

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-78422; File No. SR-NYSEARCA-2016-102)

July 27, 2016

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change for a New NYSE Arca Rule 13.9 and a New NYSE Arca Equities Rule 11.9 and to Make Conforming Changes to NYSE Arca Rule 3.2 and NYSE Arca Equities Rule 3.2

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on July 14, 2016, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II 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 the Substance of the Proposed Rule Change

The Exchange proposes a new NYSE Arca Rule 13.9 and a new NYSE Arca Equities Rule 11.9 governing the failure to meet eligibility or qualification standards or prerequisites for access to services based on rules of the Exchange’s affiliates New York Stock Exchange, LLC and NYSE MKT LLC, and (2) to make conforming changes to NYSE Arca Rule 3.2 and NYSE Arca Equities Rule 3.2. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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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.

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

The Exchange proposes a new NYSE Arca Rule 13.9 (“Rule 13.9”) and a new NYSE Arca Equities Rule 11.9 (“Rule 11.9”) governing the failure to meet the eligibility or qualification standards or prerequisites for access to services based on Rules 9555 (Failure to Meet the Eligibility or Qualification Standards or Prerequisites for Access to Services) and 9559 (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series) of the Exchange’s affiliates New York Stock Exchange, LLC (“NYSE”) and NYSE MKT LLC (“NYSE MKT”).

The Exchange also proposes conforming changes to NYSE Arca Rule 3.2 (Options Committees) and NYSE Arca Equities Rule 3.2 (Equity Committees), which set forth the authority and jurisdiction of the NYSE Arca Ethics and Business Conduct Committee (“EBCC”) and the NYSE Arca Equities Business Conduct Committee (“BCC”), respectively.

Background

In 2013, the NYSE adopted disciplinary rules that are, with certain exceptions, substantially the same as the Financial Industry Regulatory Authority, Inc. (“FINRA”) Rule 8000 Series and Rule 9000 Series, and which set forth rules for conducting investigations and

enforcement actions.<sup>4</sup> The NYSE disciplinary rules were implemented on July 1, 2013.<sup>5</sup> In 2016, NYSE MKT also adopted the Rule 8000 Series and Rule 9000 Series, which rules are, with certain exceptions, substantially the same as those of NYSE and FINRA.<sup>6</sup> The NYSE MKT disciplinary rules were implemented on April 15, 2016.<sup>7</sup>

NYSE and NYSE MKT Rule 9555 (“Rule 9555”), which NYSE Arca and NYSE Arca Equities propose to adopt in substantially the same form as approved by the Commission for NYSE and as published for immediate effectiveness by NYSE MKT, govern the failure to meet the eligibility or qualification standards, or prerequisites for access to services offered by the Exchange.

Under Rule 9555, if a member organization or covered person<sup>8</sup> does not meet the

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<sup>4</sup> See Securities Exchange Act Release Nos. 68678 (January 16, 2013), 78 FR 5213 (January 24, 2013) (SR-NYSE-2013-02) (“2013 Notice”), 69045 (March 5, 2013), 78 FR 15394 (March 11, 2013) (SR-NYSE-2013-02) (“2013 NYSE Approval Order”), and 69963 (July 10, 2013), 78 FR 42573 (July 16, 2013) (SR-NYSE-2013-49).

<sup>5</sup> See NYSE Information Memorandum 13-8 (May 24, 2013).

<sup>6</sup> See Securities Exchange Act Release Nos. 77241 (February 26, 2016), 81 FR 11311 (March 3, 2016) (SR-NYSEMKT-2016-30) (“2016 MKT Notice”).

<sup>7</sup> See NYSE MKT Information Memorandum 16-02 (March 14, 2016).

<sup>8</sup> Under NYSE and NYSE MKT Rules, a member organization means a registered broker or dealer (unless exempt pursuant to the Act) that is a member of FINRA or another registered securities exchange. See NYSE Rule 2(b)(i) & NYSE MKT Rule 2(b)(i) – Equities. A covered person under the NYSE and NYSE MKT disciplinary rules means a member, principal executive, approved person, registered or non-registered employee of a member organization (and, in the case of NYSE MKT, an ATP Holder), or other person (excluding a member organization) subject to the jurisdiction of the NYSE and NYSE MKT, respectively. See NYSE Rule 9120(g); NYSE MKT Rule 9120(g).

In order to refer to the same individuals encompassed by the definitions of member organization and covered person under the NYSE and NYSE MKT Rules, NYSE Arca proposes to use the phrase “OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder” in proposed Rule 13.9. 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

eligibility or qualification standards set forth in the NYSE and NYSE MKT's rules,<sup>9</sup> staff may provide written notice to such covered person or member organization stating that the failure to become eligible or qualified will result in a suspension or cancellation of membership or a suspension or bar from associating with any member organization.

