



8011-01p
SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66192; File No. SR-NYSEArca-2012-02)

January 19, 2012

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Amendments to NYSE Arca Rule 9.4 and NYSE Equities Inc. Rules 5.3(d) and 9.4 Relating to Discretionary Proxy Voting on Executive Compensation Matters and Election of Directors to Comply with the Dodd-Frank Act

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on January 5, 2012, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) 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 and is approving the proposed rule change on an accelerated basis.

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

The Exchange proposes to amend NYSE Arca Rule 9.4 and to adopt Commentary .01 to NYSE Arca Rule 9.4 and, through its wholly-owned corporation, NYSE Arca Equities, Inc. (“NYSE Arca Equities”), proposes to amend NYSE Arca Equities Rule 5.3(d) and NYSE Arca Equities Rule 9.4 and to adopt Commentary .01 to NYSE Arca Equities Rule 9.4. These amendments are being made to comply with the requirements of the Dodd-Frank Act with respect to the broker voting rules of national securities exchanges. The text of the proposed rule

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

change is available at the Exchange, the Commission’s Public Reference Room, and www.nyse.com.

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

Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) adopted new Section 6(b)(10)⁴ of the Securities Exchange Act (the “Exchange Act”).⁵ This new provision requires all national securities exchanges to adopt rules that prohibit their members from voting on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission, by rule, unless the member receives voting instructions from the beneficial owner of the shares.

NYSE Arca Rule 9.4 governs when OTP Holders and OTP Firms may vote shares held for customers and NYSE Arca Equities Rule 9.4 governs when ETP Holders may votes[sic]

⁴ 15 U.S.C. 78f(b)(10).

⁵ 15 U.S.C. 78a.

shares held for customers. NYSE Arca Rule 9.4 prohibits OTP Holders and OTP Firms, and NYSE Arca Equities Rule 9.4 prohibits ETP Holders, from voting any uninstructed shares, but also permits the OTP Holder or OTP Firm (in the case of NYSE Arca Rule 9.4) or ETP Holder (in the case of NYSE Arca Equities Rule 9.4) to follow the rules of another national securities exchange instead. In addition to its general requirements with respect to voting of uninstructed shares by ETP Holders, NYSE Arca Equities Rule 9.4 specifically prohibits ETP Holders from voting uninstructed shares on any proposal with respect to the implementation of any equity compensation plan, or any material revision to the terms of any existing equity compensation plan (whether or not stockholder approval of such plan is required by NYSE Arca Equities Rule 5.3(d)(1)-(7)), unless the beneficial owner of the shares has given voting instructions.

In order to assure compliance, in all cases, with newly adopted Section 6(b)(10), NYSE Arca proposes to add Commentaries (each titled “*Proxies Voting*”) to each of NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 to provide that in no event could an OTP Holder or OTP Firm (in the case of NYSE Arca Rule 9.4) or ETP Holder (in the case of NYSE Arca Equities Rule 9.4) vote uninstructed shares on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission, by rule, unless instructed by the beneficial owner of the shares.

NYSE Arca also proposes to amend NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 to provide that an OTP Holder or OTP Firm (in the case of NYSE Arca Rule 9.4) or ETP Holder (in the case of NYSE Arca Equities Rule 9.4) may only follow the rules of another SRO in voting shares if, in doing so, its records clearly indicate the procedures it is following.

NYSE Arca proposes to amend NYSE Arca Equities Rule 9.4 to delete the specific prohibition in that rule with respect to ETP Holders voting uninstructed shares on any proposal with respect to the implementation of any equity compensation plan, or any material revision to the terms of any existing equity compensation plan (whether or not stockholder approval of such plan is required by NYSE Arca Equities Rule 5.3(d)(1)-(7)), unless the beneficial owner of the shares has given voting instructions. NYSE Arca is proposing to delete this text because the Exchange believes it is no longer necessary, as NYSE Arca Equities Rule 9.4 generally prohibits ETP Holders from voting shares held on behalf of a beneficial owner except pursuant to the instructions of such beneficial holder and proposed Commentary .01 to NYSE Arca Equities Rule 9.4 would specifically prohibit ETP Holders from voting without such instructions on any proposal relating to executive compensation, or any other significant matter, as determined by the SEC, by rule. Subparagraph (7) of NYSE Arca Equities Rule 5.3(d) is currently a cross-reference to the prohibition of NYSE Arca Equities Rule 9.4 on voting uninstructed shares on equity compensation matters and it will be rendered moot by the elimination of that aspect of NYSE Arca Equities Rule 9.4. Consequently, NYSE Arca proposes to amend this provision so that it will be a cross-reference to the voting restrictions of NYSE Arca Equities Rule 9.4 generally.

