

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-56070; File No. SR-NYSEArca-2007-60)

July 13, 2007

Self-Regulatory Organizations; NYSE Arca, Inc; Notice of Filing of Proposed Rule Change and Amendment No. 1 thereto Relating to Amendments to Arca Equities Rule 12 to Provide Guidance Regarding New and Pending Arbitration Claims in Light of the Consolidation of NYSE Regulation into NASD DR

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 June 26, 2007, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NYSE Arca. On July 13, 2007, the NYSEArca filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

NYSE Arca, through its subsidiary NYSE Arca Equities, Inc (“NYSE Arca Equities” or “Corporation”), proposes to amend NYSE Arca Equities Rule 12.

NYSE Regulation, Inc. (“NYSE Regulation”) administers an arbitration program for NYSE Arca Equities. As part of the consolidation of the member firm regulation function of NYSE Regulation with the National Association of Securities Dealers, Inc. (“NASD”), NYSE Regulation will cease to provide an arbitration program, and its

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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> In Amendment No. 1, which supplemented the original filing, the Exchange clarified the applicability of NYSE Arca Equities Rule 12 as it was in effect on or prior to January 31, 2007.

existing arbitration department (“NYSE Arbitration”) will be consolidated with that of NASD Dispute Resolution, Inc. (“NASD DR”).

The proposed amendments provide that: (i) all arbitrations filed with NYSE Arca Equities after January 31, 2007 and prior to the later of the effective date of the consolidation or approval of this proposed rule change (the “Effective Date”), shall continue to be governed by the Code of Arbitration contained in the 600 series of the New York Stock Exchange LLC Rules (“NYSE Arbitration Rules”); (ii) arbitrations filed on or prior to January 31, 2007 shall continue to be governed by NYSE Arca Equities Rule 12 as it was in effect on or prior to January 31, 2007; and (iii) from and after the Effective Date, disputes between NYSE Arca Equity Trading Permit (“ETP”) holders, associated persons, and/or their customers will be arbitrated under the NASD DR Codes of Arbitration Procedure. The text of the proposed rule change is set forth below. Proposed new language is underlined; proposed deletions are in brackets.

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#### RULE 12 ARBITRATION

(a) General. All arbitrations filed with the Corporation after January 31, 2007 and prior to [insert later of effective date of the consolidation or approval of this proposed rule change] shall be governed by the Code of Arbitration contained in the 600 series of the New York Stock Exchange, L.L.C. Rules (“NYSE Arbitration Rules”), as the same may be in effect from time to time, except that arbitrations filed on or prior to January 31, 2007 shall be governed by NYSE Arca Equities Rule 12 as it was in effect on or prior to January 31, 2007 [as may be specified in this Rule 12 ]. The term “member” as used in this Rule 12 and in the NYSE Arbitration Rules shall mean and refer to ETP Holders.

From and after [insert later of effective date of the consolidation or approval of this proposed rule change] (i) any dispute, claim or controversy between or among ETP Holders and/or associated persons shall be arbitrated pursuant to the NASD Dispute Resolution, Inc. (“NASD DR”) Codes of Arbitration Procedure; and, (ii) any dispute, claim or controversy between a customer or non-member and an ETP Holder and/or associated person arising in connection with the business of such ETP Holder and/or in connection with the activities of an associated person, shall be arbitrated pursuant to NASD DR Codes of Arbitration Procedure as provided by any duly executed and enforceable written agreement, or upon demand of the customer or non-member. Such obligation to arbitrate shall extend only to those matters that are permitted to be arbitrated under NASD DR Codes of Arbitration Procedure.

(b) Referrals. The Corporation may receive, investigate and take disciplinary action with respect to any referral it receives from a NASD DR arbitrator of any matter which comes to the attention of such arbitrator during and in connection with the arbitrator's participation in a proceeding, either from the record of the proceeding or from material or communications related to the proceeding, that the arbitrator has reason to believe may constitute a violation of the Corporation’s Rules or the federal securities laws.

(c) Failure to Arbitrate or to Pay an Arbitration Award. Any ETP Holder and/or associated person who fails to submit to arbitration a matter required to be arbitrated pursuant to this Rule, or that fails to honor an arbitration award made pursuant to the NASD DR Codes of Arbitration Procedure, or made under the auspices of any other self-

regulatory organization, shall be subject to disciplinary proceedings in accordance with NYSE Arca Equities Rule 10.

