

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-81419; File No. SR-NYSEArca-2017-40)

August 17, 2017

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, in Connection with the Proposed Merger of Its Wholly Owned Subsidiary NYSE Arca Equities, Inc. With and Into the Exchange

I. Introduction

On June 2, 2017, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change in connection with the proposed merger of the Exchange’s wholly-owned subsidiary NYSE Arca Equities Inc. (“NYSE Arca Equities”) with and into the Exchange. The proposed rule change would amend: (1) Article III, Sections 3.01, 3.02 and 4.02 of the Amended and Restated NYSE Arca, Inc. Bylaws (“Bylaws”); (2) certain rules of the Exchange to facilitate the integration of NYSE Arca Equities and create a single rulebook; (3) the NYSE Options Fee Schedule (“Options Fee Schedule”); and (4) the Schedule of Fees and Charges for Exchange Services (“Listing Fee Schedule”). In addition, the proposed rule change would remove the NYSE Arca Equities organizational documents, the rules of NYSE Arca Equities, and the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services (“Equities Fee Schedule”) from the Exchange’s rules and adopt a new fee schedule for the Exchange’s equities market (“NYSE Arca Equities Fee Schedule”). The proposed rule change was published for comment in the

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

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

Federal Register on June 20, 2017.<sup>3</sup> The Commission received no comment letters on the proposed rule change.

On August 11, 2017, the Exchange filed Amendment No. 1 to the proposed rule change. On August 15, 2017, the Exchange withdrew Amendment No. 1 and filed Amendment No. 2 to the proposed rule change.<sup>4</sup> In Amendment No. 2, the Exchange proposes to: (1) reflect changes to its proposed rule text that result from other filings that became effective after the Exchange filed the instant proposed rule change; (2) make clarifying changes to the proposed text of NYSE Arca Rule 3.2(b)(2)(C)(ii) regarding the Nominating Committee; and (3) correct typographical errors or revise cross-references in the proposed rule text. In addition, instead of proposing to delete the Equities Fee Schedule and to adopt a new fee schedule for the equities market, the Exchange proposes to amend the existing Equities Fee Schedule.

The Commission is publishing this notice of Amendment No. 2 to the proposed rule change and is approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

## II. Description of the Proposed Rule Change, as Modified by Amendment No. 2

Currently, the Exchange operates its options market directly and has delegated certain responsibilities for operating its equities market to NYSE Arca Equities, its wholly-owned

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<sup>3</sup> See Securities Exchange Act Release No. 80929 (June 14, 2017), 82 FR 28157 (“Notice”).

<sup>4</sup> In Amendment No. 2, the Exchange proposes, among other things, to amend the proposed rule change to reflect changes to the rules of NYSE Arca Equities, the Options Fee Schedule, and the Equities Fee Schedule that occurred after the Exchange had filed the proposed rule change. See Section II.D., *infra*, for a more detailed description of Amendment No. 2. Amendment No. 2 is available at: <https://www.sec.gov/comments/sr-nysearca-2017-40/nysearca201740-2221802-160732.pdf>.

subsidiary.<sup>5</sup> The Exchange maintains two rulebooks, the NYSE Arca rules for its options market and the NYSE Arca Equities rules for its equities market.<sup>6</sup> The Exchange proposes to merge NYSE Arca Equities with and into the Exchange (“Merger”). After the Merger, the Exchange would directly operate both the options and equities markets and would maintain a single rulebook.

To effect these changes, the Exchange proposes to: (1) terminate the existing delegation to NYSE Arca Equities and remove the NYSE Arca Equities organizational documents and NYSE Arca Equities rulebook from the Exchange’s rules; (2) amend the Exchange’s corporate governance structure to integrate the representation and oversight of Equity Trading Permit holders (“ETP Holders”) and amend the composition requirements of the Exchange’s Board of Directors (“Board”); (3) integrate the current NYSE Arca Equities rules into the NYSE Arca rules; and (4) revise its fee schedules to reflect the Merger. The Exchange proposes that these changes would become operative upon the completion of the Merger. The Exchange has stated that it would complete the Merger following the approval of the instant proposed rule change, on a date to be determined by the Board.<sup>7</sup> The proposed changes to the Exchange’s Bylaws, rules and fee schedules are described in further detail below.

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<sup>5</sup> NYSE Arca Equities Rule 3.4 states that the Exchange, “as a self-regulatory organization registered with the Securities and Exchange Commission pursuant to Section 6 of the Exchange Act,” has ultimate responsibility for NYSE Arca Equities.

<sup>6</sup> There are separate fee schedules and organizational documents for NYSE Arca Equities.

<sup>7</sup> Although the Exchange states that it intends to complete the Merger following the approval of the proposed rule change, the Exchange confirms that the proposed amendments to its nomination and election processes with respect to the Non-Affiliated Director positions would be implemented in connection with its next annual meeting, consistent with Section 3.02(c) and (e) of its Bylaws. See Amendment No. 2, supra note 4. See also Section II.B., infra, for a discussion of the proposed changes to the Exchange’s governance.

A. Termination of Delegation and Removal of NYSE Arca Equities Rules

To effect the Merger, the Exchange proposes to terminate the delegation to NYSE Arca Equities of the operation of its equities market.<sup>8</sup> Accordingly, the Exchange proposes to remove NYSE Arca Equities Rules 14.1 and 14.2, which set forth the delegation to NYSE Arca Equities and the authority and functions retained by the Exchange, from its rules. The Exchange proposes to remove from its rules the NYSE Arca Equities corporate governance documents (the NYSE Arca Equities Certificate of Incorporation and the NYSE Arca Equities Bylaws) and the separate NYSE Arca Equities rulebook and would amend the Equities Fee Schedule<sup>9</sup> and the Listing Fees Schedule. The Exchange proposes that rules governing NYSE Arca Equities would be incorporated into its consolidated rulebook, as further described herein.

