SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59522; File No. SR-NYSEArca-2008-134)

March 5, 2009

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

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")[1] and Rule 19b-4 thereunder,[2] 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.[3] 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.[4] 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

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

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

4 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.

appropriate remedial sanctions in disciplinary proceedings. The Exchange proposes to make the following 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.[5] 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.[6] The Exchange also proposes changes to clarify that an Associated Person may be employed by an OTP Holder or OTP Firm.[7]

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,[8] and to allow adjudicators to use a "reasonable calculation of loss" for the purposes of determining restitution when actual loss cannot be calculated.[9] 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.

5 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.

6 See proposed NYSE Arca Rules 10.16(a) and (d)(2)-(3), (8) and (12).

7 See proposed NYSE Arca Rules 10.16(d)(2)-(3), (8) and (12).

8 See proposed NYSE Arca Rule 10.16(b)(2).

9 See proposed NYSE Arca Rule 10.16(b)(5).

B. Specific Sanctioning Guidelines

Rule 10.16 currently contains "Specific Sanctioning Guidelines" for certain enumerated options order handling rules[10] and rules relating to recordkeeping and financial requirements.[11] 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.[12] 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.[13] 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

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

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

12 See proposed NYSE Arca Rule 10.16(e)-(f).

13 See proposed NYSE Arca Rule 10.16(e)-(f).

rule violations in lieu of initiating formal disciplinary proceedings.[14] 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

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[14] See NYSE Arca Rule 10.12.

Guidelines for violations of NYSE Arca Rule 9 (Conducting Business with the Public),[15] and proposed Rule 10.16(h) will set forth guidelines for violations of NYSE Arca Rule 11 (Business Conduct).[16] 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 change adds NYSE Arca Rule

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15 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.

16 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.

6.37A[17] 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)[18] of the Act, and in particular, with Section 6(b)(5)[19] 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.[20]

The Commission also finds that the proposal is consistent with Section 6(b)(6)[21] of the Act, which requires that the rules of the exchange provide that its members and persons

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17 See NYSE Arca Rule 6.37A (Obligations of Market Makers - OX).

18 15 U.S.C. 78f(b).

19 15 U.S.C. 78f(b)(5).

20 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).

21 15 U.S.C. 78f(b)(6).

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,[22] 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.[23]

Florence E. Harmon
Deputy Secretary

22 15 U.S.C. 78s(b)(2).

23 17 CFR 200.30-3(a)(12).