

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58431; File No. SR-NYSEArca-2008-90)

August 27, 2008

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Arca, Inc. Amending NYSE Arca Equities Rule 7.31(x) to Clarify the Permissible Order Entry Time and Eligibility of its Primary Only Order and Amending NYSE Arca Equities Rule 14.3 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)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on August 20, 2008, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) through its wholly-owned subsidiary, NYSE Arca Equities, Inc. (“NYSE Arca Equities” or the “Corporation”), 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 to (i) amend NYSE Arca Equities Rule 7.31(x) in order to clarify the permissible order entry time and eligibility of its Primary Only Order (“PO Order”) and (ii) amend NYSE Arca Equities Rule 14.3 in order to establish procedures designed to manage potential informational advantages resulting from the affiliation between the Exchange and Archipelago Securities L.L.C. ((i) and (ii) together, the “Proposed Rule Change”). The text of

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

the proposed rule change is available on the Exchange's Web site at <http://www.nyse.com>, at the Exchange's principal office, and at 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 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 filed with the Commission a proposed rule change to amend NYSE Arca Equities Rule 7.31(x) (the “PO Plus Proposal”).⁴ NYSE Arca filed that rule change as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)⁵ of the Act and Rule 19b-4(f)(6)⁶ thereunder, which rendered it effective upon filing with the Commission. On April 11, 2008, the Commission issued an order abrogating the PO Plus Proposal (the “Abrogation Order”).⁷

⁴ See Securities Exchange Act Release No. 57377 (Feb. 25, 2008), 73 FR 11177 (February 29, 2008) (SR-NYSEArca-2008-19).

⁵ 15 U.S.C. 78s(3)(A).

⁶ 17 CFR 240.19b-4.

⁷ See Securities Exchange Act Release No. 57648 (April 11, 2008), 73 FR 20981 (April 17, 2008) (order abrogating NYSE Arca Rule 7.31(x)).

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.⁸

NYSE Arca is submitting the Proposed Rule Change to re-propose the PO Plus Order and to propose a new NYSE Arca Equities Rule 14.3(e). The Proposed Rule Change is intended to provide additional flexibility and increased system functionality for NYSE Arca Users⁹ by modifying the operability and eligibility of PO Orders, and to address the issues noted by the Commission in the Abrogation Order.

a. The PO Plus Order

The PO Order is a market or limit order that is routed to the primary, listing market, without sweeping the NYSE Arca book.¹⁰ PO Orders are thus a form of directed order, an order type that is commonly used by exchange members and offered by exchanges and other market centers to enable firms to discharge their obligations under Regulation NMS and other rules.¹¹ This is an order functionality offered by the Exchange to its Users. NYSE Arca Users submit the

⁸ See id.

⁹ See NYSE Arca Equities Rule 1.1(yy) for the definition of “User.” Under Rule 1.1(yy), the term User means any ETP Holder or Sponsored Participant who is authorized to obtain access to the NYSE Marketplace pursuant to NYSE Arca Equities Rule 7.29. PO Orders, similar to all other order types offered by the Exchange, are available only to authorized Users.

¹⁰ See NYSE Arca Equities Rule 7.31(x).

¹¹ The Exchange believes that the proposed 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).

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. It is important to note that Arca Securities accepts orders only from the Exchange (in this case NYSE Arca), which in turn only accepts orders from authorized NYSE Arca Users.

Users may enter PO Orders until a cut-off time established from time to time by the Exchange. Currently, the Exchange restricts PO Orders to participation in the primary, listing market opening. In an effort to enhance order execution opportunities for its Users, the Exchange proposes to modify the PO Order type so that PO Orders may be entered at any time and to offer an order modifier for Users to designate PO Orders that are eligible for entry and execution throughout the trading day.

Under the Proposed Rule Change, a PO Order may be entered at any time¹² and will be immediately routed to the primary, listing market for execution. If the order is not immediate-or-cancel, the order is not returned to the NYSE Arca book; rather it remains at the venue to which it is routed, until executed or cancelled that day. In instances where a symbol is halted, the PO Order will remain at the primary, listing market until it is cancelled or the symbol is re-opened. PO Orders eligible for participation in the primary, listing market’s opening must be entered before 6:28 am (Pacific Time). A PO Order entered for participation in the primary, listing market re-opening after a trading halt must be entered after trading was halted and before the Re-Opening Time. Otherwise, PO Orders eligible for participation in the primary, listing market at all other times must be marked with the modifier “PO+”.

¹² Users would be able to enter PO Orders into the system for execution during any of the Exchange’s trading sessions (Opening, Core and Late Sessions).

