

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-68007; File No. SR-NYSEMKT-2012-48)

October 9, 2012

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No.1, Amending Sections 110, 801, 803 and 805 of the Exchange's Company Guide to Comply with the Requirements of Securities and Exchange Commission Rule 10C-1

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the "Act")² and Rule 19b-4 thereunder,³ notice is hereby given that on September 25, 2012, NYSE MKT LLC (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission ("SEC" or "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 thereto on October 1, 2012, and 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend Sections 110, 801, 803 and 805 of the Exchange's Company Guide (the "Company Guide") to comply with the requirements of Securities and Exchange Commission ("Commission" or "SEC") Rule 10C-1.⁴ 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 the Statutory Basis for, the Proposed Rule Change

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ 17 CFR 240.10C-1.

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

This Amendment No. 1 to SR-NYSEMKT-2012-48 (the "filing") replaces the original Filing submitted on September 25, 2012 in its entirety. Amendment No. 1 corrects a single error in the rule text in Exhibit 5 as originally filed. The error was in Section 805(c)(5) under the heading "Transition Period."

NYSE MKT proposes to amend Sections 110, 801, 803 and 805 of the Company Guide to comply with the requirements of SEC Rule 10C-1.

The proposed changes to Sections 110, 801, 803 and 805 will become operative on July 1, 2013. Consequently, the existing text of these sections will remain in the Company Guide until June 30, 2013 and will be removed immediately thereafter.⁵ Upon approval of this filing, the amended provisions of those sections will be included in the Company Guide with introductory text indicating that the revised text does not become operative until July 1, 2013.

Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act")⁶ added Section 10C to the Securities Exchange Act of 1934.⁷ Section

⁵ The Commission notes that the Exchange will have to comply with Section 19(b) of the Act.

⁶ Pub. L. No. 111-203, 124 Stat. 1900 (2010).

⁷ 15 U.S.C. 78j-3.

10C requires the Commission to adopt rules directing the national securities exchanges and national securities 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, to comply with the requirements of Section 10C, the Commission adopted new Rule 10C-1, which directs the national securities exchanges to adopt listing rules effectuating the compensation committee and compensation adviser requirements of Section 10C.

Rule 10C-1 does not by its terms require a national securities exchange to mandate that listed companies must have a compensation committee. However, in the absence of a compensation committee, most of the provisions of Rule 10C-1 applicable to compensation committees are applicable to "the members of the board of directors who oversee executive compensation matters on behalf of the board of directors."⁸ NYSE MKT's listing standard with respect to executive compensation, Section 805 of the Company Guide, provides that the compensation of the chief executive officer of a listed company must be determined, or recommended to the board for determination, either by a compensation committee comprised of independent directors or by a majority of the independent directors on the company's board of directors. Consequently, if a listed company does not have a compensation committee, the Exchange's proposed amendments to its rules pursuant to Rule 10C-1 would apply to the independent directors of the listed company individually and as a group, as applicable. The Exchange proposes to amend Section 805(a) to provide that all references to a listed company's compensation committee in Section 805 will, in the case of a listed company that does not have a

⁸ See the definition of the term "compensation committee" in Rule 10C-1(c)(2)(iii).

compensation committee, be applicable to the listed company's independent directors as a group, and the same approach is utilized in this filing.

Compensation Committee Director Independence Requirement

In adopting independence requirements for compensation committee members, 10C-1(b)(1)(ii)⁹ requires the exchanges to consider relevant factors including, but not limited to: (i) the source of the director's compensation, including any consulting, advisory or other compensatory fees paid by the listed company; and (ii) whether the director has an affiliate relationship with the company, a subsidiary of the company or an affiliate of a subsidiary of the company. Rule 10C-1(a)(4)¹⁰ requires that the rule filing submitted to the SEC by each exchange in connection with the adoption of the rules required by Rule 10C-1 must include a review of whether and how the proposed listing standards satisfy the requirements of the final rule; a discussion of the exchange's consideration of factors relevant to compensation committee independence; and the definition of independence applicable to compensation committee members that the exchange proposes to adopt or retain in light of such review.

The Exchange's director independence standards are set forth in Section 803(A)(2). That section provides that no director qualifies as independent unless the issuer's board of directors affirmatively determines that the director does not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. In addition, Section 803(A)(2) provides that a director may not be deemed to be independent if such

⁹ 17 CFR 240.10C-1(b)(1)(ii).