B. Proposed Changes to the Exchange's Governance

The Exchange proposes to amend its Bylaws and rules to incorporate the direct representation by and oversight of Equity Trading Permit Holders ("ETP Holders") into its governance structure (which currently references Options Trading Permit Holders ("OTP Holders")), and to make other changes to its governance requirements. Specifically, the Exchange proposes to make changes to its Board's composition and oversight authority; to amend its nominating process; and to modify the composition of various committees of the Board and the Exchange. The provisions pertaining to these aspects of the Exchange's corporate governance structure are contained primarily in Article III, Section 3 of its Bylaws and Exchange Rule 3.

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<sup>8</sup> The Exchange delegated certain responsibilities for operating its equities market to NYSE Arca Equities, but retained ultimate responsibility for the equities market (including the responsibility to ensure the fulfillment of statutory and self-regulatory obligations).

<sup>9</sup> See Amendment No. 2, supra note 4.

1. Board Authority and Composition Changes

The Exchange proposes to amend Article III, Section 3.01(b) of the Bylaws, which describes the powers of the Board, to add to the Board's authority matters pertaining to ETP Holders. Under this proposed amendment, the Bylaws would define the terms "Options Trading Permit Holders" and "Equities Permit Trading Holders" and would collectively refer to both of these categories as "Permit Holders."

In addition, the Exchange proposes to amend Article III, Section 3.02(a) of its Bylaws to modify the requirement relating to the nomination of directors by the Exchange's members.<sup>10</sup> Currently, Section 3.02(a) provides that at least twenty percent (20%) of the Board's directors shall consist of individuals nominated by the trading permit holders, with at least one director nominated by the Equity Trading Permit Holders of NYSE Arca Equities and one director nominated by the Permit Holders (i.e., the Options Trading Permit Holders) of the Exchange. The proposed rule change would eliminate this compositional requirement and instead would add a definition of "Non-Affiliated Directors" to refer to the directors to be nominated collectively by the Permit Holders,<sup>11</sup> and would provide that all Permit Holders nominate the Non-Affiliated Directors as part of a single process.<sup>12</sup> With respect to the provision relating to the requirement

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<sup>10</sup> The Exchange does not propose to modify the requirement in Article III, Section 3.02(a) that at least fifty percent (50%) of the directors be persons from the public and not be, or be affiliated with, a broker-dealer in securities or employed by, or involved in any material business relationship with, the Exchange or its affiliates.

<sup>11</sup> The proposed amendments to Article III, Section 3.01(a) of the Bylaws would define the term "Non-Affiliated Directors" to refer to the directors nominated by the Permit Holders.

<sup>12</sup> The Exchange represents that its proposed process is comparable to existing processes for nominating directors by other national securities exchanges that operate options and equities markets, specifically NYSE MKT LLC (n/k/a NYSE American LLC), The NASDAQ Stock Market LLC, and Nasdaq BX, Inc. See Notice, supra note 3, at 28158-59.

that least 20 percent (20%) of the Board’s directors be Non-Affiliated Directors, the Exchange proposes that if a whole number does not result, the number of Non-Affiliated Directors to be nominated and selected by the Permit Holders would be rounded up to the next whole number.

The Exchange also proposes to make other changes to the Board’s composition that the Exchange states would be consistent with similar provisions of its affiliated national securities exchanges.<sup>13</sup> Specifically, the Exchange proposes to remove the requirement that the Board must consist of between eight and twelve directors, as determined by the Board. The Exchange proposes instead that its holding member, NYSE Group, Inc. (“NYSE Group”) would determine the number of directors to serve on the Board, subject to the other Board composition requirements in Section 3.02(a), and that there no longer would be a minimum or maximum number of required directors.

## 2. Nomination Process

The Exchange proposes corresponding changes to current Rule 3.2(b)(2), relating to the Nominating Committee, to integrate the role of ETP Holders and OTP Holders (or their Allied Persons or their Associated Persons) into a unitary process for the nomination of the Non-Affiliated Directors.<sup>14</sup> The proposed amendments to Rule 3.2(b)(2) would: (i) add the representation of ETP Holders to the nomination and petition processes regarding Non-Affiliated Directors; (ii) revise various other provisions of the current rule that refer solely to OTP Holders to include references to ETP Holders; and (iii) make other changes to reflect the proposed unified process for the nomination of the Non-Affiliated Directors by the Permit Holders.

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<sup>13</sup> The Exchange’s affiliates include the New York Stock Exchange LLC, NYSE MKT LLC (n/k/a NYSE American LLC), and NYSE National, Inc. See Notice, supra note 3, at 28158.

<sup>14</sup> Rule 3.2(b)(2) governing the Nominating Committee is proposed to be redesignated as Rule 3.2(b)(3).

