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September 24, 2015

**VIA E-MAIL**

Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

Re: **Securities Exchange Act Release No. 34-75288 (June 24, 2015), 80 FR 37316 (June 30, 2015) (SR-NYSE-2015-27) (the "Proposal")**

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Dear Mr. Fields:

The New York Stock Exchange LLC (the "NYSE" or "Exchange") appreciates the opportunity to respond to the comment letter submitted by Professor J. Robert Brown, Jr. in connection with the Exchange's proposal to amend its Eighth Amended and Restated Operating Agreement (the "Operating Agreement") to establish a Regulatory Oversight Committee ("ROC") of the Exchange board of directors ("Board") and make certain conforming amendments to the Exchange's Rules.<sup>1</sup> For the reasons set forth in the Proposal and in this response, the Exchange believes that its Proposal is consistent with Section 6(b)(5) of the Securities Exchange Act of 1934, as amended (the "Act").<sup>2</sup>

**Summary of the Proposal**

*The Independent ROC*

The Exchange proposes to create an independent Board committee to oversee the adequacy and effectiveness of the performance of its self-regulatory responsibilities. The proposed ROC would have the following responsibilities: (1) to oversee the Exchange's regulatory and self-regulatory organization responsibilities and evaluate the adequacy and

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<sup>1</sup> See Letter from J. Robert Brown, Jr., Professor of Law, University of Denver Sturm College of Law, to Brent J. Fields, Secretary, Securities and Exchange Commission, dated September 8, 2015. The Exchange notes that the comment letter was only received by the Exchange and posted on the website of the Securities and Exchange Commission (the "Commission") on September 22, 2015.

<sup>2</sup> 15 U.S.C. 78f(b)(5).

effectiveness of the Exchange's regulatory and self-regulatory organization responsibilities; (2) to assess the Exchange's regulatory performance; and (3) to advise and make recommendations to the Board or other committees of the Board about the Exchange's regulatory compliance, effectiveness and plans. As the Exchange stated in the Proposal, these three proposed core responsibilities for its ROC are substantially similar to the core responsibilities of the ROCs of other self-regulatory organizations ("SROs").<sup>3</sup>

In furtherance of these functions, the proposed ROC would have the authority and obligation to review the regulatory budget of the Exchange and specifically inquire into the adequacy of resources available in the budget for regulatory activities. The ROC would also be charged with meeting regularly with the Chief Regulatory Officer ("CRO") in executive session and, in consultation with the Exchange's Chief Executive Officer, establishing the goals, assessing the performance, and recommending the CRO's compensation. Finally, the ROC would be responsible for keeping the Board informed with respect to the foregoing matters. These obligations of the proposed ROC would be substantially similar to those of other SROs' ROCs.<sup>4</sup>

The ROC would consist of at least three members, each of whom would be a director of the Exchange that satisfies the independence requirements of the Exchange.<sup>5</sup> The size and

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<sup>3</sup> Proposal, 80 FR at 37317. See also Exchange Act Release No. 75155 (June 11, 2015), 80 FR 34744, 34744 (SR-NYSEArca-2015-29) ("Arca ROC Approval Order"); Securities Exchange Act Release No. 75148 (June 11, 2015), 80 FR 34751, 34752 (SR-NYSEMKT-2015-27) ("MKT ROC Approval Order"); NASDAQ Bylaws, Article III, Section 5; Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498, 49502 (August 21, 2008) (File No. 10-182) ("Release No. 34-58375") (approving application of BATS Exchange, Inc. ("BATS") seeking registration as a national securities exchange); Securities Exchange Act Release No. 61698 (March 10, 2010), 75 FR 13151, 13161 (March 12, 2010) ("BATS Approval Order") (approving application of EDGX Exchange, Inc. and EDGA Exchange, Inc., seeking registration as a national securities exchange); and Amended and Restated By-Laws of Miami International Securities Exchange, LLC, Article IV, Section 4.5(c).

<sup>4</sup> Proposal, 80 FR at 37317. See, e.g., NASDAQ Bylaws, Article III, Section 5; Bylaws of NASDAQ OMX PHLX LLC, Article V, Section 5-2; Third Amended and Restated Bylaws of BATS-Exchange, Inc., Article V, Section 6(c).

