

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-68039; File No. SR-NSX-2012-15)

October 11, 2012

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 thereto Amending NSX Rule 15.5 to Comply with the Requirements of Exchange Act Rule 10C-1

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 26, 2012, National Stock Exchange, Inc. (“NSX[®]” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change, as described in Items I, II, and III below, which filing was amended and replaced in its entirety by Amendment No. 1 on October 10, 2012, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comment on the proposed rule change from interested persons.

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

The Exchange is proposing to amend NSX Rule 15.5 to incorporate additional listing standard requirements applicable to issuers of equity securities listed on the Exchange as required by the provisions of Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”), which added Section 10C to the Securities Exchange Act of 1934, as amended (“Exchange Act”), and Exchange Act Rule 10C-1 which implements these requirements.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

The text of the proposed rule change is available on the Exchange's website at <http://www.nsx.com>, at the principal office of the Exchange, 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 Exchange 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. 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

This Amendment No. 1 to SR-NSX-2012-15 (the "Filing") amends and replaces in its entirety the Filing as originally submitted on September 26, 2012. The Exchange is proposing Amendment No. 1 to (i) reflect the approval of the Filing by the Executive Committee of the Exchange's Board of Directors and the Regulatory Oversight Committee, (ii) amend the rule text to propose transition periods under NSX Rule 15.5(b), and add corresponding language to the Purpose section, (iii) propose to exempt small business [sic] as defined under Exchange Act Rule 12b-2 and clarify [sic] basis for other proposed exemptions to NSX Rule 15.5 and (iv) remedy editorial inconsistencies in the rule text.. [sic]

The Dodd-Frank Act³ added Section 10C to the Exchange Act.⁴ Section 10C requires the Commission to adopt rules directing the national securities exchanges and national securities

³ Pub. L. No. 111-203, 124 Stat. 1900 (2010).

associations to prohibit the listing of any equity security of an issuer that is not in compliance with Section 10C's compensation committee and compensation adviser requirements. On June 20, 2012, the SEC adopted Rule 10C-1 to implement the requirements of Section 10C, which directs the national securities exchanges to adopt listing rules effectuating the compensation committee and compensation adviser requirements of Section 10C.⁵

The Exchange is proposing to amend NSX Rule 15.5 in accordance with Exchange Act Rule 10C-1 to: (i) prohibit the listing or continued listing of an equity security for a listed company that is not in compliance with the requirements set forth in NSX Rule 15.5, (ii) clarify the definition of "independence" as applicable to members of the "compensation committee", (iii) clarify the definition of the term compensation committee as used in NSX Rule 15.5, (iv) authorize the compensation committee to retain, compensate and oversee the work of the compensation advisers, and (v) require a compensation committee to consider the independence of a compensation adviser prior to retaining their services.

Composition of Compensation Committees

Section 10C(a)(1) of the Exchange Act required the Commission to adopt rules directing each national securities exchange registered under Section 6 of the Exchange Act, and certain national securities associations registered pursuant to Section 15A of the Exchange Act, to establish listing standards requiring a listed company's compensation committee to be comprised of independent members of the board of directors. Section 10C(a)(3) of the Exchange Act and Exchange Act Rule 10C-1(b) require Exchanges to adopt an independence standard for members

⁴ 15 U.S.C. 78j-3.

⁵ Release Nos. 33-9330; 34-67220 (June 20, 2012); 77 FR 38422 (June 27, 2012) ("Adopting Release").

of a compensation committee after considering the following factors: (i) the director's source of compensation including fees derived from consulting or other advisory or compensatory fees paid by the listed company to the director and listed company (ii) whether the director is affiliated with the listed company, a subsidiary of the listed company, or an affiliate of a subsidiary of the listed company.

NSX Rule 15.5 "Other Listing Standards" currently requires listed companies to have a compensation committee that is composed entirely of independent directors. The Exchange now proposes to amend paragraph (a) of Rule 15.5⁶ in accordance with Exchange Act Rule 10C-1 to prohibit the listing or continued listing of any equity security of a listed company that is not in compliance with the listing requirements set forth in NSX Rule 15.5 [sic]. The Exchange has defined a compensation committee in NSX Rule 15.5(d) as "a committee that oversees executive compensation, whether or not such committee performs other functions or is formally designated as a compensation committee."

