

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61177; File No. SR-NYSE-2009-105)

December 16, 2009

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change Relating to the Designation of NYSE Arca, Inc., as the NYSE's Alternative Trading Facility in an Emergency

I. Introduction

On October 13, 2009, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² a proposal to adopt NYSE Rule 49, “Emergency Powers,” to allow a qualified NYSE officer to designate the NYSE’s corporate affiliate, NYSE Arca, Inc. (“NYSE Arca”) to receive and process bids and offers in NYSE-listed securities and to execute orders in NYSE-listed securities on behalf of the NYSE in the event that an emergency condition prevents the NYSE from operating normally.³ The proposed rule change was published for comment in the Federal Register on November 12, 2009.⁴ The Commission received no comments regarding the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The NYSE proposes to adopt NYSE Rule 49 to provide a qualified NYSE officer with the authority to declare an emergency condition with respect to trading on or through the systems

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Commission today is approving a companion proposal by NYSE Arca that allows NYSE Arca to serve as the NYSE’s alternative trading facility in the event of an emergency condition. See Securities Exchange Act Release No. 61178 (order approving File No. SR-NYSE Arca-2009-90) (“NYSE Arca Order”).

and facilities of the NYSE.⁵ An emergency condition will not be declared under NYSE Rule 49 unless: (i) there exists a regional or national emergency that would prevent the NYSE from operating normally; and (ii) such declaration is necessary so that the securities markets in general, and the NYSE's systems and facilities, including the Trading Floor, in particular, may continue to operate in a manner consistent with the protection of investors and in pursuit of the public interest.⁶ For purposes of NYSE Rule 49, an "emergency" is an emergency as defined in Section 12(k)(7) of the Act,⁷ and the NYSE's authority under NYSE Rule 49 is intended to be invoked only in the event of such an emergency.⁸ The NYSE will make reasonable efforts to contact the Commission prior to taking action under NYSE Rule 49.⁹

In the event that an emergency condition is declared with respect to trading on or through the NYSE's systems and facilities, the NYSE may designate its corporate affiliate, NYSE Arca, to receive and process bids and offers in NYSE-listed securities and to execute orders in NYSE-listed securities on behalf of the NYSE.¹⁰ Thus, the NYSE would use NYSE Arca as the execution engine for NYSE trades and would ensure that these trades are executed in compliance

⁴ See Securities Exchange Act Release No. 60922 (November 3, 2009), 74 FR 58341 ("Notice").

⁵ For purposes of NYSE Rule 49, a "qualified Exchange officer" is the NYSE Euronext Chief Executive Officer or his or her designee, or the NYSE Regulation, Inc. Chief Executive Officer or his or her designee. If these individuals are unable to act due to incapacitation, the most senior surviving officer of NYSE Euronext or NYSE Regulation, Inc. will be a "qualified Exchange officer" for purposes of NYSE Rule 49. See NYSE Rule 49(a)(3)(ii).

⁶ See NYSE Rule 49(a)(2).

⁷ 15 U.S.C. 78l(k)(7).

⁸ See NYSE Rule 49(a)(3)(i) and Notice, supra note 4, at note 5 and accompanying text.

⁹ See NYSE Rule 49(c)(1).

¹⁰ See NYSE Rule 49(b)(1).

with Regulation NMS under the Act.¹¹ Under NYSE Rule 49, quotes or orders for NYSE-listed securities entered or executed on or through the systems and facilities of NYSE Arca would be reported to the Consolidated Quotation System or the Consolidated Tape as quotations or executions, respectively, made on or through the systems and facilities of the NYSE.¹² Bids and offers entered pursuant to NYSE Rule 49 would be deemed to be bids and offers of the NYSE.¹³

NYSE members and Sponsored Participants would be permitted to enter quotations and to execute orders on or through the systems and facilities of NYSE Arca regardless of whether they were members or sponsored participants of NYSE Arca when the emergency condition was declared.¹⁴ NYSE members registered as Designated Market Makers (“DMMs”) that are designated as temporary members of NYSE Arca in accordance with the NYSE Arca Equities Rules (“NYSE Arca Rules”)¹⁵ would not be considered DMMs for the duration of the designation, but would be considered “Market Makers” pursuant to NYSE Arca Rules for the

¹¹ See Notice, supra note 4, at note 9.

