

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90820; File No. SR-NYSEArca-2020-116)

December 30, 2020

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Expiration Date of the Temporary Amendments to Rules 10.9261 and 10.9830 as set forth in SR-NYSEArca-2020-85 from December 31, 2020, to April 30, 2021

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on December 22, 2020, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes extending the expiration date of the temporary amendments to Rules 10.9261 and 10.9830 as set forth in SR-NYSEArca-2020-85 from December 31, 2020, to April 30, 2021, in conformity with recent changes by the Financial Industry Regulatory Authority, Inc. (“FINRA”). The proposed rule change would not make any changes to the text of NYSE Arca Rules 10.9261 and 10.9830. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78s(b)(1).

³ 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 extending the expiration date of the temporary amendments in SR-NYSEArca-2020-85⁴ to Rules 10.9261 (Evidence and Procedure in Hearing) and 10.9830 (Hearing) from December 31, 2020, to April 30, 2021 to harmonize with recent changes by FINRA to extend the expiration date of the temporary amendments to its Rules 9261 and 9830. SR-NYSEArca-2020-85 temporarily granted to the Chief or Deputy Chief Hearing Officer the authority to order that hearings be conducted by video conference if warranted by public health risks posed by in-person hearings during the ongoing COVID-19 pandemic. The proposed rule change would not make any changes to the text of Exchange Rules 10.9261 and 10.9830.⁵

Background

In 2019, NYSE Arca adopted disciplinary rules based on the text of the Rule 8000 and

⁴ See Securities Exchange Act Release No. 90088 (October 5, 2020), 85 FR 64186 (October 9, 2020) (SR-NYSEArca-2020-85) (“SR-NYSEArca-2020-85”).

⁵ The Exchange may submit a separate rule filing to extend the expiration date of the proposed extension beyond April 30, 2021 if the Exchange requires additional temporary relief from the rule requirements identified in SR-NYSEArca-2020-85. The amended NYSE Arca rules will revert back to their original state at the conclusion of the temporary relief period and any extension thereof.

Rule 9000 Series of its affiliate NYSE American LLC (“NYSE American”), with certain changes. The NYSE American disciplinary rules are, in turn, substantially the same as the Rule 8000 Series and Rule 9000 Series of FINRA and the New York Stock Exchange LLC.⁶ The NYSE Arca disciplinary rules were implemented on May 27, 2019.⁷

In adopting disciplinary rules modeled on FINRA’s rules, NYSE Arca adopted the hearing and evidentiary processes set forth in Rule 10.9261 and in Rule 10.9830 for hearings in matters involving temporary and permanent cease and desist orders under the Rule 10.9800 Series. As adopted, the text of Rule 10.9261 and Rule 10.9830 are substantially the same as the FINRA rules with certain modifications.⁸

In response to the spread of COVID-19, on August 31, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness, SR-FINRA-2020-027, to temporarily grant FINRA’s Office of Hearing Officers (“OHO”) and the National Adjudicatory Council (“NAC”) the authority to conduct certain hearings by video conference, if warranted by the current COVID-19-related public health risks posed by in-person hearings. Among the rules FINRA amended were Rules 9261 and 9830.⁹

Given that FINRA and OHO administers disciplinary hearings on the Exchange’s behalf, and that the public health concerns addressed by FINRA’s amendments apply equally to Exchange disciplinary hearings, on September 23, 2020, the Exchange filed to temporarily amend Rule 10.9261 and Rule 10.9830 to permit FINRA to conduct virtual hearings on its

⁶ See Securities Exchange Act Release No. 85639 (April 12, 2019), 84 FR 16346 (April 18, 2019) (SR-NYSEArca-2019-15) (“2019 Notice”).

⁷ See NYSE Arca Equities RB-19-060 & NYSE Arca Options RB-19-02 (April 26, 2019).

⁸ See 2019 Notice, 84 FR at 16365 & 16373-4.

