

algorithms and strategies in such a way as to render them useless.

—The Service is a sentiment indicator that would provide users with an indication of how a specific type of market participant feels about certain securities, making available to the public information that is sometimes referred to as “the word on the street” as compiled from order flow on the trading desks of large broker-dealers.

—Nasdaq believes that it has provided adequate justification for the fees.

#### IV. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change, the comment letter, and Nasdaq’s response to the comment letter, and 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<sup>7</sup> and, in particular, Section 6(b)(4) of the Act,<sup>8</sup> which requires, among other things, that Nasdaq’s rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls, and that it not unfairly discriminate between customers, issuers, brokers or dealers. The Commission believes that the proposed rule change is consistent with these statutory standards.

Nasdaq has represented that the Service is a voluntary one, and that the information provided to subscribers is not comprised of data that broker-dealers are obligated to provide to Nasdaq for regulatory purposes because of Nasdaq’s status as a self-regulatory organization. Additionally, broker-dealers do not need the Service to perform their duties, so the decision to purchase the Service is truly voluntary and dependent upon each broker-dealer’s business model. Finally, because the Service is voluntary, Nasdaq has met the statutory standard by pricing the Service according to free market principles; indeed, if Nasdaq priced the Service too high, broker-dealers could simply opt not to purchase the Service. The Commission believes that Nasdaq’s fees for the Service are both reasonable and equitably allocated.<sup>9</sup> Additionally, the

<sup>7</sup> In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> The proposal meets the criteria, formulated by the Commission in connection with the petition filed by NetCoalition, for approval of proposed rule changes concerning the distribution of non-core

Commission does not believe that the Pathfinder Service will allow reverse engineering of the algorithms and strategies created by Nasdaq members; Nasdaq has explained the various ways the information is filtered, and has stated that such filtering will prevent this from occurring.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act<sup>10</sup>, that the proposed rule change (SR–NASDAQ–2008–016) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59264; File No. SR–NYSEArca–2009–02]

#### Self-Regulatory Organizations; Notice of Filing of and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. To Amend or Eliminate Unnecessary Rule Text

January 16, 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 January 8, 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 and II below, which Items have been prepared

market data. See Securities Exchange Act Release Nos. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21) and 55011 (December 27, 2006) (order granting petition for review of SR–NYSEArca–2006–21). In its order issued in connection with the NetCoalition petition, the Commission stated that “reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory.” 73 FR at 74781–82. As such, the “existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.” *Id.* at 74782. If an exchange “was subject to significant competitive forces in setting the terms of a proposal,” a proposal will be approved unless the Commission determines that “there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.” *Id.* at 74781.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</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.

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 or eliminate several of its rules in order to remove unnecessary rule text related to terms or systems that are now obsolete. The text of the proposed rule change is attached to the proposed rule change as Exhibit 5. 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 the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The purpose of this filing by NYSE Arca is to correct certain NYSE Arca cross-references and remove obsolete and unnecessary rule text. By abolishing these out-dated references and correcting cross-references, the Exchange is not changing or altering any obligation, rights, policies or practices enumerated within its rules.

The specific proposed changes are discussed in further detail below.

- Rule 5.3(g). Criteria for Underlying Securities: The Exchange is changing the numbering within the rule because two separate rule filings were approved at different times which affected the numbering within the rule.<sup>4</sup>

<sup>4</sup> See SR–NYSEArca–2008–108, Securities Exchange Act Release No. 34–59004 [sic] (November 24, 2008) 73 FR 207 [sic] (October 24, 2008) [sic] (filing seeking approval for listing and trading of options on Managed Fund Shares) and SR–NYSEArca–2008–66, Securities [sic] Act Release No. 34–59055 [sic] (December 4, 2008) 73 FR 238 [sic] (December 10, 2008) (filing seeking approval for Listing and Trading Options on Shares of the iShares COMEX Gold Trust and the iShares Silver Trust).

- Rule 6.20(a). Time Synchronization: The Exchange is changing the rule reference from Rule 4.25 to Rule 11.18.

- Rule 6.34. Trading by OTP Holders and OTP Firms on the Floor: The Exchange is eliminating the references to Rule 6.38 and Rule 6.52(a) in Commentary .01 as those rules are obsolete and no longer exist.

- Rule 6.48(c). Discretionary Transaction: The Exchange is changing the rule reference from Rule 6.39 to Rule 6.84.

- Rule 6.75(f)(1). Priority and Order Allocation Procedures—Open Outcry: The Exchange is eliminating the phrase related to “Exchange officer” as this now obsolete.

- Rule 6.78(e)(1)(E). Transactions Off the Exchange: The Exchange is changing the rule reference from Rule 8.103 to Rule 5.33.

- Rule 6.78. Transaction Off the Exchange. Commentary: The Exchange is removing the Rule 7.9 Meaning of Premium Bids and Offers, Index Options reference as this rule is now obsolete and no longer exists.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),<sup>5</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>6</sup> in particular, because it is 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. The Exchange believes that the proposed rule change will clarify the rule cross-references and eliminate unnecessary confusion in its rule structure.

