

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68233; File No. SR-NYSEArca-2012-103)

November 14, 2012

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Changes Amending NYSE Arca, Inc. Rules 3.2 and 3.3 and NYSE Arca Equities, Inc. Rules 3.2 and 3.3 to Expand the Eligibility Requirements for Service on Certain Boards of Directors and Committees

I. Introduction

On September 18, 2012, NYSE Arca, Inc. (“NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> proposed rule changes to amend NYSE Arca Rules 3.2 and 3.3 and NYSE Arca Equities, Inc. (“NYSE Arca Equities”) Rules 3.2 and 3.3 to expand the eligibility requirements for service on the Board of Directors of NYSE Arca (“NYSE Arca Board”) and certain committees of NYSE Arca and NYSE Arca Equities. The proposed rule changes were published for comment in the Federal Register on October 1, 2012.<sup>4</sup> The Commission received no comment letters on the proposal.

II. Background

Amendments to NYSE Arca Rules 3.2 and 3.3

NYSE Arca Rule 3.2(a) sets forth the general provisions for Options Committees.

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> See Securities Exchange Act Release No. 67923 (September 25, 2012), 77 FR 59995 (SR-NYSEArca-2012-103) (the “Notice”).

Specifically, NYSE Arca Rule 3.2(a)(8) states that any OTP Holder<sup>5</sup> of the Exchange in good standing, Allied Person<sup>6</sup> of an OTP Firm,<sup>7</sup> or person from the public is eligible for appointment or election to various Options Committees. NYSE Arca Rule 3.2(b) sets forth the eligibility requirements for three specific Options Committees: the Ethics and Business Conduct Committee (the “EBCC Committee”), the Nominating Committee, and the OTP Advisory Committee.<sup>8</sup> NYSE Arca Rule 3.3(a) sets forth the eligibility requirements for the Board Appeals Committee and Appeals Panel.<sup>9</sup> The Exchange proposes to amend its rules to expand the eligibility requirements to serve on these various committees and panels to include OTP Holders, Allied Persons of OTP Firms and Associated Persons<sup>10</sup> of OTP Firms.

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<sup>5</sup> An “OTP Holder” is a natural person, in good standing, who has been issued an Options Trading Permit (“OTP”), or has been named as a nominee. See NYSE Arca Rule 1.1(q).

<sup>6</sup> An “Allied Person” (for purposes of NYSE Arca Rules) is an individual who is (1) an employee of an OTP Firm who controls such firm, (2) an employee of an OTP Firm corporation who is a director or a principal executive officer of such corporation, (3) an employee of an OTP Firm limited liability company who is a manager or a principal executive officer of such limited liability company, or (4) a general partner in an OTP Firm partnership. Each of these persons must be approved by the Exchange as an Allied Person. See NYSE Arca Rule 1.1(b).

<sup>7</sup> “OTP Firm” means a sole proprietorship, partnership, corporation, limited liability company, or other organization in good standing who holds an OTP or upon whom an individual OTP Holder has conferred trading privileges on the Exchange’s trading facilities. See NYSE Arca Rule 1.1(r).

<sup>8</sup> The EBCC currently consists primarily of OTP Holders and Allied Persons of an OTP Firm. See NYSE Arca Rule 3.2(b)(1)(A). The Nominating Committee currently consists of six OTP Holders. See NYSE Arca Rule 3.2(b)(2)(A). The OTP Advisory Committee currently consists of OTP Holders. See NYSE Arca Rule 3.2(b)(3)(A).

<sup>9</sup> Each Appeals Panel is made up of no less than three (3) but no more than five (5) individuals, at least one of whom is a director that is an OTP Holder or Allied Person of an OTP Firm. See NYSE Arca Rule 3.3(a)(1)(B).

<sup>10</sup> “Associated Person” is 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. See NYSE Arca Rule 1.1(d).

The Exchange also proposes to expand the eligibility for its fair representation directors.<sup>11</sup> Currently, the Nominating Committee publishes the name of one OTP Holder or Allied Person of an OTP Firm as its nominee for the NYSE Arca Board.<sup>12</sup> The Exchange proposes to expand the eligibility for fair representation directors by amending this rule to allow the Nominating Committee to publish the name of an Associated Person of an OTP Firm as well.

#### Amendments to NYSE Arca Equities Rules

The Exchange proposes to make parallel changes to the NYSE Arca Equities Rules. NYSE Arca Equities Rule 3.2(a) sets forth general provisions for various Equities Committees. Specifically, NYSE Arca Equities Rule 3.2(a)(8) states that any ETP Holder<sup>13</sup> of the Exchange in good standing or Allied Person<sup>14</sup> of an ETP Holder,<sup>15</sup> or person from the public is eligible for

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<sup>11</sup> Under Section 3.02(a) of the Bylaws of NYSE Arca, the NYSE Arca Board must have 8-12 directors, and at least 20 percent of the directors must be individuals nominated by trading permit holders, with at least one director nominated by the Equities Trading Permit Holders (“ETP Holders”) of NYSE Arca Equities, and at least one director nominated by the OTP Holders of the Exchange. In addition, at least 50 percent of the directors must be directors who represent the public. The exact number of the directors nominated by the ETP Holders and OTP Holders is determined from time to time by the NYSE Arca Board, subject to the percentage restrictions described above.