¹² See NYSE Rule 49(b)(2)(ii). Accordingly, for the duration of the emergency condition, trades in NYSE-listed securities would print as “N” trades on the Consolidated Tape and quotes would be designated as NYSE quotes in the Consolidated Quotation System, notwithstanding the fact that they were processed on or through the systems and facilities of NYSE Arca. See Notice, supra note 4, at note 14 and accompanying text.

¹³ See NYSE Rule 49(b)(3)(i).

¹⁴ See NYSE Rule 49(b)(3)(i)(A). As described in greater detail in the Notice, supra note 4, NYSE Arca will provide temporary membership and/or access to NYSE members and Sponsored Participants that are not already NYSE Arca members or sponsored participants when the emergency condition is declared. Similarly, the NYSE may designate NYSE Arca members that are not members of the NYSE at the time the emergency condition is declared as temporary members of the NYSE, and may authorize temporary access for sponsored participants of NYSE Arca that do not have sponsored access to the NYSE. The temporary memberships or access will be valid only until regular trading resumes on the NYSE’s systems and facilities. See NYSE Rule 49(b)(3)(ii) and (iii).

¹⁵ See NYSE Arca Rule 2.100(b)(3)(i)(C) (approved in the NYSE Arca Order, supra note 3).

purpose of trading Exchange-listed securities on and through the systems and facilities of NYSE Arca.¹⁶

All trades in Exchange-listed securities entered or executed on or through the systems and facilities of NYSE Arca would be subject to NYSE Arca Rules governing trading, and such rules would be considered NYSE rules for the purposes of such transactions, except that: (1) NYSE rules governing member firm conduct, including membership requirements and net capital requirements, will continue to apply to NYSE members and Sponsored Participants; and (2) NYSE listing requirements for all listed securities will continue to apply.¹⁷

NYSE Arca would conduct surveillance of trading in NYSE-listed securities on or through the systems and facilities of NYSE Arca on behalf of the NYSE.¹⁸ NYSE members would remain subject to the NYSE's jurisdiction for any disciplinary action related to the trading of NYSE-listed securities on or through the facilities of NYSE Arca.¹⁹

The authority granted pursuant to NYSE Rule 49 would remain operative for up to 10 calendar days from the date the NYSE invokes such authority, and the NYSE may terminate actions taken pursuant to the rule at any time.²⁰ The NYSE may request an extension of this

¹⁶ See NYSE Rule 49(b)(3)(i)(B). According to the NYSE, NYSE Arca is not able to support DMMs operating in the same manner as they operate on the NYSE because of differences between the systems of the NYSE and NYSE Arca. The NYSE notes that DMMs will not have access to orders on the NYSE Arca system different from that of other market participants. DMMs designated as Market Makers under the NYSE Arca Rules will be obligated to meet the requirements of those rules. See Notice, supra note 4, at note 13 and accompanying text.

¹⁷ See NYSE Rule 49(b)(4).

¹⁸ See NYSE Rule 49(b)(5)(i).

¹⁹ See NYSE Rule 49(b)(5)(ii).

²⁰ See NYSE Rule 49(c)(2) and (3). The NYSE will provide adequate prior notice to members, Sponsored Participants, and investors regarding its intention to terminate any action taken under the rule. See NYSE Rule 49(c)(3).

initial 10-day period for a specified amount of time by filing a proposed rule change with the Commission pursuant to Section 19(b)(2) of the Act, and the Commission must approve the NYSE's proposal before any such extension could take effect.²¹

III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²² In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,²³ which requires, in part, that the rules of a national securities exchange be designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to promote just and equitable principles of trade, 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.