NYSE Arca is also proposing to make several other minor changes to the applicable rules. First, NYSE Arca proposes to add the words “or authorize” or “or authorizing” in certain places in NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 to clarify that the rules cover not only the giving of a proxy but also the authorization of such proxy. Second, NYSE Arca proposes to amend references to “actual” owners in certain places in NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 so that they will now refer to “beneficial” owners, as this is the

term used in the federal securities laws and Commission rules. Third, NYSE Arca proposes to amend NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 to modify the language which currently states that an OTP Holder or OTP Firm or ETP holder, as applicable, may vote shares when permitted to do so pursuant to the rules of another national securities exchange to which he or his firm “is responsible” As a clarification, NYSE Arca proposes to amend this language so that it will state that an OTP Holder or OTP Firm or ETP holder, as applicable, may vote shares when permitted to do so pursuant to the rules of another national securities exchange of which he or his firm is a member. Finally, NYSE Arca proposes to amend this same sentence in both NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 to add the words “or association” after the phrase “national securities exchange,” as an OTP Holder, OTP Member or ETP Holder may be a member of a national securities association (e.g., FINRA) whose rules contain appropriate restrictions on its members’ ability to vote uninstructed shares (as is the case with FINRA Rule 2251).

2. Statutory Basis

NYSE Arca believes that the proposed rule change is consistent with the provisions of Section 6 of the Exchange Act,⁶ in general and with Section 6(b)(10)⁷ of the Exchange Act, in particular. Specifically, NYSE Arca believes the proposed rule change is consistent with the requirements of Section 6(b)(10) that all national securities exchanges adopt rules prohibiting members from voting, without receiving instructions from the beneficial owner of shares, on the election of a member of a board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(10).

matter, as determined by the Commission, by rule. The Exchange also believes that the proposed rule change is consistent with the requirements under Section 6(b)(5)⁸ that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange is adopting this proposed rule change to comply with the requirements of Section 957 of the Dodd-Frank Act, and therefore believes the proposed rule change to be consistent with the Exchange Act, particularly with respect to the protection of investors and the public interest. NYSE Arca believes that the proposed amendment to NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 to provide that an OTP Holder or OTP Firm (in the case of NYSE Arca Rule 9.4) or ETP Holder (in the case of NYSE Arca Equities Rule 9.4) may only follow the rules of another SRO in voting shares if, in doing so, its records clearly indicate the procedures it is following, is consistent with the requirements under Section 6(b)(5) in that it will protect investors by requiring brokers to maintain adequate records when they vote uninstructed shares.

NYSE Arca believes that the proposed amendment to NYSE Arca Equities Rule 9.4 to delete the specific prohibition in that rule with respect to ETP Holders voting uninstructed shares on any equity compensation proposal is consistent with the requirements under Section 6(b)(5) in that NYSE Arca Equities Rule 9.4 generally prohibits ETP Holders from voting shares held on behalf of a beneficial owner except pursuant to the instructions of such beneficial holder and proposed Commentary .01 to NYSE Arca Equities Rule 9.4 would specifically prohibit ETP Holders from voting without such instructions on any proposal relating to executive compensation, or any other significant matter, as determined by the Commission, NYSE Arca

⁸ 15 U.S.C. 78f(b)(5).

also believes that the proposed amendment is consistent with the requirements under Section 6(b)(10) in that the specific prohibitions required by Section 957 of the Dodd-Frank Act will be included in NYSE Arca Equities Rule 9.4 as amended.

