

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77536; File No. SR-NYSEMKT-2016-26)

April 6, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending the Eighth Amended and Restated Operating Agreement of the Exchange

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 March 29, 2016, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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

The Exchange proposes to amend the Eighth Amended and Restated Operating Agreement of the Exchange (“Operating Agreement”) to (1) change the process for nominating non-affiliated directors; (2) remove a reference to an obsolete category of member; and (3) add references to Designated Market Makers. 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, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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

The Exchange proposes to amend the Operating Agreement to (1) change the process for nominating non-affiliated directors; (2) remove a reference to an obsolete category of member; and (3) add references to Designated Market Makers ("DMMs").

Process for Nominating Non-Affiliated Directors

Pursuant to the Operating Agreement, at least 20% of the Board of Directors of the Exchange ("Board") is made up of "Non-Affiliated Directors" (commonly referred to as "fair representation directors").⁴ Pursuant to Section 2.03(a) of the Operating Agreement, the nominating and governance committee ("NGC") of the board of directors of ICE, the indirect parent of the Exchange, nominates the candidates for Non-Affiliated Directors, who are then elected by NYSE Group, as the sole member of the Exchange. The Exchange proposes to amend Section 2.03(a) to have the Director Candidate Recommendation Committee ("DCRC") of the Exchange assume the role currently played by the ICE NGC, and to make a conforming change to Section 2.03(h)(i). In addition, if the Member Organizations endorse a petition candidate for Non-Affiliate Director, pursuant to Section 2.03(a)(iv) the ICE NGC makes the determination of

⁴ Pursuant to Section 2.03(a) of the Operating Agreement, Non-Affiliate Directors are persons who are not members of the board of directors of Intercontinental Exchange, Inc. ("ICE"). A person may not be a Non-Affiliate Director unless he or she is free of any statutory disqualification, as defined in Section 3(a)(39) of the Exchange Act. Non-Affiliate Directors need not be independent.

whether the person is eligible.⁵ The Exchange proposes to amend Section 2.03(a)(iv) to have the Exchange make such determination instead of the ICE NGC.

Currently, the nomination by the ICE NGC is the final step in the process for electing a Non-Affiliated Director. First, the DCRC recommends a candidate, whose name then is announced to the Exchange's Member Organizations. The Member Organizations may propose alternate candidates by petition. If there are no petition candidates, the DCRC recommends its candidate to the ICE NGC. If petition candidates are proposed, the ICE NGC makes the determination of whether the candidates are eligible, and then all of the eligible candidates are submitted to the Member Organizations for a vote. The DCRC recommends to the ICE NGC the candidate receiving the highest number of votes. The ICE NGC is obligated to designate the DCRC-recommended candidate as the nominee, and NYSE Group is obligated to elect him or her as a Non-Affiliated Director.

The Exchange believes obligating the ICE NGC to nominate the candidates for Non-Affiliated Directors based on the DCRC's unalterable recommendation is neither necessary nor meaningful. Pursuant to Section 2.03(a)(iii) the ICE NGC is obligated to designate whomever the DCRC recommends or, if there is a petition candidate, whomever emerges from the petition process. The ICE NGC does not have any discretion. Removing this unnecessary step would make the NYSE MKT process more efficient.

The Exchange believes that having the Exchange determine whether persons endorsed to be petition candidates are eligible also would be more efficient, as it would not require action from the ICE NGC, thereby removing the possibility of any delay in the process. The proposed

⁵ Pursuant to Section 2.02 of the Operating Agreement, "Member Organizations" refers to members and member organizations, as defined in NYSE MKT Rules 18 and 24, respectively.

change would be consistent with the petition process of the Nasdaq Stock Market LLC, in which the exchange determines the eligibility of proposed nominees.⁶

The Exchange believes that the proposed changes will make its process more consistent with the process by which its affiliate, NYSE Arca, Inc. (“NYSE Arca”), designates its fair representation directors, in which the ICE NGC plays no role.⁷

Accordingly, the Exchange proposes to revise Section 2.03(a)(iii)-(v) of the Operating Agreement to amend the process for electing Non-Affiliated Directors. As proposed, the process would be as follows. First, as is currently the case, the DCRC would recommend a candidate, whose name would be announced to the Member Organizations, and the Member Organizations could propose alternate candidates by petition. Second, if there were no petition candidates, the DCRC would nominate the candidate it had previously recommended. If there were petition candidates, the Exchange would make the eligibility determination of petition candidates, all eligible candidates would be submitted to the Member Organizations for a vote, and the DCRC would nominate the candidate receiving the highest number of votes. Finally, NYSE Group would be obligated to elect the DCRC-nominated candidate as a Non-Affiliated Director.