Current Rule 3.2(b)(2)(A) contains the composition requirements for the Nominating Committee, which currently nominates the director selected by the OTP Holders to the Board. The current composition of the Nominating Committee consists of six (6) OTP Holders or Allied Persons or Associated Persons of an OTP Firm.<sup>15</sup> Under the proposal, the composition of the Nominating Committee would be amended to consist of three (3) OTP Holders or Allied Persons or Associated Persons of an OTP Firm, and three (3) ETP Holders or Allied Persons or Associated Persons of an ETP Holder. The Exchange also proposes to amend current Rule 3.2(b)(2)(C)(ii) to allow the Nominating Committee to publish the names of one (1) of more OTP Holder(s) or Allied Person(s) or Associated Person(s) of an OTP Firm or ETP Holder(s) or Allied Person(s) of Associated Person(s) of an ETP Holder as its nominee(s) for Non-Affiliated Directors of the Board.<sup>16</sup>

Because the proposal would eliminate the two categories of directors currently nominated by the OTP Holders and ETP Holders and would provide for a unitary process for nominating Non-Affiliated Directors, the Exchange proposes to: (i) require the Nominating Committee to name all Non-Affiliated Director nominees that would be required under the revised rule;<sup>17</sup> (ii) delete a provision regarding the procedure for determining whether an additional permit holder representative must be an ETP Holder or an OTP Holder, if the Board were composed of more than 10 individuals; and (iii) require that the Nominating Committee name sufficient nominees so that at least 20 percent (20%) of the directors are Non-Affiliated Directors.

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<sup>15</sup> See current Rule 3.2(b)(2)(A).

<sup>16</sup> Current Rule 3.2(b)(2) provides that only an OTP Holder or Allied Person or Associated Person of an OTP Firm could be a nominee for a Board seat. See Rule 3.2(b)(2)(C)(ii).

<sup>17</sup> Proposed Rule 3.2(b)(2)(C)(ii) would require the Nominating Committee to nominate one or more nominees so that at least twenty percent (20%) of the Directors consist of Non-Affiliated Directors.

The Exchange also proposes to amend its rules to incorporate ETP Holders into the petition process for candidates for the position of Non-Affiliated Director<sup>18</sup> and into the process for contested nominations (that is, the Exchange’s process for selecting a nominee when the number of nominees exceeds the number of available Non-Affiliated Director positions).<sup>19</sup> The Exchange proposes to have the Permit Holders, rather than just the OTP Holders, participate in these processes.<sup>20</sup>

Finally, the Exchange proposes to remove obsolete rule text from Rule 3.2(b)(C)(i).<sup>21</sup>

### 3. Board and Permit Holder Committees

The Exchange proposes to amend its Bylaws and rules to integrate ETP Holders and NYSE Arca Equities committees into the Exchange committee structure.

The Exchange proposes to revise Exchange Rule 3.1, which governs committees consisting partly or entirely of directors of the Exchange (that is, Board committees), and Exchange Rule 3.2, which governs committees consisting of people other than Exchange directors, to include the representation of ETP Holders. To accomplish this integration, the Exchange proposes to replace references to “Options Committee” and “Options Committees” with “Exchange Committee” and “Exchange Committees,” respectively, in Rules 3.1 and 3.2(a). The Exchange also proposes to add ETP Holders to the list of persons eligible for appointment to

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<sup>18</sup> See proposed Rule 3.2(b)(3)(C)(ii).

<sup>19</sup> See proposed Rule 3.2(b)(3)(C)(iii).

<sup>20</sup> With respect to the contested nomination process in current Rule 3.2(b)(2)(C)(iii), the Exchange proposes to revise the provision for calculating limits on the percentage of votes that can be provided by a given Permit Holder and its associated OTP Firm to include in the calculation any ETP Holder who is deemed an affiliate of the relevant Permit Holder.

<sup>21</sup> The current rule sets forth the membership of the initial Board at the time of the Exchange’s reorganization and the amended rule would be designated as “Reserved.”



the Exchange Committees, as regular or alternate members, in Rules 3.2(a)(8) and 3.2(a)(9), respectively.

In addition, the Exchange proposes to add the current NYSE Arca Equities Business Conduct Committee (“BCC”) as an Exchange Committee in new Rule 3.2(b)(2) and include the same rule text that is in current NYSE Arca Equities Rule 3.2(b)(1), except that the references to current NYSE Arca Equities rules would be updated with the corresponding references to the rules in the proposed consolidated rulebook,<sup>22</sup> and references to the “Board,” which in the current rule means the board of directors of NYSE Arca Equities, would become references to the Exchange’s Board. Under the proposal, disciplinary proceedings of NYSE Arca Equities involving ETP Holders and associated persons would continue to be heard by the BCC, while disciplinary proceedings of NYSE Arca involving OTP Holders, OTP Firms, and associated persons would continue to be heard by its current disciplinary committee, the Ethics and Business Conduct Committee (“EBCC”). The Exchange also proposes to add the EBCC to the list of Exchange committees in Article IV, Section 4.02 of the Bylaws (the BCC is currently listed in this Bylaws section) and to remove obsolete references to the “Permit Holder Advisory Committee.”

Finally, the Exchange proposes to make conforming changes to subparagraphs (A) and (B) of Rule 3.3(a)(2) regarding the composition of the Committee for Review (“CFR”) and the CFR Appeals Panel.<sup>23</sup>

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<sup>22</sup> Specifically, references to Rules 4, 10, and 11.9 would be updated with references to Rules 4-E, 10, and 13.9, respectively.

<sup>23</sup> The Exchange proposes to use the term “the Exchange” in place of “NYSE Arca Equities” and the term “Non-Affiliated Director(s)” to refer to directors who represent the Permit Holders.

4. NYSE Arca, L.L.C. and Archipelago Securities, L.L.C.

The Exchange proposes to add new Rule 3.12 to its rulebook, which would address access to and the status of the books, records, premises, officers, directors, agents, and employees of NYSE Arca, L.L.C. and its broker-dealer affiliate, Archipelago Securities, L.L.C. (“Arca Securities”), to the extent that the business activities of Arca Securities are deemed a facility of the Exchange. Proposed Rule 3.12 would be substantially the same as current NYSE Arca Equities Rule 14.3, except that the term “the Exchange” would replace several references to NYSE Arca and NYSE Arca Equities, and one reference to “NYSE Arca Equities” would be deleted.