<sup>5</sup> Proposal, 80 FR at 37317. The Exchange's independence requirements are set forth in the Independence Policy of the Board of Directors of the Exchange (the "Exchange Independence Policy"), available at [https://www.nyse.com/publicdocs/nyse/markets/nyse/Director\\_Independence\\_Policy\\_of\\_New\\_York\\_Stock\\_Exchange\\_LLC\\_2014.pdf](https://www.nyse.com/publicdocs/nyse/markets/nyse/Director_Independence_Policy_of_New_York_Stock_Exchange_LLC_2014.pdf). See Securities Exchange Act Release No. 67564 (August 1, 2012), 77 FR 47161 (August 7, 2012) (SR-NYSE-2012-17; SR-NYSEArca-2012-59; SR-NYSEMKT-2012-07) (approving the Exchange Independence

composition of the ROC would be the same as that of the ROCs of other SROs.<sup>6</sup> The Commission has recognized that a ROC with at least three independent directors is one of several measures that can help ensure the independence of the regulatory function from the market operations and commercial interests of a national securities exchange.<sup>7</sup>

The Exchange believes that the Proposal to create an independent ROC to oversee the adequacy and effectiveness of the performance of its self-regulatory responsibilities is consistent with previously approved rule changes for other SROs and would enable the Exchange to undertake its regulatory responsibilities under a corporate governance structure that is consistent with its industry peers.<sup>8</sup> The Exchange further believes that the proposed ROC would ensure the continued independence of the regulatory process.<sup>9</sup> Integral to the Proposal is that the oversight of the Exchange's self-regulatory responsibilities and regulatory performance, including review of the regulatory plan, programs, budget and staffing, would be by a ROC composed of individuals independent of Exchange management and a CRO having general supervision of the regulatory operations of the Exchange that meets regularly with the ROC.<sup>10</sup> For these reasons, the Exchange believes its Proposal is consistent with the Section 6(b)(5) of the Act.

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Policy and the independence policies of the boards of directors of NYSE Regulation, NYSE MKT LLC, and NYSE Market, Inc. (now NYSE Market (DE), Inc.).

<sup>6</sup> Proposal, 80 FR at 37317. See e.g., NASDAQ By-laws, Article III, Section 5(c) (specifying a ROC comprising three independent directors); Third Amended and Restated Bylaws of BATS Exchange, Inc., Article V, Section 6(c) ("BATS Bylaws") (same); and Chicago Board Options Exchange, Incorporated ("CBOE") Bylaws, Article IV, Section 4.5 (specifying a ROC of at least three directors all of whom shall be "non-industry" directors).

<sup>7</sup> Proposal, 80 FR at 37317. See, e.g., Release No. 34-58375, 73 FR at 49502; Securities Exchange Act Release No. 61152 (December 10, 2009), 74 FR 66699, 66704-705 (December 16, 2009) (File No. 10-191) (approving application of C2 Options Exchange, Incorporated, seeking registration as a national securities exchange); BATS Approval Order, 75 FR at 13161.

<sup>8</sup> Proposal, 80 FR at 37317. See NASDAQ Bylaws, Article III, Section 5(c); BATS Bylaws, Article V, Section 6(c). See also Arca ROC Approval Order, 80 FR at 34744 and MKT ROC Approval Order, 80 FR at 34751.

<sup>9</sup> Proposal, 80 FR at 37317. See, e.g., Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678, 74687 (August 21, 2008) (SR-NYSE-2003-34) ("Release No. 34-48946") (approving significant restructure of NYSE governance architecture centered on Board independent of members, member organizations, and listed issuers).

<sup>10</sup> Proposal, 80 FR at 37317. See, e.g., Release No. 34-48946, 68 FR at 74687.