In addition, under Rule 9555, if a member organization or covered person does not meet the prerequisites for access to services offered by the NYSE and NYSE MKT or a member organization thereof or cannot be permitted to continue to have access to services offered by NYSE and NYSE MKT or a member organization thereof with safety to investors, creditors, members, or the Exchange, staff may provide written notice to such member organization or covered person limiting or prohibiting access to services offered by the NYSE and NYSE MKT or a member organization thereof.

The limitation, prohibition, suspension, cancellation, or bar referenced in the notice becomes effective 14 days after service of the notice unless the member organization or covered person requests a hearing during that time, except that the effective date for a notice of a limitation or prohibition on access to services shall be upon service of the notice. The text of NYSE and NYSE MKT Rule 9555 is substantially the same as FINRA's counterpart rule, except for certain conforming and technical changes.<sup>10</sup>

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Firm. Similarly, NYSE Arca Equities would use the phrase "ETP Holder or Associated Person of an ETP Holder" in proposed Rule 11.9. Under NYSE Arca Equities Rule 1.1(f), "Associated Person" refers to a 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.

<sup>9</sup> See, e.g., NYSE Rules 300 – 324 (Admission of Members); NYSE MKT Rules 300 – Equities – 324 – Equities (Admission of Members); NYSE MKT Office Rules, Section 4 (Employees and Admission of Members and Member Organizations).

<sup>10</sup> See 2013 NYSE Approval Order, 78 FR at 15394; 2016 MKT Notice, 81 FR at 11333.

NYSE and NYSE MKT Rule 9559 (“Rule 9559”) set forth hearing procedures for expedited proceedings under the NYSE and NYSE MKT Rule 9550 Series, including for proceedings under Rule 9555, and is substantially similar to FINRA’s counterpart rule. Currently, NYSE Arca and NYSE Arca Equities do not have a comparable procedural rule. As described below, the Exchange proposes to include procedural aspects of Rule 9559 that are applicable to expedited proceedings under Rule 9555 within the proposed rules for NYSE Arca and NYSE Arca Equities.

#### Proposed Rule Change

NYSE Arca and NYSE Arca Equities propose to adopt a new Rule 13.9 and 11.9, respectively, that would be substantially the same as Rule 9555 and that would incorporate certain procedural requirements for expedited hearings under Rule 9555 drawn from Rule 9559. NYSE Arca and NYSE Arca Equities are not proposing to adopt Rule 9559 in its entirety. Rule 9559 contains a number of provisions that do not relate to hearing procedures under Rule 9555.

#### NYSE Arca Rule 13.9

Proposed Rule 13.9 would govern when an OTP Firm, OTP Holder or Associated Person of an OTP Firm or OTP Holder does not meet the eligibility or qualification standards set forth in the Exchange’s rules;<sup>11</sup> does not meet the prerequisites for access to services offered by the Exchange or an OTP Firm or OTP Holder thereof; or cannot be permitted to continue to have access to services offered by the Exchange or an OTP Firm or OTP Holder thereof with safety to investors, creditors, OTP Firms, OTP Holders, or the Exchange. Like Rule 9555, the proposed Rule would be divided into separate subsections describing the notice; service of the notice; the contents of the notice; the effective date of the limitation, prohibition, suspension, cancellation or

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<sup>11</sup> See, e.g., NYSE Arca Rule 2 (Options Trading Permits); NYSE Arca Equities Rule 2 (Equity Trading Permits).

bar; requests for a hearing; failure to request a hearing; and a request for termination of the limitation, prohibition or suspension. Proposed Rule 13.9 would have a section describing certain procedures, based on Rule 9559, to be followed when a party requests a hearing.

Proposed Rule 13.9(a) (Notice to OTP Firms, OTP Holders or Associated Persons of an OTP Firm or OTP Holder of Suspension, Cancellation, Bar, or Limitation or Prohibition on Access to Services) would provide that if an OTP Firm, OTP Holder or Associated Person of an OTP Firm or OTP Holder does not meet the eligibility or qualification standards set forth in the Exchange’s Rules, Exchange staff may provide written notice to such OTP Firm, OTP Holder or Associated Person of an OTP Firm or OTP Holder stating that the failure to become eligible or qualified will result in a suspension or cancellation of trading privileges or a suspension or bar from associating with an OTP Firm or OTP Holder.<sup>12</sup>

Further, the proposed rule would provide that if an OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder does not meet the prerequisites for access to services offered by the Exchange or an OTP Firm or OTP Holder thereof or cannot be permitted to continue to have access to services offered by the Exchange or an OTP Firm or OTP Holder thereof with safety to investors, creditors, member organizations, or the Exchange, Exchange staff may provide written notice to such OTP Firm, OTP Holder or Associated Person of an OTP Firm or OTP Holder limiting or prohibiting access to services offered by the Exchange or an OTP Firm or OTP Holder thereof.<sup>13</sup> Proposed Rule 13.9(a) is substantially the same as NYSE and NYSE MKT Rule 9555(a), except that it substitutes references to “member organization or covered person” with “OTP Firm, OTP Holder or Associated Person of an OTP Firm or OTP Holder.”

