

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58066; File No. SR-NYSEArca-2008-32)

June 30, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 2 to Proposed Rule Change Relating to the Minor Rule Plan and Order Granting Accelerated Approval to the Proposed Rule Change as Modified by Amendment No. 2

I. Introduction

On March 18, 2008, 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend NYSE Arca Equities, Inc. (“NYSE Arca Equities”) Rule 10.12 (Minor Rule Plan) (“MRP”) and related rules that underlie the MRP. On April 17, 2008, the Exchange submitted Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the Federal Register on April 29, 2008.<sup>3</sup> The Commission received no comments on the proposal. On June 11, 2008, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>4</sup> This notice and order solicits comments from interested persons on Amendment No. 2 and approves the proposal, as modified by Amendment No. 2, on an accelerated basis.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 56733 (April 22, 2008), 73 FR 23287 (“Notice”).

<sup>4</sup> See partial Amendment dated June 11, 2008 (“Amendment No. 2”). The text of Amendment No. 2 is available on the Commission’s Web site (<http://www.sec.gov/rules/sro/nysearca.shtml>), at the Commission’s Public Reference Room, at NYSE Arca’s principal office, and on NYSE Arca’s Web site (<http://www.nyse.com>).

## II. Description of the Amended Proposal

The Exchange proposed to amend its Minor Rule Plan and related rules that underlie the MRP, including Rules 5.2(b)(1) (Notification Requirements for Offering of Securities), 6.1 (Adherence to Law), 6.18 (Supervision), 7.38(c) (Odd and Mixed Lots – Prohibitions), and 9.2(c) (Customer Records).

### **Rule 5.2(b)(1) – Notification Requirements for Offering of Securities**

The Exchange proposed to correct an error that was inadvertently created when the NYSE Arca Rules were updated to replace the obsolete term “Member” with the term “ETP Holder.” The Exchange stated that the intended reference in this rule is to all members of a syndicate and proposed, therefore, to reinsert the correct term “members.”

### **Rule 6.1 – Adherence to Law and Good Business Practices**

The Exchange designated existing Rule 6.1 as Rule 6.1(a) and substituted the word “fair” in the rule’s requirement that certain actions of “any ETP Holder shall at all times comply with fair and equitable principles of trade” with the word “just.” The Exchange also proposed to adopt Rule 6.1(b), which would require all ETP Holders, their associated persons, and other participants to adhere to the principles of good business practice in the conduct of their business affairs.<sup>5</sup> Violations of Rule 6.1(b) would be eligible for MRP disposition.

### **Rule 6.18 - Supervision**

The current language of Rule 6.18(b) provides that only ETP Holders for whom the Exchange is the Designated Examining Authority (“DEA”) are subject to its supervisory requirements. The Exchange proposed to amend Rule 6.18 to provide that all ETP Holders,

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<sup>5</sup> This rule is based on the current NYSE Rule 401(a).

regardless of DEA, are subject to Exchange's supervisory requirements. The Exchange also proposed to make violations of Rule 6.18 eligible for MRP disposition.

#### **Rule 7.38(c) – Odd and Mixed Lots – Prohibitions**

The Exchange proposed to replace the language in the current paragraph (c) of Rule 7.38 that presently states that all odd-lot violations shall be considered conduct inconsistent with just and equitable principles of trade and to provide instead that it shall be prohibited for ETP Holders, any associated persons thereof, and any other participants to engage in these violations. The Exchange stated that many violations of Exchange odd-lot rules do not necessarily involve the bad faith or unethical conduct.

#### **Rule 9.2(c) – Customer Records**

The Exchange proposed to change Rule 9.2(c) by adding the word “current,” to clarify and reiterate the obligation that firms with customer accounts must not only keep records of their customer accounts, but also must keep them current.

