP Holders would be eligible for membership on the BCC, the Member Advisory Committee, and the Board Appeals Committee and both Allied Persons and Associated Persons of ETP Holders would be eligible for membership on the Nominating Committee. The Exchange believes that the current Rules are unnecessarily exclusive and that the Exchange would benefit by expanding the pool of eligible candidates for these positions.

Permitting Allied Persons and Associated Persons of ETP Holders to serve in these positions also is consistent with the composition standards of at least five other SROs, as noted above.²⁸ The proposed rule change would make NYSE Arca Equities' committee composition requirements consistent with these other SROs by permitting

²⁷ See NYSE Arca Equities Rule 10.8.

²⁸ See supra notes 15-20.

Allied Persons and Associated Persons to serve on the above-referenced NYSE Arca Equities committees.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(3) of the Act,²⁹ 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 including Associated Persons in the eligibility requirements for boards and committees will better represent the interests of the membership because eligibility for positions will be expanded to a larger pool of appropriate candidates.

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 not affect the provision that persons subject to a statutory disqualification under the Act could not serve on the Exchange's boards.

The proposed rule change also furthers the objectives of Section 6(b)(6) of the Act,³⁰ because it provides for appropriate discipline for violations of Exchange rules and regulations. The Exchange believes it would benefit from the expansion of available candidates with industry knowledge that are eligible for membership on the Options and Equities Committees that are involved in reviewing disciplinary actions against OTP

²⁹ 15 U.S.C. 78f(b)(3).

³⁰ 15 U.S.C. 78f(b)(6).

Holder, OTP Firms, and ETP Holders and advising on rule changes related to disciplinary matters and trading rules.

In addition, the Exchange believes that the proposed rule change furthers the objectives of Section 6(b)(5) of the Act³¹ 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 regulating, clearing, settling, processing information with respect to, and 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. Specifically, the Exchange believes the proposed rule change would expand the pool of candidates eligible for membership on the boards and committees and thereby increase the breadth of industry knowledge that will be available to it, which benefits the public interest. In addition, the Exchange would foster cooperation and coordination with other exchanges by aligning the board and committee member composition requirements with at least five other SROs.³²

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

³¹ 15 U.S.C. 78f(b)(5).

³² See supra notes 10-13, 15-20.

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 the 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-2012-103 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-2012-103. 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, on business days between the hours of 10 a.m. and 3 p.m., located at 100 F Street, NE, Washington, DC 20549-1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet website at www.nyse.com. 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-2012-103 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.³³

Kevin M. O'Neill
Deputy Secretary

³³ 17 CFR 200.30-3(a)(12).