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<sup>12</sup> See Proposed Rule 13.9(a)(1).

<sup>13</sup> See Proposed Rule 13.9(a)(2).

Proposed Rule 13.9(b) (Service of Notice) would provide that Exchange staff shall serve the OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder with the notice described in subsection (a) and that a copy of the notice served on an Associated Person of an OTP Firm or OTP Holder also shall be served on such OTP Firm or OTP Holder. Further, the proposed Rule would provide that when counsel for the OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder agrees to accept service of such notice, Exchange staff shall<sup>14</sup> serve notice on counsel. Proposed Rule 13.9(b) is substantially the same as NYSE and NYSE MKT Rule 9555(b), except that it substitutes references to “member organization or covered person” with “OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder.”

Proposed Rule 13.9(c) (Contents of Notice) would provide that a notice issued under Rule 13.9 shall state the specific grounds and include the factual basis for Exchange action. Further, the Rule would require that the notice state when the Exchange action will take effect and explain what the respondent must do to avoid such action as well as that the respondent may file a written request for a hearing.

The proposed Rule would also provide that the notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a

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<sup>14</sup> Rule 9555 provides that Exchange staff “may” serve notice on counsel or other person authorized to represent others under NYSE or NYSE MKT Rule 9141 (Appearance and Practice; Notice of Appearance) as specified in NYSE or NYSE MKT Rule 9134 (Methods of, Procedures for Service). As adopted by NYSE and NYSE MKT, Rule 9134(b)(1) and (2) provides that when a natural person or entity, respectively, is represented by counsel or a representative, papers served on such person or entity, excluding a complaint or document initiating a proceeding, “shall” be served on such counsel or representative. The Exchange has not adopted Rule 9134 and does not have a similar requirement. Accordingly, the Exchange proposes to utilize “shall” in the proposed Rule rather than “may,” to reflect the requirement in the NYSE and NYSE MKT rules that papers served on a person or entity represented by counsel or representative be served on the counsel or representative.

hearing must set forth with specificity any and all defenses to the Exchange action. In addition, the proposed Rule would require the notice to explain that the EBCC may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction. Proposed Rule 13.9(c) is substantially the same as NYSE and NYSE MKT Rule 9555(c), except that it (1) substitutes references to “member organization or covered person” with “OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder,” and (2) eliminates the reference to the Office of Hearing Officers and replaces “Hearing Officer, or, if applicable, Hearing Panel” with “EBCC.”

Proposed Rule 13.9(d) (Effective Date of Limitation, Prohibition, Suspension, Cancellation or Bar) would provide that the limitation, prohibition, suspension, cancellation or bar referenced in a notice issued under the proposed Rule shall become effective 14 days after service of the notice, except that the effective date for a notice of a limitation or prohibition on access to services offered by the Exchange or an OTP Firm or OTP Holder thereof with respect to services to which the OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder does not have access shall be upon service of the notice. Proposed Rule 13.9(d) would also provide that a request for a hearing shall stay the effectiveness of the notice, except that the effectiveness of a notice of a limitation or prohibition on access to services offered by the Exchange or an OTP Firm or OTP Holder thereof with respect to services to which the OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder does not have access shall not be stayed by a request for a hearing. Proposed Rule 13.9(d) is substantially the same as NYSE and NYSE MKT Rule 9555(d), except that it substitutes references to “member organization or covered person” with “OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder.”

Proposed Rule 13.9(e) (Request for Hearing) would provide that an OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder served with a notice under the proposed Rule may file with EBCC a written request for a hearing. The proposed Rule would require that a request for a hearing shall be made within 14 days after service of the notice and must set forth with specificity any and all defenses to the Exchange action. Proposed Rule 13.9(e) is substantially the same as NYSE and NYSE MKT Rule 9555(e), except that it substitutes references to “member organization or covered person” with “OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder.”

Proposed Rule 13.9(f) (Failure to Request Hearing) would provide that if an OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder does not timely request a hearing, the limitation, prohibition, suspension, cancellation or bar specified in the notice shall become effective 14 days after service of the notice, except that the effective date for a notice of a limitation or prohibition on access to services offered by the Exchange or an OTP Firm or OTP Holder with respect to services to which the OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder does not have access shall be upon service of the notice. The proposed Rule would further provide that notice shall constitute final Exchange action if the OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder does not request a hearing within 14 days after service of the notice. Proposed Rule 13.9(f) is substantially the same as NYSE and NYSE MKT Rule 9555(f), except that it substitutes references to “member organization or covered person” with “OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder.”