The Committee for Review

The Exchange proposes to establish a Committee for Review (“CFR”) as a sub-committee of the ROC. The proposed CFR would be the successor to current CFR, which is a committee of the NYSE Regulation, Inc. (“NYSE Regulation”) board of directors.<sup>11</sup> The CFR would be appointed annually by the Board as a sub-committee of the ROC and would be comprised of both Exchange directors that satisfy the requirements of the Exchange Independence Policy as well as persons who are not directors.<sup>12</sup> The Exchange proposes that a majority of the members of the CFR voting on a matter subject to a vote of the CFR must be directors of the Exchange.<sup>13</sup> The proposed CFR, like the current CFR, would also be responsible for reviewing the disciplinary decisions on behalf of the Board and reviewing determinations to limit or prohibit the continued listing of an issuer's securities on the Exchange.<sup>14</sup>

The Exchange notes that the categories of members represented on the CFR would not change. The CFR’s mandate would include acting in an advisory capacity to the Board with respect to disciplinary matters, the listing and delisting of securities, regulatory programs, rulemaking and regulatory rules, including trading rules.<sup>15</sup> Moreover, the Exchange believes that member participation on the proposed CFR would provide for the fair representation of members in the administration of the affairs of the Exchange, including rulemaking and the disciplinary process, consistent with Section 6(b)(3) of the Exchange Act.<sup>16</sup>

**Response to Comment Letter**

As a general matter, the comment letter expresses a clear preference for a “structural,” rather than a “functional,” separation of the Exchange’s regulatory function. The Commission previously found that the Exchange’s current structurally separate regulatory function was consistent with the Act. This prior approval of the Exchange’s current structural separation does not, however, preclude alternative regulatory structures, such as a functional separation, that are also consistent with the Act. As the Commission has made clear, a complete structural separation

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<sup>11</sup> Proposal, 80 FR at 37320.

<sup>12</sup> Id. at 37320-21.

<sup>13</sup> Id. at 37321. Currently, a majority members of the CFR voting on a matter subject to a vote of the CFR must be directors of NYSE Regulation. See NYSE Regulation Bylaws, Article III, Section 5, available at [https://www.nyse.com/publicdocs/nyse/regulation/nyse/Seventh\\_Amended\\_and\\_Restated\\_Bylaws\\_of\\_NYSE\\_Regulation\\_Inc.pdf](https://www.nyse.com/publicdocs/nyse/regulation/nyse/Seventh_Amended_and_Restated_Bylaws_of_NYSE_Regulation_Inc.pdf).

<sup>14</sup> Proposal, 80 FR at 37321.

<sup>15</sup> Id.

<sup>16</sup> Id.; see 15 U.S.C. 78f(b)(3).

of the regulatory and market functions of an SRO is only one of a “variety” of ways to ensure the independence of the regulatory process.<sup>17</sup>

The Exchange’s proposed ROC is modeled on the NASDAQ Stock Market LLC ROC, as Professor Brown acknowledges, and is substantially similar to the ROCs of the Exchange’s peers, including the ROCs of the Exchange’s affiliates, NYSE Arca and NYSE MKT, which were approved by the Commission.<sup>18</sup> In fact, the Exchange is not aware of any other national securities exchange that has opted for a structural separation of the regulatory function. The Proposal thus does not merely “resemble” arrangements at the Exchange’s peers; it reflects a corporate governance structure that is the industry norm.<sup>19</sup>

Professor Brown does not explain why the Exchange’s Proposal, which is almost identical to the regulatory structures of other national securities exchanges, does not protect the independence of the Exchange’s regulatory function. Instead, he hypothesizes that differences “may” exist in the regulatory activities of the Exchange and its peers, and that therefore “the direct comparison to ‘industry peers’ may not be appropriate.”<sup>20</sup> While Professor Brown only states that such differences “may” exist, the Exchange can confirm that such differences do not exist and that, as a national securities exchange, the Exchange is subject to the same obligations and requirements under the Act as other national securities exchanges. The Exchange can accordingly think of no more relevant or apt comparison that it could make.

Professor Brown makes a series of specific arguments in support of the view that the Proposal does not sufficiently insulate the Exchange’s regulatory function from its commercial interest. We address each point in order.

First, Professor Brown notes that, unlike NYSE Regulation, the Exchange is a “for-profit” entity, and argues that any benefits that resulted from the not-for-profit status of NYSE Regulation would “be lost by the transfer of regulatory responsibilities to a for-profit entity.”

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<sup>17</sup> See 80 FR at 37318; Release No. 34-48946, 68 FR at 74687.