5. Other Conforming Changes to Rule 3

Finally, the Exchange proposes to make other conforming changes in other provisions of Rule 3. Specifically, in Rules 3.7 (Dues, Fees and Charges), 3.8 (Liability for Payment), and 3.10 (Certain Relationships), the Exchange proposes to add ETP Holders to existing references to OTP Holders and OTP Firms.

C. Integration of NYSE Arca Equities Rules into the NYSE Arca Rules

The Exchange currently maintains two rulebooks, the NYSE Arca rules for its options market and the NYSE Arca Equities rules for its equities market. In connection with the Merger and the termination of the Delegation, the Exchange proposes to integrate the two sets of rules into a single rulebook. The resulting rulebook would have three types of rules: (i) rules that apply to both markets; (ii) rules that apply only to the options market, to be indicated by an “-O” appended to the end of the rule number; and (iii) rules that apply only to the equities market, to be indicated by an “-E” appended to the end of the rule number.

The Exchange proposes certain changes to various rules, as summarized below, that are intended to implement the Merger and the integration of its options and equities rules.<sup>24</sup> The Exchange represents that, except as otherwise stated in its proposal, the proposed changes are not intended to change the substance of the NYSE Arca or NYSE Arca Equities rules, but are organizational in nature.<sup>25</sup>

In addition to the changes to specific rules noted below, the Exchange proposes certain changes that would apply to the entire set of Exchange rules. Specifically, the Exchange proposes to update cross-references to various rules to reflect proposed revisions to the titles and the renumbering of various rules<sup>26</sup> and to update references to defined terms to reflect proposed changes to those defined terms.<sup>27</sup>

#### 1. General Rules

NYSE Arca Rules 0 (Regulation of the Exchange, OTP Holders, OTP Firms and ETP Holders), 1 (Definitions), 2 (Trading Permits), and 3 (Organization and Administration) would be grouped under the heading “General Rules” and would apply to both options and equities markets. These rules would contain changes based on the incorporation of NYSE Arca Equities

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<sup>24</sup> These proposed changes are described in greater detail in the Notice, supra note 3, at 28161-68.

<sup>25</sup> According to the Exchange, the proposed organization of its rules would be similar to that of its affiliate NYSE MKT (n/k/a NYSE American LLC), which has rules of general application and rules specific to its equity and options markets. See Notice, supra note 3 at 28161.

<sup>26</sup> For example, a cross reference to “NYSE Arca Equities Rule 5.2(j)(6)” would be amended to “NYSE Arca Rule 5.2-E(j)(6).” References to renumbered rules also would be updated. For example, the Exchange proposes to add Commentary .01 from NYSE Arca Equities Rule 2.17 to Rule 2.18 and the references to “Rule 2.17” in Commentary .01 would be updated to “Rule 2.18.”

<sup>27</sup> Specifically, the Exchange proposes to replace references to the “Corporation” in the existing rules with references to the “Exchange.”

Rules 0 through 3. Specifically, the Exchange proposes the following changes to Rules 0, 1, and 2.<sup>28</sup>

For Exchange Rule 0, which references the Exchange's Regulatory Services Agreement with FINRA, the Exchange proposes to include "and ETP Holders" in the title because both sets of rules currently have the same rule text for Rule 0.

For Exchange Rule 1, which contains definitions used in the Exchange rules, the Exchange proposes to: (1) add definitions from the NYSE Arca Equities rules that are unique to the equities market; (2) amend definitions that are common to both markets to reflect their common application, either by incorporating references to ETP Holders and the equities market or harmonizing differences between common terms currently used in both sets of rules; and (3) update the definitions to reflect changes contained elsewhere in the Exchange's proposal.

For Exchange Rule 2, which governs trading permits, the Exchange proposes to: (1) amend the rule to clarify its application to ETP Holders and OTP Holders and OTP Firms; (2) add language identifying certain provisions that apply only to OTP Holders and OTP Firms; (3) incorporate certain defined terms and provisions that are unique to ETP Holders from NYSE Arca Equities Rule 2, along with language clarifying that those provisions apply only to ETP Holders; (4) move NYSE Arca Rule 9.17 (Books and Records) into a proposed new rule, Rule 2.28, which corresponds with NYSE Arca Equities Rule 2.24 (ETP Books and Records); and (5) insert "Exchange" in lieu of an erroneous reference to "Corporation."

## 2. Options Rules

As noted in Section II.C. above, the Exchange proposes to indicate those rules that apply solely to the options market by appending an "-O" at the end of the rule number. NYSE Arca

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<sup>28</sup> The proposed changes to Rule 3 are addressed in Part II.B., above. For a detailed description of the proposed changes to Rule 3, see Notice, supra note 3.

Rules 4-O (Capital Requirements, Financial Reports, Margins—Options), 5-O (Options Contracts Traded on the Exchange), 6-O (Options Trading), 7-O (General Options Trading Rules), 8-O (Reserved), and 9-O (Conducting Business with the Public—Options) (collectively, the “Options Rules”) would be grouped under the heading “Options Rules” and would apply to only the options market.

The Exchange proposes that the Options Rules would be substantially the same as current NYSE Arca Rules 4 through 9, except that the Exchange proposes to: (1) revise the titles of these rules to reflect that they would apply solely to options; (2) indicate that Rule 9.17 is “Reserved;”<sup>29</sup> and (3) correct an erroneous cross-reference in Rule 4.16(d)(9)(G) (Other Provisions).

