

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59117; File No. SR-NYSEArca-2008-134)

December 18, 2008

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE
Arca, Inc. to Amend the Sanctioning Guidelines

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 December 11, 2008, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “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 Rule 10.16 (“Sanctioning Guidelines”). A copy of this filing is available on the Exchange’s Web site at www.nyse.com, at the Exchange’s principal office and at the 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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Arca Rule 10.16 – NYSE Arca Sanctioning Guidelines, is used by various Exchange bodies that adjudicate disciplinary actions, including the Ethics and Business Conduct Committee (“EBCC”), the NYSE Arca Board of Governors, the Exchange’s Surveillance and Enforcement Departments (collectively, “Adjudicatory Bodies”), in determining appropriate remedial sanctions. The purpose of this proposal is to amend Rule 10.16 in order to (i) replace the existing three tiered monetary sanctioning guidelines with a new single range of suggested monetary penalties, (ii) establish new guidelines applicable to certain violations that are not presently included in the rule, (iii) increase the suggested ranges of monetary and other sanctioning guidelines, (iv) expand the jurisdiction of the guidelines to include Associated Persons of an OTP Firm, and (v) make minor non-substantive changes to Rule 10.16. An explanation of each of the proposed changes is shown below.

Associated Persons

The Rules of NYSE Arca are applicable not only to OTP Holders and OTP Firms but may also apply to Allied Persons, Affiliated Persons, Approved Persons and other employees, (collectively known as “Associated Persons”)⁴ of OTP Firms. Accordingly, to

⁴ NYSE Arca Rule 1.1(d) defines an “Associated Person” as a person who is a partner, officer, director, member of a limited liability company, trustee of a business trust, employee of an OTP Firm or any person directly or indirectly controlling, controlled by or under common control with an OTP Firm.

clarify that the sanctioning guidelines in Rule 10.16 are intended to apply to all persons using the facilities of the Exchange, the Exchange proposes adding the term “Associated Person” in addition to OTP Holder and OTP Firm, where applicable throughout Rule 10.16.

Suggested Monetary Sanctions

NYSE Arca Sanctioning Guidelines currently features a three tiered monetary penalty structure, where the applicable tier depends on the number of disciplinary actions, involving similar violative conduct by the same party, which occurred within the two years prior to the misconduct at issue. The suggested monetary sanctions increase with each occurrence, creating a range of penalties from a low of \$1,000 for the first disciplinary action to a high of \$50,000 in some cases, for the third and subsequent actions. While continued misconduct on the part of an OTP Holder, OTP Firm or Associated Person may warrant an increased sanction, the Exchange feels that these guidelines do not offer the flexibility needed to always make the best effort of applying an appropriate sanction when needed.

There may be situations where a first disciplinary action against an OTP Firm, OTP Holder or Associated Person is considered extremely egregious, especially in situations where willful intent and/or gross negligence are involved, or where investor protection and the integrity of the markets has been compromised. On the other hand, a second or subsequent disciplinary action against an OTP Firm for violations of administrative guidelines or minor actions involving different Associated Person of the same OTP Firm may not warrant an increased penalty. Therefore, the Exchange feels that a suggested monetary sanction, specifically targeted to the first or a subsequent

violation, does not necessarily serve as an adequate deterrent, nor an appropriate penalty to the violative conduct. The Exchange agrees that violations that constitute a second or a subsequent disciplinary action with respect to similar volatile [sic] conduct by the same party may still be relevant and could still be taken into consideration when determining sanctions. Accordingly, the Exchange proposes to include a provision in each of the Specific Sanctioning Guidelines contained in Rule 10.16(e), stating that recent acts of similar misconduct may be considered to be aggravating factors.

In lieu of the three tiered monetary penalty schedule, the Exchange now proposes a single suggested range of monetary penalties of which an Adjudicatory Body may use to determine an appropriate sanction. The Principal Considerations in Determining Sanctions, as contained in Rule 10.16(d) already suggests that the sanctioning guidelines are not intended to necessarily prescribe fixed sanctions for particular violations, but rather provide direction for Adjudicatory Bodies to assist them in imposing sanctions consistently and fairly. The Exchange feels that the broader range of suggested penalties will afford Adjudicatory Bodies a greater latitude than they presently have, when it comes to applying sanctions in a fair and consistent manner.

In conjunction with the move to a single range of suggested monetary sanctions, the Exchange proposes to increase both the minimum and maximum suggested monetary penalty levels. The Exchange notes that the NYSE Arca Minor Rule Plan,⁵ which is applied in lieu of formal disciplinary proceedings for violations that have been determined to be minor in nature, already authorizes monetary sanctions of up to \$5,000. The Exchange feels the current minimum monetary penalty levels contained in Rule

⁵ See NYSE Arca Rule 10.12.

10.16, which range from between \$1,000 and \$5,000 are therefore too low, given the serious nature of the violations covered by these sanction guidelines, versus less serious minor rule violations. In order to act as an effective deterrent against future violations, while also serving as a just penalty for those who commit these violations, the Exchange feels a minimum suggested sanction of \$10,000 is appropriate. Present guidelines contained in Rules 10.16(e)-(f) call for a maximum suggested sanctions of \$25,000 to \$50,000, depending on the violation. Once again, given the serious nature of the violations covered by these sanction guidelines, the Exchange feels these maximum suggested penalty levels are too restrictive. The Exchange now proposes to raise the maximum suggested penalty level to \$100,000, for violations covered by Rule 10.16(e)-(f). As a result, the new minimum penalty is \$10,000 and the new maximum penalty \$100,000.

