

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow NYSE to immediately implement a temporary measure, until June 30, 2009, to suspend its \$1.00 price continued listing requirement for capital and common stock to respond to recent market volatility and conditions. The Commission notes that this will provide certain companies with immediate relief from receiving a non-compliance or delisting notification, or from being delisted, as a result of the current market conditions. The Commission notes that this action is temporary in nature, and that following the suspension, companies currently in the compliance period will resume at the same stage and receive the remaining balance of its compliance period if they remain non-compliant with these standards. This will ensure that the temporary suspension addresses the concerns to companies and investors caused by the current market conditions, and that may result in a company's securities becoming non-compliant with the \$1.00 price requirement, or unable to cure such a deficiency, due to these market conditions. The Commission also notes that the proposed rule change is substantially similar to a recent Nasdaq filing to suspend its bid price test, and thus, raises no new regulatory issues.<sup>18</sup> In addition, the Commission believes that waiving the operative delay is consistent with the protection of investors and the public interest because it will allow NYSE to immediately conform the end dates of the suspension of the \$1.00 price requirement and the temporary lowering of the average market capitalization requirement of Section 802.01B of the Manual,<sup>19</sup> preventing any confusion over the end dates of these temporary modifications to the continued listing standards due to market conditions. For these reasons, the Commission designates that the proposed rule change become operative immediately upon filing.<sup>20</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the 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.

#### 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 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-NYSE-2009-21 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2009-21. 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 Web site (<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 inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 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-NYSE-2009-21 and should be submitted on or before April 1, 2009.

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

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-5209 Filed 3-10-09; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59522; File No. SR-NYSEArca-2008-134]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Amend Rule 10.16, Sanctioning Guidelines

March 5, 2009.

#### I. Introduction

On December 11, 2008, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") 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 to amend NYSE Arca Rule 10.16 ("Rule 10.16" or "Sanctioning Guidelines"). The proposed rule change was published for comment in the **Federal Register** on December 30, 2008.<sup>3</sup> The Commission received no comments on the proposed rule change. On February 13, 2009, NYSE Arca filed Amendment No. 1 to the proposed rule change.<sup>4</sup> This order approves the proposed rule change, as amended.

#### II. Description

Rule 10.16 sets forth (1) general principles that apply to all determinations of sanctions in options market-related disciplinary proceedings, (2) a list of principal considerations to use to determine sanctions, and (3) a set of suggested fines and non-monetary penalties for violations of specific options rules of the Exchange ("Specific Sanctioning Guidelines"). The Sanctioning Guidelines are used by various Exchange bodies (hereafter "adjudicators") to help determine appropriate remedial sanctions in disciplinary proceedings. The Exchange proposes to make the following

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

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

<sup>3</sup> See Securities Exchange Act Release No. 59117 (December 18, 2008), 73 FR 79964.

<sup>4</sup> Amendment No. 1 makes minor, non-substantive changes to the description of the proposed rule change and to the proposed rule text. Because Amendment No. 1 is non-substantive in nature, the Commission is not publishing it for comment.

<sup>18</sup> See *supra* note 11.

<sup>19</sup> See *supra* note 9.

<sup>20</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

amendments to the Sanctioning Guidelines:

#### A. General Principles

The proposed rule change clarifies that the Sanctioning Guidelines are intended to apply to all persons using the facilities of the Exchange.<sup>5</sup> Therefore, the proposed rule change amends the Sanctioning Guidelines to replace the terms “employee” and “approved person” with the broader term “Associated Person,” which includes Allied Persons, Affiliated Persons, Approved Persons and other employees of an OTP Firm.<sup>6</sup> The Exchange also proposes changes to clarify that an Associated Person may be employed by an OTP Holder or OTP Firm.<sup>7</sup>

The Exchange proposes to amend the Sanctioning Guidelines to make clear that irrelevant incidents of misconduct should not be considered by adjudicators in determining sanctions,<sup>8</sup> and to allow adjudicators to use a “reasonable calculation of loss” for the purposes of determining restitution when actual loss cannot be calculated.<sup>9</sup> Because it is not always possible for adjudicators to determine actual loss, the Exchange believes that the Sanctioning Guidelines should provide adjudicators an alternative method for calculating restitution.

#### B. Specific Sanctioning Guidelines

Rule 10.16 currently contains “Specific Sanctioning Guidelines” for certain enumerated options order handling rules<sup>10</sup> and rules relating to recordkeeping and financial requirements.<sup>11</sup> These Specific Sanctioning Guidelines list principal considerations that adjudicators should weigh when determining sanctions for these categories of rules; provide a three-tier monetary fine system based on the number of disciplinary actions against the named party; and provide for non-monetary penalties (*e.g.*, suspensions and expulsions) for named parties in disciplinary proceedings. The

proposed rule change amends the Specific Sanctioning Guidelines in Rules 10.16(e)–(f) to require that adjudicators consider the general principal considerations applicable to all violations, and to consider whether the disciplinary action is the first or subsequent disciplinary action taken against the OTP Holder, OTP Firm or Associated Person.<sup>12</sup> The Exchange notes that recent acts of similar misconduct may be considered aggravating factors.