<sup>18</sup> See Securities Exchange Act Release No. 75155 (June 11, 2015) (SR-NYSEArca-2015-29) (“Arca ROC Approval Order”) (approving creation of a ROC with primary responsibility to independently monitor the exchange’s regulatory operations) and Securities Exchange Act Release No. 75148 (June 11, 2015) (SR-NYSEMKT-2015-27) (“MKT ROC Approval Order”) (same).

<sup>19</sup> See Proposal, 80 FR at 37317; NASDAQ Bylaws, Article III, Section 5(c); BATS Bylaws, Article V, Section 6(c). See also Arca ROC Approval Order, 80 FR at 34744 and MKT ROC Approval Order, 80 FR at 34751.

<sup>20</sup> Comment Letter, at 8 (“The Exchange does not address whether differences exists in the regulatory activities of these peers. One suspects that such differences exist.”) (citation omitted).

Professor Brown fails to recognize, however, that the Proposal does not contemplate any transfer: The Exchange, as an SRO, has always retained the “ultimate responsibility for the fulfillment of its statutory and self-regulatory obligations under the Act.”<sup>21</sup> Indeed, under the delegation agreement whereby the Exchange delegated regulatory responsibility to NYSE Regulation (“Delegation Agreement”), actions taken by NYSE Regulation pursuant to delegated authority are subject to review, approval or rejection by the Exchange Board.<sup>22</sup> The Exchange has proposed the changes in its Proposal because it believes that the ROC structure would provide the Exchange, including its Board, a more direct and comprehensive view of the regulatory issues for which it is responsible.

Second, Professor Brown states that, with the exception of the Chief Executive Officer, the NYSE Regulation board of directors is made up of independent directors, and that the Operating Agreement does not impose a similar requirement. This assertion is incorrect. As proposed, the revised Operating Agreement would require the Exchange’s ROC to be made up of at least three members, each of whom would be a director of the Exchange that satisfies the independence requirements of the Exchange Independence Policy.<sup>23</sup> Further, NYSE Regulation directors do not meet any independence requirements that are different or additional to those the independent directors of the Exchange must meet: The Exchange Independence Policy and the independence policy of the Board of Directors of NYSE Regulation (the “NYSE Regulation Independence Policy”) are virtually the same, and both approved by the Commission.<sup>24</sup> Accordingly, the Exchange fails to see how a ROC composed of independent directors could be inherently inferior to the NYSE Regulation board of directors.

Third, the comment letter states that NYSE Regulation employs a “number” of safeguards to limit the “influence” of Intercontinental Exchange, Inc. (“ICE”), the ultimate parent of the Exchange and NYSE Regulation, but only mentions one – that NYSE Regulation

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<sup>21</sup> See Arca Merger Approval Order, 71 FR at 11264. See also Proposal, 80 FR at 37318.

<sup>22</sup> See Delegation Agreement among the Exchange, NYSE Market (DE), Inc., and NYSE Regulation, Inc., Section I, at [https://www.nyse.com/publicdocs/nyse/regulation/nyse/Delegation\\_Agreement\\_Between\\_New\\_York\\_Stock\\_Exchange\\_LLC\\_NYSE\\_Regulation\\_Inc\\_and\\_NYSE\\_Market\\_DE\\_Inc.pdf](https://www.nyse.com/publicdocs/nyse/regulation/nyse/Delegation_Agreement_Between_New_York_Stock_Exchange_LLC_NYSE_Regulation_Inc_and_NYSE_Market_DE_Inc.pdf). The sole exception is that action taken upon review of disciplinary decisions by the board of NYSE Regulation is final action of the Exchange. *Id.*

<sup>23</sup> See Proposal, 80 FR at 37317.

<sup>24</sup> See Release No. 34-67564, 77 FR at 47162. The sole differences between the Exchange and NYSE Regulation Independence Policies are (1) the references to the entities’ names, and (2) a reference to the Nominating and Governance Committee of NYSE Regulation. See footnote 2 to the Exchange Independence Policy at [https://www.nyse.com/publicdocs/nyse/markets/nyse/Director\\_Independence\\_Policy\\_of\\_New\\_York\\_Stock\\_Exchange\\_LLC\\_2014.pdf](https://www.nyse.com/publicdocs/nyse/markets/nyse/Director_Independence_Policy_of_New_York_Stock_Exchange_LLC_2014.pdf).