The Exchange would make a conforming change to Section 2.03(h)(i) to state that the DCRC “will be responsible for nominating Non-Affiliate Director Candidates.” Currently, the

⁶ See By-Laws of the Nasdaq Stock Market LLC, Art. II, Sec. 1(b) (“The Company may require any proposed nominee to furnish such other information as it may reasonably require to determine the eligibility of such proposed nominee to serve as a Member Representative Director.”).

⁷ See Article III, Section 3.02 of the NYSE Arca Bylaws and NYSE Arca Rule 3.2(b)(2). Similarly, the board of directors of The NASDAQ OMX Group, Inc., the sole member of the Nasdaq Stock Market LLC, plays no role in nominating or determining the eligibility of Member Representative Directors. See By-Laws of the Nasdaq Stock Market LLC, Art. II, Sec. 1.

provision states that the DCRC “will be responsible for recommending Non-Affiliated Director Candidates to the ICE NGC.”

Elimination of a Category of DCRC Membership

As noted above, the Operating Agreement requires that the DCRC include representatives from each of four categories of Exchange members. The Exchange proposes to amend Section 2.03(h)(i) of the Operating Agreement to eliminate from the DCRC representatives of the fourth category, which relates to individuals who are “associated with a Member Organization and spend a majority of their time on the trading floor of the [Exchange] and have as a substantial part of their business the execution of transactions on the trading floor of the [Exchange] for their own account or the account of their Member Organization, but are not registered as a specialist.”⁸

This fourth category describes a class of proprietary traders known as Registered Equity Market Makers (“REMM”) on the former American Stock Exchange LLC, a predecessor of the Exchange. REMMs were floor traders who engaged in on-floor proprietary trading, subject to certain requirements intended to have these members effectively function like market makers, pursuant to the exemption for market makers in Section 11(a)(1)(A) of the Exchange Act.⁹ The rules relating to this category of proprietary floor trader were eliminated shortly after the

⁸ Representatives from the following three categories would continue to be included on the DCRC: (1) member organizations that engage in a business involving substantial direct contact with securities customers (commonly referred to as “upstairs firms”), (2) specialists, and (3) floor brokers. The Exchange proposes to add DMMs to category (2), as discussed below. See note 15, *infra*, and accompanying text.

⁹ See 17 CFR 240.11a1-5; Division of Market Regulation, United States Securities and Exchange Commission, *Market 2000: An Examination of Current Equity Market Developments* (January 1994) (“Market 2000”), at A V – 7, available at <https://www.sec.gov/divisions/marketreg/market2000.pdf>. This class of proprietary traders were known as Registered Competitive Market Makers (“RCMM”) on the NYSE.

American Stock Exchange LLC was acquired by the NYSE.¹⁰ In addition, NYSE MKT Rule 114, which governed REMMs, was deleted as obsolete in 2012.¹¹ As a result, there are no Exchange members or member organizations that fall under the fourth category specified in Section 2.03(h)(i) of the Operating Agreement, and so the Exchange proposes to delete references to it as obsolete. The changes would make Section 2.03(h)(i) more consistent with the categories of members of the Committee for Review in Section 2.03(h)(iii).¹²

References to Designated Market Makers

In 2008, the Exchange adopted rules, based on NYSE rules, that transformed specialists in the Exchange's equity market into DMMs.¹³ As a result, market makers on the NYSE MKT equity market are called DMMs and on the NYSE Amex Options LLC ("NYSE Amex Options") options market are called "specialists."¹⁴ However, several provisions of the Operating Agreement were not updated, and refer only to specialists. Accordingly, the Exchange proposes to amend Sections 2.02 and 2.03(h)(i) to add references to DMMs.

¹⁰ See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995, 58996 (October 8, 2008) (SR-Amex-2008-63). The NYSE eliminated RCMs shortly thereafter. See Securities Exchange Act Release No. 60356 (July 21, 2009), 74 FR 37281 (July 28, 2009) (SR-NYSE-2009-08).

¹¹ See Securities Exchange Act Release No. 68306 (November 28, 2012), 77 FR 71846 (December 4, 2012) (SR-NYSEMKT-2012-68).

¹² See Securities Exchange Act Release No. 77008 (February 1, 2016), 81 FR 6311 (February 5, 2016) (SR-NYSEMKT-2015-106).