#### **Rule 10.12 – Minor Rule Plan**

The Exchange proposed several modifications to the MRP, including to:

- Make several trading rules and record keeping rules eligible for MRP disposition;<sup>6</sup>
- Modify the Recommended Fine Schedule in Rule 10.12(i) so that MRP fines are escalated based not on the number of violations but on the number of times the Exchange has imposed one or more MRP fines upon an ETP Holder for the violation of a particular rule;

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<sup>6</sup> See Notice, 73 FR at 23288, for a detailed description of these additions.

- Allow Exchange enforcement staff, as part of an MRP disposition of certain supervisory-related offenses, not only to impose a monetary fine, but also to require the violator to make specified changes to its supervisory or other compliance procedures;
- Enable the Exchange to require violators of Rule 2.21 (Employees of ETP Holders Registration) to remit all the fees that they should have paid in connection with the registration pursuant to Rule 2.21, in addition to any MRP fines; and
- Remove from Rule 10.12(f) the provision requiring the Business Conduct Committee to review the issuance of “each citation” as the concept of “floor citations” does not exist under the equity rules and was inadvertently inserted into the MRP.

## II. Discussion

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.<sup>7</sup> In particular, the Commission believes that the proposed rule change relating to both the MRP and the related underlying rules is consistent with Section 6(b)(5) of the Act,<sup>8</sup> which requires that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and to 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 further believes that the proposed changes to the Exchange’s MRP are consistent with Sections 6(b)(1) and 6(b)(6) of the Act,<sup>9</sup> which require that the rules of an exchange enforce compliance with, and provide appropriate discipline for, violations of

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<sup>7</sup> In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> 15 U.S.C. 78f(b)(1) and 78f(b)(6).

Commission and Exchange rules. In addition, because the MRP provides procedural rights to contest the fine and permits disciplinary proceedings on the matter, the Commission believes that the MRP, as amended by this proposal, provides a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d)(1) of the Act.<sup>10</sup> Finally, the Commission finds that the proposal is consistent with the public interest, the protection of investors, or otherwise in furtherance of the purposes of the Act, as required by Rule 19d-1(c)(2) under the Act,<sup>11</sup> which governs minor rule violation plans. The Commission believes that the proposed rule change would strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities as a self-regulatory organization in cases where full disciplinary proceedings are unsuitable in view of the minor nature of the particular violation.

In approving this proposed rule change, the Commission in no way minimizes the importance of compliance with NYSE Arca rules and all other rules subject to the imposition of fines under the MRP. The Commission believes that the violation of any self-regulatory organization's rules, as well as Commission rules, is a serious matter. However, the Exchange provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Commission expects that the Exchange would continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine of more or less than the recommended amount is appropriate for MRP disposition or whether a violation requires formal disciplinary action.

The Commission also finds good cause for approving the proposed rule change, as modified by Amendment No. 2, prior to the thirtieth day after publishing notice of Amendment

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<sup>10</sup> 15 U.S.C. 78f(b)(7) and 78f(d)(1).

<sup>11</sup> 17 CFR 240.19d-1(c)(2).

No. 2 in the Federal Register. In Amendment No. 2, the Exchange eliminated references to Rule 6.15 (Miscellaneous Prohibitions), which it originally planned to include in this proposed rule change but will instead handle in a separate rule filing. In addition, in Amendment No. 2, the Exchange proposed certain technical and non-substantive changes to the proposal. These changes do not raise any new or substantial issues. Accordingly, the Commission believes good cause exists to approve the proposal, as modified by Amendment No. 2, on an accelerated basis.

B. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2008-32 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-2008-32. 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 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. Copies of such filing also will be available for inspection and copying at the principal office of NYSE Arca. 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-2008-32 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

### III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>12</sup> and Rule 19d-1(c)(2) under the Act<sup>13</sup> that the proposed rule change (SR-NYSEArca-2008-32), as modified by Amendment No. 2 be, and it hereby is, approved on an accelerated basis and declared effective.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

Florence E. Harmon  
Acting Secretary

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<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</sup> 17 CFR 240.19d-1(c)(2).

<sup>14</sup> 17 CFR 200.30-3(a)(12) and 17 CFR 200.30-3(a)(44).