

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-70050; File No. 10-209)

In the Matter of the Application of Topaz Exchange, LLC for Registration as a National Securities Exchange

Findings, Opinion, and Order of the Commission

July 26, 2013

I. Introduction

On July 3, 2012, Topaz Exchange, LLC (“Topaz Exchange” or “Exchange”) submitted to the Securities and Exchange Commission (“Commission”) an Application for Registration as a National Securities Exchange (“Form 1 Application”)¹ under Section 6 of the Securities Exchange Act of 1934 (“Act”).² On December 19, 2012, Topaz Exchange submitted Amendment No. 1 to its Form 1 Application.³ On December 31, 2012, Topaz Exchange submitted Amendment No. 2 to its Form 1 Application.⁴ Notice of the Form 1 Application, as

¹ On March 1, 2013, the Commission issued an order granting Topaz Exchange exemptive relief, subject to certain conditions, in connection with the filing of its Form 1 Application. See Securities Exchange Act Release No. 69011, 78 FR 14844 (March 7, 2013). Because Topaz Exchange’s Form 1 Application was incomplete without the exemptive relief, the date of filing of such application is March 1, 2013. Id.

² 15 U.S.C. 78f.

³ Amendment No. 1, among other things, includes changes to the Limited Liability Company Agreement of Topaz Exchange, LLC (“Topaz Exchange LLC Agreement”) and the Constitution of Topaz Exchange, LLC (“Topaz Exchange Constitution”) concerning board composition and size, the initial director election process, and the use of regulatory funds. Amendment No. 1 also includes revisions to proposed rules of Topaz Exchange to remove rules relating to complex orders; to respond to comments on the Form 1 application from Commission staff; and to reflect recent changes to comparable rules of International Securities Exchange, LLC (“ISE”). Amendment No. 1 further provides additional descriptions in the Form 1 Application regarding proposed allocation procedures, auction mechanisms, execution of qualified contingent crosses, and the interim and initial director election processes, and removes references to complex orders.

⁴ Amendment No. 2, among other things, provides updated information regarding the board of directors of ISE and the Corporate Governance Committee of ISE and includes

modified by Amendment Nos. 1 and 2, was published for comment in the Federal Register on March 7, 2013.⁵ The Commission received four comment letters regarding the Form 1 Application.⁶ Topaz Exchange submitted a detailed response to comments on July 11, 2013.⁷ On July 11, 2013, Topaz Exchange submitted Amendment No. 3 to the Form 1 Application.⁸

II. Discussion

Under Sections 6(b) and 19(a) of the Act,⁹ the Commission shall by order grant an application for registration as a national securities exchange if the Commission finds, among other things, that the proposed exchange is so organized and has the capacity to carry out the

information regarding Longitude S.A., a newly incorporated affiliate of Topaz Exchange, which information includes the Articles of Incorporation and financial information for Longitude S.A. Finally, Amendment No. 2 provides an updated organizational chart that reflects the affiliates of Topaz Exchange.

⁵ See Securities Exchange Act Release No. 69012 (March 1, 2013), 78 FR 14847 (“Notice”).

⁶ See Letter from Angelo Evangelou, Associate General Counsel, Chicago Board Options Exchange, Incorporated, to Elizabeth M. Murphy, Secretary, Commission, dated April 23, 2013 (“CBOE Letter”); Letter from Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ OMX Group, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated April 25, 2013 (“NASDAQ Letter”); Letter from Janet McGinness, EVP and Corporate Secretary, NYSE Euronext, General Counsel, NYSE Markets, to Elizabeth M. Murphy, Secretary, Commission, dated May 10, 2013 (“NYSE Euronext Letter I”); and Letter from Janet McGinness, EVP and Corporate Secretary, NYSE Euronext, General Counsel, NYSE Markets, to Elizabeth M. Murphy, Secretary, Commission, dated June 20, 2013 (“NYSE Euronext Letter II”).

⁷ See Letter from Michael Simon, General Counsel and Secretary, Topaz Exchange, to Elizabeth M. Murphy, Secretary, Commission, dated July 10, 2013 (“Topaz Exchange Response Letter”).

⁸ Amendment No. 3, among other things, includes changes to proposed Topaz Exchange rules to respond to concerns raised by the commenters and to reflect changes to comparable ISE rules since the filing of Amendment No. 1. The changes are discussed below in Section II.D. Amendment No. 3 also provides further descriptions or updates information in the Form 1 Application. The changes proposed in Amendment No. 3 are not substantive, are consistent with the existing rules of other registered national securities exchanges, or are responsive to the concerns of the commenters and do not raise any new or novel regulatory issues.

⁹ 15 U.S.C. 78f(b) and 15 U.S.C. 78s(a), respectively.

purposes of the Act and can comply, and can enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

As discussed in greater detail below, the Commission finds that Topaz Exchange’s application for exchange registration meets the requirements of the Act and the rules and regulations thereunder. Further, the Commission finds that the proposed rules of Topaz Exchange are consistent with Section 6 of the Act in that, among other things, they assure a fair representation of the exchange’s members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer;¹⁰ and that they are designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, or broker-dealers.¹¹ Finally, the Commission finds that Topaz Exchange’s proposed rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹²

A. Overview of Ownership of Topaz Exchange

Topaz Exchange is structured as a Delaware limited liability company (“LLC”), and is a wholly-owned subsidiary of International Securities Exchange Holdings, Inc. (“ISE

¹⁰ See 15 U.S.C. 78f(b)(3).

¹¹ See 15 U.S.C. 78f(b)(5).

¹² See 15 U.S.C. 78f(b)(8).

Holdings”).¹³ In December 2007, ISE Holdings became a direct, wholly-owned subsidiary of various German companies and Swiss companies¹⁴ through an intermediary holding company, U.S. Exchange Holdings, Inc. (“U.S. Exchange Holdings”).¹⁵ U.S. Exchange Holdings is wholly-owned by a German stock corporation, Eurex Frankfurt AG (“Eurex Frankfurt”). Eurex Frankfurt is a wholly-owned subsidiary of a Swiss stock corporation, Eurex Zurich AG (“Eurex Zurich”), which, in turn, was in 2007 jointly owned by Deutsche Börse and SWX Swiss Exchange AG (“SWX”)¹⁶ (“Eurex Acquisition”). In 2012, SWX transferred its interest in Eurex Zurich to a Swiss subsidiary of Deutsche Börse (“Deutsche Börse Acquisition”), such that Eurex Zurich is now jointly owned by Deutsche Börse (together with Eurex Frankfurt, the “German companies”) and EGD (together with Eurex Zurich, the “Swiss companies,” and the Swiss companies and the German companies are referred to collectively as the “Non-U.S. Upstream Owners,” and collectively with U.S. Exchange Holdings, the “Upstream Owners”). As Deutsche

¹³ Following any Commission grant of registration to Topaz Exchange, ISE Holdings will be: (1) the sole holding company of two registered national securities exchanges, ISE and Topaz Exchange; and (2) the holder of a 31.54% ownership interest of a holding company, DE Holdings, that in turn owns two registered national securities exchanges, EDGX Exchange, Inc. (“EDGX”) and EDGA Exchange, Inc. (“EDGA”). See Exhibit C to Topaz Exchange Form 1 Application, Section R (“Organizational Chart of Affiliates of Deutsche Börse AG”).