NYSE Arca believes that the following proposed minor amendments are consistent with the requirements under Section 6(b)(5) in that they are simply clarifications of the rule text without any substantive effect: (i) the proposed amendment to subparagraph (7) of NYSE Arca Equities Rule 5.3(d), which simply corrects a cross-reference to reflect the proposed amendment to NYSE Arca Equities Rule 9.4; (ii) the addition of the words “or authorize” or “or authorizing” in certain places in NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4; (iii) the proposed replacement of references to “actual” owners in certain places in NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 by references to “beneficial” owners; and (iv) the amendment to NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 to state that an OTP Holder or OTP Firm or ETP holder, as applicable, may vote shares when permitted to do so pursuant to the rules of another national securities exchange of which he or his firm is “a member” rather than one to which he or his firm “is responsible.”

NYSE Arca believes that the proposed addition of the words “or association” after the phrase “national securities exchange” in NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 is consistent with the requirements under Section 6(b)(5) in that it simply recognizes that national securities associations may have rules governing the voting of shares by their broker-dealer members (such as FINRA Rule 2251) comparable to those of national securities exchanges.

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

No written comments were solicited or received with respect to the proposed rule change.

III. 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 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. Please include File Number SR- NYSEArca-2012-02 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- NYSEArca-2012-02. 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, 100 F Street, NE, Washington DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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- NYSEArca-2012-02 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

In its filing, NYSE Arca requested that the Commission approve the proposal on an accelerated basis so that the Exchange could immediately comply with the requirements imposed by the Dodd-Frank Act. After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁹

The Commission believes that the proposal is consistent with Section 6(b)(10)¹⁰ of the Act, which requires that national securities exchanges adopt rules prohibiting members that are not beneficial holders of a security from voting uninstructed proxies with respect to the election of a member of the board of directors of an issuer (except for uncontested elections of directors for companies registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission by rule. The Commission also

⁹ In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78f(b)(10).

believes that the proposal is consistent with Section 6(b)(5)¹¹ of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, 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, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposal is consistent with Section 6(b)(10) of the Act because it adopts revisions that comply with that section. As noted in the accompanying Senate Report, Section 957, which adopts Section 6(b)(10), reflects the principle that “final vote tallies should reflect the wishes of the beneficial owners of the stock and not be affected by the wishes of the broker that holds the shares.”¹² The proposed rule change will make the Exchange compliant with the new requirements of Section 6(b)(10) by specifically prohibiting, in Commentary language to each NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4, OTP Holder or OTP Firm (in the case of NYSE Arca 9.4) or ETP Holder (in the case of NYSE Arca Equities Rule 9.4), who are not a beneficial owner of a security, from granting a proxy to vote the security in connection with a shareholder vote on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission by rule, unless the beneficial owner of the security has instructed the member to vote the proxy in accordance with the voting instructions of the beneficial owner.¹³

¹¹ 15 U.S.C. 78f(b)(5).

¹² See S. Rep. No. 111-176, at 136 (2010).

¹³ The Commission has not, to date, adopted rules concerning other significant matters where uninstructed broker votes should be prohibited, although it may do so in the future.

The Commission believes that the proposal is consistent with Section 6(b)(5) of the Act because the proposal will further investor protection and the public interest by assuring that shareholder votes on the election of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940) and on executive compensation matters are made by those with an economic interest in the company, rather than by an OTP Holder, OTP Firm, or ETP holder that has no such economic interest, which should enhance corporate governance and accountability to shareholders.¹⁴

In addition to incorporating the provisions of Section 6(b)(10), the Exchange proposes deleting from NYSE Arca Equities Rule 9.4 the specific prohibition in that rule with respect to ETP Holders voting uninstructed shares on any equity compensation proposal. The Commission believes that this provision is no longer necessary because NYSE Arca Equities Rule 9.4 generally prohibits ETP Holders from voting any uninstructed shares, including on equity compensation matters. The Commission further notes that the new proposed Commentary to NYSE Arca's Equities Rule 9.4 prohibiting uninstructed broker votes on executive compensation covers the specific items identified in Section 951 of the Dodd-Frank Act as well as any other matter concerning executive compensation, and has been drafted broadly to reflect the requirements of Section 6(b)(10) of the Act. The Commission also notes that to the extent NYSE Arca has any past practice or interpretation that may have permitted an ETP Holder to

Should the Commission adopt such rules, we would expect NYSE Arca to adopt coordinating rules promptly to comply with the statute.

