

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-72642; File No. SR-NYSEArca-2014-63)

July 18, 2014

Self-Regulatory Organizations; NYSE Arca, Inc.; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the NYSE Arca Options Fee Schedule Relating to Lead Market Maker Rights Fees

I. Introduction

On May 23, 2013, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the NYSE Arca Options Fee Schedule relating to lead market maker (“LMM”) rights fees. NYSE Arca designated the proposed rule change as immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The Commission published notice of filing of the proposed rule change in the Federal Register on June 10, 2014.⁴ To date, the Commission has not received any comment letters on the proposed rule change.

Pursuant to Section 19(b)(3)(C) of the Act, the Commission hereby is: (1) temporarily suspending the proposed rule change; and (2) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

II. Summary of the Proposed Rule Change

The Exchange’s proposal amends its fee schedule by providing a discount on LMM

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A). The Exchange proposed to implement the fee change effective June 1, 2014.

⁴ See Securities Exchange Act Release No. 72312 (June 4, 2014), 79 FR 33247 (June 10, 2014) (“Notice”).

rights fees for certain LMMs. LMMs pay monthly LMM rights fees for each issue that they are allocated. These fees range from \$45 to \$1,500 per month, depending on the average national daily customer contracts for the issue.⁵ The Exchange's proposed rule change provides LMMs to which the Exchange has allocated 400 or more issues with a 50% discount on total LMM rights fees from June 1, 2014 through December 31, 2014.⁶ At the time of the filing of the proposed rule change, the Exchange stated that there were approximately 2,600 underlying options issues listed on the Exchange.⁷ The Exchange stated that it receives five to ten requests per week to list new issues, and that it usually receives one or two responses to its requests for LMM applications per new issue.⁸

III. Suspension of SR-NYSEArca-2014-63

Pursuant to Section 19(b)(3)(C) of the Act,⁹ at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,¹⁰ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization 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.

The Commission believes it is appropriate in the public interest to temporarily suspend the proposal to solicit comment on and evaluate further the statutory basis for NYSE Arca's

⁵ See Notice, supra note 4, at 33248.

⁶ See id.

⁷ See id.

⁸ See id.

⁹ 15 U.S.C. 78s(b)(3)(C).

¹⁰ 15 U.S.C. 78s(b)(1).

proposal to provide a 50% discount on LMM rights fees through December 31, 2014 for those LMMs to which the Exchange has allocated 400 or more issues.

In justifying its proposed rule change, NYSE Arca stated its view that providing a discount to LMM firms that have a large number of issues allocated to them will encourage LMM firms to apply for additional allocations,¹¹ although the Exchange did not provide data concerning the existing LMMs that may qualify, or be close to qualifying, for the LMM rights fee discount. In addition, NYSE Arca stated its view that the proposal is reasonable because it will reduce the overhead costs of LMM firms with a large number of issues in their allocations and will help some LMMs meet their obligations to provide liquidity in a diverse selection of issues.¹² The Exchange also stated its view that it is not unfairly discriminatory to provide a discount to large LMM firms because reducing those firms' overhead costs will enhance the ability of LMMs to provide liquidity, thereby benefitting all market participants.¹³ The Exchange further stated its view that the proposal is not unfairly discriminatory because the discount is available to any LMM firm that wishes to apply for appointment in a large number of issues.¹⁴ The Exchange also stated its view that the proposed discount reduces the burden on competition because it will enhance LMM firms' ability to quote competitively in more issues.¹⁵

¹¹ See Notice, supra note 4, at 33248.

¹² Id. See also Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."

¹³ See Notice, supra note 4, at 33248. See also Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers."

¹⁴ See Notice, supra note 4, at 33248.

¹⁵ Id. See also Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."

The Exchange did not in its filing specifically address how it determined that the 400 allocated issues threshold was appropriate to achieve its stated goals of the proposed rule change. In addition, the Exchange did not address why it believes the proposed discount constitutes an equitable allocation of fees nor did it analyze the burden, if any, of the discount on competition within the LMM community.