Proposed Rule 13.9(g) (Request for Termination of the Limitation, Prohibition or Suspension) would provide that an OTP Firm, OTP Holder or an Associated Person of an OTP

Firm or OTP Holder subject to a limitation, prohibition or suspension under the proposed Rule may file a written request for termination of the limitation, prohibition or suspension on the ground of full compliance with the notice or decision. Further, the proposed Rule would specify that such a request shall be filed with the head of the Exchange department or office that issued the notice or, if another department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the department or office that is so designated. Finally, the proposed Rule would provide that the appropriate head of the department or office may grant relief for good cause shown. Proposed Rule 13.9(g) is substantially the same as NYSE and NYSE MKT Rule 9555(g), except that it substitutes references to “member organization or covered person” with “OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder.”

Finally, proposed Rule 13.9(h) would set forth the specific procedures that would apply to hearings under the proposed Rule. As noted, proposed subsection (h) is modeled on NYSE and NYSE MKT Rule 9559, which provides uniform hearing procedures for expedited proceedings under the NYSE and NYSE MKT Rule 9550 Series, including proceedings under Rule 9555. NYSE Arca does not currently have a procedural rule comparable to Rule 9559 and therefore proposes to adopt aspects of Rule 9559 that are applicable to hearings under Rule 9555.

Proposed Rule 13.9(h)(1) would provide that a hearing shall be held within 30 days after a Respondent subject to a notice files a written request under proposed Rule 13.9(e). This requirement is the same as Rule 9559(f)(3) (Time of Hearing).

Proposed Rule 13.9(h)(2) would provide that the EBCC shall issue a notice stating the date, time, and place of the hearing at least 21 days prior to the hearing. This requirement is the same as that contained in Rule 9559(g)(3) (Notice of Hearing). Further, proposed subsection

(h)(2) would provide that not less than 14 days before the hearing, Exchange staff shall provide to the respondent who requested the hearing, all documents that were considered in issuing the notice. This requirement is the same as that contained in Rule 9559(h)(1) (Transmission of Documents) for Rule 9555 proceedings.

Proposed Rule 13.9(h)(3) would provide that, not less than seven days before the hearing, the parties shall exchange proposed exhibit and witness lists. The proposed Rule would require exhibit and witness lists to be served by overnight courier. These requirements are the same as those contained in Rule 9559(h)(2) (Transmission of Documents).

Proposed Rule 13.9(h)(4) would provide that the EBCC may approve, modify or withdraw any and all sanctions, requirements, restrictions or limitations imposed by the notice and may impose any fitting sanction. These requirements are the same as those contained in Rule 9559(n)(1) (Sanctions, Costs and Remands).

Proposed Rule 13.9(h)(5) would provide that the EBCC shall prepare a written decision within 60 days of the date of the close of the hearing and provide it to the Board of Directors. This is the same as the requirement in Rule 9559(o)(3) (Timing of Decision). Proposed subsection (h)(5) would further specify that the decision include the following elements:

- a statement describing the investigative or other origin of the notice issued under this Rule;<sup>15</sup>
- the specific statutory or rule provision alleged to have been violated or providing the authority for the Exchange action;<sup>16</sup>

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<sup>15</sup> See Proposed Rule 13.9(h)(5)(A).

<sup>16</sup> See Proposed Rule 13.9(h)(5)(B).

- a statement setting forth the findings of fact with respect to any act or practice the respondent was alleged to have committed or omitted or any condition specified in the notice;<sup>17</sup>
- the conclusions of the EBCC regarding the alleged violation or condition specified in the notice;<sup>18</sup>
- a statement of the EBCC in support of the disposition of the principal issues raised in the proceeding;<sup>19</sup> and
- a statement describing any sanction, requirement, restriction or limitation imposed, the reasons therefore, and the date upon which such sanction, requirement, restriction or limitation shall become effective.<sup>20</sup>

These requirements are the same as those contained in Rule 9559(p)(1)-(6)(Contents of Decision).

Proposed Rule 13.9(h)(6) would provide that the Board of Directors may, on its own initiative, order review of a decision prepared by the EBCC pursuant to Rule 13.9 within 30 days after notice of the decision has been served on the OTP Firm, OTP Holder or an Associated Person of an OTP Firm or OTP Holder. The proposed Rule utilizes the same language and time period as current NYSE Arca Rule 10.8(d), which provides that the Board of Directors may, on its own initiative, order a review of a decision on appeal made under Rule 10.8(b) within 30 days after notice of the decision is served on a respondent. By incorporating those Board review requirements, proposed Rule 13.9(h)(6) parallels Rule 9559(q)'s provision for a call for review

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<sup>17</sup> See Proposed Rule 13.9(h)(5)(C).

<sup>18</sup> See Proposed Rule 13.9(h)(5)(D).