¹⁴ See Organizational Chart of Affiliates of Deutsche Börse, Exhibit C. Section R. to Topaz Exchange Form 1 Application.

¹⁵ See Securities Exchange Act Release No. 56955 (December 13, 2007), 72 FR 71979 (December 19, 2007) (File No. SR-ISE-2007-101) (order approving a transaction in which ISE Holdings became a wholly-owned indirect subsidiary of Eurex Frankfurt) (“Eurex Acquisition Order”).

¹⁶ At the time, SWX was owned by SWX Group AG (later became part of SIX Group AG), which in turn was owned by Verein SWX Swiss Exchange. In 2008, SWX changed its name to SIX. In 2012, SIX transferred its interest to Eurex Global Derivatives AG (“EGD”). See Securities Exchange Act Release No. 66834 (April 19, 2012), 77 FR 24752 (April 25, 2012) (File Nos. SR-EDGA-2012-08; SR-EDGX-2012-07; and SR-ISE-2012-21) (order approving a transaction in which Eurex Frankfurt became a wholly-owned indirect subsidiary of Deutsche Börse) (“Deutsche Börse Acquisition Order”).

Börse holds a 100% direct ownership interest in EGD, it therefore holds a 100% indirect ownership interest in Eurex Zurich.

B. Governance of Topaz Exchange

1. Topaz Exchange Board of Directors

The board of directors of Topaz Exchange (“Topaz Exchange Board” or “Board”) will be its governing body and will possess all of the powers necessary for the management of its business and affairs, including governance of Topaz Exchange as a self-regulatory organization (“SRO”).¹⁷ Topaz Exchange will be governed by a board of directors comprised of no fewer than 8, but no more than 16, directors.¹⁸ Specifically:

- At least 50% of Topaz Exchange Board must be comprised of Non-Industry Directors;¹⁹
- At least one of the Non-Industry Directors must be a Public Director;²⁰
- Topaz Exchange Board will include the President/Chief Executive Officer as a director;²¹ and

¹⁷ See Topaz Exchange Constitution, Article III, Section 3.1.

¹⁸ See Topaz Exchange Constitution, Article III, Section 3.2(a).

¹⁹ See Topaz Exchange Constitution, Article III, Section 3.2(b)(ii). In no event shall the number of Non-Industry Directors constitute less than the number of Industry Directors. ISE Holdings, Inc. may, in its sole discretion, elect one additional director who shall meet the requirements of Non-Industry Directors, except that such person was employed by Topaz Exchange at any time during the three-year period prior to his or her initial election. See Topaz Exchange Constitution, Article III, Section 3.2(b)(iv). This provision is similar to a provision in ISE’s Constitution and has been used in the past to place a former president/chief executive officer of ISE on its board of directors (“ISE Board”).

²⁰ See Topaz Exchange Constitution, Article III, Section 3.2(b)(ii).

²¹ See Topaz Exchange Constitution, Article III, Section 3.2(b)(iii).

- At least 30% of Topaz Exchange Board must be officers, directors or partners of Topaz Exchange members, and must be elected by a plurality of holders of Exchange Rights (“Industry Directors”), of which at least one must be elected by a plurality of holders of Primary Market Maker (“PMM”) Exchange Rights, one must be elected by a plurality of holders of Competitive Market Maker (“CMM”) Exchange Rights, and one must be elected by a plurality of holders of Electronic Access Member (“EAM”) Exchange Rights, provided that the number of each type of Industry Director shall always be equal to one another.²²

As part of the process to elect members of the Board, the Nominating Committee will nominate the proposed Industry Directors and the Corporate Governance Committee²³ or ISE Holdings will nominate the proposed Non-Industry Directors.²⁴ A petition process will allow Topaz Exchange members to nominate alternative candidates for consideration as Industry Directors.²⁵ At the first annual meeting and at each annual meeting thereafter, ISE Holdings will

²² See Topaz Exchange Constitution, Article III, Section 3.2(b)(i).

²³ See *infra* Section II.B.2. for a description of Topaz Exchange’s Nominating Committee and Corporate Governance Committee.

²⁴ See, e.g., Topaz Exchange Constitution, Article III, Section 3.10(a)-(b). ISE Holdings, as the Sole LLC Member of Topaz Exchange, is permitted to petition the Corporate Governance Committee to propose alternative Non-Industry Directors and Public Directors. See Topaz Exchange Constitution, Article III, Section 3.10(b)(ii).

²⁵ See, e.g., Topaz Exchange Constitution, Article III, Section 3.10(a)(ii). Specifically, as proposed in Amendment No. 1, in addition to the Industry Director nominees named by the Nominating Committee, persons eligible to serve as such may be nominated for election to the Topaz Exchange Board by a petition, signed by the holders of not less than five percent (5%) of the outstanding Exchange Rights of the series entitled to elect such person if there are more than eighty (80) Exchange Rights in the series entitled to vote, ten percent (10%) of the outstanding rights of such series entitled to elect such person if there are between eighty (80) and forty (40) Exchange Rights in the series entitled to vote, and twenty-five percent (25%) of the outstanding Exchange Rights of such series entitled to elect such person if there are less than forty (40) Exchange Rights in the series entitled to vote. For purposes of determining whether a person has been nominated for

elect all of the members of the Topaz Exchange Board (except the Industry Directors which are elected by Topaz Exchange members²⁶), but it will be required to do so in compliance with the compositional requirements for the Board outlined in the Topaz Exchange Constitution.

