

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-76492; File No. SR-NYSEArca-2015-92)

November 20, 2015

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adopting a Rule Relating to Fingerprint-Based Background Checks of Directors, Officers, Employees, and Others

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 November 12, 2015, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (the “SEC” or “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 a rule to [sic] relating to fingerprint-based background checks of directors, officers, employees and others. 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 15 U.S.C. 78a.

³ 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange and its wholly owned subsidiary NYSE Arca Equities proposes a new Rule 3.11⁴ codifying the current practice of conducting fingerprint-based background checks of prospective and current employees, temporary personnel, independent contractors, service providers and others. The proposed rule is substantially similar to Rule 28 of the Exchange’s affiliates, New York Stock Exchange LLC and NYSE MKT LLC.⁵ A number of other securities markets have also adopted a similar rule, permitting them to obtain fingerprints from certain enumerated parties.⁶ The proposed rule is also consistent with those rules.

Background and Proposed Rule Change

Section 17(f)(2) of the Securities Exchange Act of 1934 (the “Act”), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”),⁷ provides that every member of a national securities exchange, broker, dealer, registered transfer agent, registered clearing agency, registered securities information processors, national securities exchanges and national securities associations shall require each of its partners, directors, officers and employees of [sic] to be fingerprinted and submit those fingerprints (or cause the

⁴ NYSE Arca and NYSE Arca Equities Rule 3 govern organization and administration. The text of proposed Rule 3.11 would be identical for both NYSE Arca and NYSE Arca Equities.

⁵ See NYSE Rule 28; NYSE MKT Rule 28. There are no substantive differences between the proposed Rule and NYSE Rule 28 and NYSE MKT Rule 28.

⁶ See, e.g., International Securities Exchange (“ISE”) Rule 1408; Nasdaq Stock Market (“Nasdaq”) Rule 0140; Chicago Board Options Exchange (“CBOE”) Rule 15.10.

⁷ See 15 U.S.C. 78q(f)(2); Dodd-Frank Act Sect. 929S.

fingerprints to be submitted) to the Attorney General of the United States (“Attorney General”) for identification. Section 17(f)(2) explicitly directs the Attorney General to provide self-regulatory organizations (“SROs”) designated by the Commission with access to criminal history record information. Further, SEC Rule 17f-2 authorizes SROs to store criminal record information received from the Federal Bureau of Investigation (“FBI”), which maintains on behalf of the Attorney General a database of fingerprint-based criminal history records.

Consistent with these requirements, proposed Rule 3.11 would permit the Exchange to obtain fingerprints of prospective and current employees, temporary personnel, independent contractors and service providers of the Exchange and its principal subsidiaries; submit those fingerprints to the Attorney General or his or her designee for identification and processing; and receive criminal history record information from the Attorney General for evaluation and use, in accordance with applicable law, in enhancing the security of the facilities, systems, data, and/or records of the Exchange and its principal subsidiaries.

The Exchange would utilize a Live-Scan⁸ electronic system to capture and transmit fingerprints directly to the FBI. The capture and transmittal function, and corresponding receipt of criminal history information from the FBI, would be handled directly by Exchange personnel and/or an FBI-approved “Channel Partner”⁹ who would maintain and operate, on behalf of the

⁸ Live-Scan refers to the process of capturing fingerprints directly into a digitized format as opposed to traditional ink and paper methods. Live-Scan technology captures and transfers images to a central location and/or interface for identification processing.

⁹ FBI-approved Channel Partners receive the fingerprint submission and relevant data, collect the associated fee(s), electronically forward the fingerprint submission with the necessary information to the FBI Criminal Justice Information Services Division (“CJIS”) for a national Criminal History Summary check, and receive the electronic summary check result for dissemination to the authorized employer entity. See Securities Exchange Act Release No. 71066 (December 12, 2013), 78 FR 76667 (December 18, 2013) (SR-ISE-2013-66) (“Release No. 71066”). The Exchange would retain ultimate legal responsibility for the fulfillment of its statutory and self-regulatory obligations

Exchange, a Live-Scan and/or other electronic system(s) for the submission of fingerprints to the FBI; receive and maintain criminal history record information from the FBI; and disseminate such information, through secure systems, to a limited set of approved reviewing officials within the Exchange and its affiliates.