### 3. Equities Rules

As noted in Section II.C. above, the Exchange proposes to indicate those rules that apply solely to the equities market by appending an “-E” at the end of the rule number. NYSE Arca Rules 4-E (Capital Requirements, Financial Reports, Margins—Equities), 5-E (Equities Listings), 6-E (Order Audit Trail System), 7-E (Equities Trading), 8-E (Trading of Certain Equity Derivatives), and 9-E (Conducting Business with the Public—Equities) (collectively, the “Equities Rules”) would be grouped under the heading “Equities Rules” and would apply only to the equities market.<sup>30</sup>

These proposed new Equities Rules would be substantially the same as current NYSE Arca Equities Rules 4 through 5, 7 through 9, the Conduct Rules, and the Order Audit Trail

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<sup>29</sup> As noted in Section II.C.1., supra, the Exchange would move this provision to proposed Rule 2.28.

<sup>30</sup> The Exchange proposes that NYSE Arca Equities Rule 6 (Business Conduct) and Rule 5220 (Disruptive Quoting and Trading Activity Prohibited) would be integrated into Exchange Rule 11 (Business Conduct). Those proposed changes are further described in Section II.C.4., infra, which describes the proposed changes to Rule 11.

System Rules. However, the Exchange proposes several changes to: (1) modify the organization of those rules;<sup>31</sup> (2) delete references to the Delegation or the pre-Merger arrangement between NYSE Arca Equities and the Exchange; (3) remove obsolete provisions; (4) update these rules to reflect the appropriate defined terms as result of the changes in the Exchange’s proposal; and (5) correct cross-references.<sup>32</sup>

#### 4. Disciplinary and Miscellaneous Rules

NYSE Arca Rules 10 (Disciplinary Proceedings, Other Hearings and Appeals), 11 (Business Conduct), 12 (Arbitration), 13 (Cancellation, Suspension and Reinstatement), and 14 (Liability of Directors and Exchange) would apply to the options and equities markets and would be grouped under the heading “Disciplinary and Miscellaneous Rules.” These rules would contain changes based on the incorporation of NYSE Arca Equities Rules 6, 10 through 13, and 5220, as further described herein.

Rule 10 (Disciplinary Proceedings, Other Hearings, and Appeals). The Exchange proposes to revise Rule 10 to incorporate NYSE Arca Equities Rule 10, which sets forth the equivalent requirements regarding disciplinary proceedings, hearings and appeals for ETP Holders and their associated persons. As a result, a single set of rules would encompass all

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<sup>31</sup> As further described in the Notice, supra note 3, the Exchange proposes that its Conduct Rules and Order Audit Trail System Rules would be located in proposed Rules 9-E and 6-E, respectively. Currently, these rules are located in NYSE Arca Equities Rules 2010 through 5320 and NYSE Arca Equities Rules 7410 through 7470, respectively.

<sup>32</sup> The proposed rule change also would incorporate into the Exchange’s rules the amended versions of proposed Rules 7.10-E, 7.11-E, 7.31-E, and 7.35-E, which have been approved but are not yet operative. However, under the proposal, only the currently operative versions of these rules would appear in the Exchange rulebook. A notice disclosing that an amended but not yet operative version of the rule exists, along with links to the amended version of the rule and the relevant approval order, would appear in the preamble to the rule text for each of these proposed rules. The Exchange intends to announce by Trader Update when the amended version of the rule becomes operative. See Notice, supra note 3, at 28165.

disciplinary proceedings and appeals. Specifically, the Exchange proposes to amend the rule to: (1) clarify its application to ETP Holders, OTP Holders, OTP Firms, and associated persons of ETP Holders and OTP Firms; (2) incorporate references, where appropriate, to the BCC, which is the NYSE Arca Equities disciplinary committee; (3) incorporate certain procedural provisions that currently are contained only in NYSE Arca Equities Rule 10 and harmonize the disciplinary procedures for the equities and options markets; (4) incorporate the equities minor rule plan, including the associated fine schedule, into Rule 10; and (5) make various non-substantive revisions to the rule, including adding an “-O” to references to the options rules.

The Exchange also proposes to revise Rule 10.8 to clarify that the Committee for Review (“CFR”), and not the full Board, would be acting with respect to the Review Board. The CFR is the Board committee that has delegated authority to consider appeals on behalf of the Board and that appoints the Review Board under the rule. The Exchange further proposes to amend Rule 10.8 to permit the Complainant or Respondent to request that the Board review a decision of the Review Board.

Rule 11 (Business Conduct). The Exchange proposes to revise Rule 11 to incorporate NYSE Arca Equities Rule 6 (Business Conduct) and NYSE Arca Equities Rule 5220. Specifically, the Exchange proposes to: (1) amend Rule 11 to clarify its application to both OTP and ETP Holders, where appropriate; and (2) incorporate business conduct standards from the NYSE Arca Equities rules that are unique to ETP Holders, including the full text of current NYSE Arca Equities Rules 6.7 (Trading Ahead of Research Reports), 6.9 (Taking or Supplying Securities to Fill Customer’s Order), and 6.10 (ETP Holders Holding Options).

Rule 12 (Arbitration). The Exchange proposes to revise Rule 12 (Arbitration) to incorporate NYSE Arca Equities Rule 12 (Arbitration). To implement the change, the Exchange

proposes to amend the existing rule to reference ETP Holders and to make other minor updating changes.