⁹ See Securities Exchange Act Release No. 89737 (September 2, 2020), 85 FR 55712 (September 9, 2020) (SR-FINRA-2020-027) (the “August 31 FINRA Filing”).

behalf.¹⁰ The temporary amendments to Rule 10.9261 and Rule 10.9830, as originally proposed, will expire on December 31, 2020, absent another proposed rule change filing by the Exchange.

The COVID-19 conditions necessitating these temporary amendments persist, with cases rapidly escalating nationwide. Based on its assessment of current COVID-19 conditions and the lack of certainty as to when COVID-19-related health concerns will subside, on December 1, 2020, FINRA filed to extend the expiration date of the temporary rule amendments to, among other rules, FINRA Rule 9261 and 9830 from December 31, 2020, to April 30, 2021.¹¹

Proposed Rule Change

Consistent with FINRA's recent proposal, the Exchange proposes to extend the expiration date of the temporary rule amendments to NYSE Arca Rules 10.9261 and 10.9830 as set forth in SR-NYSEArca-2020-85 from December 31, 2020, to April 30, 2021.

As set forth in SR-FINRA-2020-042, based on its assessment of current COVID-19 conditions, including the recent escalation in COVID-19 cases nationwide, FINRA does not believe that the COVID-19-related health concerns necessitating this relief will subside by December 31, 2020, and has determined that there will be a continued need for this temporary relief for several months beyond December 31, 2020.¹² FINRA accordingly proposed to extend the expiration date of the temporary rule amendments in the August 31 FINRA Filing from December 31, 2020, to April 30, 2021.

The Exchange proposes to similarly extend the expiration date of the temporary rule amendments to NYSE Arca Rules 10.9261 and 10.9830 as set forth in SR-NYSEArca-2020-85

¹⁰ See supra note 4.

¹¹ See Securities Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (SR-FINRA-2020-042) (“SR-FINRA-2020-042”).

¹² See id.

from December 31, 2020, to April 30, 2021. With COVID-19 cases surging nationwide, the Exchange agrees with FINRA that the COVID-19-related public health risks necessitating this temporary relief have not yet abated and are unlikely to abate by December 31, 2020. The proposed change will permit OHO to continue to assess, based on critical COVID-19 data and criteria and the guidance of health and security consultants, whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference. FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will maintain fair process for the parties.¹³ The Exchange believes that this is a reasonable procedure to continue to follow for hearings under Rules 10.9261 and 10.9830 chaired by a FINRA employee.

As noted below, the Exchange has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so the Exchange can implement the proposed rule change immediately.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,¹⁴ in general, and furthers the objectives of Section 6(b)(5),¹⁵ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and

¹³ See SR-FINRA-2020-042, 85 FR at 81251-52; August 31 FINRA Filing, 85 FR at 55713.

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(5).

a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.¹⁶

The Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between Exchange rules and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance. As such, the proposed rule change will foster cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposed rule change, which extends the expiration date of the temporary amendments to Exchange rules consistent with FINRA's extension to its Rules 9261 and 9830 for four months as set forth in SR-FINRA-2020-042, will permit the Exchange to continue to effectively conduct hearings during the COVID-19 pandemic in situations where in-person hearings present likely public health risks. The ability to conduct hearings by video conference will permit the adjudicatory functions of the Exchange's disciplinary rules to continue unabated, thereby avoiding protracted delays. The Exchange believes that this is especially important in matters where temporary and permanent cease and desist orders are sought because the proposed rule change would enable those hearings to continue to proceed without delay, thereby enabling the Exchange to continue to take immediate action to stop significant, ongoing customer harm, to the benefit of the investing public.