¹⁰ 17 CFR 240.10C-1(a)(4).

director has a relationship with the listed company which violates any one of five “bright line” tests.¹¹

The provisions of Section 803(A)(2) will continue to be applicable to independence determinations in relation to compensation committee service, as compensation committee members will be required to be independent under the Exchange’s general board independence standards set forth in Section 803(A)(2), in addition to the independence requirements proposed specifically for compensation committee service.

¹¹ The following are the “bright line” tests set forth in Section 803(A)(2): (a) The director is, or during the past three years was, employed by the company, other than prior employment as an interim executive officer (provided the interim employment did not last longer than one year); (b) The director accepted or has an immediate family member who accepted any compensation from the company in excess of \$120,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than the following: (i) compensation for board or board committee service; or, (ii) compensation paid to an immediate family member who is an employee (other than an executive officer) of the company; or, (iii) compensation received for former service as an interim executive officer (provided the interim employment did not last longer than one year); or, (iv) benefits under a tax-qualified retirement plan, or non-discretionary compensation; (c) The director is an immediate family member of an individual who is, or at any time during the past three years was, employed by the company as an executive officer; (d) The director is, or has an immediate family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments (other than those arising solely from investments in the company's securities or payments under non-discretionary charitable contribution matching programs) that exceed 5% of the organization's consolidated gross revenues for that year, or \$200,000, whichever is more, in any of the most recent three fiscal years; (e) The director is, or has an immediate family member who is, employed as an executive officer of another entity where at any time during the most recent three fiscal years any of the issuer's executive officers serve on the compensation committee of such other entity; or (f) The director is, or has an immediate family member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor who worked on the company's audit at any time during any of the past three years. In lieu of Section 803A(2)(a) through (f), a director of a business development company is considered to be independent if he or she is not an “interested person” of the company, as defined in Section 2(a)(19) of the Investment Company Act of 1940.

The Exchange proposes to amend Section 803(A)(2) of the Company Guide to require that, in affirmatively determining the independence of any director who will serve on the compensation committee of the listed company's board of directors, or, in the case of a company that does not have a compensation committee, in affirmatively determining the independence of *all* independent directors, the board of directors must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management, in connection with the duties of a compensation committee member including, but not limited to, the two factors that are explicitly enumerated in Rule 10C-1(b)(ii) that are set forth in proposed Section 805(c)(1). When considering the sources of a director's compensation in determining his independence for purposes of compensation committee service, proposed new commentary .03 to Section 805 provides that the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation. Similarly, when considering any affiliate relationship a director has with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in determining his independence for purposes of compensation committee service, the proposed commentary provides that the board should consider whether the affiliate relationship places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, in each case of a nature that would impair his ability to make independent judgments about the listed company's executive compensation.

The Exchange does not propose to adopt any specific numerical tests with respect to the factors specified in proposed Section 805(c)(1) or to adopt a requirement to consider any other

specific factors. In particular, the Exchange does not intend to adopt an absolute prohibition on a board making an affirmative finding that a director is independent solely on the basis that the director or any of the director's affiliates are shareholders owning more than some specified percentage of the listed company. In the adopting release for Rule 10C-1 (the "Adopting Release"),¹² the SEC recognized that the exchanges might determine that not all affiliate relationships would adversely affect a director's ability to be independent from management.¹³ Consistent with the views of commenters on the SEC's rules as originally proposed, the Exchange believes that – rather than adversely affecting a director's ability to be independent from management as a compensation committee member – share ownership in the listed company aligns the director's interests with those of unaffiliated shareholders, as their stock ownership gives them the same economic interest in ensuring that the listed company's executive compensation is not excessive.

The Exchange believes that its existing "bright line" independence standards as set forth in Section 803(A)(2) of the Company Guide are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for compensation committee service. In addition, Section 803(A)(2) already requires the board to consider any relationship that would interfere with the director's exercise of independent judgment in carrying out the responsibilities of a director. The Exchange believes that these requirements with respect to general director independence, when combined with the specific considerations required by proposed Section 805(c)(1), represent an appropriate standard for compensation committee independence that is consistent with the requirements of Rule 10C-1.

Compensation Committee Advisers

¹² Release Nos. 33–9330; 34–67220 (June 20, 2012); 77 FR 38422 (June 27, 2012).

¹³ See Adopting Release at 38428.

Rule 10C-1(b)(2)¹⁴ requires exchange rules to mandate that compensation committees must have broad authority to engage advisers to assist in their performance of the committee's functions. Specifically, exchange rules must mandate that:

- (a) The compensation committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser; and
- (b) The compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel and other adviser retained by the compensation committee.

