

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-65970; File No. SR-NYSEArca-2011-74)

December 15, 2011

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change Expanding the Scope of Potential “Users” of Its Co-Location Services to Include Any Market Participant that Requests to Receive Co-Location Services Directly From the Exchange and Amending Its Fee Schedule to Establish a Fee for Users that Host Their Customers at the Exchange’s Data Center

I. Introduction

On October 14, 2011, 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”)¹ and Rule 19b-4 thereunder,² a proposed rule change to expand the scope of potential “Users” of its co-location services, and to amend its Fee Schedule. The proposed rule change was published for comment in the Federal Register on November 1, 2011.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange operates a data center in Mahwah, New Jersey from which it provides co-location services to Users.⁴ For purposes of its co-location services, the term “User” currently includes any ETP Holder or Sponsored Participant who is authorized to obtain access to the NYSE Arca Marketplace pursuant to NYSE Arca Equities Rule 7.29 (see NYSE Arca Equities Rule 1.1(yy)). The Exchange proposed to expand the scope of potential Users of its co-location

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 65625 (October 26, 2011), 76 FR 67522 (“Notice”).

⁴ See Securities Exchange Act Release No. 63275 (November 8, 2010), 75 FR 70048.

services to include any market participant that requests to receive co-location services directly from the Exchange.⁵ Under the proposed rule change, Users could therefore include ETP Holders, Sponsored Participants, non-ETP Holder broker-dealers and vendors.⁶

The Exchange also proposed to amend its Price List to establish a fee applicable to Users that provide hosting services to their customers (“Hosted Users”) at the Exchange’s data center.⁷ “Hosting” would be a service offered by a User to a Hosted User and could include, for example, a User supporting its Hosted User’s technology, whether hardware or software, through the User’s co-location space. Specifically, the Exchange proposed to charge each User a fee of \$500.00 per month for each Hosted User that the User hosts in the Exchange’s data center. Users would independently set fees for their Hosted Users and the Exchange would not receive a share of any such fees.

III. Discussion and Commission’s 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 In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,⁹ which requires that the rules of a national securities

⁵ As stated by the Exchange, Users must agree to, and be capable of satisfying, any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange. See Notice, 76 FR at 67522.

⁶ Id. The Exchange anticipated that the potential additional Users would provide, for example, hosting, service bureau, technical support, risk management, order routing and market data delivery services to their customers while the User is co-located in the Exchange’s data center.

⁷ Id.

⁸ In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78f(b)(4).

exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and 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 promote just and equitable principles of trade, 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange noted that the expansion of the scope of potential Users of the Exchange's co-location services increases access to the Exchange's co-location facilities and that the co-location services would be offered to these additional Users in a manner that is not unfairly discriminatory.¹¹ The Commission believes that this expansion of the scope of potential Users is consistent with the Exchange Act and should increase access to the Exchange co-location facilities by allowing additional categories of market participants to access the Exchange's co-location services.

Regarding the proposed hosting fee, the Exchange represented that it will be applied uniformly and will not unfairly discriminate between Users of co-location services, as the hosting fee will be applicable to all interested Users that provide hosting services.¹² The Exchange also represented that the hosting fee is reasonable because it is designed to defray expenses incurred or resources expended by the Exchange.¹³ In light of the Exchange's representations, the Commission believes that the hosting fee is consistent with Section 6(b)(4) of the Exchange Act.

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ See Notice, 76 FR at 67523.

¹² Id.

¹³ Id.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁴ that the proposed rule change (SR-NYSEArca-2011-74) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Kevin M. O'Neill
Deputy Secretary

¹⁴ 15 U.S.C. 78s(b)(2).

¹⁵ 17 CFR 200.30-3(a)(12).