

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-64595; File No. SR-NYSEArca-2011-32)

June 3, 2011

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services to Establish a Gross FOCUS Revenue Fee

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> notice is hereby given that, on May 31, 2011, 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 Exchange. 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 through its wholly-owned subsidiary NYSE Arca Equities, Inc. (“NYSE Arca Equities”) proposes to amend the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services (the “Schedule”) to establish a new regulatory fee. While changes to the Schedule pursuant to this proposal will be effective on filing, the changes will become operative on June 1, 2011. The text of the proposed rule change is available at the Exchange, at the Commission’s Public Reference Room, on the Commission’s website at [www.sec.gov](http://www.sec.gov), and at [www.nyse.com](http://www.nyse.com).

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

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

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

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

Effective June 1, 2011, the Exchange proposes to amend the Schedule to establish a regulatory fee (“Gross FOCUS Revenue Fee”) to be charged to ETP Holders, the purpose of which is to recover the regulatory expenses of the Exchange with respect to ETP Holders, including expenses associated with the regulatory functions performed both by NYSE Regulation, Inc. (“NYSE Regulation”) and by the Financial Industry Regulatory Authority (“FINRA”) pursuant to a regulatory services agreement, for which FINRA is paid by NYSE Regulation. The Exchange is proposing to set this regulatory fee at a rate of \$0.07 per \$1,000 of gross revenues as reported by each ETP Holder in its FOCUS report.<sup>3</sup> The fee would be similar to the gross revenue FOCUS Report fee that the New York Stock Exchange (“NYSE”) charges its member organizations to partially recover its expenses for performance of regulatory functions.<sup>4</sup> However, the rate will be lower than the \$0.105 per \$1,000 of FOCUS gross revenues charged by the NYSE, reflecting the fact that the costs of regulating the electronic NYSE Arca market are less than the costs of regulating the NYSE with its trading floor. Moving to a regulatory fee based on FOCUS gross revenues would align the Exchange’s equity

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<sup>3</sup> FOCUS (Securities Exchange Act Form X-17A-5) is an acronym for Financial and Operational Combined Uniform Single Report. The report is filed periodically with the Commission pursuant to Securities Exchange Act Rule 17a-5.

<sup>4</sup> See NYSE Rule 129 (Oversight Services).

regulatory fee structure more closely with that of the NYSE. The Exchange believes that the revenue generated from this new regulatory fee, when combined with the Exchange's other regulatory fees with respect to ETP Holders, will be less than or equal to the Exchange's related regulatory costs.

Prior to the initiation of the new Gross FOCUS Revenue Fee on June 1, the Exchange has eliminated, by means of a separate rule filing,<sup>5</sup> the fees assessed on ETP Holders, OTP Holders and OTP Firms<sup>6</sup> that conduct equities and/or options business on the Exchange and that register financial advisors (or registered representatives) ("RR Fees"). Each RR Fee was a fixed amount of money that an ETP Holder, OTP Holder or OTP Firm paid to the Exchange for each registered representative that it registered, and it was based on the action associated with the registration.

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<sup>5</sup> See Securities Exchange Act Release No. 64399 (May 4, 2011), 76 FR 27114 (May 10, 2011) (File No. SR-NYSEArca-2011-20) (the "Options Regulatory Fee Filing").

<sup>6</sup> The term "ETP Holder" refers to a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that has been issued an Equity Trading Permit ("ETP") by NYSE Arca Equities for effecting approved securities transactions on the trading facilities of NYSE Arca Equities. See NYSE Arca Equities Rule 1.1(n).

The term "OTP Holder" refers to a natural person, in good standing, who has been issued an Options Trading Permit ("OTP") by the Exchange for effecting approved securities transactions on the trading facilities of the Exchange, or has been named as a nominee. See Exchange Rule 1.1(q).

The term "OTP Firm" refers to a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that holds an OTP or upon whom an individual OTP Holder has conferred trading privileges on the Exchange's trading facilities pursuant to and in compliance with the rules of the Exchange. See Exchange Rule 1.1(r).

Each ETP Holder, OTP Holder and OTP Firm has status as a "member" of the Exchange as that term is defined in Section 3 of the Act. An ETP Holder or an OTP Firm must be a registered broker or dealer pursuant to Section 15 of the Securities Exchange Act of 1934, as amended (the "Act"). An OTP Holder must be a registered broker or dealer pursuant to Section 15 of the Act, or a nominee or an associated person of a registered broker or dealer that has been approved by the Exchange to conduct business on the trading facilities of the Exchange.

The Exchange has eliminated the RR Fees because it believes that such fees are no longer the most equitable manner in which to assess regulatory fees. Among other things, sales practice regulation has been allocated to FINRA pursuant to a 17d-2 plan, so tying the Exchange's regulatory fees to the number of registered representatives does not match regulatory revenues to regulatory expenses. The Exchange's regulatory costs are primarily driven by market regulation. Consequently, a fee based on trading activity, such as the proposed Gross FOCUS Revenue Fee, will better match such revenues and expenses.<sup>7</sup> The Exchange believes that the proposed Gross FOCUS Revenue Fee represents the best alternative for replacing the revenue dedicated to covering the costs of the Exchange's regulatory programs with respect to ETP Holders and the equities business of the Exchange that was lost with the elimination of the RR Fees.

The Exchange believes that the realigned regulatory fee structure as proposed herein will allow the Exchange to continue to adequately fund the expenses associated with the performance of its regulatory functions with respect to ETP Holders and the equities business of the Exchange. The Exchange will monitor the amount of revenue collected from the Gross FOCUS Revenue Fee to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange expects to monitor regulatory costs and revenues on an annual basis, at a minimum. If the Exchange determines that regulatory revenues exceed regulatory costs, the Exchange would adjust the Gross FOCUS Revenue Fee downward by submitting a fee change filing to the Commission.

## 2. Statutory Basis

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<sup>7</sup> See the Options Regulatory Fee Filing for a more complete analysis of the rationale for eliminating RR Fees.

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>8</sup> in general, and Section 6(b)(4) of the Act,<sup>9</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes that the proposal does not constitute an inequitable allocation of fees, as all similarly situated member organizations will be subject to the same fee structure, and access to the Exchange's market is offered on fair and non-discriminatory terms. More specifically, the Exchange believes that the proposed Gross FOCUS Revenue Fee represents a fairer and more equitable allocation of fees than the current fee structure because it would be charged to all members on revenues generated by their equity business instead of how many registered persons a particular ETP Holder employs. The latter standard has become increasingly irrelevant as a measure of regulatory services required due, among other reasons, to the rise of internet and discount brokerage firms in comparison to traditional brokerage firms. The Exchange believes the proposed Gross FOCUS Revenue Fee is reasonable because it will raise revenue related to the amount of equity business conducted, which correlates more closely with the amount of Exchange regulatory services required.

The Exchange further believes that the initial level of the Gross FOCUS Revenue Fee is reasonable because it is expected to generate revenues that, when combined with the Exchange's other regulatory fees with respect to ETP Holders, will be less than or equal to the Exchange's costs related to the regulation of its equities business. This is consistent with the Commission's previously stated view that regulatory fees be used for regulatory purposes and not to support the Exchange's business side.

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<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(4).

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>10</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>11</sup> thereunder, because it establishes a due, fee, or other charge imposed by NYSE Arca.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2011-32 on the subject line.

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(2).

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2011-32. 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 website (<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 website viewing and printing 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-2011-32 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.<sup>12</sup>

Cathy H. Ahn  
Deputy Secretary

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