

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-65457; File No. SR-NYSEAmex-2011-63)

September 30, 2011

Self-Regulatory Organizations; NYSE Amex LLC; Order Approving a Proposed Rule Change Amending NYSE Amex Equities Rule 17(c)(2)(B) to Make Permanent the Pilot Program that Permits the Exchange to Accept Inbound Orders Routed by Archipelago Securities LLC in Its Capacity as a Facility of Affiliated exchanges and to Clarify the NYSE Amex Equities Rule 17(c)(2)(A)(ii) to More Accurately Reflect the Regulatory Services Agreement between the Exchange and the Financial Industry Regulatory Authority

I. Introduction

On August 18, 2011, NYSE Amex LLC (“NYSE Amex” or “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 make permanent the existing pilot program that permits the Exchange to accept inbound orders routed by Archipelago Securities LLC (“Arca Securities”) in its capacity as a facility of an affiliated exchange (with the attendant obligations and conditions), and to clarify the text of NYSE Amex Equities Rule 17(c)(2)(B) to more accurately reflect the regulatory services agreement (“RSA”) between the Exchange and the Financial Industry Regulatory Authority (“FINRA”). The proposed rule change was published for comment in the Federal Register on August 26, 2011.³ The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 65184 (August 22, 2011), 76 FR 53511 (“Notice”).

II. Background

Arca Securities is a broker-dealer that is an NYSE Amex member organization,⁴ and, among other things, is permitted to provide to members of the NYSE and NYSE Arca optional routing services to other market centers.⁵ On June 16, 2011, the Exchange filed an immediately effective proposed rule change to, among other things, permit the Exchange to receive inbound routes of equity orders that Arca Securities routes in its capacity as a facility of NYSE and NYSE Arca on a pilot basis ending September 30, 2011.⁶ The Exchange now seeks permanent approval of this inbound routing pilot.⁷

III. Discussion and Commission Findings

After careful review, 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.⁸ Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,⁹ which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply

⁴ Arca Securities is owned indirectly by NYSE Euronext (“NYSE Euronext”), which also indirectly owns three registered securities exchanges – NYSE Arca, Inc. (“NYSE Arca”), the Exchange, and New York Stock Exchange LLC (“NYSE”). Thus, Arca Securities is an affiliate of each of these exchanges.

⁵ Arca Securities operates as a facility of NYSE and NYSE Arca that provides outbound routing from NYSE and NYSE Arca to other market centers, subject to certain conditions. See Securities Exchange Act Release Nos. 55590 (April 5, 2007), 72 FR 18707 (April 13, 2007) (SR-NYSE-2007-29); and 52497 (September 22, 2005), 70 FR 56949, 56952-56953 (September 29, 2005) (SR-PCX-2005-90).

⁶ See Securities Exchange Act Release No. 64728 (June 23, 2011), 76 FR 38223 (June 29, 2011) (SR-NYSEAmex-2011-39) (“Routing Pilot Release”). See also Notice, 76 FR at 53511, n.5 and accompanying text.

⁷ See Notice.

⁸ 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).

⁹ 15 U.S.C. 78f(b)(1).

and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulation thereunder, and the rules of the Exchange. Further, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁰ which requires, among other things, that the rules of a national securities exchange be 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, and 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. Section 6(b)(5) also requires that the rules of an exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers.

Recognizing that the Commission has expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange previously implemented limitations and conditions to Arca Securities's affiliation with the Exchange to permit the Exchange to accept orders routed inbound to NYSE Amex by Arca Securities from its affiliates, NYSE and NYSE Arca, on a pilot basis.¹¹ The Exchange now seeks to make this pilot permanent, and to more accurately reflect in its rule text its RSA with FINRA. Specifically, the Exchange states it is in compliance with the following obligations and conditions:¹²

- First, the Exchange will maintain an agreement pursuant to Rule 17d-2 under the Exchange Act with FINRA to relieve the Exchange of regulatory responsibilities

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ See Routing Pilot Release. See also supra note 6 and accompanying text.

¹² See Notice, 76 FR at 53512.

for Arca Securities with respect to rules that are common rules between the Exchange and FINRA, and maintain an RSA with FINRA to perform regulatory responsibilities for Arca Securities for unique Exchange rules.

- Second, the RSA will require the Exchange to provide FINRA with information, in an easily accessible manner, regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively “Exceptions”) in which Arca Securities is identified as a participant that has potentially violated Exchange or Commission Rules and of which the Exchange becomes aware, and shall require that FINRA provide a report, at least quarterly, to the Exchange quantifying all Exceptions in which Arca Securities is identified as a participant that has potentially violated Exchange or Commission Rules;¹³
- Third, the Exchange, on behalf of its parent, NYSE Euronext, will establish and maintain procedures and internal controls reasonably designed to prevent Arca Securities from receiving any benefit, taking any action or engaging in any activity based on 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 member organizations of the Exchange in connection with the provision of inbound order routing to the Exchange; and

¹³ See Notice, 76 FR at 53512, n.8 and accompanying text. The Exchange proposed to modify this provision, as set forth in NYSE Amex Equities Rule 17(c)(2)(A)(ii) to more accurately reflect its RSA with FINRA and specify that the quarterly report of Exceptions shall be provided to the Exchange’s Chief Regulatory Officer (“CRO”). The Exchange states that upon approval of this change, it will continue to comply with the obligations and conditions as set forth in NYSE Amex Equities Rule 17(c)(2). See Notice, 76 FR at 53512.

- Fourth, the Exchange may furnish to Arca Securities the same information on the same terms that the Exchange makes available in the normal course of business to any other member organization.¹⁴

The Exchange believes that by meeting the above-listed conditions it has set up mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to Arca Securities, and has demonstrated that Arca Securities cannot use any information it may have because of its affiliation with the Exchange to its advantage.¹⁵

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.¹⁶ Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, for the reasons discussed below, the Commission believes that it is consistent with the Act to permit Arca Securities to provide inbound routing to the Exchange on a permanent basis instead of a pilot basis, subject to the other conditions described above.

¹⁴ See NYSE Amex Equities Rule 17(c)(2). See also Notice, 76 FR at 53512.

¹⁵ See Notice, 76 FR at 53512.

¹⁶ See, e.g., Securities Exchange Act Release Nos. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.); 58673 (September 29, 2008), 73 FR 57707 (October 8, 2008) (SR-Amex-2008-62) (order approving the combination of NYSE Euronext and the American Stock Exchange LLC); 59135 (December 22, 2008), 73 FR 79954 (December 30, 2008) (SR-ISE-2009-85) (order approving the purchase by ISE Holdings of an ownership interest in DirectEdge Holdings LLC); and 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (SR-NYSE-2008-120) (order approving a joint venture between NYSE and BIDS Holdings L.P.).

The Exchange has proposed four ongoing conditions applicable to Arca Securities's routing activities, which are enumerated above. The Commission believes that these conditions mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that FINRA's oversight of Arca Securities,¹⁷ combined with FINRA's monitoring of Arca Securities's compliance with the Exchange's rules and quarterly reporting to NYSE Amex's CRO, will help to protect the independence of the Exchange's regulatory responsibilities with respect to Arca Securities.

¹⁷ This oversight will be accomplished through the Regulatory Contract between the Exchange and FINRA and a 17d-2 Agreement.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (SR-NYSEAmex-2011-63) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Elizabeth M. Murphy
Secretary

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).