The Exchange's amendments also clarify the definition of "independence" as it pertains to members of the compensation committee in NSX Rule 15.5(d)(5)(a) by expressly enumerating relevant factors that a listed company's board of directors must consider including (i) the source of compensation of a member of the compensation committee, including any consulting [sic] advisory or other compensatory fee paid by the listed company to such member, and (ii) whether a member of the compensation committee is affiliated with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company. The Exchange believes this requirement will benefit investors by ensuring that the members of the company's

⁶ The Commission notes that the reference to paragraph (a) is incorrect as there have been no changes to paragraph (a). Further, the Commission notes that the changes are contained in Rule 15.5(d).

compensation committee that oversees executive compensation are not subject to conflicts of interest.

Authority of Compensation Committee to Retain Advisers

Section 10C(f) of the Exchange Act also required the Commission to adopt rules directing the national securities exchanges to establish listing standards which provide a compensation committee with the authority, in its sole discretion, to hire compensation consultants or outside legal counsel (“Compensation Advisers”). The compensation committee may only retain the Compensation Adviser after considering certain independence factors.⁷

Exchange Act Rule 10C-1(b)(2) provides that the compensation committee must be directly responsible for the appointment, compensation and oversight of the work of any Compensation Adviser retained by the compensation committee. Exchange Act Rule 10C-1(b)(3) also requires the listed company to provide appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to such Compensation Adviser retained by the compensation committee. However, the compensation committee must consider, prior to retaining the Compensation Adviser, independence factors that are consistent with Exchange Act Rule 10C-1(b)(4) including: (i) whether the Compensation Adviser’s employer provides other services to the listed company; (ii) the amount of fees the listed company has paid to the Compensation Adviser’s employer as a percentage of the total revenue of the person that employs the Compensation Adviser; (iii) the policies and procedures designed to prevent conflicts of interest of the person that employs the Compensation Adviser; (iv) any business or personal relationship between compensation committee member and the Compensation Adviser; (v) whether the Compensation Adviser owns any of the listed company’s

⁷ 17 CFR 240.10C-1(b)(4).

stock; and (vi) any business or personal relationship between the Compensation Adviser or the Compensation Adviser's employer and any executive officer of the listed company.

The Exchange is proposing to amend NSX Rule 15.5(d)(5)(i)(b) [sic] to require the compensation committee's written charter to authorize the compensation committee in its sole discretion, to (i) retain a Compensation Adviser but only after considering certain factors regarding independence, and (ii) have direct responsibility for the appointment, compensation and oversight of the work performed by any Compensation Adviser on behalf of the compensation committee.

The Exchange also proposes to add NSX Rule 15.5(d)(5)(b)(i)(F) which will require a compensation committee to consider the independence factors set forth in Exchange Act Rule 10C-1(b)(4) prior to retaining a Compensation Adviser including: (i) whether the Compensation Adviser's employer provides other services to the listed company; (ii) the amount of fees the listed company has paid to the Compensation Adviser's employer as a percentage of the total revenue of the person that employs the Compensation Adviser; (iii) the policies and procedures designed to prevent conflicts of interest of the person that employs the Compensation Adviser; (iv) any business or personal relationship between compensation committee member and the Compensation Adviser; (v) whether the Compensation Adviser owns any of the listed company's stock; and (vi) any business or personal relationship between the Compensation Adviser or the Compensation Adviser's employer and any executive officer of the listed company. The Exchange finds these proposed changes are appropriate in order to ensure that the compensation committee's decisions are not inappropriately biased towards the listed company's management.

Compensation Committee Funding

The Exchange is proposing to add paragraph (c) under NSX Rule 15.5(d)(5) which requires each listed company to provide the compensation committee with appropriate funding for the reasonable compensation of Compensation Advisers retained by the compensation committee. The level of appropriate funding and compensation is determined by the compensation committee.

Exempted Listed Companies

Exchange Act Rule 10C-1(b)(5)⁸ provides an automatic exemption from the application of the entirety of Exchange Act Rule 10C-1 for controlled companies and smaller reporting companies, and Exchange Act Rule 10C-1(b)(1)(iii)(A)⁹ provides an automatic exemption from the compensation committee independence requirements for limited partnerships, companies in bankruptcy, open-end management investment companies registered under the Investment Company Act of 1940 (“1940 Act”). Exchange Act Rule 10C-1(b)(1)(iii)(A) also exempts from the compensation committee independence requirements any foreign private issuer that discloses in its annual report filed with the SEC the reasons that the foreign private issuer does not have an independent compensation committee and [sic] any small business or small organization as defined by Exchange Act Rule 12b-2 [sic].¹⁰

The Exchange proposes that its existing exemptions from the compensation-related listing rules remain unchanged. The Exchange’s current listing rules provide exemptions for; (i) controlled companies; (ii) limited partnerships and companies in bankruptcy; (iii) closed-end and open-end funds registered under the 1940 Act; (iv) passive business organizations in the form of

⁸ 17 CFR 240.10C-1(b)(5).