The Commission believes that the requirement in the Topaz Exchange Constitution that at least 30% of the directors be Industry Directors and the means by which they will be chosen by Topaz Exchange members²⁷ provide for the fair representation of members in the selection of directors and the administration of Topaz Exchange and therefore is consistent with Section 6(b)(3) of the Act.²⁸ Section 6(b)(3) of the Act requires that “the rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.” As the Commission previously has noted, this statutory requirement helps to ensure that members have a voice in the exchange’s use of self-regulatory authority, and that the exchange is administered in a way that is equitable to all those persons who trade on its market or through its facilities.²⁹ In addition, with respect to

election by petition by the requisite percentage, no Topaz Exchange member, alone or together with its affiliates, may account for more than 50% of the signatures of the holders of outstanding Exchange Rights of the series entitled to elect such person, and any such signatures by such Exchange Members, alone or together with its affiliates, in excess of such 50% limitation shall be disregarded. Id. This process is identical to the process in place at ISE. See ISE Constitution, Article III, Section 3.10(a)(ii).

²⁶ See Topaz Exchange Constitution, Article III, Sections 3.2(b)(i) and (c).

²⁷ Id.

²⁸ 15 U.S.C. 78f(b)(3).

²⁹ See, e.g., Securities Exchange Act Release Nos. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131) (order granting the exchange registration of Nasdaq Stock Market, Inc.) (“Nasdaq Order”); and 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182) (order granting the exchange registration of BATS Exchange, Inc.) (“BATS Order”). See also Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (File No. SR-NYSE-2005-77) (“NYSE/Archipelago Merger Approval Order”).

the requirement that the number of Non-Industry Directors, including at least one Public Director, will at all times be at least 50% of the Board, the Commission believes that the proposed composition of the Topaz Exchange Board satisfies the requirements of Section 6(b)(3) of the Act.³⁰

Interim Board

After Topaz Exchange is granted registration by the Commission, but prior to commencing operations, ISE Holdings, as the sole shareholder of Topaz Exchange,³¹ will appoint an interim board of directors for Topaz Exchange that will serve only until the first annual meeting (“Interim Topaz Exchange Board”). The Interim Topaz Exchange Board will include the same individuals as the then-serving ISE Board and will consist of 15 directors: the President/Chief Executive Officer Director;³² 6 Industry Directors; and 8 Non-Industry Directors.³³ Topaz Exchange represents that it anticipates that there will be a significant overlap between its membership and the membership of ISE.³⁴ Topaz Exchange further represents that it does not expect to receive a meaningful number of applications for membership from non-ISE

³⁰ 15 U.S.C. 78f(b)(3). See also Securities Exchange Act Release No. 68341, p.8, (December 3, 2012), 77 FR 73065, 73067 (December 7, 2012) (File No. 10-207) (order granting the registration of Miami International Securities Exchange, LLC) (“MIAX Order”) and Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (“Regulation ATS Release”).

³¹ See infra Section II.C.1. for a discussion of the ownership of Topaz Exchange.

³² See Exhibit J to Topaz Exchange Form 1 Application.

³³ See Exhibit J to Topaz Exchange Form 1 Application. See also Amendment No. 3.

³⁴ See Exhibit L to Topaz Exchange Form 1 Application. Based on discussions with ISE members, Topaz Exchange represented that it currently expects that Topaz Exchange’s membership will consist substantially of current ISE members, including, but not limited to, those ISE members that have representatives serving as industry directors on the ISE Board. See Exhibit J to Topaz Exchange Form 1 Application.

members during the tenure of the Interim Topaz Exchange Board.³⁵ Thus, the 6 interim Industry Directors to be appointed to the Topaz Exchange Board likely will have been elected by Topaz Exchange members in their capacity as ISE members.³⁶

These interim Industry Directors will serve until the first initial Topaz Exchange Board is elected pursuant to the full nomination, petition, and voting process set forth in the Topaz Exchange Constitution and described above.³⁷ Topaz Exchange will complete such process as promptly as possible and within 90 days after its application for registration as a national securities exchange is granted by the Commission.³⁸

The Commission believes that the process for electing the interim Topaz Exchange Board, as proposed, is consistent with the requirements of the Act, including that the rules of the exchange assure fair representation of the exchange's members in the selection of its directors and administration of its affairs.³⁹ The Interim Topaz Exchange Board will be filled by current ISE Board members (which currently include Industry Directors who were elected by current ISE members) until the first annual meeting of Topaz Exchange. As noted above, Topaz

³⁵ See Exhibit J to Topaz Exchange Form 1 Application.

³⁶ See *id.*

³⁷ See Topaz Exchange Constitution, Article III, Sections 3.2(c) and 3.10; see also Exhibit J to Topaz Exchange Form 1 Application.

³⁸ See Exhibit J to Topaz Exchange Form 1 Application.

³⁹ See 15 U.S.C. 78f(b)(3). Topaz Exchange's proposed timeline for the interim Topaz Exchange Board process comports with the interim board process recently approved by the Commission for the Boston Options Exchange ("BOX") and Miami International Securities Exchange, LLC ("MIAX"). BOX, which previously operated as a facility of NASDAQ OMX BX, Inc., recently was granted registration as a national securities exchange. See Securities Exchange Act Release No. 66871 (April 27, 2012), 77 FR 26323 (May 3, 2012) (File No. 10-206) ("BOX Order"). NASDAQ OMX BX recently received approval for a new options market. See Securities Exchange Act Release No. 67256 (June 26, 2012), 77 FR 39277 (July 2, 2012) (File No. SR-BX-2012-030) ("BX Order"). MIAX recently was granted registration as a national securities exchange. See MIAX Order, *supra* note 30.

Exchange represents that it anticipates that there will be significant overlap between the initial members of Topaz Exchange and the current members of ISE.⁴⁰ Topaz Exchange further represents that it will complete the full nomination, petition, and voting process as set forth in the Topaz Exchange Constitution,⁴¹ as promptly as possible and within 90 days of when Topaz Exchange's application for registration as a national securities exchange is granted.⁴² As noted above, as part of this process, members of Topaz Exchange will be able to petition for alternative candidates to be considered for Industry Director positions.⁴³ This process will provide persons who are approved as members of Topaz Exchange after the effective date of this Order with the opportunity to participate in the selection of the Industry Directors within 90 days of when Topaz Exchange's application for registration as a national securities exchange is granted.

The Commission believes that the Interim Topaz Exchange Board process is designed to provide member representation sufficient to allow Topaz Exchange to commence operations for an interim period prior to going through the process to elect a new Board pursuant to the full nomination, petition, and voting process set forth in the Topaz Exchange Constitution.

2. Exchange Committees

Topaz Exchange will have a number of Board committees,⁴⁴ including an Executive Committee (consisting of six directors, including three Non-Industry Directors),⁴⁵ a Finance and Audit Committee (consisting of between three and five directors, all of whom must be Non-

⁴⁰ Topaz Exchange will have a streamlined waive-in process for existing ISE members to apply for membership on Topaz Exchange. See Topaz Exchange Rule 302(a).

⁴¹ See, e.g., Topaz Exchange Constitution, Article III, Section 3.10(a)-(b).