limits the number of ICE board members that can sit on the NYSE Regulation board to less than a majority. Professor Brown is correct that the NYSE Regulation board is composed of majority independent directors who are not also on the board of ICE. However, Professor Brown is not correct when he states that the Operating Agreement “requires that the [Exchange] Board consist of at least a majority of independent directors from the holding company.” The Exchange recently removed this requirement from the Operating Agreement, which now simply requires that a majority of the directors be U.S. persons that satisfy the Exchange Independence Policy.<sup>25</sup> Professor Brown also notes that up to 30% of the Board could consist of directors who are not independent. The Exchange board is only required to have a majority of independent directors. However, the ROC, which the Exchange is proposing to have oversight of the Exchange’s regulatory function, would be required to be 100% independent.

Overall, in his first three points Professor Brown seems to be arguing, without providing evidence to support his premise, that directors of NYSE Regulation are inherently more independent than independent directors of ICE that serve as independent directors of the Exchange. The Exchange respectfully disagrees. As noted, both sets of directors are subject to virtually the same independence policies. The independence policies are robust: They require not only that a director not have any material relationship with ICE and its subsidiaries, but also subject the director to the independence tests of Section 303A.02 of the Exchange’s Listed Company Manual – the same independence tests as the Exchange requires the independent directors of listed companies to meet. In addition, the policies include independence criteria related to the director’s relationships with member organizations, members, allied members, allied persons, approved persons, and listed companies, standards stemming from the regulatory responsibilities and roles that the Exchange exercises in overseeing the organizations and companies included in those categories.<sup>26</sup> In fact, an independent director of ICE that serves on the Exchange Board must meet the independence requirements not only of the Exchange, but also those of ICE, which are themselves subject to Commission review and approval.<sup>27</sup>

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<sup>25</sup> See Securities Exchange Act Release No. 34–75105, June 4, 2015 (SR–NYSE– 2015–16), 80 FR 33005 (June 10, 2015) (approving proposed rule change to remove the requirement that the independent directors that make up the majority of the board of directors of the Exchange also be directors of ICE).

<sup>26</sup> See note 5, *supra*. See also Securities Exchange Act Release No. 68639 (January 11, 2013) (SR-NYSE-2012-49), 78 FR 4570 (January 22, 2013).

<sup>27</sup> Securities Exchange Act Release No. 70210 (August 15, 2013) (SR–NYSE– 2013–42), 78 FR 51758 (August 21, 2013) (granting approval of proposed rule change relating to a corporate transaction in which NYSE Euronext will become a wholly-owned subsidiary of ICE). The ICE director independence policy is “substantially identical” to that of NYSE Euronext, the previous parent company of the Exchange and NYSE Regulation. *Id.* at 51764.

Fourth, Professor Brown claims that the ROC structure provides little insulation for the regulatory function from the Exchange's commercial interests. This statement is flatly contradicted by the numerous Commission findings that use of a ROC is consistent with the Act,<sup>28</sup> and, in particular, that a structure like the one in the Proposal, which has a CRO reporting to an independent ROC, adds a "significant degree of independence" that should "insulate" regulatory activity from economic pressures and potential conflicts of interest.<sup>29</sup>

Fifth, Professor Brown's related observation that the proposed ROC would have little substantive authority over the regulatory budget and adequacy of regulatory resources is also incorrect. As noted, the proposed ROC was modeled on the NASDAQ ROC and has the same powers, including the power to review the regulatory budget and inquire about the adequacy of available regulatory resources. The three core responsibilities of the proposed ROC are in fact substantially similar to those of the ROCs of other SROs.<sup>30</sup> The Commission has clearly determined that a ROC with these powers is sufficient to ensure funding of regulation and is consistent with the Act. The comment letter provides no reason or authority to reach a different conclusion here.

Sixth, Professor Brown maintains that the proposed ROC's decision making process is insufficiently insulated from the Exchange's commercial activities because independent directors of ICE may serve on the ROC. The Exchange respectfully disagrees. As stated above, the Exchange rejects the proposition that directors of NYSE Regulation are inherently more independent than independent directors of ICE that serve as independent directors of the Exchange. As noted, ICE independent directors on the Board must meet the independence requirements of both the Exchange and ICE.

