

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58430; File No. SR-NYSE-2008-76)

August 27, 2008

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by New York Stock Exchange LLC Amending NYSE Rule 2B In Order To Establish Procedures Designed To Manage Potential Informational Advantages Resulting From the Affiliation Between the Exchange and Archipelago Securities L.L.C.

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 August 20, 2008, New York Stock Exchange LLC (“NYSE” or the “Exchange”) 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 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 Exchange Rule 2B in order to establish procedures designed to manage potential informational advantages resulting from the affiliation between the Exchange and Archipelago Securities L.L.C., an NYSE affiliated member. The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room, and www.nyse.com.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

On February 13, 2008, NYSE Arca Inc. ("NYSE Arca") filed with the Commission a proposed rule change to amend NYSE Arca Rule 7.31(x) (the "PO Plus Proposal").³ NYSE Arca filed that rule change as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)⁴ of the Act and Rule 19b-4(f)(6)⁵ thereunder, which rendered it effective upon filing with the Commission. On April 11, 2008, the Commission issued an order abrogating NYSE Arca's PO Plus Proposal (the "Abrogation Order").⁶

In the Abrogation Order, the Commission noted its concern regarding (i) the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders and (ii) the potential for informational advantages that could place an affiliated member of an exchange at a competitive advantage vis-à-vis other non-affiliated members.⁷

The Exchange is submitting this proposed rule change in order to address the Commission's concerns and clarify the Exchange's procedures regarding affiliated members.

³ See Securities Exchange Act Release No. 57377 (Feb. 25, 2008), 73 FR 11177 (February 29, 2008) (SR-NYSEArca-2008-19).

⁴ 15 U.S.C. 78s(3)(A).

⁵ 17 CFR 240.19b-4.

⁶ See Securities Exchange Act Release No. 57648 (Apr. 11, 2008), 73 FR 20981 (April 17, 2008) (SR-NYSEArca-2008-19) (order abrogating NYSE Arca Rule 7.31(x)).

⁷ Id.

a. NYSE Arca's Proposed PO Plus Order

According to its recent rule filing, NYSE Arca proposes to amend its Primary Only (“PO”) Order. The PO Order is a market or limit order that is routed to the primary, listing market, without sweeping the NYSE Arca book.⁸ NYSE Arca Users submit the PO Order to NYSE Arca. In turn, NYSE Arca passes the PO Order to Archipelago Securities L.L.C. (“Arca Securities”), its outbound order routing facility. Arca Securities routes the PO Order to the primary, listing market. PO Orders are thus a form of directed order, an order type that is commonly offered by exchanges and other market centers to enable firms to discharge their obligations under Regulation NMS and other rules.⁹ According to its filing, NYSE Arca intends to offer this order type, modified as PO Plus, for entry and execution throughout the trading day. Of course, by its definition, PO Orders may be routed by Arca Securities (upon instruction from NYSE Arca) to the NYSE in those instances where the NYSE is the primary, listing exchange.

b. Order Routing and Existing NYSE Rules

NYSE Rule 2B provides, in pertinent part, that:

Without prior SEC approval, the Exchange or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member organization. (Emphasis added.)

Arca Securities is the approved outbound routing facility of NYSE Arca. In its Order approving the merger of the Archipelago Exchange (“ArcaEx”) with the Pacific Exchange (the

⁸ See NYSE Arca Equities Rule 7.31(x).

⁹ NYSE Arca’s proposed PO Plus functionality is substantially similar to the “Directed Order” type currently offered by The NASDAQ Stock Market LLC (“Nasdaq”), which allows Nasdaq members to enter orders to be routed to a user-designated market center other than Nasdaq, without first interacting with the Nasdaq order book. See Securities Exchange Act Release No. 55405 (March 6, 2007), 72 FR 11069 (March 12, 2007) (SR-NASDAQ-2007-020).

“PCX”),¹⁰ the Commission permitted ArcaEx’s holding company, Archipelago Holdings, Inc. (“Archipelago”), to own and operate Arca Securities, in its capacity as a facility of the PCX that routes orders from ArcaEx to other market centers.¹¹ This approval remains in effect insofar as Arca Securities acts in the capacity of a facility of NYSE Arca for the routing of orders from NYSE Arca to other market centers, including the NYSE, subject to the applicable conditions.¹² Although Arca Securities was required to discontinue its operation of the DOT function in connection with the Archipelago/NYSE merger, no restrictions other than those previously described were requested or imposed by the Commission with respect to Arca Securities’ continuing role as an outbound router for NYSE Arca.¹³

Arca Securities performs a similar outbound routing function on behalf of the NYSE. On April 5, 2007, in a notice of immediate effectiveness, the Commission published the NYSE’s rule change that established Arca Securities as a facility of the NYSE for purposes of routing orders to away market centers for execution in compliance with NYSE Rules and Regulation

¹⁰ Following the ArcaEx-PCX merger, Archipelago merged with the NYSE and the PCX was later renamed NYSE Arca.

¹¹ See Securities Exchange Act Release No. 52497 (September 22, 2005), 70 FR 56949 (September 29, 2005) (order approving SR-PCX-2005-90). The Commission’s approval was subject to several conditions and undertakings, specifically that: (1) Arca Securities would continue to operate and be regulated as a facility of the PCX; (2) the scope of the exception would be limited to outbound routing; (3) the primary regulatory responsibility for Arca Securities would lie with an unaffiliated SRO; and (4) the continued use of Arca Securities for outbound routing would remain optional for other PCX members.

¹² Id.