⁴² See Topaz Exchange Constitution, Article III, Sections 3.2(c) and 3.10.

⁴³ See Topaz Exchange Constitution, Article III, Section 3.10(a)(ii).

⁴⁴ See Topaz Exchange Constitution, Article V, Section 5.1(a).

⁴⁵ See Topaz Exchange Constitution, Article V, Section 5.2.

Industry Directors),⁴⁶ a Compensation Committee (consisting of between three and five directors, all of whom must be Non-Industry Directors),⁴⁷ and a Corporate Governance Committee (consisting of at least three directors, all of whom must be Non-Industry Directors),⁴⁸ and such other additional committees as may be approved by the Topaz Exchange Board.⁴⁹

Topaz Exchange also will have a Nominating Committee, which will be a committee of Topaz Exchange and not a committee of the Board.⁵⁰ The Nominating Committee will be composed of three industry representatives, and will be responsible for nominating candidates for Industry Director positions.⁵¹ As noted above, there will be a petition process by which members of Topaz Exchange can nominate their own nominees for the Industry Director positions.⁵² These nomination processes are consistent with processes that the Commission has approved for other exchanges.⁵³

The Commission believes that Topaz Exchange's proposed committees, which are similar to committees maintained by other exchanges,⁵⁴ are designed to help enable Topaz Exchange to carry out its responsibilities under the Act and are consistent with the Act, including

⁴⁶ See Topaz Exchange Constitution, Article V, Section 5.5.

⁴⁷ See Topaz Exchange Constitution, Article V, Section 5.6.

⁴⁸ See Topaz Exchange Constitution, Article V, Section 5.4.

⁴⁹ See Topaz Exchange Constitution, Article V, Section 5.1(a).

⁵⁰ See Topaz Exchange Constitution, Article V, Section 5.3.

⁵¹ See *id.* The Interim Topaz Exchange Board shall appoint the initial members of the Nominating Committee in accordance with the qualifications prescribed in Section 5.3 of the Topaz Exchange Constitution.

⁵² See Topaz Exchange Constitution, Article III, Section 3.10(a)(ii). See also *supra* note 25 and accompanying text.

⁵³ See, e.g., ISE Constitution, Articles III and V, Sections 3.10 and 5.3; MIAX By-laws Articles II and V, Sections 2.4 and 5.3.

⁵⁴ See, e.g., MIAX Order, *supra* note 30, and BOX Order, *supra* note 39.

Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.⁵⁵

C. Regulation of Topaz Exchange

When Topaz Exchange commences operations as a national securities exchange, Topaz Exchange will have all the attendant regulatory obligations under the Act. In particular, Topaz Exchange will be responsible for the operation and regulation of its trading system and the regulation of its members. Certain provisions in the Topaz Exchange and ISE Holdings governance documents are designed to facilitate the ability of Topaz Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act. The discussion below summarizes some of these key provisions.

1. Ownership Structure: Ownership and Voting Limitations

As noted above in Section II.A, Topaz Exchange will be structured as a Delaware LLC and will be a wholly-owned subsidiary of ISE Holdings⁵⁶ following any Commission grant of registration to Topaz Exchange as a national securities exchange.⁵⁷ ISE Holdings is owned by German companies and Swiss companies through an intermediary holding company, U.S. Exchange Holdings.⁵⁸ ISE Holdings' governing documents impose limits on any direct or

⁵⁵ 15 U.S.C. 78f(b)(1).

⁵⁶ The Topaz Exchange LLC Agreement provides that ISE Holdings may not assign its interest in Topaz Exchange unless such assignment is subject to prior approval by the Commission pursuant to the rule filing procedure under Section 19 of the Act. See Topaz Exchange LLC Agreement, Section 7.1 (Assignments; Additional LLC Members).

⁵⁷ See supra note 13 and accompanying text.

⁵⁸ See supra note 14 and accompanying text.

indirect change in control of ISE Holdings, which are to be enforced through the creation of a statutory trust.⁵⁹

First, ISE Holdings' governing documents prohibit any Topaz Exchange member (alone or together with its Related Persons⁶⁰) from owning more than 20% of any class of Voting Shares of ISE Holdings.⁶¹ A second limit prohibits any other person (alone or together with its related persons) from owning more than 40% of any class of Voting Shares of ISE Holdings.⁶² A third limit prohibits any person (alone or together with its Related Persons) from voting or causing the voting of shares representing more than 20% of the voting power of the then outstanding Voting Shares of ISE Holdings.⁶³ As described more fully below, if a person exceeds an ISE Holdings' ownership or voting limit, a majority of the capital stock of ISE Holdings that has the right by its terms to vote in the election of the ISE Holdings board of directors ("ISE Holdings Board") or on other matters (other than matters affecting the rights, preferences or privileges of the capital stock) automatically will be transferred to a Delaware statutory trust ("Trust").⁶⁴

⁵⁹ See Article FOURTH, Section III.(c) of the Amended and Restated Certificate of Incorporation of International Securities Exchange Holdings, Inc. ("ISE Holdings Certificate"). See *infra* notes 72-74 and 110-114 and accompanying text for a discussion of the statutory trust.

⁶⁰ See ISE Holdings Certificate, Article FOURTH, Section III for the definition of "Related Persons."

⁶¹ See *id.* for the definition of "Voting Shares."

⁶² See ISE Holdings Certificate, Article FOURTH, Section III.(a)(i).

⁶³ See ISE Holdings Certificate, Article FOURTH, Section III.(b). See also Second Amended and Restated Bylaws of ISE Holdings ("ISE Holdings Bylaws"), Article XI, Section 11.1(b).

⁶⁴ See ISE Holdings Certificate, Article FOURTH, Section III.(c). See also *infra* notes 72-75 and accompanying text for a discussion of the Trust and the related Trust Agreement.

Consistent with the governance structure of other exchanges, ISE Holdings' Board may waive the 40% ownership limitation and the 20% voting restriction for persons other than Topaz Exchange members, subject to certain specified conditions,⁶⁵ but such waiver will not be effective unless approved by the Commission.⁶⁶

The Topaz Exchange LLC Agreement and Topaz Exchange Constitution do not include change of control provisions that are similar to those in the ISE Holdings Certificate and ISE Holdings Bylaws. However, the Topaz Exchange LLC Agreement and the Topaz Exchange Constitution explicitly provide that ISE Holdings is the Sole LLC Member of Topaz

⁶⁵ The ISE Holdings Certificate allows the ISE Holdings Board to waive the ISE Holdings ownership and voting limits pursuant to an amendment to the ISE Holdings Bylaws, provided that the ISE Holdings Board makes certain determinations. See ISE Holdings Certificate, Article FOURTH, Sections III.(a)(i)(A), III.(a)(i)(B) and III.(b)(i). Article XI of the ISE Holdings Bylaws was adopted in connection with the Eurex Acquisition (see supra note 15 and accompanying text), when ISE LLC was the sole national securities exchange controlled by ISE Holdings. See Eurex Acquisition Order, supra note 15. Article XI, Section 11.1(b) was subsequently amended to apply to any Controlled National Securities Exchange, which will include Topaz Exchange.