The proposed rule change also replaces the three tiers of suggested fines set out in the Specific Sanctioning Guidelines with a single range of suggested fines. The Exchange believes that a single range of suggested fines will provide adjudicators greater latitude than they presently have in applying sanctions in a fair and consistent manner. The proposed rule change further amends the fine levels to increase the minimum and maximum fines that adjudicators may impose in disciplinary proceedings.<sup>13</sup> The Exchange notes that under its Minor Rule Violation Plan (“MRVP”), the Exchange is authorized to impose fines of up to \$5,000 for minor rule violations in lieu of initiating formal disciplinary proceedings.<sup>14</sup> The Exchange represented that, in light of the fines permissible under the Exchange’s MRVP, the current minimum monetary penalty levels in Rule 10.16 (which range between \$1,000 and \$5,000) are too low, given the serious nature of the violations.

Likewise, given the serious nature of the violations covered by the Sanctioning Guidelines, the Exchange believes the current maximum monetary penalty levels are also too restrictive. Therefore, in order to act as an effective deterrent against future violations, while serving as a just penalty for those who commit these violations, the Exchange proposes to increase the minimum monetary penalty to \$10,000 and the maximum monetary penalty to \$100,000.

The proposed rule change also amends the non-monetary penalty provision (providing for suspension, expulsion or other sanction for a named party in a disciplinary proceeding) to increase the suggested maximum term of suspensions from two years to five years. Under the current Sanctioning Guidelines, an adjudicator may suspend a named party in a formal disciplinary proceeding for up to two years or expel or permanently bar a named party for

egregious rule violations. The Exchange believes that there are certain violations that could justify a suspension of more than two years, but do not justify an expulsion or a permanent bar. Therefore, the Exchange believes that increasing the maximum term of suspensions from two to five years will afford adjudicators greater flexibility in determining appropriate non-monetary sanctions.

The proposed rule change also amends Rule 10.16 to include Specific Sanctioning Guidelines for two additional rules. Proposed Rule 10.16(g) will set forth Specific Sanctioning Guidelines for violations of NYSE Arca Rule 9 (Conducting Business with the Public),<sup>15</sup> and proposed Rule 10.16(h) will set forth guidelines for violations of NYSE Arca Rule 11 (Business Conduct).<sup>16</sup> While the proposed principal considerations and non-monetary sanctions for these new Specific Sanctioning Guidelines are substantially similar to those contained in amended Rules 10.16(e)–(f), the Exchange proposes a different range of suggested fines for these two rules. The Exchange represents that violations of NYSE Arca Rules 9 and 11 are extremely serious matters. Therefore, the Exchange believes that the range of fines contained in Rules 10.16(g)–(h) should be higher than the range of fines contained in Rules 10.16(e)–(f). Accordingly, the proposed rule change provides that the suggested range of fines in Rules 10.16(g)–(h) will be from \$15,000 to \$150,000. The Exchange believes that these fines are appropriate given the serious nature of Rule 10.16(g)–(h) related offenses. The Exchange believes that these fines will act as an effective deterrent against future violations and serve as a just penalty for those that commit these violations.

#### C. Miscellaneous Changes

The proposed rule change makes additional amendments to the Sanctioning Guidelines as follows:

Rule 10.16(e)(2) sets forth Specific Sanctioning Guidelines for violations of the priority rules and obligations of market makers. The proposed rule

<sup>5</sup> The Commission notes that Rule 10.16 is applicable to the options market-related activity of NYSE Arca, and therefore by its terms is limited to options market-related disciplinary proceedings of NYSE Arca.

<sup>6</sup> See proposed NYSE Arca Rules 10.16(a) and (d)(2)–(3), (8) and (12).

<sup>7</sup> See proposed NYSE Arca Rules 10.16(d)(2)–(3), (8) and (12).

<sup>8</sup> See proposed NYSE Arca Rule 10.16(b)(2).

<sup>9</sup> See proposed NYSE Arca Rule 10.16(b)(5).

<sup>10</sup> See NYSE Arca Rule 10.16(e) (Specific Sanctioning Guidelines for Options Order Handling Rules).

<sup>11</sup> See NYSE Arca Rule 10.16(f) (Specific Sanctioning Guidelines for Recordkeeping and Financial Requirements Rules.)

<sup>12</sup> See proposed NYSE Arca Rule 10.16(e)–(f).

<sup>13</sup> See proposed NYSE Arca Rule 10.16(e)–(f).

