

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-67619; File Nos. SR-NYSEArca-2012-67)

August 8, 2012

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Changes Amending NYSE Arca, Inc. Rule 3.2 and NYSE Arca Equities, Inc. Rule 3.2, Which Concern the Nomination and Election of Fair Representation Directors

I. Introduction

On June 18, 2012, NYSE Arca, Inc. (“NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> proposed rule changes to amend NYSE Arca Rule 3.2 and NYSE Arca Equities, Inc. (“NYSE Arca Equities”) Rule 3.2, which concern the nomination and election of fair representation directors. The proposed rule changes were published for comment in the Federal Register on June 28, 2012.<sup>4</sup> The Commission received no comment letters on the proposal.

II. Background

NYSE Arca Rule 3.2 sets forth a process for the nomination and selection of fair representation directors for the NYSE Arca Board of Directors (“NYSE Arca Board”)<sup>5</sup>, and

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

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

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

<sup>4</sup> See Securities Exchange Act Release No. 67244 (June 22, 2012), 77 FR 38701 (SR-NYSEArca-2012-67) (the “Notice”).

<sup>5</sup> Under Section 3.02(a) of the Bylaws of NYSE Arca (“NYSE Arca Bylaws”) the NYSE Arca Board must have 8-12 directors, and at least 20 percent of the directors must be individuals nominated by trading permit holders, with at least one director nominated by the Equities Trading Permit Holders (“ETP Holders”) of NYSE Arca Equities, and at least one director nominated by the Options Trading Permit Holders (“OTP Holders”) of the Exchange. In addition, at least 50 percent of the directors must be directors who represent the public. The exact number of the directors nominated by the ETP Holders

NYSE Arca Equities Rule 3.2 sets forth a similar process for the nomination and selection of fair representation directors for the NYSE Arca Equities Board of Directors (“Equities Board”).<sup>6</sup>

The Exchange states that the proposed rule changes would streamline those processes and make them more similar to the processes used by the New York Stock Exchange LLC (“NYSE”) and NYSE MKT LLC (“NYSE MKT”).<sup>7</sup>

A. Amendments to NYSE Arca Rules

Nominating Committee Composition and Appointment

The Exchange proposes to amend NYSE Arca Rules 3.2(b)(2)(A) and (B) to change the composition of, and the appointment process for, its nominating committee for fair representation directors (the “Nominating Committee”).<sup>8</sup> The Exchange proposes to eliminate the public member position from the Nominating Committee and eliminate the nomination process for the Nominating Committee members and instead have the NYSE Arca Board appoint the members of the Nominating Committee. The Exchange represents that this change is

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and OTP Holders is determined from time to time by the NYSE Arca Board, subject to the percentage restrictions described above.

Similar to the NYSE Arca Bylaws, Section 3.02(a) of the Bylaws of NYSE Arca Equities, Inc. (the “Equities Bylaws”) requires that at least 20 percent of the Equities Board, but no fewer than two directors, must be nominees of the nominating committee of the Equities Board (“Equities Nominating Committee”) selected in accordance with NYSE Arca Equities Rule 3.2. Under Section 3.02(e) of the Equities Bylaws, the Equities Board nominates directors for election at the annual meeting of stockholders, and such nominations must comply with Section 3.02(a) of the Equities Bylaws and NYSE Arca Equities Rules. A 10-member Equities Board must include two nominees of the Equities Nominating Committee. See Section 3.02(e) of the Equities Bylaws.

<sup>6</sup> NYSE Arca Equities, Inc. is a wholly-owned subsidiary of NYSE Arca.

<sup>7</sup> See Notice, supra note 4 at 38701.

<sup>8</sup> Currently, the Nominating Committee has seven members, consisting of six OTP Holders and one member of the public.

consistent with the fair representation nominating committee composition and selection processes followed by NYSE and NYSE MKT.<sup>9</sup>

#### Petition Process for Fair Representation Director Nominees

The Exchange also proposes to amend the petition process for fair representation director nominees to the NYSE Arca Board.<sup>10</sup> Under proposed NYSE Arca Rule 3.2(b)(2)(C)(ii), the Nominating Committee would publish the names of the nominees to the NYSE Arca Board on an “Announcement Date” each year sufficient to accommodate the nomination and petition processes of the proposed rule. OTP Holders in good standing would be permitted to nominate additional eligible candidates if a written petition of at least 10 percent of OTP Holders in good standing were submitted to the Nominating Committee within two weeks after the Announcement Date. The Exchange states that these proposed revisions would make the petition process more efficient and consistent with the petition process for fair representation directors for NYSE and NYSE MKT.<sup>11</sup>

The proposed rule would also require each petition candidate to include a completed questionnaire used to gather information concerning director candidates, and the Nominating Committee would determine whether the petition candidate is eligible to serve on the NYSE

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<sup>9</sup> See Notice, surpa note 4 at 38702.

<sup>10</sup> Under current NYSE Arca Rule 3.2(b)(2)(C)(ii), the Nominating Committee publishes the names of the fair representation director nominees to the NYSE Arca Board no later than 65 days prior to the expiration of the term of its directors. OTP Holders may submit a petition to add another nominee within 10 business days after the Nominating Committee publishes its nominees to the NYSE Arca Board. If a written petition of the lesser of 35 OTP Holders or 10 percent of OTP Holders in good standing is submitted to the Nominating Committee, such person also is nominated by the Nominating Committee.

<sup>11</sup> See Notice, supra note 4 at 38702.

Arca Board (including whether such person was free of a statutory disqualification under Section 3(a)(39) of the Act), and such determination would be final and conclusive. The questionnaire would be a new requirement to assist the Nominating Committee in reaching its decision.