⁶⁶ See ISE Holdings Certificate, Article FOURTH, Sections III.(a)(i)(A) and III.(b)(i). Article XI of the ISE Holdings Bylaws, which originally was adopted in connection with the Eurex Acquisition (see supra note 15 and accompanying text for a description of the Eurex Acquisition), waives the ISE Holdings ownership and voting limits to allow the Upstream Owners to own and vote all of the common stock of ISE Holdings. Article XI, Section 11.1(b) states that, in waiving the ISE Holdings ownership and voting limits to permit the Upstream Owners to own and vote the capital stock of ISE Holdings, the ISE Holdings Board has determined, with respect to each Upstream Owner, that: (i) such waiver will not impair the ability of ISE Holdings and each "Controlled National Securities Exchange" (i.e., any national securities exchange or facility thereof controlled, directly or indirectly, by ISE Holdings, including ISE, EDGA, EDGX, and as a result of this Order, Topaz Exchange) to carry out their respective functions and responsibilities under the Act; (ii) such waiver is in the best interests of ISE Holdings, its stockholders, and each Controlled National Securities Exchange; (iii) such waiver will not impair the ability of the Commission to enforce the Act; (iv) neither the Upstream Owner nor any of its related persons is subject to a statutory disqualification (within the meaning of Section 3(a)(39) of the Act, 15 U.S.C. 78c(a)(39)); and (v) neither the Upstream Owner nor any of its related persons is a member of such Controlled National Securities Exchange.

Exchange.⁶⁷ ISE Holdings is permitted under the Topaz Exchange LLC Agreement to assign all but not less than all of its interest in Topaz Exchange (and therefore no longer would be its sole owner), but the assignment of all of ISE Holdings' interest in Topaz Exchange will be subject to the rule filing procedures under Section 19 of the Act.⁶⁸

As detailed above, ISE Holdings is owned by various Upstream Owners, none of which have similar ownership and voting limits in their governing documents. To facilitate compliance with the ISE Holdings ownership and voting limits, the Upstream Owners have committed to take reasonable steps necessary to cause ISE Holdings to be in compliance with the ISE Holdings ownership and voting limits. These commitments are contained in the governing documents for U.S. Exchange Holdings⁶⁹ and in corporate resolutions for the non-U.S. Upstream Owners.⁷⁰

⁶⁷ See Topaz Exchange LLC Agreement, Article II, Section 2.1 and Topaz Exchange Constitution Article I, Section 1.1 (both of which define "Sole LLC Member" to mean ISE Holdings, as the sole member of Topaz Exchange).

⁶⁸ See 15 U.S.C. 78s; see also Topaz Exchange LLC Agreement, Article VII, Section 7.1 and Topaz Exchange Constitution, Article I, Section 1.1.

⁶⁹ For a U.S. Upstream Owner, the U.S. Exchange Holdings Certificate provides that, for so long as U.S. Exchange Holdings directly or indirectly controls a Controlled National Securities Exchange, U.S. Exchange Holdings will take reasonable steps necessary to cause ISE Holdings to be in compliance with the ISE Holdings' ownership and voting limits. See U.S. Exchange Holdings Certificate, Article THIRTEENTH.

⁷⁰ See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Section (4)), Exhibit B to Topaz Exchange Form 1 Application. In its Form 1 Application, Topaz Exchange included these supplemental resolutions that each of the current Non-U.S. Upstream Owners of Topaz Exchange has adopted that, in part, incorporate provisions regarding the ownership and voting limits ("Topaz Exchange Resolutions") in the same manner and to the same extent as prior corporate resolutions signed by the Non-U.S. Upstream Owners apply to ISE ("2007 Resolutions"). The Topaz Exchange Resolutions were signed by the Non-U.S. Upstream Owners and extend to Topaz Exchange the commitments that the then non-U.S. upstream owners made in the 2007 Resolutions with respect to ISE. For example, Topaz Exchange represented in Exhibit B to its Form 1 Application that Deutsche Börse AG Executive Board executed its corporate resolution on November 10, 2009.

Further, in connection with the Eurex Acquisition, ISE implemented the Trust pursuant to a Trust Agreement (“2007 Trust Agreement”)⁷¹ among ISE Holdings, U.S. Exchange Holdings, trustees (“Trustees”), and a Delaware trustee, which agreement has been subsequently amended

Since 2007, U.S. Exchange Holdings’ governing documents and the non-U.S. upstream owners’ 2007 Resolutions have been updated, where appropriate, to reflect changes in corporate structure and ownership as described herein. In 2010, to effect the registrations of EDGA and EDGX as national securities exchanges, and to maintain ISE Holdings’ ownership and voting limits, as well as the independence of the regulatory function of EDGA and EDGX, the U.S. Exchange Holdings governing documents and the 2007 Resolutions were supplemented by each of the then non-U.S. upstream owners through supplemental resolutions (“DirectEdge Resolutions”) that applied the commitments of the 2007 Resolutions to EDGA and EDGX, as affiliates of ISE, see supra note 13, in the same manner and to the same extent as the 2007 Resolutions applied to ISE and the U.S. Exchange Holdings governing documents were updated to apply prospectively to any other national securities exchange that ISE Holdings may control, either directly or indirectly, including, but not limited to, ISE, EDGA and EDGX. See Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10-194 and 10-196) (order granting the exchange registration of EDGA and EDGX) (“DirectEdge Exchanges Order”). The Commission also approved changes to U.S. Exchange Holdings’ and ISE Holdings’ governing documents to apply these governing documents to any prospective national securities exchange that U.S. Exchange Holdings or ISE Holdings, as applicable, directly or indirectly controlled. See Securities Exchange Act Release Nos. 59135 (December 22, 2008), 73 FR 79954 (December 30, 2008) (“ISE Holdings Order”) and 61498 (February 4, 2010), 75 FR 7299 (February 18, 2010) (“U.S. Exchange Holdings Order”).

In 2012, new resolutions were executed by EGD, a Swiss corporation, when it became a wholly-owned subsidiary of Deutsche Börse, and thus a Non-U.S. Upstream Owner of ISE, EDGA and EDGX. See Deutsche Börse Acquisition Order, supra note 16.

