

For the Commission, by the Division of Investment Management, under delegated authority.

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65906; File No. SR-NYSEArca-2011-92]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services

December 7, 2011.

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> notice is hereby given that, on December 1, 2011, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III 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.

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

The Exchange proposes to amend the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services ("Fee Schedule"). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://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 the Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The Exchange proposes to amend the Fee Schedule, as described below, and implement the fee changes on December 1, 2011.

##### Auctions

##### Opening and Market Order Auctions—Securities \$1.00 and Greater

The Fee Schedule currently provides that a fee of \$0.0005 per share is charged for orders executed in the Opening or Market Order Auction.<sup>3</sup> The order types that may execute in the Opening or Market Order Auction are Limit Orders, Market Orders and Auction-Only Orders, which are Limit and Market Orders that are only to be executed within an Auction.<sup>4</sup> The Exchange currently charges the \$0.0005 fee for an Auction-Only Order but not a Limit or Market Order executed in the Opening or Market Order Auction. The Exchange proposes to amend the Fee Schedule to provide that during an Opening or Market Order Auction, the \$0.0005 per share fee will apply to executions of Auction-Only Orders and Market Orders. Limit Order executions in the Opening or Market Order Auction will continue to be free.<sup>5</sup>

##### Trading Halt Auction—Securities \$1.00 and Greater

The Exchange does not currently charge a fee for executions of orders in Trading Halt Auctions.<sup>6</sup> The Exchange proposes to amend the Fee Schedule to provide that during a Trading Halt Auction, a \$0.0005 per share fee will apply to the execution of Auction-Only

<sup>3</sup> This fee is currently referenced within the Tier 1, Tier 2 and Basic Rates sections of the Fee Schedule and will be amended, as discussed herein, in each instance. Auctions are described under NYSE Arca Equities Rule 7.35.

<sup>4</sup> See NYSE Arca Equities Rule 7.31(t). An Auction-Only order is executable during the next auction following entry of the order. If the Auction-Only Order is not executed in the auction, the balance is cancelled. Auction-Only orders are only available for auctions that take place on the Exchange and are not routed to other exchanges.

<sup>5</sup> The Exchange also proposes to remove the text from Footnote 2 of the Fee Schedule that provides that transaction fees do not apply to orders executed in the Opening Auction and Market Order Auction. This text inadvertently was not removed in 2010 when the Exchange implemented the \$0.0005 fee for orders executed in the Opening or Market Order Auction. See Securities Exchange Act Release No. 63056 (October 6, 2010), 75 FR 63233 (October 14, 2010) (SR-NYSEArca-2010-87).

<sup>6</sup> As noted above for Opening and Market Order Auctions, the order types that may execute in a Trading Halt Auction are Limit Orders, Market Orders and Auction-Only Orders.

Orders and Market Orders. Limit Order executions in the Trading Halt Auction will continue to be free.

##### Closing Auction—Securities \$1.00 and Greater

The Fee Schedule currently provides that a fee of \$0.0010 per share is charged for Market-On-Close ("MOC") and Limit-On-Close ("LOC")<sup>7</sup> Orders executed in the Closing Auction.<sup>8</sup> The Exchange also currently charges this \$0.0010 fee for Auction-Only Orders that are executed in the Closing Auction, which are effectively equivalent to a MOC Order or LOC Order, but does not charge for Market Orders or Limit Orders that are executed in the Closing Auction. The Exchange proposes to amend the Fee Schedule to provide that, in addition to MOC and LOC Orders, Auction-Only and Market Orders that are executed in the Closing Auction will be charged the \$0.0010 fee. Limit Order executions in the Closing Auction will continue to be free.

##### All Auctions—Securities Less Than \$1.00

The Fee Schedule does not currently provide for a fee for executions during auctions on the Exchange in securities priced below \$1.00.<sup>9</sup> The Exchange proposes to amend the Fee Schedule to reflect that a fee of 0.1% of the total dollar value of the order will be charged for round lot and odd lot executions of securities priced below \$1.00 that take place during an Opening, Market Order, Trading Halt or Closing Auction. The

<sup>7</sup> See NYSE Arca Equities Rule 7.31(dd) and (ee). MOC Orders are Market Orders and LOC Orders are Limit Orders that are to be executed only during the Closing Auction, except that the Exchange rejects MOC and LOC Orders in securities for which the Exchange is not the primary market or when the auction is suspended pursuant to NYSE Arca Equities Rule 7.35(g).