¹³ See Securities Exchange Act Release Nos. 58705 (Oct. 1, 2008), 73 FR 58995 (Oct. 8, 2008) (SR-Amex-2008-63) (approval order) and 59022 (Nov. 26, 2008), 73 FR 73683 (Dec. 3, 2008) (SR-NYSEALTR-2008-10) (amending equity rules to conform to NYSE New Market Model Pilot rules). See also Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379, 64381 (October 29, 2008) (SR-NYSE-2008-46) (approving rule change to create NYSE New Market Model Pilot).

¹⁴ The Exchange operates a marketplace for trading options through NYSE Amex Options, a facility of the Exchange. See Rule 2 – Equities (i) & (j) (defining DMM) and Rule 927NY (defining specialist).

Section 2.02 of the Operating Agreement provides that the Board has general supervision over Member Organizations and over approved persons in connection with their conduct with or affecting Member Organizations. Section 2.02 further provides that the Board “may disapprove of any member acting as a specialist or odd lot dealer”. The Exchange proposes to add “designated market maker (as defined in Rule 2 of the Company Rules) (‘DMM’)” after “specialist” in Section 2.02.

Section 2.03(h)(i) sets out the categories of individuals that shall be represented on the DCRC. The Exchange proposes to add “or DMM” to the references to “specialist” in categories (ii) and (iii), so that they reference both types of market makers. The changes would be consistent with the categories of members of the Committee for Review in Section 2.03(h)(iii), which refers to both DMMs and specialists.¹⁵

Finally, the Exchange proposes to make technical and conforming changes to the recitals and signature page of the Operating Agreement.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act¹⁶ in general, and with Section 6(b)(1)¹⁷ in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

¹⁵ See note 12, *supra*.

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(1).

The proposed change would remove the requirement that the ICE NGC nominate the candidates for Non-Affiliated Directors and have the DCRC nominate the candidates for Non-Affiliated Director directly. This proposed change would remove an unnecessary step in the process of nominating candidates for Non-Affiliated Directors and increase efficiency. In addition, the proposed change would remove the requirement that the ICE NGC make the determination whether persons endorsed to be petition candidates are eligible to be Non-Affiliated Directors, and have the Exchange make such determination instead. By not requiring action from the ICE NGC, the possibility of any resulting delay in the process is removed. For these reasons, the Exchange believes that the proposed rule change would contribute to the orderly operation of the Exchange and would enable the Exchange to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply and enforce compliance with the provisions of the Exchange Act by its members and persons associated with its members. The Exchange therefore believes that approval of the proposed is consistent with Section 6(b)(1) of the Act.

The Exchange believes that amending the Operating Agreement to remove the requirement that the DCRC include representatives from the fourth category of members would remove a reference to an obsolete category, thereby reducing potential confusion that may result from retaining obsolete references in the Exchange's Operating Agreement. The Exchange believes that eliminating such obsolete references would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency, thereby reducing potential confusion. Removing such obsolete references will also further the goal of transparency and add clarity to the Exchange's rules.

The Exchange believes that adding references to DMMs enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The proposed addition of a reference to DMMs in Section 2.02 will clarify that the Board has general supervision over all Member Organizations, including the ability to disapprove of any member acting as a DMM, as well as a specialist or odd lot dealer. The proposed addition of references to DMMs in Section 2.03(h)(i) further the goals of Section 6(b)(3) of ensuring fair representation of an exchange's members in the selection of its directors and administration of its affairs by including both types of market makers in the categories of individuals that shall be represented on the DCRC.

The Exchange also believes that this filing furthers the objectives of Section 6(b)(5) of the Exchange Act¹⁸ because the proposed rule change would be consistent with and facilitate a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, 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 having the DCRC nominate the candidates for Non-Affiliated Director would remove impediments to and perfect a national market system because the proposed rule change would remove an unnecessary step in the process for nominating

¹⁸ 15 U.S.C. 78f(b)(5).

candidates for Non-Affiliated Directors and would remove the ICE NGC from making the determination whether persons endorsed to be petition candidates are eligible to be Non-Affiliated Directors. By not requiring action from the ICE NGC, the possibility of any resulting delay in the process is removed. The Exchange believes that the proposed rule change is therefore consistent with and facilitates a governance and regulatory structure that furthers the objectives of Section 6(b)(5) of the Act.

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 Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with the administration and functioning of the Exchange and its board of directors.

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

No written comments were solicited or received with respect to 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 up to 90 days (i) as the Commission may designate 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-2016-26 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEMKT-2016-26. 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 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-2016-26, 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.¹⁹

Robert W. Errett
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).