¹⁴ As the Commission stated in approving NYSE rules prohibiting broker voting in the election of directors, having those with an economic interest in the company vote the shares, rather than the broker who has no such economic interest, furthers the goal of enfranchising shareholders. See Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (SR-NYSE-2006-92).

vote on certain equity compensation plans, under its existing rule, this will no longer be applicable and is superseded by the newly adopted provisions.

The Commission notes that NYSE Arca has proposed to amend NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 to provide that OTP Holders, OTP Firms, or ETP Holders may only follow the rules of another self-regulatory organization in voting shares if its records clearly indicate the procedures it is following. The Commission believes that this will help to ensure that any broker voting that is permitted is pursuant to approved rules of another self-regulatory organization.

The Commission notes that the Exchange has also proposed to make certain clarifications to its rules, which include: amending subparagraph (7) of NYSE Arca Equities Rule 5.3(d) to cross-reference to NYSE Arca Equities Rule 9.4; replacing references to “actual” owners with “beneficial” owners in certain places in NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4; and amending NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 to state that an OTP Holder or OTP Firm or ETP Holder, as applicable, may vote shares when permitted to do so pursuant to the rules of another national securities exchange of which he or his firm is “a member” rather than one to which he or his firm “is responsible.” The Commission believes that these clarifications are technical in nature and should provide greater transparency in Exchange’s rules and help avoid confusion.

The Commission further notes that the Exchange added “or association” to NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 so that an OTP Holder, OTP Firm, or ETP Holder, as applicable, would be prohibited from giving a proxy to vote, unless pursuant to the rules of any national securities exchange or association of which it is a member. The Commission believes that this is appropriate since OTP Holders, OTP Firms, or ETP Holders are members of FINRA,

a national securities association that also has restrictions on broker voting.¹⁵ Finally, the Commission notes that the change to reflect that NYSE Arca rules prohibit not only the giving of a proxy, but also the authorization of the proxy, should help to clarify the intent of NYSE Arca proxy rules and is consistent with the requirements of Section 6 of the Act.

Based on the above, the Commission finds that the NYSE Arca proposal will further the purposes of Sections 6(b)(5) and 6(b)(10) of the Act because it should enhance corporate accountability to shareholders while also serving to fulfill the Congressional intent in adopting Section 6(b)(10) of the Act.

The Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,¹⁶ for approving the proposed rule change prior to the 30th day after the date of publication of notice in the Federal Register. Section 6(b)(10) of the Act, enacted under Section 957 of the Dodd-Frank Act, does not provide for a transition phase, and requires rules of national securities exchanges to prohibit broker voting on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission by rule. The Commission believes that good cause exists to grant accelerated approval to the Exchange's proposal, because it will conform the Exchange's rules to the requirements of Section 6(b)(10) of the Act. Moreover, the Commission notes that the Exchange's proposed Commentaries to

¹⁵ See FINRA Rule 2251. In addition, the Commission notes that the addition of "or association" to NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 is consistent with ISE Rule 421 and BATS-Y Exchange, Inc. Rule 13.3(b). See Securities Exchange Act Releases Nos. 63139 (October 20, 2010), 75 FR 65680 (October 26, 2011) (SR-ISE-2010-99) and 65448 (September 30, 2011), 76 FR 62103 (October 6, 2011) (SR-BYX-2011-024).

¹⁶ 15 U.S.C. 78s(b)(2).

NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 are identical to Nasdaq Rule 2251(d), which was previously approved by the Commission.¹⁷ Finally, as noted above, the Exchange's proposed changes to NYSE Arca Rule 9.4 and NYSE Arca Equities Rule 9.4 are consistent with rules of other national securities exchanges, provide clarity and transparency in the Exchange's rules, and raise no new regulatory issues. Based on the above, the Commission believes the Exchange's proposed rule change raises no new regulatory issues, and therefore finds good cause to accelerate approval.

¹⁷ See Securities Exchange Act Release No. 62992 (September 24, 2010), 75 FR 60844 (October 1, 2010) (SR-Nasdaq-2010-114).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (SR- NYSEArca-2012-02) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Kevin M. O'Neill
Deputy Secretary

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¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12).