<sup>8</sup> The Closing Auction MOC and LOC fees are currently referenced within the Tier 1, Tier 2 and Basic Rates sections of the Fee Schedule and will be amended, as discussed herein, in each instance. However, the Exchange notes that when it implemented the Closing Auction MOC and LOC fee in October 2009, it stated that the fee would apply for all pricing levels, including tiered and basic rate pricing, but inadvertently did not reflect this particular fee for Tape A securities in the Basic Rates section of the Fee Schedule. See Securities Exchange Act Release No. 60834 (October 16, 2009), 74 FR 54612 (October 22, 2009) (SR-NYSEArca-2009-88). The Exchange notes that Closing Auctions in Tape A securities are rarely conducted on the Exchange, if at all, but instead are conducted on the primary market for the particular security. The proposed rule change will correct this inadvertent omission and ensure that the Fee Schedule will provide for the appropriate fee if a Closing Auction is conducted on the Exchange in a Tape A security.

<sup>9</sup> In limited circumstances the Exchange inadvertently has charged for executions during auctions on the Exchange in securities priced below \$1.00, but has since rebated ETP Holders for any such charges.

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

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

proposed fee of 0.1% would be consistent with the fee that is currently charged for round lot and odd lot executions of securities priced below \$1.00 that take place outside of an auction.

Additionally, the text of Footnote 3 of the Fee Schedule states that rebates will not be paid for executions in securities priced under \$1.00. The Exchange believes that this text is more appropriate within Footnote 5 of the Fee Schedule because it would be located closer to the section of the Fee Schedule describing fees for securities priced below \$1.00 per share. Accordingly, the Exchange proposes to re-locate this text from Footnote 3 to Footnote 5 and reflect Footnote 3 as "Reserved" for possible use at a later time.

#### Primary Sweep Orders

The Fee Schedule currently provides for a fee of \$0.0021 per share for Primary Sweep Orders ("PSOs")<sup>10</sup> in Tape A securities that are routed outside the Book to the New York Stock Exchange ("NYSE"). The Exchange proposes to amend the Fee Schedule to reflect that the \$0.0021 per share fee will only be applicable to PSOs that remove liquidity from the NYSE and that a PSO that provides liquidity to the NYSE will not be charged a fee or provided a credit.<sup>11</sup>

The Exchange proposes to implement all of the changes discussed herein on December 1, 2011.

#### 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>12</sup> in general, and Section 6(b)(4) of the Act,<sup>13</sup> in particular, because it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. Specifically, the Exchange believes that the proposed rule change will add greater specificity to the Fee Schedule for securities priced at \$1.00 or more by identifying the particular types of orders that will be charged a fee during auctions and those that will not be charged a fee. This will include fees applicable to executions

during Trading Halt Auctions, which are similar in process and function to Opening and Market Order Auctions. The Exchange believes that it is appropriate to exclude Limit Orders from such fees because Limit Orders that are available to execute at any time during the trading day contribute valuable price discovery information to the market for securities priced at \$1.00 and above, which are more actively traded, and as such the Exchange wishes to encourage the submission of such Limit Orders, which will benefit all market participants.

The Exchange believes that it is equitable and reasonable to charge the same round and odd lot execution fees for securities priced below \$1.00, whether inside or outside the auction. Because such securities are more thinly traded, the Exchange does not believe that differential pricing for Limit Orders would have a significant impact on the number of such orders submitted, and as such proposes to charge all orders the same fees.

The Exchange believes that it is equitable and reasonable to impose the \$0.0021 per share fee for PSOs that remove liquidity from the NYSE and to not charge a fee or provide a credit to PSOs that provides liquidity because PSOs are designed to remove liquidity and are not designed to provide liquidity.<sup>14</sup> An ETP Holder that intends to provide liquidity in a Tape A security should instead utilize the PO+ order type, which receives a credit of \$0.0015 per share when providing liquidity to the NYSE.<sup>15</sup>

The proposed rule change will also remove obsolete text that does not belong in the Fee Schedule and move certain text to a more appropriate location.

#### 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 foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>16</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>17</sup> thereunder, because it establishes a due, fee, or other charge imposed by the NYSE Arca.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2011-92 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-2011-92. This file number should be included on the subject line if email 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

<sup>10</sup> See NYSE Arca Equities Rule 7.31(kk). A PSO is a Primary Only ("PO") Order that initially sweeps the Exchange's Book before being routed to the security's primary market.

<sup>11</sup> In limited circumstances where a PSO in a Tape A security is routed to the NYSE and provides liquidity to the NYSE, the Exchange has provided the ETP Holder that submitted the PSO with a credit of \$0.0015, which corresponds to the credit applicable on the NYSE.

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(4).

<sup>14</sup> See Securities Exchange Act Release No. 55896 (June 11, 2007), 72 FR 33795 (June 19, 2007) (SR-NYSEArca-2007-50).

<sup>15</sup> See NYSE Arca Equities Rule 7.31(x)(3). A PO+ Order is a PO Order entered for participation in the primary market, other than for participation in the primary market opening or primary market re-opening.