<sup>12</sup> See NYSE Arca Rule 3.2(b)(2)(C)(ii).

<sup>13</sup> An “ETP Holder” is a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that has been issued an Equities Trading Permit. See NYSE Arca Equities Rule 1.1(n).

<sup>14</sup> An “Allied Person”(for purposes of NYSE Arca Equities Rules) is an individual who is (1) an employee of an ETP Holder who controls such firm, (2) an employee of an ETP Holder corporation who is a director or a principal executive officer of such corporation, (3) an employee of an ETP Holder limited liability company who is a manager or a principal executive officer of such limited liability company, or (4) a general partner in an ETP Holder partnership; each of these persons must be approved by NYSE Arca Equities as an Allied Person. See NYSE Arca Equities Rule 1.1(c).

<sup>15</sup> ETP Firm means a sole proprietorship, partnership, corporation, limited liability company, or other organization in good standing who holds an OTP or upon whom an

appointment or election to Equities Committees. NYSE Arca Equities Rule 3.2(b) sets forth provisions for two specific Equities Committees: the Business Conduct Committee (the “BCC Committee”) and the Nominating Committee (the “Equities Nominating Committee”).<sup>16</sup> NYSE Arca Rule 3.3(a) sets forth the eligibility requirements for the Board Appeals Committee.<sup>17</sup> The Exchange proposes to amend the rules of NYSE Arca Equities so to expand the eligibility requirements to serve on these various committees and panels to include ETP Holders, Allied Persons of ETP Firms and Associated Persons<sup>18</sup> of ETP Firms.

In addition to amending the composition requirements of the Equities Nominating Committee, the Exchange also proposes to amend NYSE Arca Rules 3.2(b)(2)(C)(i) to expand the eligibility for fair representation directors. Currently, the Equities Nominating Committee may nominate ETP Holders or Allied Persons of ETP Holders to serve on the NYSE Arca Board. The Exchange proposes to expand the eligibility for fair representation directors by amending this rule to allow the Equities Nominating Committee to publish the name of an Associated Person of an ETP Firm as well.

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individual OTP Holder has conferred trading privileges on the Exchange’s trading facilities. See NYSE Arca Rule 1.1(r).

<sup>16</sup> The BCC currently consists of a minimum of one ETP Holder or Allied Persons of an ETP Holder. See NYSE Arca Equities Rule 3.2(b)(1)(A). The Nominating Committee currently consists of six ETP Holders. See NYSE Arca Equities Rule 3.2(b)(2)(A).

<sup>17</sup> Each Appeals Committee currently consists of at least one public director and at least one director that is an ETP Holder or Allied Person of an ETP Firm. See NYSE Arca Equities Rule 3.3(a)(1)(A).

<sup>18</sup> “Associated Person” is person who is a partner, officer, director, member of a limited liability company, trustee of a business trust, employee of an ETP Holder, or any person directly or indirectly controlling, controlled by or under common control with an ETP Holder. See NYSE Arca Equities Rule 1.1(f).

### III. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule changes and finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>19</sup> In particular, the Commission finds that the proposed rule changes are consistent with Section 6(b)(3) of the Act,<sup>20</sup> which, among other things, requires that the rules of an exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provides that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker or dealer. As the Exchange notes, the proposed rule changes are consistent with the composition requirements set forth in the governing documents of other self-regulatory organizations.<sup>21</sup> The Exchange is not proposing to alter the number of fair representation candidates on the boards or any other aspect of the NYSE Arca Board's composition or nomination process.

The proposed rule change also furthers the objectives of Section 6(b)(6) of the Act,<sup>22</sup> because it provides for appropriate discipline for violations of Exchange rules and regulations. The Commission believes that the proposed rule change will expand the available candidates with industry knowledge that are eligible for membership on the Options and Equities Committees that are involved in reviewing disciplinary actions against OTP Holders, OTP Firms, and ETP Holders and advising on rule changes related to disciplinary matters and trading rules.

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<sup>19</sup> In approving the proposed rule changes, the Commission has considered their impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>20</sup> 15 U.S.C. 78f(b)(3).

<sup>21</sup> See Notice, supra note 3 at 59995-59997.

<sup>22</sup> 15 U.S.C. 78f(b)(6).

The Commission also believes that the proposed rule change furthers the objectives of Section 6(b)(5) of the Act<sup>23</sup> 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 coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. Specifically, the Commission believes the proposed rule change would expand the pool of candidates eligible for membership on the NYSE Arca Board and committees of NYSE Arca and NYSE Arca Equities and thereby increase the breadth of industry knowledge that would be available to these entities, which should benefit the public interest.

#### IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule changes are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

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<sup>23</sup> 15 U.S.C. 78f(b)(5).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>24</sup> that the proposed rule changes (SR-NYSEArca-2012-103), are approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>24</sup> 15 U.S.C. 78s(b)(2).

<sup>25</sup> 17 CFR 200.30-3(a)(12).