In temporarily suspending the proposal, the Commission intends to further assess whether the proposed discount on LMM rights fees, which is only available through the end of 2014 to LMMs with 400 or more allocated issues, is consistent with the statutory requirements applicable to a national securities exchange under the Act as described below. In particular, the Commission will assess whether the proposed rule change satisfies the requirements of the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹⁶

Therefore, the Commission finds that it is appropriate in the public interest,¹⁷ for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.

¹⁶ See 15 U.S.C. 78f(b)(4), (5) and (8).

¹⁷ For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

IV. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEArca-2014-63

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)¹⁸ and 19(b)(2) of the Act¹⁹ to determine whether NYSE Arca's proposed rule change should be approved or disapproved. Pursuant to Section 19(b)(2)(B) of the Act,²⁰ the Commission is providing notice of the grounds for disapproval under consideration. As discussed above, the proposal provides a 50% discount through December 31, 2014 on total LMM rights fees for LMMs with 400 or more issues in their allocations. The Act requires that exchange rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; that exchange rules not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and that exchange rules not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Commission intends to assess whether the Exchange's proposal is consistent with these and other requirements of the Act.

The Commission believes it is appropriate to institute disapproval proceedings at this time in view of the legal and policy issues raised by the proposal. Institution of disapproval proceedings does not indicate, however, that the Commission has reached any conclusions with

¹⁸ 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

¹⁹ 15 U.S.C. 78s(b)(2).

²⁰ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. Id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding. Id.

respect to the issues involved. The sections of the Act and the rules thereunder which are applicable to the proposed rule change include:

- Section 6(b)(4) of the Act,²¹ which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.”
- Section 6(b)(5) of the Act,²² which requires that the rules of a national securities exchange be designed to, among other things, “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” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers.”
- Section 6(b)(8) of the Act,²³ which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate” in furtherance of the Act.

V. Commission’s Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as other relevant concerns. Such comments should be submitted by [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an

²¹ 15 U.S.C. 78f(b)(4).

²² 15 U.S.C. 78f(b)(5).

²³ 15 U.S.C. 78f(b)(8).

oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.²⁴

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following:

- As noted above, Section 6(b)(4) of the Act, requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.” The Commission seeks comment on whether it is an equitable allocation of reasonable fees to provide a 50% discount on LMM rights fees through the end of 2014 only to LMMs with 400 or more allocated issues;
- The Exchange stated that the proposed discount is intended to encourage LMM firms to apply for additional allocations, although the Exchange did not provide data concerning existing LMMs that may qualify, or be close to qualifying, for the LMM rights fee discount. The Commission seeks comments on whether the proposed LMM rights fee discount is designed to achieve this stated purpose;

²⁴ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

- The Commission seeks comment on whether the filing was sufficient under Section 19(b) of the Act in addressing whether the proposed discount constitutes an equitable allocation of fees;
- As noted above, Section 6(b)(5) of the Act requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers or dealers.” The Commission seeks comment on whether discrimination among LMMs on the basis of being allocated 400 or more issues is a “fair” basis for discrimination with respect to the LMM rights fees charged by the Exchange;
- The Commission seeks comment on whether the filing was sufficient under Section 19(b) of the Act in addressing issues regarding the basis for discrimination between LMMs with 400 or more allocations and LMMs with less than 400 allocations, and whether the basis for such discrimination is fair, and why or why not;
- Section 6(b)(8) of the Act requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].” The Commission seeks comment on whether the filing was sufficient in addressing issues regarding the potential effects of the proposed fee change on competition, and what, if any, impact the proposed fee change might have on competition; and
- Whether the proposed discount on LMM rights fees through the end of 2014 for LMMs with 400 or more allocations will affect competition within the LMM community, and if so, how and what type of impact might it have.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, 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-2014-63 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-2014-63. 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. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR-

NYSEArca-2014-63 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from the date of publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,²⁵ that File Number SR-NYSEArca-2014-63, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

Kevin M. O'Neill
Deputy Secretary

²⁵ 15 U.S.C. 78s(b)(3)(C).

²⁶ 17 CFR 200.30-3(a)(57) and (58).