The Commission believes that the proposal is reasonably designed to permit the NYSE to continue to operate in the event of an emergency, as defined in Section 12(k)(7) of the Act, by allowing the NYSE to designate its corporate affiliate, NYSE Arca, to receive and process quotations in NYSE-listed securities and to execute orders in NYSE-listed securities on behalf of the NYSE in the event of such an emergency.²⁴ The NYSE would invoke its authority under

²¹ Id.

²² In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

²³ 15 U.S.C. 78f(b)(5).

²⁴ The Commission previously has approved proposals by other national securities exchanges to establish back-up trading arrangements. See, e.g., Securities Exchange Act Release Nos. 51717 (May 19, 2005), 70 FR 30160 (May 25, 2005) (File No. SR-CBOE-2004-59) (approving proposal by the Chicago Board Options Exchange, Incorporated to

NYSE Rule 49 only in an emergency, as defined in Section 12(k)(7) of the Act.²⁵ The NYSE will make reasonable efforts to consult with the Commission prior to taking action under NYSE Rule 49.²⁶ Any action taken under NYSE Rule 49 would be operative for up to 10 calendar days from the date that the NYSE invokes its authority under the rule, and the NYSE may terminate action taken under the rule at any time.²⁷ To extend an action taken pursuant to NYSE Rule 49 beyond the initial 10-calendar day period, the NYSE must file a proposed rule change with the Commission pursuant to Section 19(b)(2) under the Act, and the Commission would need to approve such an extension before it could take effect.²⁸ In addition, the Commission could, at any time, exercise its authority under Section 12(k)(2) of the Act²⁹ to terminate an action taken by the NYSE under NYSE Rule 49.

NYSE Rule 49 also addresses surveillance and the disciplinary procedures that would apply in the event that NYSE Arca serves as the NYSE's alternative trading facility, as provided in the rule. In particular, NYSE Arca would conduct surveillance of trading in Exchange-listed

enter into back-up trading arrangements with other exchanges); 51926 (June 27, 2005), 70 FR 38232 (July 1, 2005) (File No. SR-Phlx-2004-65) (approving proposal by the Philadelphia Stock Exchange ("Phlx") to enter into back-up trading arrangements with other exchanges); 40088 (June 12, 1998), 63 FR 33426 (June 18, 1998) (File No. SR-Phlx-98-25) (approving the trading of Dell options listed on the Phlx at the American Stock Exchange on a temporary basis); and 27365 (October 19, 1989), 54 FR 43511 (October 25, 1989) (File Nos. SR-Amex-89-26; CBOE-89-21; PSE-89-28; and Phlx-89-52) (approving proposals to trade options listed on the Pacific Stock Exchange on other exchanges following an earthquake).

²⁵ See NYSE Rule 49(a)(1) and (3). See also note 8, supra, and accompanying text.

²⁶ See NYSE Rule 49(c)(1).

²⁷ See NYSE Rule 49(c)(2) and (3). The NYSE will provide adequate prior notice to members, Sponsored Participants, and investors of its intention to terminate any action taken pursuant to NYSE Rule 49. See NYSE Rule 49(c).

²⁸ See NYSE Rule 49(c)(2).

²⁹ 15 U.S.C. 78l(k)(2).

securities on behalf of the NYSE.³⁰ NYSE members and member organizations would remain subject to the NYSE's jurisdiction for any disciplinary actions related to the trading of NYSE-listed securities on or through the systems and facilities of NYSE Arca, and violations of NYSE Arca's rules would be referred to the NYSE for prosecution according to the NYSE's disciplinary rules.³¹

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³² that the proposed rule change (File No. SR-NYSE-2009-105) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

Florence E. Harmon
Deputy Secretary

³⁰ See NYSE Rule 49(b)(5)(i).

³¹ See NYSE Rule 49(b)(5)(ii).

³² 15 U.S.C. 78s(b)(2).

³³ 17 CFR 200.30-3(a)(12).