

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-67184; File No. SR-NYSEMKT-2012-07)

June 12, 2012

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending Independence Policy of the Board of Directors of NYSE Euronext and Creating New Independence Policy for Boards of Directors of the New York Stock Exchange LLC, NYSE MKT LLC, NYSE Regulation, Inc. and NYSE Market, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 8, 2012, NYSE MKT LLC (“NYSE MKT”) 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 NYSE MKT. 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

NYSE MKT proposes to amend the Independence Policy of the Board of Directors of NYSE Euronext (the “NYSE Euronext Director Independence Policy”) and create a new independence policy (the “Subsidiary Director Independence Policy”) for the boards of directors of NYSE MKT, New York Stock Exchange LLC (“the Exchange”), NYSE Market, Inc. (“NYSE Market”) and NYSE Regulation, Inc. (“NYSE Regulation” and, together, the “Regulated Subsidiaries”).³ In addition, NYSE MKT proposes to amend the Amended and Restated Bylaws of NYSE Euronext, the Amended and Restated Bylaws of NYSE Market, Inc., Third Amended and Restated Bylaws of NYSE Regulation, Inc., the Third Amended and Restated Operating

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange and NYSE Arca, Inc. (“NYSE Arca”) are filing substantially the same proposed rule change.

Agreement of New York Stock Exchange LLC and the Second Amended and Restated Operating Agreement of NYSE MKT LLC (collectively the “Organizational Documents”) to make certain conforming changes described below. The text of the proposed rule change is available on the Exchange’s website at www.nyse.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, NYSE MKT 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. NYSE MKT 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

The purpose of this rule filing is to amend the NYSE Euronext Director Independence Policy, create the Subsidiary Director Independence Policy for the boards of directors of the Regulated Subsidiaries, and make certain conforming changes to the Organizational Documents, as set forth below.

NYSE Euronext Director Independence Policy

Under the Proposed Rule Change, the NYSE Euronext Director Independence Policy would be amended to reflect the following changes (the “Proposed Amendments”):

- (i) a majority (as opposed to 75%) of the board of directors of NYSE Euronext (the “Board”) would be required to be independent;
- (ii) executive officers of listed companies would no longer be prohibited from being

considered independent for purposes of the Board;

- (iii) the “additional independence requirements” at the end of the current NYSE Euronext Director Independence Policy—which provide that executive officers of foreign private issuers, executive officers of NYSE Euronext and directors of affiliates of member organizations must together comprise no more than a minority of the total Board—would be eliminated;
- (iv) references to certain European regulatory authorities would be updated, because their names have changed;
- (v) references to NYSE Alternext US LLC and NYSE Amex LLC would refer instead to NYSE MKT LLC, because of this entity’s previous name changes; and
- (vi) footnote 2 would be deleted because the NYSE Euronext Director Independence Policy would not be applicable to the Regulated Subsidiaries, each of which is proposed to have its own director independence policy.

The Commission previously considered and approved these aspects of the director independence policy in connection with the previously proposed combination of NYSE Euronext and Deutsche Börse AG (the “Combination”).⁴ Under the rule change approved in connection with the Combination, Alpha Beta Netherlands Holding N.V. (“Holdco”)—which was the holding company formed in connection with the Combination that would have become the parent company of NYSE Euronext—would have adopted a director independence policy that was substantially similar to the current NYSE Euronext Director Independence Policy, except for the Proposed Amendments noted above and except for certain references to the independence

⁴ See Securities Exchange Act Release No. 34-66171 (January 17, 2012) File Nos. SR-EDGA-2011-34; SR-EDGX-2011-33; SR-ISE-2011-69; SR-NYSE-2011-51; SR-NYSEAmex-2011-78; SR-NYSEArca-2011-72), 77 FR 3297.

standards and criteria in the Dutch Corporate Governance Code that would be added, given that Holdco was formed under and subject to the laws of the Netherlands. Upon consummation of the Combination, the NYSE Euronext Director Independence Policy would have ceased to apply. On February 2, 2012, following the European Commission's decision to prohibit the Combination, NYSE Euronext and Deutsche Börse agreed to terminate the agreement to combine their businesses.

NYSE MKT explained the reasons for incorporating the Proposed Amendments in Holdco's director independence policy and believes the rationale for making these amendments is substantially applicable with equal force to the NYSE Euronext Director Independence Policy.

Summarized below are the principal reasons for the Proposed Amendments listed in items (i), (ii) and (iii) above. NYSE MKT believes that the Proposed Amendments listed in items (iv), (v) and (vi) above are self-explanatory and technical in nature.

Majority Independence Requirement

NYSE MKT believes that a majority independence standard is appropriate to ensure that the Board as a whole consists of individuals with independent, objective perspectives, while at the same time affording NYSE Euronext sufficient flexibility to include persons with expertise and qualifications that will contribute meaningfully to the Board's performance of its oversight function. The importance of allowing highly qualified individuals to serve on the Board is underscored by the fact that NYSE Euronext serves as the holding company for a complex, global business with highly specialized operations and regulatory functions.