Seventh, Professor Brown maintains that the CRO is inadequately insulated from the Exchange's commercial interests because the CRO does not report to the ROC and the ROC lacks the authority to "retain or dismiss" the CRO, which means the CRO could be "subordinated" to Exchange's CEO. These claims are incorrect. The Proposal clearly provides that the CRO would report to the ROC.<sup>31</sup> The Exchange notes in this connection that, even if the CRO did not report to the ROC, it would not necessarily render the Proposal inconsistent with

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<sup>28</sup> See notes 6 and 18, *supra*.

<sup>29</sup> Release No. 34-48946, 68 FR at 74687. In addition, the Exchange notes that Section 4.05 of the proposed amendments to the Operating Agreement provides that the Exchange shall not use any regulatory assets, or any regulatory fees, fines or penalties collected by the Exchange's regulatory staff for commercial purposes or distribute such assets, fees, fines or penalties to NYSE Group LLC, as member, or any other entity. See Proposal, 80 FR at 37318.

<sup>30</sup> See note 3, *supra*.

<sup>31</sup> Proposal, 80 FR at 37318.

the Act. NASDAQ's CRO, for instance, reports solely to the Chief Executive Officer of NASDAQ, while the BOX Options Exchange's CRO reports to both the ROC and the President of the Exchange.<sup>32</sup> Professor Brown ignores these facts.

Moreover, given that the CRO reports to the ROC, the ROC clearly has the power to retain or dismiss the CRO, only it must do so in consultation with the Exchange's Chief Executive Officer as part of the process of establishing the goals, assessing the performance, and recommending the CRO's compensation.<sup>33</sup> The letter does not cite a single instance where a ROC has the unfettered power to retain or dismiss a CRO. The Exchange notes in this regard that the NASDAQ ROC only has the power to "be informed" about the compensation and promotion or termination of the Chief Regulatory Officer and the reasons therefor.<sup>34</sup>

Professor Brown views any partnership between the ROC and the Exchange CEO as a weakness, but it is inherent in when national securities exchanges are also SROs with regulatory responsibilities. The Exchange's CEO cannot be disconnected from regulatory responsibilities when the Exchange retains the "ultimate responsibility for the fulfillment of its statutory and self-regulatory obligations under the Act."<sup>35</sup>

Eighth, Professor Brown argues that the proposed CFR does not effectively insulate the disciplinary review process from the Exchange. As noted, the CFR would be a subcommittee of the ROC. Professor Brown's claim that the CFR would have no relationship to the ROC is incorrect. The proposed CFR would be comprised of both Exchange directors that satisfy the independence requirements, as well as persons who are not directors. Because the majority of the Exchange Board must be independent and any non-affiliated director (also known as a "fair representation" director) must be independent, as a functional matter if the Exchange has a five person Board, four of the five directors would qualify for CFR membership.<sup>36</sup>

Finally, Professor Brown proposes various "revisions" to the Proposal. The Exchange believes that the Proposal is consistent with the Act and that Professor Brown's "revisions" are not necessary to ensure the independence of the regulatory function. We address each proposed "revision" in turn.

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<sup>32</sup> See NASDAQ Approval Order, 71 FR at 3555 (citing NASDAQ Bylaws, Article IV, Section 7); Release No. 34-66871 (April 27, 2012), 77 FR 26323, 26330 (May 3, 2012) (File No. 10-206) (citing BOX Exchange Bylaws Section 7.01).

<sup>33</sup> Proposal, 80 FR at 37317.

<sup>34</sup> NASDAQ Bylaws, Article III, Section 5(c).

<sup>35</sup> See Arca Merger Approval Order, 71 FR at 11264.

<sup>36</sup> Proposal, 80 FR at 37320.

Preliminarily, Professor Brown notes that a possible response to the Proposal would be to reject the premise that the structural separation of business and regulatory functions should be ended, leaving the Delegation Agreement in place. The Exchange believes that Professor Brown has not provided any credible reason why the current structure should remain or why the Exchange's Proposal is not consistent with the requirements of the Act. As noted, a structural separation of the regulatory function is not the only way to ensure the independence of the regulatory function, and does not preclude alternatives, such as a functional separation, that are also consistent with the Act.