Proposed Sanctioning Guidelines for Certain Violations Not Previously Covered

NYSE Arca proposes adopting new sanctioning guidelines for two additional categories of rule violations. New Rule 10.16(g) will offer guidelines for sanctions related to violations of NYSE Arca for Rule 9 - Conducting Business with the Public, while new Rule 10.16(h) will offer guidelines for sanctions related to violations of NYSE Arca Rule 11 – Business Conduct. Rule 9 generally consists of rules specifically intended to provide protection to public customers and their accounts. Rule 11 generally consists of rules that are intended to prevent actions that could be deemed detrimental to the welfare and protection of investors, or conduct or proceedings inconsistent with just and equitable principals [sic] of trade. While these proposed guidelines are substantially

similar to those contained in Rules 10.16(e)-(f), the Exchange is proposing a modified range of suggested monetary sanctions.

NYSE Arca feels that the two proposed rules described above, which encompass some extremely serious violations, appropriately set forth increased ranges of monetary penalties. Therefore, the Exchange proposes sanctioning guidelines that include a suggested minimum fine level of \$15,000 and a maximum suggested fine level of \$150,000. The Exchange feels that these monetary levels are appropriate given the serious nature of these offenses. This proposed range will act not only as an effective deterrent against future violations, but will also provide an appropriate penalty.

Suspension

Each of the sanctioning guidelines provided for in Rule 10.16, along with the new guidelines outlined in this proposal, contain [sic] a provision that allows for the suspension or expulsion of a named party in a disciplinary action. Under existing guidelines, the Exchange has no option other than the expulsion of a named party if it is determined that a two year suspension is not adequate. The Exchange feels that there are certain violations where a suspension of more than two years is appropriate, but does [sic] go as far as to warrant an expulsion or permanent bar. In particularly egregious cases involving a pattern of misconduct, the guidelines allow for an expulsion or permanent bar of the named party. The Exchange now proposes to expand the allowable suspension to up to five years. The Exchange feels that by expanding the time frame of which a named party may be subject to a suspension, Adjudicatory Bodies will be afforded greater flexibility in determining appropriate sanctions.

Miscellaneous and Minor Revisions

Rule 10.16(b)(2) – This provision presently states that there are certain regulatory incidents that are not relevant to the determination of disciplinary sanctions, and goes on to list examples. The Exchange proposes to revise the language of this provision by saying that *any* regulatory incident, which is not relevant to the determination of a disciplinary sanction, should not be considered. Since all non-relevant incidents should not be considered, the Exchange proposes removing the existing examples in the provision.

Rule 10.16(b)(5) – This provision deals with restitution when an identifiable party has suffered a quantifiable loss as a result of a named party's misconduct. Since it is not always possible to determine an exact loss in every instance, the Exchange proposes changing the criteria for calculating orders of restitution from the actual loss sustained by the injured party, to a reasonable calculation of any loss sustained. It will be the responsibility of the Adjudicatory Body to calculate what is considered a reasonable loss, based on the evidence. Adjudicatory Bodies will continue to be required to include a description of the method used to calculate any restitution as part of any decisions rendered.

The Exchange also proposes at this time to correct a minor typographical error, which appears in the first sentence of this subsection of the existing rule text. The correction is marked on the attached on the Exhibit 5.⁶

Rule 10.16(b)(7) – The Adjudicatory Bodies may require OTP Holders to obtain additional training before continuing as a floor official. NYSE Arca does not utilize OTP

⁶ The Commission notes that Exhibit 5 is attached to the rule filing filed with the Commission but not to this release.

Holders as floor officials. Therefore the Exchange proposes removing any reference to floor official training contained in this provision. The Exchange also proposes making minor, non-substantive, changes to this provision.

Rule 10.16(d)(2) – The Exchange proposes adding “affiliated OTP Holder or OTP Firm” as an acceptable entity that an individual may acknowledged their misconduct to. This will serve to include individuals that may be affiliated with an OTP Holder OTP Firm, such as officers, partners or other Associated persons, but who are not technically employed by that firm.

Rule 10.16(d)(3) – The Exchange proposes replacing the word “employer” with the phrase OTP Holder or OTP Firm.

Rule 10.16(d)(8) - The Exchange proposes replacing the word “employer” with the phrase OTP Holder or OTP Firm or other relevant party.

Rule 10.16(d)(12) – The Exchange proposes replacing the word “supervisor” with the phrase employer or associated OTP Holder or OTP Firm.

Rule 10.16(e) – The Exchange proposes adding Rule 6.37A in addition to the list of covered rules contained in this provision, as it too, is applicable to Market Maker Obligations.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)⁷ of the Securities Exchange Act of 1934 (the “Act”), in general, and furthers the objectives of Section 6(b)(5)⁸ 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

⁷ 15 U.S.C. §78f(b).

⁸ 15 U.S.C. §78f(b)(5).

coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposal is also consistent with Section 6(b)(6)⁹ and 6(b)(7),¹⁰ which requires that members and persons associated with members are appropriately disciplined for violations of Exchange rules and are provided a fair procedure for disciplinary procedures.

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

⁹ 15 U.S.C. §78f(b)(6).

¹⁰ 15 U.S.C. §78f(b)(7).

- (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-2008-134 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-2008-134. 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-2008-134 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.¹¹

Florence E. Harmon
Acting Secretary

¹¹ 17 CFR 200.30-3(a)(12).