<sup>19</sup> See Proposed Rule 13.9(h)(5)(E).

<sup>20</sup> See Proposed Rule 13.9(h)(5)(F).

by the NYSE and NYSE MKT Board of Directors.

Finally, proposed Rule 13.9(h)(7) would provide that the right to have any action pursuant to this Rule reviewed by the SEC is governed by Section 19 of the Exchange Act. The filing of an application for review by the SEC shall not stay the effectiveness of final Exchange action, unless the SEC otherwise orders. This is the same as Rule 9559(r)(Application for SEC Review).

The Exchange is not adopting the remaining subsections of Rule 9559 in whole or in part because they are either inapplicable to Rule 9555 proceedings,<sup>21</sup> are already addressed in the NYSE Arca and NYSE Arca Equities Rules,<sup>22</sup> or find no analogue in the NYSE Arca and NYSE Arca Equities Rules relating to disciplinary proceedings.<sup>23</sup>

#### NYSE Arca Equities Rule 11.9

The Exchange proposes to make parallel changes to the NYSE Arca Equities Rules. Proposed Rule 11.9 would govern when an ETP Holder or Associated Person of an ETP Holder does not meet eligibility or qualification standards; does not meet prerequisites for access to services; or cannot be permitted to continue to have access to services with safety to investors, creditors, ETP Holders, or the Exchange. Like Rule 9555 and proposed NYSE Arca Rule 13.9, the proposed Rule would be divided into separate subsections describing the notice; service of the notice; the contents of the notice; the effective date of the limitation, prohibition, suspension,

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<sup>21</sup> See Rule 9559 (f)(1) & (3) (Time of Hearing); (g)(1) & (2) (Notice of Hearing); (o)(1) & (2) (Timing of Decision).

<sup>22</sup> See Rule 9559(a) (Applicability); (b) (Computation of Time); (c)(Stays); (d)(Appointment and Authority of Hearing Officer and/or Hearing Panel); (i) (Evidence); (j) (Additional Information); (k) (Record of Hearing); (l) (Record of Proceeding); (m) (Failure to Appear at a Pre-Hearing Conference or Hearing or to Comply with a Hearing Officer Order Requiring the Production of Information); (n) (Sanctions, Costs and Remands).

<sup>23</sup> See Rule 9559(e) (Consolidation or Severance of Proceedings).

cancellation or bar; requests for a hearing; failure to request a hearing; and a request for termination of the limitation, prohibition or suspension. Like proposed NYSE Arca Rule 13.9, proposed Rule 11.9 would have a section describing procedures, based on Rule 9559, that apply if a party requests a hearing.

Proposed Rule 11.9(a) (Notice to ETP Holder or Associated Person of ETP Holder of Suspension, Cancellation, Bar, or Limitation or Prohibition on Access to Services) would provide that if an ETP Holder or an Associated Person of an ETP Holder does not meet the eligibility or qualification standards set forth in the Exchange's Rules, Exchange staff may provide written notice to such ETP Holder or Associated Person of an ETP Holder stating that the failure to become eligible or qualified will result in a suspension or cancellation of trading privileges or a suspension or bar from associating with any ETP Holder.<sup>24</sup>

Further, the proposed rule would provide that if an ETP Holder or Associated Person of an ETP Holder does not meet the prerequisites for access to services offered by the Exchange or an ETP Holder thereof or cannot be permitted to continue to have access to services offered by the Exchange or an ETP Holder thereof with safety to investors, creditors, member organizations, or the Exchange, Exchange staff may provide written notice to such ETP Holder or an Associated Person of an ETP Holder limiting or prohibiting access to services offered by the Exchange or an ETP Holder thereof.<sup>25</sup> Proposed Rule 11.9(a) is substantially the same as NYSE and NYSE MKT Rule 9555(a), except that it substitutes references to "member organization or covered person" with "ETP Holder or Associated Person of an ETP Holder."

Proposed Rule 11.9(b) (Service of Notice) would provide that Exchange staff shall serve the ETP Holder or an Associated Person of an ETP Holder with the notice described in

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<sup>24</sup> See Proposed Rule 11.9(a)(1).

<sup>25</sup> See Proposed Rule 11.9(a)(2).

subsection (a) and that a copy of the notice served on an Associated Person of an ETP Holder also shall be served on such ETP Holder. Further, the proposed Rule would provide that Exchange staff shall<sup>26</sup> serve notice on counsel when counsel for the ETP Holder or an Associated Person of an ETP Holder agrees to accept service of such notice. Proposed Rule 11.9(b) is substantially the same as NYSE and NYSE MKT Rule 9555(b), except that it substitutes references to “member organization or covered person” with “ETP Holder or an Associated Person of an ETP Holder.”