¹³ For purposes of inbound orders in general and NYSE Arca’s proposed amendment in particular, the Exchange believes that there is no functional difference between inbound orders routed by Arca Securities that previously scrape the NYSE Arca book and the PO Order, which do not. Each type of order is subject to the same principles governing NYSE Arca’s authority to send, and the Exchange’s authority to receive, orders routed via Arca Securities. As clarified herein, appropriate procedures are in place to manage any potential conflicts of interest or potential information advantages.

NMS.¹⁴ Pursuant to NYSE Rule 17, Arca Securities receives its routing instructions from the NYSE and reports any such executions back to the NYSE.¹⁵ Arca Securities has no discretion and cannot change the terms of an order or the routing instructions.¹⁶ Moreover, each type of order is subject to the same principles governing the Exchange's authority to route orders to away market centers, namely: use of Arca Securities for outbound routing is only available to—and is optional for—NYSE Members, the primary regulatory responsibility for Arca Securities lies with an unaffiliated SRO, and, as clarified herein, appropriate procedures are in place to manage any conflicts of interest or potential information advantages. In this capacity as a facility of the NYSE, Arca Securities receives the routing instructions from the NYSE and routes the orders to various away market centers, including NYSE Arca, for execution.

c. Record Keeping.

As mentioned above, in the Abrogation Order, the Commission noted the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders.

In order to manage these concerns, with respect to orders routed to NYSE by Arca Securities, an NYSE member, in its capacity as a facility of NYSE Arca, the Exchange notes that Arca Securities is subject to independent oversight and enforcement by the Financial Industry Regulatory Authority (“FINRA”), an unaffiliated self-regulatory organization (“SRO”) that is Arca Securities' designated examining authority. In this capacity, FINRA is responsible for examining Arca Securities with respect to its books and records and capital obligations, and

¹⁴ See Securities Exchange Act Release No. 55590 (April 5, 2007), 72 FR 18707 (April 13, 2007) (notice of immediate effectiveness of SR-NYSE-2007-29).

¹⁵ See NYSE Rule 17(b)(1).

¹⁶ Id.

shares with NYSE Regulation, Inc. (“NYSE Regulation”) the responsibility for reviewing Arca Securities’ compliance with intermarket trading rules such as SEC Regulation NMS. In addition, through an agreement between FINRA and the NYSE pursuant to the provisions of Rule 17d-2 under the Act, FINRA’s staff reviews for Arca Securities’ compliance with other NYSE rules through FINRA’s examination program. NYSE Regulation monitors Arca Securities for compliance with NYSE trading rules, subject, of course, to SEC oversight of NYSE Regulation’s regulatory program.

In order to alleviate any residual concerns the Commission may have regarding the potential for conflicts of interest, the Exchange notes that NYSE Regulation has agreed with the Exchange that it will collect and maintain the following information of which NYSE Regulation staff becomes aware – namely, all alerts, complaints, investigations and enforcement actions where Arca Securities (in its capacity as a facility of NYSE Arca, routing orders to the NYSE) is identified as a participant that has potentially violated NYSE or applicable SEC rules – in an easily accessible manner, so as to facilitate any review conducted by the SEC’s Office of Compliance Inspections and Examinations. NYSE Regulation has further agreed with the Exchange that it will provide a report to the Exchange’s Chief Regulatory Officer, on at least a quarterly basis, which: (i) quantifies all alerts (of which NYSE Regulation is aware in its tracking system) that identify Arca Securities as a participant that has potentially violated NYSE or SEC rules and (ii) quantifies the number of all investigations that identify Arca Securities as a participant that has potentially violated NYSE or SEC rules.¹⁷

¹⁷ The Exchange, NYSE Regulation, and SEC staff, may agree going forward to reduce the number of applicable or relevant surveillances that form the scope of the agreed upon report.

d. New Policies and Procedures.

Finally, in the Abrogation Order, the Commission noted the potential for informational advantages that could place an affiliated member of an exchange at a competitive advantage vis-à-vis other non-affiliated members.

In response to this concern, with respect to Arca Securities being an affiliated member of the NYSE, the Exchange is proposing to amend Exchange Rule 2B. As amended, Exchange Rule 2B will require the implementation of policies and procedures that are reasonably designed to prevent Arca Securities from acting on non-public information regarding NYSE systems prior to the time that such information is made available generally to all NYSE members performing inbound order routing functions. These policies and procedures would include systems development protocols to facilitate an audit of the efficacy of these policies and procedures.

Specifically, Exchange Rule 2B shall provide as follows:

The holding company owning both the Exchange and Archipelago Securities LLC shall establish and maintain procedures and internal controls reasonably designed to ensure that Archipelago Securities, L.L.C. does not develop or implement changes to its system on the basis of non-public information regarding planned changes to Exchange systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated members of the Exchange in connection with the provision of inbound order routing to the Exchange.

The Exchange believes these measures will effectively address the concerns identified by the Commission regarding the potential for informational advantages favoring Arca Securities vis-à-vis other non-affiliated NYSE members.

e. Pilot Period

The Exchange proposes that the Commission authorize the NYSE to receive inbound routes of PO Plus Orders from Arca Securities for a pilot period of twelve months from the date

of the approval of this rule filing. The Exchange believes that this pilot period is of sufficient length to permit both the Exchange and the Commission to assess the impact of the rule change described herein.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)¹⁸ of the Act, in general, and furthers the objectives of Section 6(b)(5),¹⁹ in particular, 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system.

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 35 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:

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(5).

- (A) by order approve 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-NYSE-2008-76 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-NYSE-2008-76. 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 Web site (<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 inspection and copying in the Commission's Public Reference Section, 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 will also be available for inspection and copying at the principal office of the self-regulatory organization. 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-NYSE-2008-76 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.²⁰

Florence E. Harmon
Acting Secretary

²⁰ 17 CFR 200.30-3(a)(12).