⁷¹ The term of the Trust is perpetual, provided that ISE Holdings directly or indirectly controls a national securities exchange or a facility thereof, which would include Topaz Exchange.

to take into account subsequent acquisitions, including the current transaction.⁷²

The current agreement (“2012 Trust Agreement”) serves, in part, to effectuate the ownership and voting limits for ISE Holdings in the event that a person obtains an ownership or voting interest in excess of the limits established in the ISE Holdings Certificate without prior Commission approval. To accomplish that purpose, for as long as ISE Holdings controls, directly or indirectly, a national securities exchange, including Topaz Exchange, the Trust would accept, hold and dispose of Trust Shares⁷³ on the terms and subject to the conditions set forth

⁷² See Eurex Acquisition Order, supra note 15, at Section II.C., for a more detailed description of the Trust. By its terms, the 2007 Trust Agreement related solely to ISE Holdings’ ownership of ISE LLC, and not to any other national securities exchange that ISE Holdings might control, directly or indirectly. In 2010, the Commission approved proposed rule changes that revised the 2007 Trust Agreement to replace references to ISE with references to any Controlled National Securities Exchange (the 2007 Trust Agreement, as thereby amended, is referred to herein as the “2009 Trust Agreement”). See ISE Holdings Order and U.S. Exchange Holdings Order, supra note 70; see also DirectEdge Exchanges Order, supra note 70; 2009 Trust Agreement, Articles I and II, Sections 1.1 and 2.6.

Thus, the 2009 Trust Agreement will apply to Topaz Exchange upon the Commission’s granting its registration as a national securities exchange because it is controlled directly by ISE Holdings. Except for the expanded scope, the 2009 Trust Agreement was substantially similar to the 2007 Trust Agreement. In 2012, the Commission approved a proposed rule change that revised the 2009 Trust Agreement to replace references to a former owner, SIX, to the new owner, EGD (the 2009 Trust Agreement, as thereby amended, is referred to herein as the “2012 Trust Agreement”). See Deutsche Börse Acquisition Order, supra note 16, for more detailed information on the addition of EGD as a Non-U.S. Upstream Owner of ISE, EDGA, and EDGX. Except for reflecting a new Upstream Owner of ISE Holdings, the 2012 Trust Agreement was substantially similar to the 2009 Trust Agreement.

⁷³ Under the Trust, the term “Trust Shares” means either Excess Shares or Deposited Shares, or both, as the case may be. The term “Excess Shares” means that a person obtained an ownership or voting interest in ISE Holdings in excess of the ownership and voting limits pursuant to Article FOURTH of the ISE Holdings Certificate, for example, through ownership of one of the Non-U.S. Upstream Owners or U.S. Exchange Holdings, without obtaining the approval of the Commission. The term “Deposited Shares” means shares that are transferred to the Trust pursuant to the Trust’s exercise of the Call Option. Under the Trust, the term “Call Option” means the option granted by the Trust beneficiary to the Trust to call the Voting Shares as set forth in Section 4.2 therein. See infra Section II.C.2.b for further discussion of the Call Option.

therein.⁷⁴ Specifically, if any person's ownership percentage exceeds the ownership limits or any person's voting control percentage exceeds the voting limits without Commission approval, the Excess Shares will be transferred automatically to the Trust pursuant to the terms prescribed in the ISE Holdings Certificate.⁷⁵ The Trust then would accept the Excess Shares and hold them for the benefit of the trust beneficiary, U.S. Exchange Holdings, who has the right to reacquire the Excess Shares either when a person no longer exceeds the ownership or voting limits or when such excess ownership percentage or voting control percentage is approved by the Commission in accordance with ISE Holdings Certificate.⁷⁶

Although ISE Holdings is not independently responsible for regulation of Topaz Exchange, its activities with respect to the operation of Topaz Exchange must be consistent with, and must not interfere with, the self-regulatory obligations of Topaz Exchange.⁷⁷ As described above, the provisions applicable to direct and indirect changes in control of ISE Holdings and Topaz Exchange, as well as the voting limitation, are designed to help prevent any owner of ISE Holdings from exercising undue influence or control over the operation of Topaz Exchange and to help assure that Topaz Exchange is able to effectively carry out its regulatory obligations under the Act. In addition, these limitations are designed to address the conflicts of

⁷⁴ See 2012 Trust Agreement, Article IV, Section 4.1; see also ISE Holdings Certificate, Article FOURTH, Section III.(c); Eurex Acquisition Order, supra note 15, at 72 FR 71982 n.37 and accompanying text.

⁷⁵ See id.

⁷⁶ See 2012 Trust Agreement, Article IV, Section 4.1(f). In addition, as discussed in Section II.C.2.b below, the Trust also may accept, hold and dispose of Trust Shares in connection with the Call Option. Section 4.2(h) of the 2012 Trust Agreement governs when the Trustees can transfer Deposited Shares in connection with the Call Option. Section 4.3(a) of the 2012 Trust Agreement further permits the Trustees, upon receipt of written instructions from the Trust Beneficiary, to sell Trust Shares to a person or persons whose ownership percentage or voting control percentage will not violate the ownership or voting limits.

⁷⁷ See also infra Section II.C.2. (Regulatory Independence).

interests that might result from a member of a national securities exchange owning interests in the exchange. As the Commission has noted in the past, however, a member's interest in an exchange, including an entity that controls an exchange, could become so large as to cast doubts on whether the exchange may fairly and objectively exercise its self-regulatory responsibilities with respect to such member.⁷⁸ A member that is a controlling shareholder of an exchange could seek to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and conduct surveillance of the member's conduct or diligently enforce the exchange's rules and the federal securities laws with respect to conduct by the member that violates such provisions. As such, these requirements are designed to minimize the potential that a person or entity can improperly interfere with or restrict the ability of Topaz Exchange to effectively carry out its regulatory oversight responsibilities under the Act.

The Commission believes that Topaz Exchange's and ISE Holdings' proposed ownership and voting limitation provisions, coupled with the provisions in U.S. Exchange Holdings' governing documents, the Topaz Exchange Resolutions and the 2012 Trust Agreement described above,⁷⁹ are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.⁸⁰ In particular, these requirements are designed to minimize the potential that a person could

⁷⁸ See, e.g., DirectEdge Exchanges Order, supra note 70, and BATS Order, supra note 29; see also MIAX Order, supra note 30.

⁷⁹ See supra notes 69-70, and accompanying text.