⁹ 17 CFR 240.10C-1(b)(1)(iii)(A).

¹⁰ 17 CFR 240.12b-2.

trusts (such as royalty trusts), derivatives and special purpose securities (such as those described in NSX Rule 15.5(a)(1)), and issuers whose only listed equity security is a preferred stock. The Exchange notes that these categories of issuers typically: (i) are externally managed and do not directly employ executives (e.g., limited partnerships that are managed by their general partner or closed-end funds managed by an external investment adviser); (ii) do not by their nature have employees (e.g., passive business organizations in the form of trusts or issuers of derivative or special purpose securities); or (iii) have executive compensation policy set by a body other than the board (e.g., bankrupt companies have their executive compensation determined by the bankruptcy court). In light of these structural reasons why these categories of issuers generally do not have compensation committees, the Exchange believes that it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements and that it is appropriate to grant them an exemption.

The Exchange currently does not require issuers whose only listed security is a preferred stock to comply with NSX Rule 15.5.¹¹ The Exchange proposes to continue to exempt these issuers from compliance with the proposed amended rule. The Exchange believes this approach is appropriate because holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer, and preferred stocks are typically regarded by investors as a fixed income investment comparable to debt securities, the issuers of which are exempt from compliance with Exchange Act Rule 10C-1.

¹¹ NSX Rule 15.5(a)(2).

While Exchange Act Rule 10C-1 exempts Smaller Reporting Companies from all of its requirements, Nasdaq’s [sic] current listing rules do not include any such exemptions.¹² Consistent with the exemption in Exchange Act Rule 10C-1, however, The Exchange proposes to exempt smaller reporting companies¹³ from compliance with the proposed new independence requirements with respect to compensation committee service.¹⁴ Under SEC Rule 12b-2, a smaller reporting company is required to test whether it continues to qualify for that status as of the last business day of its second quarter of each fiscal year (the “Smaller Reporting Company Determination Date”) and ceases as of the first day of the next fiscal year to be able to avail itself of the benefits under SEC rules applicable to smaller reporting companies. Consequently, the Exchange proposes to adopt a new transition provision applicable to companies that cease to be smaller reporting companies and become subject to the compensation committee independence requirements of proposed NSX Rule 15.5(d)(5).¹⁵ As proposed, a company that ceases to be a smaller reporting company would be required, if applicable, (i) to have a committee composed entirely of members that meet the independence requirements of proposed NSX Rule 15.5(d)(5) within six months of the Smaller Reporting Company Determination Date and (ii) to comply with NSX Rule 15.5(d)(i)(F) [sic] as of the Smaller Reporting Company Determination Date.

Transition Periods

¹² See 17 CFR 240.10C-1(b)(5)(ii).

¹³ As defined in SEC Rule 12b-2 and Item 10(f) of Regulation S-K.

¹⁴ NSX Rule 15.5(d)(5)(e).

¹⁵ A company that is otherwise exempt from the requirement to have an independent compensation committee when it ceases to be a smaller reporting company would not, of course, be subject to a transition period. See discussion infra.

The Adopting Release contemplates that exchanges may provide transition periods through the exemptive authority provided to the exchanges under Exchange Act Rule 10C-1(b)(1)(iii).¹⁶ Consistent with the transition periods approved by the SEC for inclusion in Rule 15.5 at the time of its original adoption,¹⁷ the Exchange proposes to amend NSX Rule 15.5(b) to provide that listed companies would have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the new NSX Rule 15.5(d)(5) compensation committees independence standards. Existing compensation committee independence standards would continue to apply pending the transition to the new independence standards. The Exchange believes that its prior use of a similar transition period was satisfactory and that it is reasonable to follow the same approach in connection with the proposed changes to the compensation committee independence standards.