Rule 10C-1(b)(3)¹⁵ requires exchange rules to mandate that the listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the compensation committee.

The Exchange proposes to adopt the requirements specified in Rule 10C-1(b)(2) and (3) verbatim as new subsection (c)(3) to Section 805.

Compensation Adviser Independence Factors

Rule 10C-1(b)(4)¹⁶ provides that the compensation committee of a listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration the following factors, as well as any other factors identified

¹⁴ 17 CFR 240.10C-1(b)(2).

¹⁵ 17 CFR 240.10C-1(b)(3).

¹⁶ 17 CFR 240.10C-1(b)(4).

by the relevant national securities exchange or national securities association in its listing standards:

- (i) The provision of other services to the listed company by the person that employs the compensation consultant, legal counsel or other adviser;
- (ii) The amount of fees received from the listed company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser;
- (iii) The policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest;
- (iv) Any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee;
- (v) Any stock of the listed company owned by the compensation consultant, legal counsel or other adviser; and
- (vi) Any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the listed company.

Accordingly, the Exchange proposes to add as new subsection (c)(4) to Section 805 a provision specifying that, before engaging an adviser, the compensation committee must consider the factors enumerated above. As proposed, Section 805(c)(4) would not include any additional factors for consideration, as the Exchange believes that the list included in

Rule 10C-1(b)(4) is very comprehensive and the proposed listing standard would also require the compensation committee to consider any other factors that would be relevant to the adviser's independence from management.

Consistent with Rule 10C-1(b)(2)(iii),¹⁷ the Exchange proposes to include as new Commentary .04 to Rule 805 an explicit statement that nothing in Section 805(c) shall be construed: (A) to require the Compensation Committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee; or (B) to affect the ability or obligation of the Compensation Committee to exercise its own judgment in fulfillment of the duties of the Compensation Committee (or, if applicable, the independent directors). In addition, as provided by Rule 10C-1(b)(4), proposed new Commentary .05 to Section 805 would specify that the compensation committee need not engage in an analysis of the independence factors before consulting with or obtaining advice from in-house legal counsel.

Cure Periods

Rule 10C-1(a)(3)¹⁸ requires that exchange rules must include appropriate procedures for a listed issuer to have a reasonable opportunity to cure any non-compliance with the provisions of exchange rules adopted as required by Rule 10C-1. In addition, Rule 10C-1(a)(3) states that such rules may provide that if a member of a compensation committee ceases to be independent in accordance with the requirements of Rule 10C-1 for reasons outside the member's reasonable control, that person, with notice by the issuer to the exchange, may remain a compensation committee member of the listed issuer until the earlier of the next annual meeting or one year from the occurrence of the event that caused the member to be no longer independent. The

¹⁷ 17 CFR 240.10C-1(b)(2)(iii).

¹⁸ 17 CFR 240.10C-1(a)(3).

Exchange proposes to adopt, as new Rule 805(c)(2), this cure provision period for events of non-compliance with the proposed compensation committee independence requirements that are outside of the director's reasonable control.¹⁹ However, the Exchange proposes to modify this cure provision by limiting its use to circumstances where the committee continues to have a majority of independent directors, as this would ensure that the applicable committee could not take any action without the agreement of one or more independent directors. The Exchange believes that this requirement addresses any actual or apparent conflict of interest which may arise due to the continued service of a non-independent director on the compensation committee.

Transition Periods

The Adopting Release contemplates that exchanges may provide transition periods through the exemptive authority provided to the exchanges under Rule 10C-1(b)(1)(iii).²⁰ Consistent with the transition periods approved by the SEC for inclusion in the Exchange's current corporate governance requirements at the time of their original adoption,²¹ the Exchange proposes to adopt new Section 805(c)(5), under which 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 Section 805(c)(1) compensation committee 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.

¹⁹ See proposed Section 803(c)(3).

²⁰ See Adopting Release at 38444.

²¹ See Securities Exchange Act Release No. 48863 (December 1, 2003), 68 FR 68432 (December 8, 2003)(SR-Amex-2003-65).