⁸⁰ 15 U.S.C. 78f(b)(1).

improperly interfere with or restrict the ability of the Commission or Topaz Exchange to effectively carry out their regulatory oversight responsibilities under the Act.⁸¹

2. Regulatory Independence and Oversight

a. ISE Holdings

Although ISE Holdings itself will not itself carry out regulatory functions, its activities with respect to the operation of Topaz Exchange must be consistent with, and not interfere with, the self-regulatory obligations of Topaz Exchange.⁸² In this regard, Topaz Exchange and ISE Holdings' respective corporate documents include certain provisions that are designed to maintain the independence of the Topaz Exchange's self-regulatory function.⁸³ These provisions are substantially similar to those included in the governing documents of other exchanges that recently have been granted registration.⁸⁴ Specifically:

- The directors, officers, and employees of ISE Holdings must give due regard to the preservation of the independence of the self-regulatory function of Topaz Exchange and must not take actions that would interfere with the effectuation of decisions by the Topaz Exchange Board relating to its regulatory functions (including disciplinary

⁸¹ In addition, the 2012 Trust Agreement, like the 2007 and 2009 Trust Agreements, is consistent with the provisions that other entities that directly or indirectly own or control a SRO have instituted and that have been approved by the Commission. See, e.g., Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (File No. SR-NYSE-2006-120) (order relating to the combination between NYSE Group, Inc. and Euronext N.V.). See also Eurex Acquisition Order, supra note 15, at 72 FR 71986 n.111.

⁸² See, e.g., BOX Order, supra note 39, and DirectEdge Exchanges Order, supra note 70.

⁸³ See supra note 66, noting that the ISE Holdings Certificate and the ISE Holdings Bylaws were revised in 2010 to cover any Controlled National Securities Exchange, which would include Topaz Exchange.

⁸⁴ See, e.g., BOX Order, supra note 39, and MIAX Order, supra note 30.

- matters) or that would adversely affect the ability of Topaz Exchange to carry out its responsibilities under the Act.⁸⁵
- ISE Holdings must comply with federal securities laws and the rules and regulations promulgated thereunder, and must cooperate with Topaz Exchange and the Commission pursuant to, and to the extent of, their respective regulatory authority. In addition, ISE Holdings' officers, directors, and employees must comply with federal securities laws and the rules and regulations thereunder and agree to cooperate with Topaz Exchange and the Commission pursuant to their respective regulatory authority.⁸⁶
 - ISE Holdings, and its officers, directors, employees, and agents are deemed to irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and Topaz Exchange, for purposes of any suit, action, or proceeding pursuant to U.S. federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, Topaz Exchange's activities.⁸⁷

⁸⁵ See ISE Holdings Bylaws, Article I, Section 1.5. Similarly, Article V, Section 5.1(b) of the Topaz Exchange LLC Agreement requires each Topaz Exchange Board director to take into consideration the effect that his or her actions would have on the ability of Topaz Exchange to carry out its responsibilities under the Act and on the ability of Topaz Exchange to engage in conduct that fosters and does not interfere with Topaz Exchange's ability 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 or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system; and in general to protect investors and the public interest.

⁸⁶ See ISE Holdings Certificate, Article TENTH. ISE Holdings also shall take reasonable steps necessary to cause its agents to cooperate with Topaz Exchange and the Commission pursuant to their respective regulatory authority. ISE Holdings Certificate, Article THIRTEENTH.

⁸⁷ See ISE Holdings Bylaws, Article I, Section 1.4.

- All books and records of Topaz Exchange containing confidential information pertaining to the self-regulatory function of Topaz Exchange (including but not limited to confidential information regarding disciplinary matters, trading data, trading practices and audit information) shall be retained in confidence by Topaz Exchange and its officers, directors, employees and agents and will not be used by Topaz Exchange for any commercial purpose and shall not be made available to persons other than those officers, directors, employees and agents that have a reasonable need to know the contents thereof.⁸⁸
- The books and records of Topaz Exchange and ISE Holdings must be maintained in the United States⁸⁹ and, to the extent they are related to the operation or administration of Topaz Exchange, ISE Holdings books and records will be subject at all times to inspection and copying by the Commission.⁹⁰
- Furthermore, to the extent that they are related to the activities of Topaz Exchange, the books, records, premises, officers, directors, and employees of ISE Holdings will

⁸⁸ See Topaz Exchange LLC Agreement, Article VI, Section 4.1(b) and ISE Holdings Certificate, Article ELEVENTH. ISE Holdings LLC Agreement also provides that all books and records of Topaz Exchange reflecting confidential information pertaining to the self-regulatory function of Topaz Exchange will be subject to confidentiality restrictions. See ISE Holdings Certificate, Article ELEVENTH. The requirement to keep such information confidential shall not limit or impede the Commission's ability to access and examine such information or limit or impede the ability of officers, directors, employees, or agents of ISE Holdings to disclose such information to the Commission. See id.

⁸⁹ See Topaz Exchange LLC Agreement, Article IV, Section 4.1 and ISE Holdings Bylaws, Article I, Section 1.3.

⁹⁰ See ISE Holdings Certificate, Article TWELFTH.

be deemed to be the books, records, premises, officers, directors, and employees of Topaz Exchange, for purposes of, and subject to oversight pursuant to, the Act.⁹¹

- ISE Holdings will take necessary steps to cause its officers, directors, and employees, prior to accepting a position as an officer, director, or employee (as applicable) to consent in writing to the applicability of provisions regarding books and records, confidentiality, jurisdiction, and regulatory obligations, with respect to their activities related to Topaz Exchange.⁹²
- ISE Holdings Certificate and ISE Holdings Bylaws require that, so long as ISE Holdings controls Topaz Exchange, any changes to those documents be submitted to the Topaz Exchange Board, and, if such change is required to be filed with, or filed with and approved by, the Commission before it may be effective pursuant to Section 19 of the Act and the rules thereunder, such change shall not be effective until filed with, or filed with and approved by, the Commission.⁹³

b. Upstream Owners

Although the Upstream Owners will not carry out any regulatory functions, the activities of each of the Upstream Owners with respect to the operation of Topaz Exchange must be consistent with, and not interfere with, the self-regulatory obligations of Topaz Exchange. The 2007 Resolutions, as supplemented by the supplemental Resolutions for Topaz Exchange, the U.S. Exchange Holdings Certificate, and the U.S. Exchange Holdings Bylaws include certain provisions that are designed to maintain the independence of the self-regulatory function of

⁹¹ See id.

⁹² See ISE Holdings Bylaws, Article I, Section 1.6.

⁹³ See ISE Holdings Certificate, Article FOURTEENTH; and ISE Holdings Bylaws, Article X; see also supra notes 67-68 and accompanying text discussing a similar provision for Topaz Exchange.