Although NYSE Euronext has unique responsibilities and functions as the holding company for several regulated subsidiaries, it is subject to various corporate governance and regulatory obligations that are addressed by means of ownership and voting limitations on its

shareholders, commitments to provide access to its books and records and to submit to the jurisdiction of the Commission, director qualification requirements and other undertakings.

NYSE MKT submits that some of these undertakings call for in-depth industry knowledge and expertise on the Board, such as the requirement that NYSE Euronext directors take into consideration the effect that NYSE Euronext's actions would have on the ability of its U.S. regulated subsidiaries to (i) foster cooperation and coordination with persons engaging in regulating, clearing, settling and processing information with respect to, and facilitating transactions in securities, and (ii) remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system.

Executives of Listed Companies

NYSE MKT believes that a per se disqualification of listed company executives from being deemed independent should not be applicable to NYSE Euronext. The per se disqualification was initially adopted by the New York Stock Exchange, Inc. in early 2005 in the context of its unique circumstances and history and its management structure and board composition at that time.⁵ NYSE MKT submits that those circumstances are no longer applicable, and the disqualification of listed company executives tends to undermine rather than facilitate NYSE Euronext's efforts to ensure a qualified and balanced board composition and promote various other important corporate governance objectives, such as ensuring appropriate expertise and experience on the Board, as well as representation of the interests of a diverse range of market constituencies and local European and U.S. interests. A per se disqualification narrows the pool of potential NYSE Euronext director candidates and arbitrarily eliminates from consideration a large number of highly qualified, experienced individuals who have proven track

⁵ See Securities Exchange Act Release No. 34-51217 (February 16, 2005) (File No. SR-NYSE-2004-54), 70 FR 9688.

records as business leaders. Under the NYSE Euronext Director Independence Policy, the Board would still need to assess whether a listed company executive meets the various independence criteria, including whether he or she has any “material relationship” with NYSE Euronext and its subsidiaries.

Furthermore, NYSE MKT believes that the objectivity of Board members is adequately protected by the various other independence criteria in the NYSE Euronext Director Independence Policy, such as the requirement that independent directors may not be or have been within the last year, and may not have an immediate family member who is or within the last year was, a member of NYSE MKT, the Exchange or NYSE Arca. In addition, if and to the extent that a matter concerning a listed company whose executive is a NYSE Euronext director were ever to come before the Board for consideration, such director would be required to be recused from acting on such matter pursuant to the Board’s conflicts of interest policy.

Additional Independence Requirements

Finally, the NYSE Euronext Director Independence Policy provides that the sum of (i) executive officers of foreign private issuers, (ii) executive officers of NYSE Euronext and (iii) directors of affiliates of “members” (as defined in Sections 3(a)(A)(3)(ii), 3(a)(A)(3)(iii) and 3(a)(A)(3)(iv) of the Exchange Act⁶) of NYSE MKT, the Exchange or NYSE Arca, may not constitute more than a minority of the total number of directors of NYSE Euronext. The purpose of this requirement is to ensure that, although executives of listed companies who are foreign private issuers are not disqualified from serving on the Board, such executives may not, together with NYSE Euronext executives and directors of affiliates of members, constitute more than a minority of the Board. In light of NYSE MKT’s proposal to eliminate the disqualification of

⁶ 15 U.S.C. 78c.

listed company executives from the NYSE Euronext Director Independence Policy, this requirement would serve no purpose because the exception to such disqualification for foreign private issuer executives would also be eliminated. NYSE MKT further notes that under the proposed NYSE Euronext Director Independence Policy, executives of NYSE Euronext and directors of affiliates of exchange members would not be deemed independent and, accordingly, could not in any event constitute more than a minority of the Board.

Subsidiary Director Independence Policy

Currently, the independent directors of the Regulated Subsidiaries must satisfy the requirements of the NYSE Euronext Director Independence Policy. Under the Proposed Rule Change, each of the Regulated Subsidiaries would have its own independence policy in the form of the Subsidiary Director Independence Policy attached as Exhibit 5B to the Proposed Rule Change, in lieu of the NYSE Euronext Director Independence Policy.

The Commission previously considered and approved this form of Subsidiary Director Independence Policy to be adopted by the Regulated Subsidiaries in connection with the previously proposed Combination (except that the prior form contained certain references to Holdco that have been replaced in Exhibit 5B with references to NYSE Euronext). NYSE MKT explained the reasons for creating the Subsidiary Director Independence Policy to determine the independence of directors of the Regulated Subsidiaries, and believes these reasons (as set forth below) continue to be applicable.