In addition, the Exchange proposes to continue to apply to the proposed new compensation committee requirements the existing transition periods available to newly-listed companies under Section 809(a) of the Company Guide.²²

The Exchange proposes to exempt smaller reporting companies²³ from compliance with the proposed new independence requirements with respect to compensation committee service. 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 include in proposed Section 805(c)(5) a transition provision applicable to companies that cease to be smaller reporting companies and become subject to the compensation committee independence requirements of proposed Section 805(c)(1).²⁴ As proposed, a company that ceases to be a smaller reporting company would be required, if applicable, to (I) have a committee composed entirely of members that meet the independence requirements of proposed Section 805(c) within six months of the Smaller Reporting Company Determination Date and (II) have a compensation committee as of the Smaller Reporting Company Determination Date that complies with the requirements of

²² Section 809(a) affords companies that have listed in conjunction with their initial public offering exemptions from all board composition requirements consistent with the exemptions afforded in Exchange Act Rule 10A-3. That is, for each applicable committee that the company establishes (i.e., nominating and/or compensation) the company must have one independent member at the time of listing, a majority of independent members within 90 days of listing and all independent members within one year.

²³ As defined in SEC Rule 12b-2 and Item 10(f) of Regulation S-K.

²⁴ 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*.

proposed Section 805(c)(4) with respect to compensation consultant independence considerations.

General Exemptions

Rule 10C-1(b)(5)²⁵ provides an automatic exemption from the application of the entirety of Rule 10C-1 for controlled companies and smaller reporting companies,²⁶ and Rule 10C-1(b)(1)(iii)(A)²⁷ 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”). 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.

Pursuant to the general exemptive authority granted in Rule 10C-1(b)(5)(i), the Exchange proposes to exempt from all of the proposed requirements each category of issuers that qualifies for a general or specific exemption under Rule 10C-1(b)(1)(iii)(A). The Exchange also proposes to provide a general exemption from all of the requirements to all of the other categories of issuers that are currently exempt from the Exchange’s existing compensation committee

²⁵ 17 CFR 240.10C-1(b)(5).

²⁶ The Exchange proposes to amend subsection (h) of Section 801 to include a statement that smaller reporting companies are required to comply with Section 805(c), with the exception of the compensation committee independence requirements of [sic] Section 803(c)(1) [sic] and the requirements of proposed Section 805(c)(4) with respect to compensation consultant independence considerations. The same statement will be included in proposed Commentary .01 to Section 805. In addition, the Exchange proposes to amend Section 805(b) to clarify that henceforth only smaller reporting companies will be eligible to avail themselves of the ability of the board under exceptional and limited circumstances to appoint a non-independent director to the compensation committee.

²⁷ 17 CFR 240.10C-1(b)(1)(iii)(A).

requirements. Thus, as proposed, controlled companies, limited partnerships, companies in bankruptcy, and open-end and closed-end funds that are registered under the 1940 Act, asset-backed issuers and other passive business organizations (such as royalty trusts) or derivatives and special purpose securities listed pursuant to Exchange Rules 1000, and 1200 and Sections 106, 107 and 118B would be exempt from both the new compensation committee independence requirements and the new compensation adviser requirements. 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 (such as royalty trusts)); 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.

Foreign private issuers²⁸ are currently permitted by Section 110 to apply for an exemption from the Exchange's compensation committee requirements. The Exchange proposes to follow this approach by granting a general exemption, pursuant to the discretion granted to the Exchange by Rule 10C-1(b)(5)(i),²⁹ from the proposed new compensation committee requirements to foreign private issuers that seek an exemption on the basis that they follow home

²⁸ The term "foreign private issuer" used in Section 110 is defined in Exchange Act Rule 3b-4(c).

²⁹ 17 CFR 240.10C-1(b)(5)(i).

country practice. The Exchange notes that Section 110 provides that foreign based entities availing themselves of exemptions from compliance with Exchange rules must provide English language disclosure of any significant ways in which their corporate governance practices differ from those followed by domestic companies pursuant to the Exchange's standards. Section 110 currently provides that this disclosure may be provided on the company's web site and/or in its annual report as distributed to shareholders in the U.S. As the Exchange no longer requires companies to distribute annual reports, except for its requirements in Section 610 with respect to the web site posting and distribution of annual reports filed with the SEC, the Exchange proposes to modify this provision to provide that a company must either include this disclosure on its web site or in the annual report it is required to file with the SEC that includes audited financial statements (including on Forms 10-K, 20-F, or 40-F) While Section 110 does not require a statement as to why a company does not comply with an applicable requirement in the manner provided by Rule 10C-1(b)(1)(iii)(A), the Exchange does not believe that this is a significant difference, as the explanation companies would likely provide for not having an independent compensation committee would simply be that they were not required to do so by home country law.

The Exchange currently does not require issuers whose only listed security is a preferred stock to comply with Section 805. The Exchange proposes to grant these issuers a general exemption 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 Rule 10C-1.

