

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77901; File No. SR-NYSEMKT-2016-26)

May 25, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No.1 Thereto, to Amend the Eighth Amended and Restated Operating Agreement of the Exchange

I. Introduction

On March 29, 2016, NYSE MKT LLC (“Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the Eighth Amended and Restated Operating Agreement of the Exchange (“Operating Agreement”). The proposed rule change was published for comment in the Federal Register on April 12, 2016.³ The Commission received no comments in response to the Notice. On May 19, 2016, the Exchange filed Amendment No. 1 to the proposal.⁴ This order approves the proposed rule change, as modified by Amendment No.1 thereto.

II. Description of the Proposal

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”).

A. Process for Nominating Non-Affiliated Directors

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 77536 (April 6, 2016), 81 FR 21636 (“Notice”).

⁴ Amendment No. 1 is a technical amendment to retain the initial reference to “DCRC Candidates” in Section 2.03(a)(iii) of the Operating Agreement rather than to delete it. Because Amendment No. 1 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 is not subject to notice and comment.

Pursuant to the Operating Agreement, at least 20 percent of the Exchange’s Board of Directors (“Board”) is made up of “Non-Affiliated Directors” (commonly referred to as “fair representation directors”).⁵ 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, Inc. (“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 Exchange’s Member Organizations endorse a Petition Candidate⁶ for Non-Affiliated Director pursuant to Section 2.03(a)(iv) of the Operating Agreement, the ICE NGC makes the determination of whether the person is eligible.⁷ 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 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

⁵ Pursuant to Section 2.03(a) of the Operating Agreement, Non-Affiliated Directors are persons who are not members of the Board of Directors of Intercontinental Exchange, Inc. (“ICE”). A person may not be a Non-Affiliated Director unless he or she is free of any statutory disqualification, as defined in Section 3(a)(39) of the Act, 15 U.S.C. 78c(a)(39), Non-Affiliated Directors need not be independent.

⁶ See Section 2.03(a)(iv) of the Operating Agreement.

⁷ 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.

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 that 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, whoever emerges from the petition process. According to the Exchange, the ICE NGC does not have any discretion. The Exchange believes that removing this step would make the NYSE MKT process with respect to the nomination of Non-Affiliated Directors more efficient. Moreover, the Exchange believes that having the Exchange determine whether persons endorsed to be Petition Candidates are eligible to serve as Non-Affiliated Directors also would be more efficient, as it would not require action by the ICE NGC, thereby potentially removing the possibility of any delay in the process. The Exchange further states that the proposed change would be consistent with the petition process of the Nasdaq Stock Market LLC in which that exchange determines the eligibility of proposed nominees.⁸

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. First, as is currently the case, the DCRC would recommend a candidate, whose name would be announced to the

⁸ 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.").

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 whom it had previously recommended. If there were Petition Candidates, the Exchange would make the eligibility determination regarding 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.

In addition, the Exchange would make a conforming change to Section 2.03(h)(i) to state that the DCRC “will be responsible for nominating Non-Affiliated Director Candidates.” Currently, the provision states that the DCRC “will be responsible for recommending Non-Affiliated Director Candidates to the ICE NGC.”

B. Elimination of a Category of DCRC Membership

The Operating Agreement requires that the DCRC include representatives from each of the 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.”⁹

This fourth category describes a class of proprietary traders known as Registered Equity

⁹ 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.

Market Makers (“REMMs”) 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.¹⁰ The rules relating to this category of proprietary floor trader were eliminated shortly after the American Stock Exchange LLC was acquired by the NYSE.¹¹ In addition, NYSE MKT Rule 114, which governed REMMs, was deleted as obsolete in 2012.¹² 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. Thus, the Exchange proposes to delete references to this category as obsolete. This change would make Section 2.03(h)(i) consistent with the categories of members of the Committee for Review, as set forth in Section 2.03(h)(iii).¹³

C. 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.¹⁴ As a result, market makers on the NYSE MKT

¹⁰ This class of proprietary traders were known as Registered Competitive Market Makers (“RCMM”) on the New York Stock Exchange LLC (“NYSE”).

¹¹ See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995, 58996 (October 8, 2008) (SR-Amex-2008-63). The NYSE eliminated RCMMs shortly thereafter. See Securities Exchange Act Release No. 60356 (July 21, 2009), 74 FR 37281 (July 28, 2009) (SR-NYSE-2009-08).