As set forth in detail in the SR-NYSEArca-2020-85, the temporary relief to permit

¹⁶ 15 U.S.C. 78f(b)(7) and 78f(d).

hearings to be conducted via video conference maintains fair process and will continue to provide fair process consistent with Sections 6(b)(7) and 6(d) of the Act¹⁷ while striking an appropriate balance between providing fair process and enabling the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets while accounting for the significant health and safety risks of in-person hearings stemming from the outbreak of COVID-19. The Exchange notes that this proposal, like SR-NYSEArca-2020-85, provides only temporary relief. As proposed, the changes would be in place through April 30, 2021. As noted in SR-NYSEArca-2020-85 and above, the amended rules will revert back to their original state at the conclusion of the temporary relief period and, if applicable, any extension thereof.

Accordingly, the proposed rule change extending this temporary relief is in the public interest and consistent with the Act's purpose.

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

The Exchange does not believe that the proposed temporary rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but is rather intended solely to provide continued temporary relief given the impacts of the COVID-19 pandemic and the related health and safety risks of conducting in-person activities. The Exchange believes that the proposed rule change will prevent unnecessary disruptions that would otherwise result if the temporary amendments were to expire on December 31, 2020.

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.

¹⁷ 15 U.S.C. 78f(b)(7) and 78f(d).

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)¹⁸ of the Act and Rule 19b-4(f)(6) thereunder.¹⁹

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b-4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. As noted above, the Exchange states that the COVID-related health and safety risks of conducting in-person activities, which necessitated these temporary amendments, persist and that cases are escalating nationwide. Based on FINRA's assessment of the current COVID-19 conditions and FINRA's determination that there is a continued need for this temporary relief for several months beyond December 31, 2020, the Exchange states that it agrees with FINRA that the COVID-19-related public health risks necessitating this temporary relief have not yet

¹⁸ 15 U.S.C. 78s(b)(3)(A).

¹⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) 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 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.

abated and are unlikely to abate by December 31, 2020.²⁰ Moreover, the Exchange states that FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will provide a fair process for all parties and will enable the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets.²¹ The Exchange believes that this is a reasonable procedure to continue to follow for hearings under Rules 10.9261 and 10.9830 chaired by a FINRA employee. Accordingly, the Exchange states that waiver of the operative delay would prevent unnecessary disruptions that would otherwise result if the temporary amendments were to expire on December 31, 2020.

The Exchange also indicates that this filing is eligible to become operative immediately because the proposal would continue to provide greater harmonization between the Exchange rules and FINRA rules that serve a similar purpose, resulting in less burdensome and more efficient regulatory compliance. This proposal would serve to extend the expiration date of the temporary amendments to the Exchange rules set forth in SR-NYSEArca-2020-85, which is consistent with FINRA's extension to its comparable rules, where FINRA requested and the Commission granted a waiver of the 30-day operative delay.²² The Exchange also states that this temporary relief is necessary in order to continue performing adjudicatory functions necessary to meet its statutory obligations in light of COVID-19 related health and safety risks associated with in-person hearings and will only be temporary relief, with the rules reverting back to their original state at the conclusion of the relief period and any extension thereof.²³

²⁰ See SR-FINRA-2020-042.

²¹ See id.

²² See supra note 11 (referencing FINRA's proposal to extend the expiration date of temporary rule amendments allowing hearings to be conducted on a temporary basis by video conference if warranted by COVID-19 related health risks).

²³ See supra note 5 and accompanying text.

The Commission observes that this proposal, like SR-NYSEArca-2020-85 and FINRA's comparable filing,²⁴ provides only temporary relief during the period in which the Exchange's operations are impacted by COVID-19. As proposed, the changes would be in place through April 30, 2021. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.²⁵

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 necessary or appropriate in the public interest, for the protection of investors, or 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.

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:

²⁴ See supra notes 9 and 11 and accompanying text.

²⁵ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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. Please include File Number SR-NYSEArca-2020-116 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-2020-116. 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, on business days between the hours of 10:00 a.m. and 3:00 p.m., located at 100 F Street, NE, Washington, DC 20549. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR-NYSEArca-2020-116 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.²⁶

J. Matthew DeLesDernier
Assistant Secretary

²⁶ 17 CFR 200.30-3(a)(12).