Rule 13 (Cancellation, Suspension and Reinstatement). The Exchange proposes to revise Rule 13 to incorporate NYSE Arca Equities Rule 11 (Cancellation, Suspension and Reinstatement). To implement the change, the Exchange proposes to amend the existing rule to: (1) clarify its application to both ETP and OTP Holders; (2) add a provision to Rule 13.2 (Procedures for Suspension) that is unique to ETP Holders; (3) delete Rule 13.2(a)(2)(E) as obsolete;<sup>33</sup> (4) to incorporate references to the BCC, where appropriate; and (5) make minor updating changes.

Rule 14 (Liability of Directors and Exchange). The Exchange proposes to revise Rule 14 to incorporate NYSE Arca Equities Rule 13 (Liability of Directors and Corporation). To effect this change, the Exchange proposes to amend the rule to clarify its application to both ETP and OTP Holders and to make other minor updating changes.

#### 5. Fee Schedules

Initially, the Exchange proposed to delete the “Equities Fee Schedule” from the rules of the Exchange, and to adopt the “NYSE Arca Equities Fee Schedule” as the new fee schedule for the Exchange’s equities market.<sup>34</sup> As noted in Section II.D., below, which describes in more detail Amendment No. 2, the Exchange proposes to: (1) retain the existing Equities Fee Schedule; (2) amend it to reflect certain proposed changes noted in the original filing; and (3) include certain updating revisions. In addition, the Exchange proposes to make changes to the

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<sup>33</sup> See Securities Exchange Act Release No. 67435 (July 13, 2012), 77 FR 42533, 42534 n.12 (July 19, 2012).

<sup>34</sup> The Exchange does not propose to amend the NYSE Arca Equities Proprietary Market Data Fees, which does not reference NYSE Arca Equities, Inc.



Options Fee Schedule and Listing Fee Schedule to update cross-references and terminology used therein as a result of the other changes in the proposed rule change.

D. Description of Amendment No. 2

On August 15, 2017, the Exchange filed partial Amendment No. 2 to the proposed rule change.<sup>35</sup> In Amendment No. 2, the Exchange proposes to revise rule text to: (1) reflect changes to various rules that resulted from other Exchange filings and that were effective after the Exchange filed the instant proposed rule change; (2) make clarifying revisions to current NYSE Arca Rule 3.2(b)(2)(C)(ii) (Options Committees), which is the Exchange's rule regarding the Nominating Committee; and (3) make changes to correct typographical errors or to revise cross-references in the proposed rule text.<sup>36</sup> In addition, as discussed in more detail below, the Exchange proposes to amend the Equities Fee Schedule by replacing Exhibit 5E of the proposed rule change with new Exhibit 5E and by removing Exhibit 5J from the proposed rule change.<sup>37</sup> Accordingly, Amendment No. 2 would amend NYSE Arca Rules 3.2(b)(3)(C)(ii), 5.32-O(f)(3) and (4), 6.4-O Commentary .07(c), 6.7470-E(c),<sup>38</sup> 7.4-E and 7.4T-E,<sup>39</sup> 7.16-E(f)(5)(A),

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<sup>35</sup> See Amendment No. 2, supra note 4.

<sup>36</sup> NYSE Arca Rules 5.32-O(f)(3) and (4) (updating cross-reference), 6.4-O Commentary .07(c) (updating cross-reference), and proposed NYSE Arca Rule 7.16-E(f)(5)(A) (correcting typographical error).

<sup>37</sup> See Amendment No. 2, supra note 4, Exhibit 5E.

<sup>38</sup> Securities Exchange Act Release No. 80903 (June 12, 2017), 82 FR 27732 (June 16, 2017) (SR-NYSEArca-2017-66).

<sup>39</sup> Securities Exchange Act Release No. 81325 (August 7, 2017), 82 FR 37615 (August 11, 2017) (SR-NYSEArca-2017-82).

7.37-E(b)(7)(C),<sup>40</sup> 7.37-E(d),<sup>41</sup> 7.38-E(b)(1),<sup>42</sup> and 7.44-E(m)<sup>43</sup> in Exhibit 5B and NYSE Arca Equities Rules 7.37(b)(7)(C)<sup>44</sup> and (d),<sup>45</sup> 7.38(b)(1),<sup>46</sup> 7.44(m),<sup>47</sup> 7.46 Commentary .70,<sup>48</sup> 13.2<sup>49</sup> and 7470(c)<sup>50</sup> in Exhibit 5I of the proposed rule change. In addition, Amendment No. 2 would amend in Exhibit D of the proposed rule change the effective date of the Options Fee Schedule and note 8 to the Billing Disputes provision of the Options Fee Schedule.<sup>51</sup>

Finally, Amendment No. 2 would remove Exhibit 5J and replace current Exhibit 5E of the proposed rule change with new Exhibit 5E. Proposed new Exhibit 5E reflects the Exchange's proposal to amend the existing Equities Fee Schedule rather than adopting a new fee schedule. Amendment No. 2 would: (1) amend the title of the Equities Fee Schedule to be consistent with the title format of the Options Fee Schedule; (2) update cross references to cite to

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<sup>40</sup> Securities Exchange Act Release No. 81303 (August 3, 2017), 82 FR 37245 (August 9, 2017) (SR-NYSEArca-2017-83).

<sup>41</sup> Securities Exchange Act Release No. 81061 (June 30, 2017), 82 FR 31642 (July 7, 2017) (SR-NYSEArca-2017-70).

<sup>42</sup> Securities Exchange Act Release No. 81142 (July 13, 2017), 82 FR 33192 (July 19, 2017) (SR-NYSEArca-2017-73).