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

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

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 Web site 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 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-NYSEArca-2011-92 and should be submitted on or before January 4, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65910; File No. SR-FICC-2011-08]

### Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving Proposed Rule Change To Expand the Applicability of the Fails Charge to Agency Debt Securities Transactions

December 8, 2011.

#### I. Introduction

On October 20, 2011, the Fixed Income Clearing Corporation ("FICC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change SR-FICC-2011-08 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").<sup>1</sup> The proposed rule change was published for comment in the **Federal Register** on November 1, 2011.<sup>2</sup> No comment letters were received on the

proposal. This order approves the proposal.

#### II. Description

The purpose of this rule change is to expand the applicability of the fails charge to Agency debt securities transactions. The Treasury Markets Practices Group (the "TMPG"), a group of market participants active in the Treasury securities market sponsored by the Federal Reserve Bank of New York (the "FRBNY"), has been addressing the persistent settlement fails in Agency debt securities transactions that have arisen, in part, due to low interest rates.

To encourage market participants to resolve fails promptly, the TMPG recommended expanding the applicability of the fails charge (which currently applies to Treasury securities transactions) to Agency debt with the objective of reducing the incidence of delivery failures and supporting liquidity in this market.

The TMPG had previously recommended a charge for fails on Treasury securities, which the Government Securities Division (the "GSD") implemented after Commission approval.<sup>3</sup> At that time, the TMPG recommendation did not extend to Agency securities and, therefore, the GSD's 2009 rule filing did not cover Agency debt. However, the TMPG recently has expanded its recommendation to cover certain Agency securities and, therefore, the GSD is proposing to apply the existing fails charge regime to Agency debt transactions as recommended by the TMPG. Specifically, transactions in debentures issued by Fannie Mae, Freddie Mac, and the Federal Home Loan Banks now will be subject to this charge. The proposed fails charge for Agencies will be the same as that currently in place for Treasuries and is equal to the greater of: (a) 0 percent or (b) 3 percent per annum minus the federal funds target rate. The charge will accrue each calendar day a fail is outstanding.

The following examples illustrate the manner in which the proposed fails charge will apply:

*Example 1:* A settlement obligation fails and the next calendar date is a valid FICC business date. The GSD calculates the TMPG fail charge from the date the fail occurs to the next valid FICC business date. As the next valid business date is the next calendar date, the member's credit/debit resulting from the TMPG fail charge is assessed for one day.

*Example 2:* A settlement obligation fails and the next calendar date is a holiday

occurring on a Tuesday, Wednesday or Thursday. The GSD calculates the TMPG fail charge from the date the fail occurs to the next valid FICC business date. The TMPG fail charge is assessed for two days; the day the fail occurs and the date of the holiday.

*Example 3:* A settlement obligation fails on Friday and the following Monday is not a holiday. The GSD calculates the TMPG fail charge from the date the fail occurs to the next valid FICC business date. The TMPG fail charge is assessed for three days; Friday, Saturday and Sunday.

FICC's Board of Directors (or appropriate Committee thereof) will retain the right to revoke application of the proposed charges if industry events or practices warrant such revocation.

The expansion of the fails charge trading practice to the Agency debt market requires that Rule 11 (Netting System), Section 14 (Fails Charge) of the GSD rulebook be amended to make such rule applicable to debentures issued by any of Fannie Mae, Freddie Mac or the Federal Home Loan Banks. The current GSD rule states that the fails charge shall be the product of the (i) funds associated with a failed position and (ii) 3 percent per annum minus the target fed funds rate that is effective at 5 p.m. EST on the business day prior to the originally scheduled settlement date, capped at 3 percent per annum. FICC is proposing to restate the formula to make it clearer by amending section (ii) of the formula to read "the greater of (a) 0 percent or (b) 3 percent per annum minus the fed funds target rate . \* \* \*". This change is not meant to affect the result of the formula in any way but rather is a more precise way of stating the formula.

The proposed rule change makes clear that FICC will not guaranty fails charge proceeds in the event of a default (*i.e.*, if a defaulting member does not pay its fail charge, members due to receive fails charge proceeds will have those proceeds reduced pro-rata by the defaulting member's unpaid amount).

#### Timing of Implementation

The fails charges will apply to transactions in Agency debentures entered into on or after February 1, 2012, as well as to transactions that were entered into, but remain unsettled as of, February 1, 2012. For transactions entered into prior to, and unsettled as of, February 1, 2012, the fails charge will begin accruing on the later of February 1, 2012, or the contractual settlement date.

<sup>18</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> Securities Exchange Act Release No. 34-65632 (October 26, 2011), 76 FR 67519 (November 1, 2011).

<sup>3</sup> See Securities Exchange Act Release No. 34-59802 (April 20, 2009), 74 FR 19248 (April 28, 2009).