(d) Other Actions. The submission of any matter to arbitration as provided for under this Rule shall in no way limit or preclude any right, action or determination by the Corporation that it would otherwise be authorized to adopt, administer or enforce.

[(b) Jurisdiction. Any dispute, claim or controversy arising out of or in connection with the business of any member of the Corporation, or arising out of the employment or termination of employment of associated person(s) with any member may be arbitrated under this Rule 12 except that: (1) a dispute, claim, or controversy alleging employment discrimination (including a sexual harassment claim) in violation of a statute may only be arbitrated if the parties have agreed to arbitrate it after the dispute arose; and (2) any type of dispute, claim, or controversy that is not permitted to be arbitrated under the NYSE Arbitration Rules, such as class action claims, shall not be eligible for arbitration under this Rule 12.

(c) Predispute Arbitration Agreements. The requirements of NYSE Arbitration Rules shall apply to predispute arbitration agreements between the Corporation's members and/or associated persons and their customers.

(d) Referrals. If any matter comes to the attention of an arbitrator during and in connection with the arbitrator's participation in a proceeding, either from the record of the proceeding or from material or communications related to the proceeding, that the arbitrator has reason to believe may constitute a violation of the Corporation's Rules or the federal securities laws, the arbitrator may refer the matter to NYSE Regulation, Inc. for disciplinary investigation.

(e) Payment of Awards. Any member or associated person who fails to honor an award of arbitrators appointed in accordance with this Rule 12 shall be subject to disciplinary proceedings in accordance with Rule 10 (Disciplinary Proceedings, Other Hearings, and Appeals).

(f) Other Actions. The submission of any matter to arbitration under this Chapter shall in no way limit or preclude any right, action or determination by the Corporation that it would otherwise be authorized to adopt, administer or enforce.]

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE Arca 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 these statements may be examined at the places specified in Item IV below. NYSE Arca has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to provide guidance regarding both new and pending arbitration claims in light of the consolidation of the member firm regulation function of NYSE Regulation into NASD DR.<sup>5</sup> NYSE Arbitration currently

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<sup>5</sup> The NYSE has proposed a separate filing related to the consolidation of NYSE Arbitration into NASD DR. See Securities Exchange Act Release No. 55818 (May 25, 2007), 72 FR 30898 (June 4, 2007) (SR-NYSE 2007-48). On June 21, 2007, the NYSE filed Amendment No. 1 to this proposed rule change. See

administers an arbitration program for NYSE Arca Equities, governed by what is referred to as “Rule 12.”<sup>6</sup>

As part of the consolidation of NYSE Regulation with NASD,<sup>7</sup> NYSE Regulation will cease to administer an arbitration program, and its existing arbitration department will be consolidated with NASD DR. As a result, on and after the date of the consolidation, all arbitration claims filed prior to the Effective Date, and previously subject to Rule 12 or NYSE Regulation rules, will be administered by NASD DR pursuant to a Regulatory Services Agreement with the New York Stock Exchange LLC (“NYSE”).

The rules governing the administration of any particular arbitration will depend on the date the case was filed. This will ensure that any person that filed an arbitration under a particular set of arbitration rules will continue to have the case administered pursuant to those rules through to the case’s conclusion. There are two categories of cases. First, NYSE Arca Equities cases filed on or prior to January 31, 2007 are and would continue to be governed by Rule 12 as it was in effect on that date. Second, NYSE

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Securities Exchange Act Release No. 56015 (July 5, 2007), 72 FR 37811 (July 11, 2007).

<sup>6</sup> Although Rule 12 has subsequently been amended, for purposes of administering NYSE Arca Equities arbitrations filed on or prior to January 31, 2007, NYSE Arbitration follows Rule 12 as it was in effect on that date.

<sup>7</sup> Additional information regarding the consolidation may be found in: SR-NASD-2007-23 (March 19, 2007) concerning proposed amendments to the By-Laws of NASD to implement governance and related changes to accommodate the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc.; and SR-NYSE-2007-22 (February 27, 2007) concerning proposed amendments to several NYSE rules which, among other matters, harmonize the rules with corresponding NASD regulatory requirements.