The Subsidiary Director Independence Policy is substantially similar to the current NYSE Euronext Director Independence Policy, except for the following changes:

- (i) references to NYSE Euronext would refer instead to the relevant Regulated Subsidiary;

- (ii) the requirement that at least three-fourths of the directors must be independent would be deleted, since the organizational documents of the Regulated Subsidiaries contain the independence and other qualification requirements for directors;
- (iii) the requirement in the NYSE Euronext Director Independence Policy that the board consider the special responsibilities of a director in light of NYSE Euronext's ownership of U.S. regulated subsidiaries and European regulated entities would be deleted, because unlike NYSE Euronext, the Regulated Subsidiaries are not holding companies;
- (iv) the requirement for directors to inform the Chairman of the Nominating and Governance Committee of certain relationships and interests would be deleted, since the boards of the Regulated Subsidiaries do not have a Nominating and Governance Committee, except that in the Subsidiary Director Independence Policy to be adopted by NYSE Regulation, this provision would reference the Nominating and Governance Committee of NYSE Regulation;
- (v) references to NYSE Alternext US LLC and NYSE Amex LLC would refer instead to NYSE MKT LLC, because of this entity's previous name changes;
- (vi) because the NYSE Euronext Director Independence Policy provides that a director of an affiliate of a "Member Organization" cannot qualify as an independent director of these Regulated Subsidiaries, the conflicting language stating that a director of an affiliate of a "Member Organization" shall not per se fail to be independent would be deleted;
- (vii) because language in the NYSE Euronext Director Independence Policy provides

that an executive officer of an issuer whose securities are listed on a NYSE Exchange cannot qualify as an independent director of these Regulated Subsidiaries, the conflicting language providing an exception applicable only to NYSE Euronext directors would be deleted; and

- (viii) the “additional independence requirements” at the end of the current Independence Policy of NYSE Euronext, which provides that executive officers of foreign private issuers, executive officers of NYSE Euronext and directors of affiliates of member organizations must together comprise no more than a minority of the total board, would be eliminated. This provision is designed to ensure that although persons who are directors of an affiliate of a Member Organization or who are executive officers of a “foreign private issuer” listed on a NYSE Exchange may in some circumstances qualify as independent for purposes of NYSE Euronext board membership, such persons may not, together with executive officers of NYSE Euronext, constitute more than a minority of the total NYSE Euronext directors. Under the proposed Subsidiary Director Independence Policy, such persons could not be deemed to be independent directors of the relevant Regulated Subsidiary and, accordingly, this limitation on the number of such persons who may serve on the board is unnecessary.

NYSE MKT believes that adopting a separate director independence policy for the Regulated Subsidiaries that is more tailored to their specific requirements—rather than applying the NYSE Euronext Director Independence Policy with various carve-outs and exceptions noted therein for the Regulated Subsidiaries—will add clarity to NYSE MKT’s rules.

Proposed Conforming Modifications to Organizational Documents

The Organizational Documents would be modified to reflect the changes indicated in Exhibits 5C through 5G, which are summarized as follows:

- (i) references in the Amended and Restated Bylaws of NYSE Market, Inc., the Third Amended and Restated Bylaws of NYSE Regulation, Inc., the Third Amended and Restated Operating Agreement of New York Stock Exchange LLC and the Second Amended and Restated Operating Agreement of NYSE MKT LLC would be modified to refer to the applicable Subsidiary Director Independence Policy rather than to the NYSE Euronext Director Independence Policy;
- (ii) references to NYSE Alternext US LLC and NYSE Amex LLC in such Organizational Documents would be amended to refer instead to NYSE MKT LLC, because of this entity's previous name changes; and
- (iii) Section 3.4 of the Amended and Restated Bylaws of NYSE Euronext would be modified to provide that a majority (rather than three-fourths) of the Board members would be required to be independent.

2. Statutory Basis

NYSE Euronext believes that this filing is consistent with Section 6(b)⁷ of the Exchange Act in general, and furthers the objectives of Section 6(b)(1)⁸ in particular, in that it enables NYSE MKT to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of NYSE MKT. The Proposed Rule Change will help to ensure that the boards of directors of NYSE Euronext and the Regulated Subsidiaries consist of individuals with

⁷ 15 U.S.C. 78(f)(b).

⁸ 15 U.S.C. 78(f)(b)(1).

independent, objective perspectives, while at the same time affording them sufficient flexibility to include persons with expertise and qualifications that will contribute meaningfully to these boards' performance of their oversight and other functions. For example, some responsibilities of these boards call for in-depth industry knowledge and expertise on the Board, such as the requirement that NYSE Euronext directors take into consideration the effect that NYSE Euronext's actions would have on the ability of its U.S. regulated subsidiaries to (i) foster cooperation and coordination with persons engaging in regulating, clearing, settling and processing information with respect to, and facilitating transactions in securities, and (ii) remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system. NYSE MKT also believes that adopting a separate director independence policy for the Regulated Subsidiaries that is more tailored to their specific requirements—rather than applying the NYSE Euronext Director Independence Policy with various carve-outs and exceptions noted therein for the Regulated Subsidiaries—will add clarity to NYSE MKT's rules.

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

NYSE MKT 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 Exchange Act.

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

NYSE MKT has neither solicited nor received written comments on the Proposed Rule Change.

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 or disapprove such 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-NYSEMKT-2012-07 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-NYSEMKT-2012-07. 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 the filing also will be available for inspection and copying at the principal office of NYSE MKT. 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-NYSEMKT-2012-07 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.⁹

Kevin M. O'Neill
Deputy Secretary

⁹ 17 CFR 200.30-3(a)(12).