Proposed Rule 11.9(c) (Contents of Notice) would provide that a notice issued under Rule 11.9 shall state the specific grounds and include the factual basis for Exchange action. Further, the Rule would require that the notice state when the Exchange action will take effect and explain what the respondent must do to avoid such action as well as that the respondent may file a written request for a hearing.

The proposed Rule would also provide that the notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Exchange action. In addition, the proposed Rule would require the notice to explain that the BCC may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction. Proposed Rule 11.9(c) is substantially the same as NYSE and NYSE MKT Rule 9555(c), except that it (1) substitutes references to “member organization or covered person” with “ETP Holder or an Associated Person of an ETP Holder,” and (2) eliminates the reference to the Office of Hearing Officers and replaces “Hearing Officer, or, if applicable, Hearing Panel” with “BCC.”

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<sup>26</sup> See note 14, supra.

Proposed Rule 11.9(d) (Effective Date of Limitation, Prohibition, Suspension, Cancellation or Bar) would provide that the limitation, prohibition, suspension, cancellation or bar referenced in a notice issued under the proposed Rule shall become effective 14 days after service of the notice, except that the effective date for a notice of a limitation or prohibition on access to services offered by the Exchange or an ETP Holder thereof with respect to services to which the ETP Holder or an Associated Person of an ETP Holder does not have access shall be upon service of the notice. Proposed Rule 11.9(d) would also provide that a request for a hearing shall stay the effectiveness of the notice, except that the effectiveness of a notice of a limitation or prohibition on access to services offered by the Exchange or an ETP Holder thereof with respect to services to which the ETP Holder or an Associated Person of an ETP Holder does not have access shall not be stayed by a request for a hearing. Proposed Rule 11.9(d) is substantially the same as NYSE and NYSE MKT Rule 9555(d), except that it substitutes references to “member organization or covered person” with “ETP Holder or an Associated Person of an ETP Holder.”

Proposed Rule 11.9(e) (Request for Hearing) would provide that an ETP Holder or an Associated Person of an ETP Holder served with a notice under the proposed Rule may file with the BCC a written request for a hearing. The proposed Rule would require that a request for a hearing shall be made within 14 days after service of the notice and must set forth with specificity any and all defenses to the Exchange action. Proposed Rule 11.9(e) is substantially the same as NYSE and NYSE MKT Rule 9555(e), except that it substitutes references to “member organization or covered person” with “ETP Holder or an Associated Person of an ETP Holder.”

Proposed Rule 11.9(f) (Failure to Request Hearing) would provide that if an ETP Holder

or an Associated Person of an ETP Holder does not timely request a hearing, the limitation, prohibition, suspension, cancellation or bar specified in the notice shall become effective 14 days after service of the notice, except that the effective date for a notice of a limitation or prohibition on access to services offered by the Exchange or an ETP Holder with respect to services to which the ETP Holder or an Associated Person of an ETP Holder does not have access shall be upon service of the notice. The proposed Rule would further provide that notice shall constitute final Exchange action if the ETP Holder or an Associated Person of an ETP Holder does not request a hearing within 14 days after service of the notice. Proposed Rule 11.9(f) is substantially the same as NYSE and NYSE MKT Rule 9555(f), except that it substitutes references to “member organization or covered person” with “ETP Holder or an Associated Person of an ETP Holder.”

Proposed Rule 11.9(g) (Request for Termination of the Limitation, Prohibition or Suspension) would provide that an ETP Holder or an Associated Person of an ETP Holder subject to a limitation, prohibition or suspension under the proposed Rule may file a written request for termination of the limitation, prohibition or suspension on the ground of full compliance with the notice or decision. Further, the proposed Rule would specify that such a request shall be filed with the head of the Exchange department or office that issued the notice or, if another department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the department or office that is so designated. Finally, the proposed Rule would provide that the appropriate head of the department or office may grant relief for good cause shown. Proposed Rule 11.9(g) is substantially the same as NYSE and NYSE MKT Rule 9555(g), except that it substitutes references to “member organization or covered person” with “ETP Holder or an Associated Person of an ETP Holder.”

Finally, proposed Rule 11.9(h) would set forth specific procedures that would apply to hearings under the proposed Rule. As noted, proposed subsection (h) is modeled on NYSE and NYSE MKT Rule 9559, which provides uniform hearing procedures for expedited proceedings under the NYSE and NYSE MKT Rule 9550 Series, including proceedings under Rule 9555. NYSE Arca Equities does not currently have a procedural rule comparable to Rule 9559 and therefore proposes to adopt aspects of Rule 9559 that are applicable to hearings under Rule 9555.

Proposed Rule 11.9(h)(1) would provide that a hearing shall be held within 30 days after a Respondent subject to a notice files a written request under proposed Rule 11.9(e). This requirement is the same as Rule 9559(f)(3) (Time of Hearing).