Arca Equities cases filed after January 31, 2007, but prior to the Effective Date will continue to be governed by existing NYSE Regulation arbitration rules.<sup>8</sup>

NYSE Arca Equities Rule 12, as amended, would provide detailed guidance concerning claims involving ETP Holders and/or associated persons that are asserted on and after the Effective Date.<sup>9</sup> First, any dispute, claim or controversy between or among ETP Holders and/or associated persons shall be arbitrated pursuant to the NASD DR Codes of Arbitration Procedure. Second, any dispute, claim or controversy between a customer or a non-member and an ETP Holder and/or associated person arising in connection with the business of such ETP Holder and/or in connection with the activities of an associated person, shall be arbitrated pursuant to NASD DR Codes of Arbitration Procedure as provided by any duly executed and enforceable written agreement, or upon the demand of the customer or non-member. This obligation to arbitrate shall extend only to those matters that are permitted to be arbitrated under NASD DR Codes of Arbitration Procedure.

In almost all cases the change from NYSE rules or NYSE Arca Equities rules to NASD DR arbitration rules should not result in material, substantive differences to persons participating in the arbitration process. However, one difference is the treatment of employment discrimination claims. NASD DR rules provide that any claim alleging employment discrimination, including any sexual harassment claims, in violation of a

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<sup>8</sup> See Securities Exchange Act Release No. 55142 (January 19, 2007), 72 FR 3898 (January 26, 2007) (SR-NYSEArca-2006-54) and Securities Exchange Act Release No. 55141 (January 19, 2007), 72 FR 3897 (January 26, 2007) (SR-NYSEArca-2006-55).

<sup>9</sup> It is proposed that the provisions in the current Rule 12(b)–(f) be deleted because these sections would be replaced by the proposed Rule 12 provisions described herein.

statute, will be eligible for arbitration pursuant to either a pre-dispute or a post-dispute agreement to arbitrate. In contrast, NYSE Rule 600(f), NYSE Rule 347(b) and current NYSE Arca Equities Rule 12(b) permit claims to be arbitrated only when the parties have agreed to arbitrate the claim after it has arisen.

Proposed Rule 12(b) would explicitly retain NYSE Arca Equities' enforcement authority related to arbitration. In appropriate cases, arbitrators would refer to NYSE Arca Equities potential violations of NYSE Arca Equities' rules or the federal securities laws that come to their attention during and in connection with a proceeding. Rule 12(b) would specify that NYSE Arca Equities would retain the ability to take action based on such referrals that may come from arbitrators in cases being arbitrated at NASD DR.

Proposed Rule 12(c) also would provide that any ETP Holder and/or associated person of any ETP Holder, that fails to honor an award of arbitrators rendered under the NASD DR Codes of Arbitration Procedure, or under the auspices of any other self-regulatory organization, shall be subject to disciplinary proceedings in accordance with NYSE Arca Equities Rule 10. Proposed Rule 12(c) also would specify that failure to submit a matter to arbitration as required by Rule 12 also would subject the ETP Holder and/or associated person to Exchange disciplinary action.

Proposed Rule 12(d) would also specify that the submission of any matter to arbitration as provided for under the Rule shall in no way limit or preclude any right, action or determination by NYSE Arca Equities that it would otherwise be authorized to adopt, administer or enforce.

## 2. Statutory Basis



The Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5)<sup>10</sup> of the Act, which requires, among other things, that the rules of an Exchange be designed to promote just and equitable principles of trade and to protect investors and the public interest. The proposed rule change will streamline the arbitration process and, after a transitional period, provide for a unified and more efficient arbitration forum with one set of arbitration rules and administrative procedures. This will allow resources to be devoted to maintaining and improving the NASD DR program, rather than splitting resources among duplicative programs. As a result of these improvements, the proposed rule change will better protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or

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<sup>10</sup> 15 U.S.C. 78f(b)(5).

(ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be 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, as amended, 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2007-60 on the subject line.

##### Paper Comments:

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

All submissions should refer to File Number SR-NYSEArca-2007-60. 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, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of NYSE Arca. 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-2007-60 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>11</sup> 17 CFR 200.30-3(a)(12).