2. Statutory Basis

The Exchange believes that the proposed rule change in relation to the Exchange's compensation committee requirements and the proposed compensation consultant independence requirements are consistent with Section 10C of the Exchange Act and Rule 10C-1 thereunder in that they comply with the requirements of Rule 10C-1 with respect to the adoption by national securities exchanges of compensation committee listing standards. The Exchange believes that the proposed rule change is consistent with Section 6(b)³⁰ of the Exchange Act in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,³¹ in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 amendments to its compensation committee listing standards are consistent with the protection of investors and the public interest in that they strengthen the independence requirements for compensation committee membership, provide additional authority to compensation committees and require compensation committees to consider the independence of compensation consultants.

The Exchange believes that the general exemptions from the proposed requirements that it is granting to foreign private issuers that request an exemption based on home country practice

³⁰ 15 U.S.C. 78f(b).

³¹ 15 U.S.C. 78f(b)(5).

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 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 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 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

The Exchange has not solicited written comments on the proposed rule change. The Exchange has received two comment letters on the proposed rule change.³² One commenter made the following points: (i) the Exchange should specify that the relevant factors for consideration with respect to compensation committee independence should include a consideration of fees received for service on the board itself; (ii) the relevant factors should explicitly include consideration of the personal and business relationships between directors and officers; (iii) the additional factors to be considered for compensation committee independence should be considered as a part of general board independence determinations; and (iv) the listing standards should specify that, while the factors must be considered in their totality, a single factor can result in the loss of board independence.

The Exchange does not believe that it is appropriate to consider board compensation as part of the compensation committee independence determination with respect to individual directors. Non-executive directors devote considerable time to the affairs of the companies on whose boards they sit and eligible candidates would be difficult to find if board and committee service were unpaid in nature. Consequently, independent directors of listed companies are almost invariably paid for their board and committee service. As all independent directors are almost certainly going to receive board compensation from the company and do so on terms determined by the board as a whole, the Exchange does not believe that an analysis of the board compensation of individual directors is a meaningful consideration in determining their independence for purposes of compensation committee service.

³² Both of these letters were addressed to NYSE Regulation, Inc. Neither author indicated that the comments related to just one of the three national securities exchanges owned by NYSE Euronext. Therefore, the Exchange is addressing those comments to the extent they are applicable to its existing rules and the proposed amendments.

The Exchange interprets its existing director independence requirements as requiring the board to consider relationships between the director and any member of management in making its affirmative independence determinations. Consequently, the Exchange does not believe that any further clarification of this requirement is necessary.

The Exchange does not believe that it is necessary to explicitly require that the additional independence considerations for compensation committee service should be a part of the board's general independence determinations for all independent directors. Section 803(A) provides that, in making its affirmative determination with respect to a director's independence, the board must satisfy itself that the director "does not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director." As such, the Exchange believes that, where appropriate, listed company boards should already be including in their general independence determinations factors including those being added to the compensation committee independence determination.

The Exchange does not believe it is necessary to include in the listing standards a statement that a single factor may be sufficiently material to render a director non-independent, as this is clearly the intention of the listing standards as drafted. Section 803(A) in its current form and in its proposed amended form requires the board to consider the materiality of each separate relationship between the director and the listed company or its management.

The second commenter proposed that the Exchange should require companies to make a public disclosure with respect to the factors considered by the compensation committee in reviewing the independence of compensation consultants, legal counsel and other compensation advisers. This commenter also proposed that the Exchange should require with respect to outside counsel hired by the compensation committee the same disclosure as is required by Item

407(e)(3)(iv) of Regulation S-K with respect to the nature of any conflict that arises from the engagement of a compensation consultant identified in the proxy statement. The Exchange does not believe that it is necessary to establish additional disclosure requirements of this nature. Item 407 of Regulation S-K contains extensive disclosure requirements with respect to a listed company's corporate governance. Moreover, with respect to disclosure of any conflicts of interest that may arise with respect to outside counsel hired by the compensation committee, the Exchange believes that the rigorous conflict of interest requirements applicable to attorneys adequately address such concerns. And the Exchange is mindful that requiring additional public disclosures regarding outside counsel could require a listed company to disclose information that otherwise may be protected by attorney-client privilege.

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 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-NYSEMKT-2012-48 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-2012-48. 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 office and the Internet website 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-NYSEMKT-2012-48, 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.³³

Kevin M. O'Neill
Deputy Secretary

³³ 17 CFR 200.30-3(a)(12).