The proposed changes to the PO Order type will provide additional flexibility and functionality to the Exchange’s system and its Users that wish to use the system to comply with their obligations to avoid trading through any Protected Quotation within the meaning of Rule 600(b)(58) of Regulation NMS.¹³ PO Orders may be designated as intermarket sweep orders thereby permitting the executing party to execute at the primary, listing market without checking away market centers for any protected bid or offer (as defined in Rule 600(b) of Regulation NMS under the Act). Of course, a broker-dealer that designates an order as an intermarket sweep order has the responsibility of complying with Rules 610 and 611 of Regulation NMS.

b. Order Routing and Existing NYSE Arca Rules

In its Order approving the merger of the Archipelago Exchange (“ArcaEx”) with the Pacific Exchange (the “PCX”),¹⁴ 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.¹⁵ The Exchange believes that this approval remains in effect insofar as Arca Securities acts in the capacity of a

¹³ 17 CFR 242.600(b)(58).

¹⁴ Following the ArcaEx-PCX merger, Archipelago merged with the NYSE and the PCX was later renamed NYSE Arca.

¹⁵ 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. With respect to routing of PO Orders by Arca Securities, NYSE Arca believes that these conditions and undertakings continue to be fulfilled.

facility of NYSE Arca for the routing of orders from NYSE Arca to other market centers, subject to the applicable conditions.¹⁶

In its Order granting this approval, the Commission also recognized the distinction between Arca Securities' role as a broker-dealer performing the DOT function and Arca's role as an Exchange facility in connection with outbound routing:

Archipelago Securities also provides the DOT function in addition to its Outbound Router function . . . PCX requests . . . an exception for Archipelago Securities to permit Archipelago to continue to own all of its ownership interest in and operate the DOT function of Archipelago Securities on a pilot basis until the earlier of (1) a period of 60 days following the closing of the Merger, and (2) the closing date of the proposed merger of Archipelago and the NYSE . . .

(Emphasis added.)¹⁷

Significantly, although Arca Securities was required to discontinue its operation of the DOT function in connection with the Archipelago/New York Stock Exchange ("NYSE") merger, no restrictions other than those previously described above were requested or imposed by the Commission with respect to Arca Securities' continuing role as an outbound router for the Exchange. Accordingly, NYSE Arca does not believe that outbound routing of PO Orders by Arca Securities to the NYSE, as an approved facility of the Exchange, is inconsistent with existing NYSE Arca rules.¹⁸

¹⁶ Id.

¹⁷ Id.

¹⁸ For purposes of routing in general and this proposal in particular, the Exchange believes that there is no functional difference between routing orders that previously scraped the NYSE Arca book and routing the PO Order, which does not. Each type of order is subject to the same principles governing the Exchange's authority to route orders to away

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 NMS.¹⁹ Pursuant to NYSE Rule 17, Arca Securities receives its routing instructions from the NYSE and reports any such executions back to the NYSE.²⁰ Arca Securities has no discretion and cannot change the terms of an order or the routing instructions.²¹ Moreover, each type of order is subject to the same principles governing the NYSE'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.

market centers, namely: use of Arca Securities for outbound routing is optional for NYSE Arca Users, the primary regulatory responsibility for Arca Securities lies with an unaffiliated SRO, and, as clarified herein, appropriate procedures are in place to manage any potential conflicts of interest or potential information advantages.

¹⁹ 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).

²⁰ See NYSE Rule 17(b)(1).

²¹ Id.

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 Arca by Arca Securities in its capacity as a facility of the NYSE, 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 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 NYSE Arca pursuant to the provisions of Rule 17d-2 under the Act,²² FINRA’s staff reviews for Arca Securities’ compliance with other NYSE Arca rules through FINRA’s examination program. NYSE Regulation monitors Arca Securities for compliance with NYSE Arca 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 the NYSE, routing orders to NYSE Arca) is

²² 17 CFR 240.17d-2.

identified as a participant that has potentially violated NYSE Arca 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) that identify Arca Securities as a participant that has potentially violated NYSE Arca or SEC rules and (ii) quantifies the number of all investigations that identify Arca Securities as a participant that has potentially violated NYSE Arca or SEC rules.²³

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 NYSE Arca, the Exchange is proposing to add new Rule 14.3(e). New Rule 14.3(e) will require the implementation of policies and procedures that are reasonably designed to prevent Arca Securities from acting on non-public information regarding NYSE Arca systems prior to the time that such information is made available generally to all NYSE Arca members performing inbound routing functions. These policies and procedures would include systems development protocols to facilitate an audit of the efficacy of these policies and procedures.

Specifically, new Rule 14.3(e) shall provide as follows:

²³ 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.

The holding company owning both the Exchange and Archipelago Securities, L.L.C. 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 Arca members.

e. Pilot Period

The Exchange proposes that the Commission authorize NYSE Arca to receive inbound routes from Arca Securities (in its capacity as a facility of NYSE, routing orders to NYSE Arca) 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)²⁴ of the Act, in general, and furthers the objectives of Section 6(b)(5),²⁵ in particular, in that it is designed to prevent

²⁴ 15 U.S.C. 78f(b).

²⁵ 15 U.S.C. 78f(b)(5).

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:

- (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-NYSEArca-2008-90 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-2008-90. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. 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-2008-90 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.²⁶

Florence E. Harmon
Acting Secretary

²⁶ 17 CFR 200.30-3(a)(12).