<sup>43</sup> Securities Exchange Act Release No. 80851 (June 2, 2017), 82 FR 26722 (June 8, 2017) (SR-NYSEArca-2017-63).

<sup>44</sup> See supra note 40.

<sup>45</sup> See supra note 41.

<sup>46</sup> See supra note 42.

<sup>47</sup> See supra note 43.

<sup>48</sup> Securities Exchange Act Release No. 80651 (May 10, 2017), 82 FR 22600 (May 16, 2017) (SR-NYSEArca-2017-49).

<sup>49</sup> Securities Exchange Act Release Nos. 80866 (June 6, 2017), 82 FR 26967 (June 12, 2017) (proposed rule change) and 81197 (July 24, 2017), 82 FR 35244 (July 28, 2017) (approval order) (SR-NYSEArca-2017-46).

<sup>50</sup> See supra note 38.

<sup>51</sup> Securities Exchange Act Release No. 81268 (July 31, 2017), 82 FR 36516 (August 4, 2017) (SR-NYSEArca-2017-79).

the proposed NYSE Arca rules for the equities market by adding “-E” to the rule numbers; (3) update cross references to NYSE Arca Equities Rules 1.1(c) and 1.1(d) in footnotes 8 and 9 to NYSE Arca Rules 1.1(b) and (c) respectively; (4) correct the cross-references in the table under “Market Data Revenue Sharing Credit” from NYSE Arca Equities Rule 7.31(s) to NYSE Arca Rule 7.31-E(g); (5) remove the heading for “NYSE Arca Marketplace: Crowd Participant (‘CP’) Program Payments” table and text as they are now obsolete;<sup>52</sup> (6) revise the heading “NYSE Arca Equities: Regulatory Fees” to state “Regulatory Fees”; and (7) in General Note 1 under “Co-Location Fees,” replace the word “equities” in the “NYSE Arca Equities Fee Schedule” with “Options” as a correction.

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>53</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>54</sup> which requires an exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange. In addition, the Commission finds that the proposed rule change is also consistent with Section 6(b)(3) of the Act,<sup>55</sup> which requires that the rules of the exchange assure a fair

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<sup>52</sup> The Exchange notes in Amendment No. 2 that NYSE Arca Equities Rule 7.25 expired on June 23, 2016. See Amendment No. 2, supra note 4.

<sup>53</sup> In approving this proposed rule change, the Commission has considered the proposed rules’ impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>54</sup> 15 U.S.C. 78f(b)(1).

<sup>55</sup> 15 U.S.C. 78f(b)(3).

representation of its members in the selection of its directors and administration of its affairs and provide 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; Section 6(b)(5) of the Act,<sup>56</sup> which requires, among other things, that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers or dealers; and Section 6(b)(7) of the Act,<sup>57</sup> which requires, among other things, that the rules of an exchange provide a fair procedure for the disciplining of members and persons associated with members, 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.

In connection with the Merger, the Exchange proposes to terminate the delegation to NYSE Arca Equities of the operation of its equities market and to remove the NYSE Arca Equities organizational documents from the Exchange's rules. As a result of the Merger, the Exchange would directly operate the equities market facility of the Exchange, while continuing to bear the responsibility to ensure the fulfillment of its statutory and self-regulatory organization responsibilities.<sup>58</sup> The Exchange also proposes to amend the NYSE Arca Bylaws and rules to incorporate the direct oversight of and participation by ETP Holders into the NYSE Arca governance structure. The Exchange represents that the independent regulatory oversight committee ("ROC") of the Board would continue to oversee the Exchange's regulatory and self-

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<sup>56</sup> 15 U.S.C. 78f(b)(5).

<sup>57</sup> 15 U.S.C. 78f(b)(7).

<sup>58</sup> See Notice, supra note 3, at 28168.

regulatory organization responsibilities with regard to both the equities and options markets and the Exchange's regulatory department would continue to carry out its regulatory functions with respect to both markets under the oversight of the independent ROC.<sup>59</sup> The Commission believes that these proposed changes, which would allow the Exchange to directly operate its equities market along with its options market, is consistent with Section (b)(1) of the Act. The Commission notes that the Exchange's restructuring proposal also is consistent with similar proposed rule changes approved by the Commission for other national securities exchanges.<sup>60</sup>

In addition, the Exchange proposes several changes to its Board composition requirements and the nomination process for the directors representing Permit Holders (i.e., the Non-Affiliated Directors). Specifically, the Exchange proposes to amend its Bylaws to remove the requirement that the Board consist of between eight and twelve directors and to provide that the Exchange's holding member, NYSE Group, (rather than the Board) would determine the size of the Board. The Exchange also proposes to modify the manner in which it fulfills the requirement that at least 20% of the directors would be nominated by the Permit Holders by providing that such directors would be nominated by OTP Holders and ETP Holders in a single vote, rather than the current two-step voting processes. The Exchange further proposes to amend the 20% requirement regarding Board representation by Permit Holders to provide that if the calculation representing 20% of directors is a fraction, the number of Non-Affiliated Directors to be nominated by the Permit Holders must be rounded up to the next whole number, thereby ensuring that the number of directors nominated by the Permit Holders never would constitute less than 20% of the directors. In addition, the Exchange proposes to provide for the

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<sup>59</sup> Id.

<sup>60</sup> See Notice, supra note 3, at 28158-59.

representation of ETP Holders in the Exchange's committee structure, including its nominating committee, in a manner consistent with the representation of OTP Holders.