Proposed Rule 11.9(h)(2) would provide that the BCC shall issue a notice stating the date, time, and place of the hearing at least 21 days prior to the hearing. This requirement is the same as that contained in Rule 9559(g)(3) (Notice of Hearing). Further, proposed subsection (h)(2) would provide that not less than 14 days before the hearing, Exchange staff shall provide to the respondent who requested the hearing, all documents that were considered in issuing the notice. This requirement is the same as that contained in Rule 9559(h)(1) (Transmission of Documents) for Rule 9555 proceedings.

Proposed Rule 11.9(h)(3) would provide that not less than seven days before the hearing, the parties shall exchange proposed exhibit and witness lists. The proposed Rule would require exhibit and witness lists to be served by overnight courier. These requirements are the same as those contained in Rule 9559(h) (Transmission of Documents).

Proposed Rule 11.9(h)(4) would provide that the BCC may approve, modify or withdraw any and all sanctions, requirements, restrictions or limitations imposed by the notice and may impose any fitting sanction. These requirements are the same as those contained in Rule

9559(n)(1) (Sanctions, Costs and Remands).

Proposed Rule 11.9(h)(5) would provide that that the BCC prepare a written decision within 60 days of the date of the close of the hearing and provide it to the Board of Directors. This is the same as the requirement in Rule 9559(o)(3) (Timing of Decision). Proposed subsection (h)(5) would further specify that the decision include the following elements:

- a statement describing the investigative or other origin of the notice issued under this Rule;<sup>27</sup>
- the specific statutory or rule provision alleged to have been violated or providing the authority for the Exchange action;<sup>28</sup>
- a statement setting forth the findings of fact with respect to any act or practice the respondent was alleged to have committed or omitted or any condition specified in the notice;<sup>29</sup>
- the conclusions of the BCC regarding the alleged violation or condition specified in the notice;<sup>30</sup>
- a statement of the BCC in support of the disposition of the principal issues raised in the proceeding;<sup>31</sup> and
- a statement describing any sanction, requirement, restriction or limitation imposed, the reasons therefore, and the date upon which such sanction, requirement, restriction or limitation shall become effective.<sup>32</sup>

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<sup>27</sup> See Proposed Rule 11.9(h)(5)(A).

<sup>28</sup> See Proposed Rule 11.9(h)(5)(B).

<sup>29</sup> See Proposed Rule 11.9(h)(5)(C).

<sup>30</sup> See Proposed Rule 11.9(h)(5)(D).

<sup>31</sup> See Proposed Rule 11.9(h)(5)(E).

These requirements are the same as those contained in Rule 9559(p)(1)-(6)(Contents of Decision).

Proposed Rule 11.9(h)(6) would provide that the Board of Directors may, on its own initiative, order review of a decision prepared by the BCC pursuant to Rule 11.9 within 30 days after notice of the decision has been served on the ETP Holder or Associated Person of an ETP Holder. The proposed Rule utilizes the same language and time period as current NYSE Arca Equities Rule 10.8(d), which provides that the NYSE Arca Board of Directors<sup>33</sup> may, on its own initiative, order a review of a decision on appeal within 30 days after notice of the decision is served on a respondent. Proposed Rule 11.9(h)(6) parallels the requirement in Rule 9559(q) setting forth a call for review by the NYSE and NYSE MKT Board of Directors.

Finally, proposed Rule 11.9(h)(7) would provide that the right to have any action pursuant to this Rule reviewed by the SEC is governed by Section 19 of the Exchange Act. The filing of an application for review by the SEC shall not stay the effectiveness of final Exchange action, unless the SEC otherwise orders. This is the same as Rule 9559(r)(Application for SEC Review).

NYSE Arca Equities is not adopting the remaining subsections of Rule 9559 in whole or in part because they are either inapplicable to Rule 9555 proceedings,<sup>34</sup> are already addressed in the NYSE Arca and NYSE Arca Equities Rules,<sup>35</sup> or find no analogue in the NYSE Arca and

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<sup>32</sup> See Proposed Rule 11.9(h)(5)(F).

<sup>33</sup> NYSE Arca Equities Rule 10.8(d) refers to the “NYSE Arca Board of Governors.” The reference is outdated, and means the NYSE Arca Board of Directors. See Securities Exchange Act Release No. 77898 (May 24, 2016), 81 FR 34404, 34406 (May 31, 2016) (SR-NYSEArca-2016-11).

<sup>34</sup> See Rule 9559 (f)(1) & (3) (Time of Hearing); (g)(1) & (2) (Notice of Hearing); (o)(1) & (2) (Timing of Decision).

NYSE Arca Equities Rules relating to disciplinary proceedings.<sup>36</sup>

### Conforming Changes

NYSE Arca Rule 3.2(b)(1)(B) describes the functions and authority of the NYSE Arca EBCC. Under subsection (b)(1)(B)(ii), this includes the authority to conduct hearings and render decisions in summary disciplinary actions and proceedings pursuant to Rule 10.5 (Hearing). The Exchange proposes to amend NYSE Arca Rule 3.2(b)(1)(B)(ii) to add a clause specifying that the EBCC can also conduct hearings and render decisions in expedited proceedings pursuant to Rule 13.9.