First, Professor Brown proposes that the Commission require that, except for the Chief Executive Officer of the Exchange, the Board consist entirely of independent directors that are not directors of ICE or any of its affiliates. The Exchange believes that this would be imprudent and unnecessary. The Exchange Board already consists of a majority of independent directors, and at least 20% of the Board members must be non-affiliated directors (i.e., "fair representation" directors). The Exchange is not proposing to change the composition of its Board in the Proposal. It has and will remain a board composed of a majority of independent directors, some of whom may also be independent directors that serve as directors of ICE. As discussed above, the Exchange does not believe that directors that meet the Exchange's approved independence standards are less independent because they also serve as directors of ICE or ICE affiliates. The Exchange accordingly believes that the Proposal would enable the Exchange to be so organized as to have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange.

Second, Professor Brown proposes that the Commission require that the ROC consist entirely of independent directors who are not directors of ICE.<sup>37</sup> The suggestion that these directors not be ICE directors makes little sense given that, in order to be eligible to sit on the ROC, an independent director of ICE must meet the robust independence requirements not only of the Exchange, but also those of ICE, which are themselves subject to Commission review and approval. As noted, the Exchange rejects the proposition that directors of NYSE Regulation are inherently more independent than independent directors of ICE that serve as independent directors of the Exchange.

Third, Professor Brown proposes that the Commission give the ROC greater substantive authority, including "irrevocably delegated authority over its budget and other critical functions." As proposed, the ROC would have significant substantive authority to review the regulatory budget of the Exchange and specifically inquire into the adequacy of resources available in the budget for regulatory activities. This proposed authority would be the same as that of the ROCs

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<sup>37</sup> Professor Brown's proposal erroneously references the Chief Executive Officer serving on the ROC. As noted above, however, all of the members of the ROC must be independent directors. Accordingly, the Chief Executive Officer could not be on the ROC.

of other SROs that have been determined to be consistent with the Act. Providing the ROC with “irrevocably delegated” authority over the budget and other matters would be an unprecedented and significant departure from corporate governance norms that is completely unnecessary to ensure the independence of the regulatory function.

Fourth, Professor Brown proposes that ROC have “far greater authority” as regards the CRO. As discussed above, the CRO would report to the ROC, and the ROC would have the authority to establish goals and assess the performance of the CRO in consultation with the Exchange. Once again, these powers and obligations of the proposed ROC are substantially the same as other SROs and the Exchange believes that such powers and authority would be sufficient to oversee the performance of the CRO and ensure the independence of the CRO in performing his or her responsibilities.

Fifth, Professor Brown proposes that the ROC should have the authority to determine the CRO’s compensation. As discussed above, the ROC’s authority to make recommendations with respect to the CRO’s compensation has been found to be consistent with the Act. The letter cites no precedent to the contrary and the Exchange believes that its proposal in this regard is consistent with the Act.

Sixth, Professor Brown proposes that the Board be required to provide funding for the regulatory authority “as determined by” the ROC. As noted above, the ROC would have the authority and obligation to review the regulatory budget and inquire into its adequacy. The Commission has clearly determined that a ROC with these powers is sufficient to ensure funding of regulation and is consistent with the Act. The comment letter provides no reason or authority to reach a different conclusion here.

Seventh, Professor Brown proposes that membership of the CFR be limited to members of the ROC and members appointed by the ROC. As noted, the requirement that members of the CFR be independent directors of the Exchange is sufficient to ensure the integrity of the disciplinary appeals process.

Finally, Professor Brown proposes that the provision permitting removal “for cause” be defined so as to restrict the ability of the Board to easily change the membership of the ROC. Removal of ROC members for cause is not a universal requirement, and at least one SRO does not require “cause” as a basis to remove a member of the ROC.<sup>38</sup> Once again, the comment letter proffers no reason why the Exchange should be held to a different standard.

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<sup>38</sup> See, e.g., CBOE Bylaws, Article IV, Section 4.5 (“Members of the Regulatory Oversight and Compliance Committee shall not be subject to removal except by the Board”).

Mr. Brent J. Fields  
September 24, 2015  
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The Exchange appreciates the opportunity to respond to Professor Brown's comment letter and respectfully requests the Commission approve the Proposal, as amended.

Very truly yours,

A handwritten signature in blue ink, appearing to be 'B. J. Fields', is written below the closing text.