The Commission believes the proposed changes to the Exchange's Board composition, nomination process, and committee structure are consistent with Section 6(b)(1) and 6(b)(3) of the Act. The Commission notes that the proposal to allow NYSE Group to determine the size of the Board is consistent with previous proposed rule changes approved by the Commission that allow discretion as to the size of exchange boards.<sup>61</sup> The Commission also notes that, under the proposal, such discretion would not alter the existing requirement that at least 20% of the directors would be nominated by the Permit Holders. Furthermore, the proposal would enhance the 20% requirement by specifying that the calculation representing 20% of the directors would be rounded up to the nearest whole number, if it otherwise would result in a fraction. This proposed change is consistent with previous proposals approved by the Commission.<sup>62</sup> The Commission also believes that the proposed changes to incorporate ETP Holders into the Non-Affiliated Director nomination process and the Exchange's committee structure, in a manner on par with OTP Holders, are consistent with the requirement in Section 6(b)(3) of that Act that the rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs.

The Exchange also proposes to integrate the existing NYSE Arca Equities rules into the NYSE Arca rules to create a single rulebook covering the Exchange's options and equities

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<sup>61</sup> See, e.g., Section 2.03(a)(i) of the Seventh Amended and Restated Operating Agreement of New York Stock Exchange LLC; Section 9(a) of the Second Amended Limited Liability Company Agreement Of The NASDAQ Stock Market LLC.

<sup>62</sup> See, e.g., Securities Exchange Act Release Nos. 69869 (June 27, 2013), 78 FR 40252 (SR-NYSE-2013-32); 59683 (April 1, 2009), 74 FR 15799 (April 7, 2009) (SR-NYSE-2009-12); 58673 (September 29, 2008), 73 FR 57707, 57711-12 (October 3, 2008) (SR-Amex-2008-62).

markets. As noted above, in carrying out this rule integration, the Exchange proposes to harmonize conflicting rules; combine rules, including definitions; update cross-references; update rule text; delete obsolete rule text; correct grammatical errors in rule text; rearrange rule provisions, as necessary; and make various non-substantive changes to the rules. The Commission notes that the Exchange represents that the proposed integration of NYSE Arca Equities rules into the NYSE Arca rules is not intended to change the substance of these rules, but is largely organizational in nature.<sup>63</sup> The Commission also notes that, while similar changes related to the integration of the rules are proposed with respect to the Exchange's fee schedules, the Exchange is not proposing any new fees nor altering any current fees.<sup>64</sup> The Commission believes that the proposed integrated rules for the Exchange's options and equities markets should allow market participants to more easily navigate and understand the Exchange's rules, and should simplify and streamline the Exchange's administration of its rules. Thus, the Commission believes that the proposed changes related to integration of the NYSE Arca Equities rules into the NYSE Arca rules are consistent with Sections 6(b)(1) and 6(b)(5) of the Act.

Finally, the Exchange proposes certain changes to the disciplinary proceedings rules governing its Permit Holders. The Exchange proposes to incorporate the rules relating to the current NYSE Arca Equities Business Conduct Committee (referred to as "the BCC") into the Exchange's rules and to integrate the rules for disciplinary proceedings to cover both ETP Holders and OTP Holders. The Exchange represents that the proposed changes would provide that disciplinary proceedings involving ETP Holders would continue to be heard by the BCC, while disciplinary proceedings involving OTP Holders would continue to be heard by the Ethics

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<sup>63</sup> See Notice, supra note 3, at 28161.

<sup>64</sup> See Section II.D., supra, noting that in Amendment No. 2, the Exchange proposes to amend the Equities Fee Schedule by replacing Exhibit 5E with new Exhibit 5E and by removing Exhibit 5J from the proposed rule change.

and Business Conduct Committee (referred to as “the EBCC”).<sup>65</sup> The Exchange also proposes revisions to its rules to clarify that the review of decisions by either the BCC or EBCC would be heard by the CFR, a committee of the Board, rather than the full Board. The Commission notes, however, that the proposed changes would not fundamentally alter the current disciplinary procedures for either ETP Holders or OTP Holders, but would continue the existing disciplinary processes in a single rulebook and would provide further clarity about the Exchange’s current review process. Thus, the Commission finds that the proposed changes to the disciplinary rules are consistent with Sections 6(b)(5) and 6(b)(7) of the Act.

#### IV. Solicitation of Comments on Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 2 to the proposed rule change is consistent with the Exchange 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-2017-40 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-2017-40. 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

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<sup>65</sup> See id.



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-2017-40 and should be submitted by [insert date 21 days from the date of publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 2, prior to the 30th day after the date of publication of notice of Amendment No. 2 in the Federal Register. As discussed above, Amendment No. 2 revises the Exchange's rule text primarily to reflect updates to its rules that resulted from Exchange filings that became effective after the Exchange filed the original proposed rule change and to make other clarifying, correcting, or updating changes to the proposed rule text. In addition, in Amendment No. 2, the Exchange modifies its original proposal by carrying over the Equities Fee Schedule, as set forth in new Exhibit 5E, and making minor updating changes instead of replacing that fee schedule in its entirety. The Commission believes that the proposed changes in Amendment No. 2 do not

raise any new issues, but rather would add greater clarity to the proposed rule change.

Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,<sup>66</sup> to approve the proposed rule change, as modified by Amendment No. 2 on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>67</sup> that the proposed rule change (SR-NYSEArca-2017-40), as modified by Amendment No. 2 thereto, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>68</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>66</sup> 15 U.S.C. 78s(b)(2).

<sup>67</sup> Id.

<sup>68</sup> 17 CFR 200.30-3(a)(12).