<sup>14</sup> See NYSE Arca Rule 10.12.

<sup>15</sup> See NYSE Arca Rule 9 (Conducting Business with the Public). This rule generally consists of several provisions intended to protect public customers and their accounts.

<sup>16</sup> See NYSE Arca Rule 11 (Business Conduct). This rule generally consists of several provisions intended to prevent actions that could be deemed detrimental to the welfare and protection of investors, or conduct or proceedings inconsistent with just and equitable principles of trade.

change adds NYSE Arca Rule 6.37A<sup>17</sup> to Rule 10.16(e)(2) because Rule 6.37A also deals with the obligations of market makers, and thus is appropriately included in this Specific Sanctioning Guideline.

The proposed rule change eliminates references to floor official training for OTP Holders in Rule 10.16(b)(7) because the Exchange does not employ OTP Holders as floor officials.

The proposal also corrects spelling and typographical errors and makes other minor, non-substantive changes throughout the Sanctions Guidelines such as the renumbering of certain provisions and the elimination of obsolete "Commentary" and examples of regulatory incidents that are not relevant to determinations of sanctions.

### III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6(b)<sup>18</sup> of the Act, and in particular, with Section 6(b)(5)<sup>19</sup> of the Act, which requires, among other things, that the Exchange's rules be 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, and to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.<sup>20</sup>

The Commission also finds that the proposal is consistent with Section 6(b)(6)<sup>21</sup> of the Act, which requires that the rules of the exchange provide that its members and persons associated with its members shall be appropriately disciplined for violations of the Act and the rules and regulations thereunder.

The Exchange's proposal amends the Sanctioning Guidelines to provide more flexibility for adjudicators in crafting fair and appropriate monetary and non-monetary sanctions for violations of certain enumerated Exchange rules, and adds categories of rules that will be subject to the Sanctioning Guidelines. The proposed rule change also clarifies that the guidelines apply to all persons using the option-related facilities of the

Exchange, and makes other changes that should strengthen the Exchange's disciplinary program. Accordingly, the Commission finds that the proposed rule change is consistent with the Act.

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>22</sup> that the proposed rule change (SR-NYSEArca-2008-134) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-5202 Filed 3-10-09; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59521; File No. SR-NYSEArca-2009-15]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Rule Change by NYSE Arca, Inc. Implementing Fee Change

March 5, 2009.

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 February 27, 2009, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III 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 Substance of the Proposed Rule Change

The Exchange proposes to amend the section of its Schedule of Fees and Charges for Exchange Services (the "Schedule"). While changes to the Schedule pursuant to this proposal will be effective upon filing, the changes will become operative on March 2, 2009. The amended section of the Schedule is included as Exhibit 5 hereto.<sup>4</sup> A copy of

this filing is available on the Exchange's Web site at <http://www.nyse.com>, at the Exchange's principal office and at the Commission's Public Reference Room.

#### 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 to make multiple changes to its Schedule that will take effect on March 2, 2009. A more detailed description of the proposed changes follows.

###### Tier 1 Rate Changes

Tier 1 rates are applied to customers with an average daily share volume per month greater than 90 million shares in Tape A, B and C, including adding liquidity of more than 45 million shares. In Tape A and Tape C securities the Exchange will continue its inverted pricing structure, but proposes a new rebate of \$0.0029 for orders that add liquidity and new fee of \$0.0028 for orders that remove liquidity. Previously in Tape A and Tape C securities the Exchange paid a rebate of \$0.0028 for orders that added liquidity and charged a fee of \$0.0027 for orders that removed liquidity.

###### Mid-Point Passive Liquidity Orders

The Exchange proposes a rebate of \$0.0020 per share for resting Mid-point Passive Liquidity ("MPL") Orders<sup>5</sup> in Tape A and Tape C securities for all customers. Previously the Exchange paid a rebate of \$0.0015 for resting MPL orders in Tape A and Tape C securities. The Exchange proposes a rebate of \$0.0010 per share for resting MPL orders

<sup>17</sup> See NYSE Arca Rule 6.37A (Obligations of Market Makers—OX).

<sup>18</sup> 15 U.S.C. 78f(b).

<sup>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>21</sup> 15 U.S.C. 78f(b)(6).

<sup>22</sup> 15 U.S.C. 78s(b)(2).

<sup>23</sup> 17 CFR 200.30-3(a)(12).

<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> The Commission notes that while provided in Exhibit 5 to the filing, the text of the proposed rule change is not attached to this notice but is available

at the Commission's Public Reference Room and at <http://www.nyse.com>.

<sup>5</sup> The MPL order is an undisplayed limit order that offers price improvement to customers by executing at the mid-point of the National Best Bid and Offer (NBBO). MPL orders will generally interact with all order types including contra MPLs, but excluding cross or directed orders.