NYSE Arca Equities Rule 3.2(b)(1)(B), like NYSE Arca Rule 3.2(b)(1)(B), describes the functions and authority of the NYSE Arca Equities BCC that, under subsection (b)(1)(B)(ii) includes the authority to conduct hearings and render decisions in summary disciplinary actions and proceedings. The Exchange proposes to amend NYSE Arca Equities Rule 3.2(b)(1)(B)(ii) to specify that the NYSE Arca Equities BCC can also conduct hearings and render decisions in expedited proceedings pursuant to Rule 11.9.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>37</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>38</sup> in particular, because it is designed to promote just and equitable principles of trade, to foster cooperation and

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<sup>35</sup> See Rule 9559(a) (Applicability); (b) (Computation of Time); (c) (Stays); (d) (Appointment and Authority of Hearing Officer and/or Hearing Panel); (i) (Evidence); (j) (Additional Information); (k) (Record of Hearing); (l) (Record of Proceeding); (m) (Failure to Appear at a Pre-Hearing Conference or Hearing or to Comply with a Hearing Officer Order Requiring the Production of Information); (n) (Sanctions, Costs and Remands).

<sup>36</sup> See Rule 9559(e) (Consolidation or Severance of Proceedings).

<sup>37</sup> 15 U.S.C. 78f(b).

<sup>38</sup> 15 U.S.C. 78f(b)(5).

coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, to prevent fraudulent and manipulative acts and practices, and to protect investors and the public interest. In addition, the Exchange believes that the proposed rule change furthers the objectives of Section 6(b)(7) of the Act,<sup>39</sup> in particular, in that it provides fair procedures for the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange or a member thereof, including on a non-summary, but expedited, proceeding basis.<sup>40</sup>

The proposed changes will provide greater harmonization between NYSE Arca, NYSE Arca Equities, NYSE, and NYSE MKT rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for common members. As previously noted, the proposed rule text is substantially the same as the rule text in effect for NYSE and NYSE MKT. The proposed rule change would enhance the ability of NYSE Arca and NYSE Arca Equities to have a direct and meaningful impact on its regulatory program for enforcing the eligibility or qualification standards as set forth in their respective rules by providing a mechanism and procedure for suspending or cancelling trading privileges or suspending or barring a person from associating with a trading privileges holder or firm, as appropriate. As such, the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange further believes that the proposed hearing procedures in subsection (h) of

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<sup>39</sup> 15 U.S.C. 78f(b)(7).

<sup>40</sup> See 15 U.S.C. 78f(d)(1)-(3).

proposed Rules 11.9 and 13.9 are fair. The proposed procedural requirements are based on timeframes and requirements in Rule 9559, which governs expedited proceedings, including proceedings under Rule 9555, on the NYSE and NYSE MKT. The proposed Rules would provide the same time periods as Rule 9559 for when a hearing shall be held (30 days after a respondent subject to a notice files a written request for hearing); for when the date, time, and place of the hearing need to be announced (at least 21 days prior to the hearing); for producing to the respondent all documents considered in issuing the notice (not less than 14 days before the hearing); and for exchanging proposed exhibit and witness lists (not less than seven days before the hearing). In addition to these safeguards, the proposed Rules, like Rule 9559, would empower the body hearing the appeal to approve, modify or withdraw any and all sanctions, requirements, restrictions or limitations imposed by the notice and impose any fitting sanction, and would also require a written decision within a specific timeframe (60 days) from the close of the hearing. The Exchange believes that these incorporated procedural requirements would, similar to Rule 9559, provide adequate procedural protections to all parties and promote efficiency. The Exchange also believes that not adopting aspects of Rule 9559 that are not relevant to expedited proceedings under Rule 9555 also promotes a fair procedure for the denial of membership to any person seeking to become an Exchange permit holder, the barring of any person from becoming associated with an Exchange permit holder, and the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange or a permit holder thereof.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change is not intended to address competitive issues, but rather it is designed to (i) provide greater harmonization among NYSE Arca, NYSE Arca Equities, NYSE,

and NYSE MKT rules of similar purpose; and (ii) enhance the quality of the regulatory program for enforcing eligibility or qualification standards on the Exchange, resulting in less burdensome and more efficient regulatory compliance and facilitating performance of regulatory functions.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>41</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>42</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

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<sup>41</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>42</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

#### 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-2016-102 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-2016-102. 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 such 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-2016-102, 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>43</sup>

Robert W. Errett  
Deputy Secretary

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<sup>43</sup> 17 CFR 200.30-3(a)(12).