¹² See Securities Exchange Act Release No. 68306 (November 28, 2012), 77 FR 71846 (December 4, 2012) (SR-NYSEMKT-2012-68).

¹³ See Securities Exchange Act Release No. 77008 (February 1, 2016), 81 FR 6311 (February 5, 2016) (SR-NYSEMKT-2015-106).

¹⁴ See Securities Exchange Act Release Nos. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex-2008-63) (approval order) and 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR-NYSEALTR-2008-10) (amending equity rules to conform to NYSE New Market Model Pilot rules). See also Securities Exchange

equity market are called DMMs and on the NYSE Amex Options LLC (“NYSE Amex Options”) options market are called specialists.¹⁵ 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.

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 set forth in Section 2.03(h)(iii), which refers to both DMMs and specialists.¹⁶

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

Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46) (approving rule change to create NYSE New Market Model Pilot).

¹⁵ 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).

¹⁶ See note 13, supra, and accompanying text.

III. Discussion and Commission's Findings

The Commission finds that the proposed rule change, as modified by Amendment No.1, is consistent with the requirements of Section 6 of the Act¹⁷ and the rules and regulations thereunder applicable to a national securities exchange.¹⁸

The Commission finds that the proposed rule change is consistent with Section 6(b)(1),¹⁹ which requires, among other things, that a national securities exchange 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 provisions of the Act, the rules and regulation thereunder, and the rules of the exchange. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(3) of the Act,²⁰ which requires, among other things, that the rules of a national securities exchange assure a fair representation of its members in the selection of its directors and administration of its affairs.

The proposed rule change would remove the requirement that the ICE NGC nominate the candidates for Non-Affiliated Directors and instead have the DCRC nominate the candidates for Non-Affiliated Director directly.²¹ Because the ICE NGC currently is required to nominate the candidate recommended to it by the DCRC, this proposed change would remove an additional step in the process of nominating candidates for Non-Affiliated Director positions and thus may improve the efficiency of the nomination process.

¹⁷ 15 U.S.C. 78f.

¹⁸ The Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁹ 15 U.S.C. 78f(b)(1).

²⁰ 15 U.S.C. 78f(b)(3).

²¹ The Commission notes that the DCRC is appointed by the Board. See Section 2.03(h)(i) of the Operating Agreement.

In addition, the proposed rule change would remove the requirement that the ICE NGC make the determination of whether persons endorsed to be Petition Candidates are eligible to be a Non-Affiliated Director, and would have the Exchange make such determination instead. The proposed process would maintain an independent review of the eligibility of any Petition Candidates, while avoiding the potential conflict of interest that could arise if, for example, the DCRC were to be responsible for both proposing and nominating candidates and making eligibility determinations of Petition Candidates proposed by Member Organizations. The Commission previously considered and approved rules of another exchange that similarly provide for that exchange to determine the eligibility of proposed Petition Candidates.²²

Further, eliminating the requirement that the DCRC include representatives from the fourth category of members described above (formerly REMMs) would remove a reference to an obsolete category of member from the Operating Agreement. The Commission finds that eliminating such an obsolete reference would add clarity to the Exchange's rules and be consistent with the public interest and the protection of investors.

Finally, the proposed addition of references to DMMs in Section 2.02 and 2.03(h)(i) of the Operating Agreement would more accurately reflect that specialists in the Exchange's equity market are now referred to as DMMs and also would make these sections consistent with Section 2.03(h)(iii) (categories of members of the Committee for Review), which refers to both DMMs and specialists. The proposed addition of a reference to DMMs in Section 2.02 would 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

²² See *supra* note 8. See generally Securities Exchange Act Release Nos. 56876 (November 30, 2007), 72 FR 70357 (December 11, 2007) (SR-NASDAQ-2007-068) (approving process for electing Member Representative Directors).

proposed addition of references to DMMs in Section 2.03(h)(i) would clarify that DMMs, as well as specialists, are categories of individuals that would be represented on the DCRC.

The Commission finds that the foregoing revisions to the Operating Agreement are consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²³ that the proposed rule change (SR-NYSEMKT-2016-26), as modified by Amendment No.1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Brent J. Fields
Secretary

²³ 15 U.S.C. 78s(b)(2).

²⁴ 17 CFR 200.30-3(a)(12).