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

The Exchange has filed the proposed rule change pursuant to Section

19(b)(3)(A)(iii) of the Act<sup>7</sup> and Rule 19b–4(f)(6) thereunder.<sup>8</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b–4(f)(6)(iii) thereunder.<sup>10</sup>

A proposed rule change filed under Rule 19b–4(f)(6)<sup>11</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),<sup>12</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange believes the waiver of this period will allow it to immediately remove outdated and obsolete references and terms contained in Exchange rules without delay. The Commission has determined that waiving the 30-day operative delay of the Exchange’s proposal is consistent with the protection of investors and the public interest because such waiver will allow the Exchange to promptly remove obsolete references and terms contained in its rules, thereby avoiding further potential confusion and ensuring that the rule text of the Exchange is accurate.<sup>13</sup> Therefore, the Commission designates the proposal as operative upon filing. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such 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 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–NYSEArca–2009–02 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–2009–02. 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 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 such 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–NYSEArca–2009–02 and should be submitted on or before February 17, 2009.

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>8</sup> 17 CFR 240.19b–4(f)(6).

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange’s intent to file the proposed rule change along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>11</sup> 17 CFR 240.19b–4(f)(6).

<sup>12</sup> 17 CFR 240.19b–4(f)(6)(iii).

<sup>13</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. See 15 U.S.C. 78c(f).

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

<sup>6</sup> 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Florence E. Harmon,**  
*Deputy Secretary.*

[FR Doc. E9-1672 Filed 1-26-09; 8:45 am]

**BILLING CODE 8011-01-P**

## UNITED STATES SENTENCING COMMISSION

### Sentencing Guidelines for United States Courts

**AGENCY:** United States Sentencing Commission.

**ACTION:** Notice of period during which individuals may apply to be appointed to the voting membership of the Practitioners Advisory Group; request for applications.

**SUMMARY:** The Practitioners Advisory Group of the United States Sentencing Commission is a standing advisory group of the United States Sentencing Commission pursuant to 28 U.S.C. 995 and Rule 5.4 of the Commission's Rules of Practice and Procedure. Having decided to adopt a formal charter for the Practitioners Advisory Group, the United States Sentencing Commission is reconstituting the voting membership of the advisory group under that charter. The purpose of the advisory group is (1) To assist the Commission in carrying out its statutory responsibilities under 28 U.S.C. 994(o); (2) to provide to the Commission its views on the Commission's activities and work, including proposed priorities and amendments; (3) to disseminate to defense attorneys, and to other professionals in the defense community, information regarding federal sentencing issues; and (4) to perform other related functions as the Commission requests. Under the charter, the advisory group will consist of not more than 17 voting members, each of whom may serve not more than two consecutive three-year terms. Of those 17 voting members, one shall be Chair, one shall be Vice Chair, 12 shall be circuit members (one for each federal judicial circuit other than the Federal Circuit), and three shall be at-large members. To be eligible to serve as a voting member, an individual must be an attorney who (1) Devotes a substantial portion of his or her professional work to advocating the interests of privately represented individuals, or of individuals represented by private practitioners through appointment under the

Criminal Justice Act of 1964, within the federal criminal justice system; (2) has significant experience with federal sentencing or post-conviction issues related to criminal sentences; and (3) is in good standing of the highest court of the jurisdiction or jurisdictions in which he or she is admitted to practice. Additionally, to be eligible to serve as a circuit member, the individual's primary place of business or a substantial portion of his or her practice must be in the circuit concerned. Each voting member is appointed by the Commission. The Commission hereby invites any individual who is eligible to be appointed to the initial voting membership of the Practitioners Advisory Group to apply. Applications should be received by the Commission not later than March 30, 2009.

Applications may be sent to Michael Courlander at the address listed below.

**DATES:** Applications for the initial voting membership of the Practitioners Advisory Group should be received not later than March 30, 2009.

**ADDRESSES:** *Send applications to:* United States Sentencing Commission, One Columbus Circle, NE., Suite 2-500, South Lobby, Washington, DC 20002-8002, *Attention:* Public Affairs.

**FOR FURTHER INFORMATION CONTACT:** Michael Courlander, Public Affairs Officer, *Telephone:* (202) 502-4597.

**SUPPLEMENTARY INFORMATION:** Section 995(a)(1) of title 28, United States Code, authorizes the Commission to establish general policies and promulgate rules and regulations as necessary for the Commission to carry out the purposes of the Sentencing Reform Act of 1984. Having adopted a formal charter for the Practitioners Advisory Group, the United States Sentencing Commission is reconstituting the voting membership of the Practitioners Advisory Group under that charter. The Commission invites any individual who is eligible to be appointed to the initial voting membership of the Practitioners Advisory Group to apply.

**Authority:** 28 U.S.C. 994(a), (o), (p), 995; USSC Rules of Practice and Procedure 5.2, 5.4.

**Ricardo H. Hinojosa,**  
*Acting Chair.*

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**BILLING CODE 2210-40-P**

## UNITED STATES SENTENCING COMMISSION

### Sentencing Guidelines for United States Courts

**AGENCY:** United States Sentencing Commission.

**ACTION:** Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

**SUMMARY:** Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth a number of issues for comment, some of which are set forth together with the proposed amendments; some of which are set forth independent of any proposed amendment; and one of which (regarding retroactive application of proposed amendments) is set forth in the **SUPPLEMENTARY INFORMATION** portion of this notice.

The proposed amendments and issues for comment in this notice are as follows: (1) A proposed amendment in response to the Identity Theft Restitution and Enforcement Act of 2008, title II of Public Law 110-326, including proposed changes to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information), and § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), and issues for comment regarding the guidelines' treatment of offenses involving fraud, identity theft, computers, and communications; (2) a proposed amendment in response to the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Public Law 110-465, including proposed changes to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) and § 2D3.1

<sup>14</sup> 17 CFR 200.30-3(a)(12).