Opportunity to Cure Defects

As permitted under Exchange Act Rule 10C-1(a)(3), the Exchange is amending Rule 15.5(d)(5)(d) to provide listed companies with a reasonable opportunity to cure any non-compliance with the Rule's compensation committee listing requirements that could result in a delisting of the listed company's securities. As outlined in the proposed rule changes, listed companies that fail to comply with the requirements will be subject to the delisting procedures set forth in Exchange Rule 15.7 unless the deficiencies are cured within forty-five days from the date of notification by the Exchange. However, if a member of the Compensation committee ceases to be independent for reasons outside of the member's control, that person, with notice by the listed company to the Exchange may remain a Compensation committee member of the listed

¹⁶ See Adopting Release at 38444.

¹⁷ See Securities Exchange Act Release No. 51691 (May 12, 2005), 70 FR 28973 (May 19, 2005) (SR-CSE-2003-06).

company until the earlier of the next annual shareholders' meeting of the listed company or one year from the occurrence of the event that caused the member to be no longer independent.

The proposed changes are intended to benefit investors by (a) requiring independent directors of a listed companies to oversee executive compensation matters, (b) consider the independence of any adviser to the compensation committee prior to retention, and (c) be responsible for the appointment, compensation, and oversight of these advisers.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 10C of the Exchange Act.¹⁸ The statutory basis for the proposed rule change is Section 6 of the Securities Exchange Act of 1934 (the "Act")¹⁹ in general, which requires the rules of an exchange 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 a national market system and, in general, to protect investors and the public interest. In addition, the Exchange believes the proposed rule change is consistent with Exchange Act Rules 10C-1(b)(1), 10C-1(b)(4) and 10C-1(b)(2)(ii)²⁰ requiring that the rules of an exchange: provide specific director independence standards; supply governing standards regarding the responsibility of a compensation committee for the appointment, supervision, and compensation of compensation consultants and advisers; and

¹⁸ 15 U.S.C. 78j-3.

¹⁹ 15 U.S.C. 78fb-5.

²⁰ 17 C.F.R. §§ 240.10C-1(b)(1), (b)(4) and (b)(2)(ii).

apply these standards to any directors who oversee compensation matters, in the absence of a formal compensation committee, on behalf of the board of directors.

In particular, the proposed rule change will benefit investors by requiring that the independent directors of a listed company oversee executive compensation matters, consider uniform independence criteria before hiring Compensation Advisers, and have the authority to supervise, retain and compensate these advisers. By implementing Section 10C in such a manner, the proposed amended rule does not allow listed companies to avoid the listing standards by not having a specific compensation committee or another committee that performs similar functions.

The proposed rule change is non-discriminatory and is applicable to all listed companies on the Exchange, unless specifically exempted under proposed Rule 15.5(a) and 15.5(d)(5)(e). The Exchange believes that the general exemptions from the proposed requirements that it is granting to foreign private issuers and smaller reporting companies are consistent with Section 10C and Rule 10C-1, for the reasons stated above in the “Purpose” section, including because (i) Rule 10C-1(b)(5)(ii) explicitly exempts smaller reporting companies and (ii) foreign private issuers will comply with their home country law and, if they avail themselves of the exemption, will be required to disclose that fact under existing Exchange listing requirements. The Exchange believes it is an appropriate use of its exemptive authority under Exchange Act Rule 10C-1(b)(5)(i), and that it is not unfairly discriminatory under Section 6(b)(5) of the Act, to provide general exemptions under the proposed rules to issuers whose only listed class of equity securities on the Exchange is a preferred stock, as holders of listed preferred stock have significantly greater protections with respect to their rights to receive dividends and a liquidation preference upon dissolution of the issuer, and preferred stocks are typically regarded by investors as a fixed income investment comparable to debt securities, the issuers of which are exempt from

compliance with Exchange Act Rule 10C-1. The Exchange believes that it is an appropriate use of its exemptive authority under Rule 10C-1(b)(5)(i), and that it is not unfairly discriminatory under Section 6(b)(5) of the Act, to provide general exemptions under the proposed rules for all of the other categories of issuers that are not currently subject to the Exchange's compensation committee requirement, for the structural reasons discussed in the "Purpose" section and because it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements.

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

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

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

Written comments on the proposed rule change were neither solicited nor received.

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

Within 45 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 (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 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-NSX-2012-15 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-NSX-2012-15. 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 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-NSX-2012-15, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Kevin M. O'Neill
Deputy Secretary

²¹ 17 CFR 200.30-3(a)(12).