

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-75148; File No. SR-NYSEMKT-2015-27)

June 11, 2015

Self-Regulatory Organizations; NYSE MKT LLC; Order Approving Proposed Rule Change to Amend the Sixth Amended and Restated Operating Agreement of the Exchange

I. Introduction

On April 17, 2015, NYSE MKT LLC (“Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”),² and Rule 19b-4 thereunder,³ a proposed rule change to amend the Sixth Amended and Restated Operating Agreement (“Operating Agreement”) of the Exchange. The proposed rule change was published for comment in the Federal Register on May 4, 2015.⁴ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

NYSE MKT proposes to amend the Exchange’s Operating Agreement to (1) establish a Regulatory Oversight Committee (“ROC”), and (2) remove the requirement that the independent directors who make up the majority of the board of directors of the Exchange (“Board”) also be directors of Intercontinental Exchange, Inc. (“ICE”), the Exchange’s parent company.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ See Securities Exchange Act Release No. 74825 (April 28, 2015), 80 FR 25341 (“Notice”).

A. Creation of a ROC

The Exchange proposes to add subsection (ii) to Section 2.03(h) of the Operating Agreement to establish a ROC and to delineate its composition and functions. The ROC would have the responsibility to independently monitor the Exchange's regulatory operations.⁵ In particular, pursuant to Section 2.03(h)(ii), the ROC would:

- oversee the Exchange's regulatory and self-regulatory organization responsibilities and evaluate the adequacy and effectiveness of the Exchange's regulatory and self-regulatory organization responsibilities;
- assess the Exchange's regulatory performance; and
- advise and make recommendations to the Board or other committees of the Board about the Exchange's regulatory compliance, effectiveness and plans.

In furtherance of these functions, the Exchange proposes that the ROC shall have the authority and obligation to: (i) review the regulatory budget of the Exchange and specifically inquire into the adequacy of resources available in the budget for regulatory activities; (ii) meet regularly with the Chief Regulatory Officer ("CRO") in executive session; (iii) in consultation with the Exchange's Chief Executive Officer, establish the goals, assess the performance, and recommend the CRO's compensation; and (iv) keep the Board informed with respect to the foregoing matters.

With respect to the ROC's composition, Section 2.03(h)(ii) would provide that the ROC shall consist of at least three members, each of whom shall be a director of either the Exchange or of NYSE Regulation, Inc. ("NYSE Regulation"), and who satisfy the independence

⁵ See Notice, 80 FR at 25342.

requirements of the Exchange.⁶ The Exchange represents that it believes that a ROC comprised of at least three independent members has been recognized as 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.⁷

In addition, Section 2.03(h)(ii) of the Operating Agreement would provide that the Board, on affirmative vote of a majority of directors, at any time may remove a member of the ROC for cause, and also would provide that a failure of the ROC member to qualify as independent under the Company Director Independence Policy would constitute a basis to remove a member of the ROC for cause. If the term of office of a ROC member terminates, and the remaining term of office of such member at the time of termination is not more than three months, Section 2.03(h)(ii) would provide that during the period of vacancy, the ROC would not be deemed to be in violation of its compositional requirements by virtue of the vacancy. To clarify the process for filling vacancies on any committee of the Exchange, including the ROC, the Exchange also proposes to amend Section 2.03(h) of the Operating Agreement to provide that vacancies in the membership of any committee shall be filled by the Board. The Exchange represents that it believes that the proposed adoption of a ROC would ensure the continued independence of the regulatory process.⁸

⁶ The Exchange's independence requirements are set forth in the Company Director Independence Policy of the Exchange. See Securities Exchange Act Release No. 67564 (August 1, 2012), 77 FR 47151 (August 7, 2012) (SR-NYSE-2012-17) (approving, among other things, the Exchange's Company Director Independence Policy).

⁷ See Notice, 80 FR at 25342.

⁸ See Notice, 80 FR at 25343.

B. Exchange Independent Directors

Currently, Section 2.03(a)(i) of the Operating Agreement, which governs the Board's composition, provides that a majority of the Exchange's directors shall be U.S. persons who are members of the board of directors of ICE and who satisfy the Exchange's Company Director Independence Policy. Each such director is defined as an "ICE Independent Director" in Section 2.03(a)(i) of the Operating Agreement. The Exchange proposes to amend Section 2.03(a)(i) to remove the requirement that the independent directors, who must comprise the majority of the Board also be directors of ICE, by amending the definition of "ICE Independent Director" to remove the reference to ICE, and to make conforming changes in both subsections (i) and (ii) of Section 2.03(a).

The Exchange represents that, under this modification to its Operating Agreement, a majority of the directors of the Board would continue to satisfy the Company Director Independence Policy.⁹ The Exchange also notes that it believes that eliminating the requirement that the independent directors of the Exchange also be directors of ICE would allow the Exchange to broaden the pool of potential Board members, resulting in a more diversified Board membership while still ensuring the directors' independence.¹⁰ The Exchange states that eliminating the requirement that the independent directors of the Exchange also be directors of ICE would result in the Exchange's Board composition requirements being commensurate with the board requirements of its affiliate, NYSE Arca, Inc., which does not require any of its directors to be directors of ICE.¹¹

⁹ See Notice, 80 FR at 25343.

¹⁰ Id.

¹¹ Id.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.¹² In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,¹³ which requires an exchange to be so organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the Act, the rules and regulations thereunder, and the rules of the exchange. The Commission also finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁴ which requires that the rules of the exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the Exchange's creation of a ROC as an independent committee to oversee the adequacy and effectiveness of the Exchange's regulatory responsibilities, compliance and plans, is appropriate and should help the Exchange to fulfill its self-regulatory obligations. The Commission notes that, under proposed Section 2.03(h)(ii) of the Operating Agreement, the responsibilities, enumerated functions, and authority of the ROC

¹² In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹³ 15 U.S.C. 78(b)(1).

¹⁴ 15 U.S.C. 78(b)(5).

are substantially similar to those of other exchanges.¹⁵ In addition, the Commission believes that the proposed requirement that the members of the ROC consist of either directors of the Exchange or directors of NYSE Regulation who satisfy the independence requirements of the Exchange's Company Director Independence Policy, and the provisions relating to the removal of a member of the ROC either for cause or for failing to qualify as independent, should help ensure the continued independence of the members of the ROC. The proposal to establish a ROC should assist the Exchange in meeting its statutory obligations to comply, and to enforce compliance by its members and persons associated with its members, with the Act, the rules and regulations thereunder, and the rules of the Exchange.

The Commission notes that, while the proposal removes the requirement that the independent directors who make up the majority of the Board also be ICE directors, it does not alter the requirement under the Operating Agreement that a majority of the Board must satisfy the Exchange's Company Director Independence Policy.¹⁶ Thus, the majority of directors on the Exchange's Board must still qualify as independent directors under the Exchange's Company Director Independence Policy. Moreover, removing the requirement that the independent directors on the Exchange's Board also be directors of ICE may result in a more diversified Board composition as candidates for membership on the Board who qualify as independent under the Company Director Independence Policy need not be limited to those candidates who also serve on the board of directors of ICE.

¹⁵ See, e.g., Bylaws of NASDAQ Stock Market LLC, Article III, Section 5(c); Third Amended and Restated Bylaws of BATS Exchange, Inc., Article V, Section 6(c); Amended and Restated Bylaws of Miami International Securities Exchange, LLC, Article IV, Section 4.5(c).

¹⁶ See supra note 6.

Accordingly, the Commission finds that the proposed rule change is consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NYSEMKT-2015-27) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Robert W. Errett
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).