According to the Exchange, such a questionnaire is already used by NYSE and NYSE MKT and having the Nominating Committee determine the qualifications of a petition candidate is similar to the NYSE and NYSE MKT processes.<sup>12</sup>

#### Contested Nominations

Currently, in the event that the OTP Holder position is nominated by the Nominating Committee pursuant to a petition by the OTP Holders, and there are two or more nominees for the NYSE Arca Board, the Nominating Committee must submit the contested nomination to the OTP Holders for selection. The nominee for the NYSE Arca Board selected by the most OTP Holders is submitted by the Nominating Committee to the NYSE Arca Board. The Exchange proposes to amend this rule to simplify it and provide that if the number of nominees exceeds the number of available seats, the Nominating Committee would submit the contested nomination to the OTP Holders for selection, and the nominee for the NYSE Arca Board receiving the most votes of OTP Holders would be submitted by the Nominating Committee to the NYSE Arca Board.<sup>13</sup>

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<sup>12</sup> See id.

<sup>13</sup> The Exchange also proposes to amend this rule to explicitly provide that OTP Holders would be afforded no less than 20 calendar days to submit their votes on a confidential basis.

## B. Amendments to NYSE Arca Equities Rules

### Nominating Committee Composition and Appointment

Current NYSE Arca Equities Rules 3.2(b)(2)(A) and (B) are similar to the counterpart NYSE Arca rules described above.<sup>14</sup> As proposed with respect to NYSE Arca Rules 3.2(b)(2)(A) and (B), and consistent with current NYSE and NYSE MKT processes described above, the Exchange proposes to amend NYSE Arca Equities Rule 3.2 to eliminate the public member position from the Equities Nominating Committee and eliminate the nomination process for the Equities Nominating Committee members and instead have the Equities Board appoint the members of the Equities Nominating Committee.

### Petition Process for Fair Representation Director Nominees

The Exchange also proposes to amend the petition process for fair representation director nominees to the Equities Board. Under proposed NYSE Arca Equities Rule 3.2(b)(2)(C)(ii), the Equities Nominating Committee would publish the names of the nominees on an “Announcement Date” each year sufficient to accommodate the nomination and petition processes as set forth in the proposed rule.<sup>15</sup> ETP Holders in good standing would be permitted to nominate additional eligible candidates if a written petition of at least 10 percent of ETP

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<sup>14</sup> Under current NYSE Arca Equities Rule 3.2(b)(2)(A), the Equities Nominating Committee has seven members, consisting of six ETP Holders and one member of the public.

<sup>15</sup> Under current NYSE Arca Equities Rule 3.2(b)(2)(C)(ii), the Equities Nominating Committee publishes the names of the fair representation director nominees no later than 65 days prior to the expiration of the term of the directors. ETP Holders may submit a petition to add another nominee within 10 business days after the Equities Nominating Committee publishes its nominees. If a written petition of at least 10 percent of ETP Holders in good standing is submitted to the Equities Nominating Committee within 45 days preceding the expiration of the current term, such person is also nominated by the Equities Nominating Committee.

Holders in good standing were submitted to the Equities Nominating Committee within two weeks after the Announcement Date. Each petition candidate would be required to include a completed questionnaire used to gather information concerning director candidates, and the Equities Nominating Committee would determine whether the petition candidate is eligible to serve on the Equities Board or NYSE Arca Board (including whether such person was free of a statutory disqualification under Section 3(a)(39) of the Act), and such determination would be final and conclusive. According to the Exchange, the proposed rule change would amend this process to align it with the NYSE and NYSE MKT processes and proposed NYSE Arca Rule 3.2(b)(2)(C) for the same reasons stated above with respect to proposed NYSE Arca Rule 3.2.<sup>16</sup>

#### Contested Nominations

Currently, in the event that there is a contested nomination, the Equities Nominating Committee submits such contested nomination to the ETP Holders, which may select two nominees for the contested seat on the Equities Board and one nominee for the contested seat on the NYSE Arca Board. The Exchange proposes to simplify this text to align it with the proposed changes to NYSE Arca Rule 3.2(b)(2)(C)(iii).<sup>17</sup>

### III. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule changes and finds that the proposed rule changes are consistent with the requirements of the Act and the rules and

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<sup>16</sup> See Notice, *supra* note 4 at 38703.

<sup>17</sup> Current NYSE Arca Equities Rule 3.2(b)(2)(C)(ii) does not describe the voting process. The proposed rule changes would amend the rule to explicitly provide that ETP Holders would be afforded no less than 20 calendar days to submit their votes on a confidential basis. The Exchange also proposes certain technical and conforming changes.

regulations thereunder applicable to a national securities exchange.<sup>18</sup> In particular, the Commission finds that the proposed rule changes are consistent with Section 6(b)(3) of the Act,<sup>19</sup> which, among other things, requires that the rules of an exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provides that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker or dealer. The Commission also notes that the proposed rule changes are substantially similar to the nominating and fair representation policies and procedures of NYSE and NYSE MKT. Furthermore, the proposed rule changes would not amend the fair representation requirements as set forth in Sections 3.02 of both the NYSE Arca Bylaws and the Equities Bylaws.

#### IV. Conclusion

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

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<sup>18</sup> In approving the proposed rule changes, the Commission has considered their impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>19</sup> 15 U.S.C. 78f(b)(3).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>20</sup> that the proposed rule changes (SR-NYSEArca-2012-67), are approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>20</sup> 15 U.S.C. 78s(b)(2).

<sup>21</sup> 17 CFR 200.30-3(a)(12).