Fingerprint-based background checks would enhance the ability to screen adequately employees and non-employees¹⁰ to determine better, in accordance with applicable law, whether there are unacceptable risks associated with granting such persons access to facilities and records. Through access to state-of-the-art information systems administered and maintained by the FBI, the Exchange would receive centrally-maintained “criminal history record information,” which includes arrest-based data and derivative information, and may include personal descriptive data; FBI number; conviction status; sentencing, probation and parole information; and such other information as the FBI may make available. This information is supplied to the FBI by various local, state, federal and/or international criminal justice agencies. The information obtained through fingerprint-based background checks would thus provide a more exhaustive and reliable profile of a candidate’s criminal record, and thereby better facilitate risk assessment, than a physical review of court records based on information provided by the candidate.

The proposed access to criminal history information is consistent with federal law. As

under the Act, including compliance with Section 17(f)(2) of the Act as amended by the Dodd-Frank Act.

¹⁰ Under the proposed Rule, the Exchange would also obtain fingerprints from service providers, including employees of affiliates of the Exchange. See CBOE Rule 15.10; Securities Exchange Act Release No. 69496 (May 2, 2013), 78 FR 26671, 26671 (May 7, 2013) (SR-CBOE-2013-044) (CBOE conducts fingerprint-based criminal record checks of directors, officers and employees as well as, without limitation, “temporary personnel, independent contractors, consultants, vendors and service providers ... who have or are anticipated to have access to facilities and records.”).

noted, Section 17(f)(2) was amended by the Dodd-Frank Act to also require partners, directors, officers and employees of registered securities information processors, national securities exchanges and national securities associations to be fingerprinted. Although Section 17(f)(2) does not require the fingerprinting of contractors, the statute specifically permits SROs designated by the SEC to have access to “all criminal history record information.”

The Exchange accordingly believes that fingerprint-based background checks of employees and non-employees would promote the objectives of investor protection, business continuity and workplace safety by providing the Exchange with an effective tool for identifying and excluding persons with felony or misdemeanor conviction records that may pose a threat to the safety of Exchange personnel or the security of facilities and records.

The Exchange will comply with all applicable laws relating to the use and dissemination of criminal history record information obtained from the FBI.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act¹¹ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹² in particular, because it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. In particular, the Exchange believes fingerprint-based background checks of directors, officers, employees and contractors is consistent with the Section 6(b)(5) requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

and open market and a national market system, and, in general, to protect investors and the public interest in that they would help identify and exclude persons with felony or misdemeanor conviction records that may pose a threat to the safety of Exchange personnel or the security of facilities and records, thereby enhancing business continuity, workplace safety and the security of the Exchange's operations and helping to protect investors and the public interest. The proposed rule is substantially similar to the rules of the Exchange's affiliates NYSE and NYSE MKT and the fingerprinting rules of other SROs.¹³ The proposed amendment would also conform the Exchange's fingerprinting practices with Section 17(f)(2) of the Act.

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. The proposed rule change is not intended to address competitive issues but rather to enhance the security and continuity of the Exchange's facilities and records by adopting a fingerprinting rule that codifies the Exchange's current practice in compliance with Section 17(f)(2) of the Act as amended by the Dodd-Frank Act.¹⁴ As discussed below, the Exchange notes that the proposed rule change is based on the fingerprinting rules of other SROs.

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

¹³ See, e.g., International Securities Exchange Rule 1408. See generally Release No. 71066, 78 FR at 76668, n. 12 (noting that “[a]n FBI-approved Channel Partner simply helps expedite the delivery of Criminal History Summary information on behalf of the FBI”, and that the “process for making a request through an FBI-approved Channel Partner is consistent with FBI submission procedures”).

¹⁴ See Section 929S of the Dodd-Frank Act.

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 for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁵ and Rule 19b-4(f)(6) thereunder.¹⁶

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)¹⁷ of the Act to determine whether the proposed rule change should be approved or 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-

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

¹⁷ 15 U.S.C. 78s(b)(2)(B).

2015-92 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2015-92. 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 10 a.m. and 3 p.m. 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-2015-92 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.¹⁸

Robert W. Errett
Deputy Secretary

¹⁸ 17 CFR 200.30-3(a)(12).