Topaz Exchange, enable Topaz Exchange to operate in a manner that complies with the U.S. federal securities laws, including the objectives and requirements of Sections 6(b) and 19(g) of the Act,⁹⁴ and facilitate the ability of Topaz Exchange, and the Commission to fulfill their regulatory and oversight obligations under the Act. Specifically:

- Each such Non-U.S. Upstream Owner and U.S. Exchange Holdings will comply with the U.S. federal securities laws and the rules and regulations thereunder and cooperate with the Commission and Topaz Exchange.⁹⁵ Also, each board member, officer, and employee of the Non-U.S. Upstream Owners, and of U.S. Exchange Holdings, in discharging his or her responsibilities, must comply with the U.S. federal securities laws and the rules and regulations thereunder, and must cooperate with the Commission and Topaz Exchange.⁹⁶
- In discharging his or her responsibilities as a board member of a Non-U.S. Upstream Owner, or of U.S. Exchange Holdings, each such member must, to the fullest extent permitted by applicable law, take into consideration the effect that the actions of the Upstream Owner or U.S. Exchange Holdings, as applicable, will have on the ability

⁹⁴ 15 U.S.C. 78f(b) and 15 U.S.C. 78s(g).

⁹⁵ See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Section (1) and Topaz Exchange Resolution Section (2)(a)); and U.S. Exchange Holdings Certificate, Article ELEVENTH.

⁹⁶ See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Sections (7)(a) and (8)(a) and Topaz Exchange Resolution Sections (2)(b) and (2)(c)); U.S. Exchange Holdings Certificate, Article TENTH. The Resolutions also provide that each Non-U.S. Upstream Owner will take reasonable steps necessary to cause each person who subsequently becomes a board member of the Non-U.S. Upstream Owner to agree in writing to certain matters included in the Resolutions. See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Section (7) and Topaz Exchange Resolution Section (2)(b)).

of Topaz Exchange to carry out its responsibilities under the Act.⁹⁷ In addition, each of the Non-U.S. Upstream Owners and U.S. Exchange Holdings, and their board members, officers, and employees, must give due regard to the preservation of the independence of the self-regulatory function of Topaz Exchange (or in the case of the Non-U.S. Upstream Owners, that they will take reasonable steps necessary to cause their officers and employees involved in the activities of Topaz Exchange to give due regard to preserving the independence of the self-regulatory functions of Topaz Exchange).⁹⁸

- The Non-U.S. Upstream Owners (along with their respective board members, officers, and employees), and U.S. Exchange Holdings agree to keep confidential, to the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of Topaz Exchange, including, but not limited to, confidential information regarding disciplinary matters, trading data, trading practices and audit information, contained in the books and records of Topaz Exchange and not use such information for any commercial purposes.⁹⁹

⁹⁷ See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Section (7)(f) and Topaz Exchange Resolution Section (2)(b)); and U.S. Exchange Holdings Certificate, Article TENTH.

⁹⁸ See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Sections (5), (7)(d), and (8)(d) and Topaz Exchange Resolution Section (2)); and U.S. Exchange Holdings Certificate, Article TWELFTH.

⁹⁹ See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Sections (6), (7)(e) and (8)(e) and Topaz Exchange Resolution Section (2)); and U.S. Exchange Holdings Certificate, Article FOURTEENTH.

The Commission believes that any non-regulatory use of such information would be for a commercial purpose. See DirectEdge Exchanges Order, *supra* note 70, at 75 FR 13155 n.53.

- The books and records of the Non-U.S. Upstream Owners related to the activities of Topaz Exchange must at all times be made available for, and the books and records of U.S. Exchange Holdings must be subject at all times to, inspection and copying by the Commission and Topaz Exchange.¹⁰⁰
- Books and records of U.S. Exchange Holdings related to the activities of Topaz Exchange will be maintained within the United States.¹⁰¹
- For so long as each of the Non-U.S. Upstream Owners or U.S. Exchange Holdings directly or indirectly controls Topaz Exchange, the books, records, officers, directors (or equivalent), and employees of each of the Non-U.S. Upstream Owners or of U.S. Exchange Holdings will be deemed to be the books, records, officers, directors, and employees of Topaz Exchange, as applicable.¹⁰² And, for so long as U.S. Exchange Holdings directly or indirectly controls Topaz Exchange, the premises of U.S. Exchange Holdings will be deemed to be the premises of Topaz Exchange.¹⁰³
- To the extent involved in the activities of Topaz Exchange, each of the Non-U.S. Upstream Owners, its board members, officers, and employees, irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for purposes of any suit, action or proceeding arising out of, or relating to, the activities of Topaz

¹⁰⁰ See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Section (3) and Topaz Exchange Resolution Section (2)(a)); and U.S. Exchange Holdings Certificate, Article FIFTEENTH. See infra Section II.C.2.c for a discussion of the 2009 Procedure through which the Swiss companies would make available their books and records relating to the activities of the Topaz Exchange.

¹⁰¹ See U.S. Exchange Holdings Certificate, Article FIFTEENTH.

¹⁰² See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Sections (3) and (8)(c) and Topaz Exchange Resolution Sections (2)(a) and (2)(c)); and U.S. Exchange Holdings Certificate, Article FIFTEENTH.

¹⁰³ See U.S. Exchange Holdings Certificate, Article FIFTEENTH.

Exchange to the extent such board member, officer or employee are involved in the activities of Topaz Exchange.¹⁰⁴ Likewise, U.S. Exchange Holdings, its officers, directors, and employees whose principal place of business and residence is outside of the United States, to the extent such director, officer, or employee is involved in the activities of Topaz Exchange, irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for purposes of any suit, action or proceeding pursuant to the U.S. federal securities laws, and the rules or regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of Topaz Exchange.¹⁰⁵

- The 2007 Resolutions, as supplemented by the Topaz Exchange Resolutions, and the U.S. Exchange Holdings Certificate and the U.S. Exchange Holdings Bylaws each require that any change to the applicable document (including any action by the Non-U.S. Upstream Owners that would have the effect of amending or repealing the Topaz Exchange Resolutions or the 2007 Resolutions) must be submitted to the Topaz Exchange Board.¹⁰⁶ If such change must be filed with, or filed with and approved by, the Commission under Section 19 of the Act,¹⁰⁷ and the rules thereunder, then such

¹⁰⁴ See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Sections (2), (7)(b), and (8)(b) and Topaz Exchange Resolution Section (2)).

¹⁰⁵ See U.S. Exchange Holdings Bylaws, Article VI, Section 16.

¹⁰⁶ See, e.g., Form of German Parent Corporate Resolutions (Topaz Exchange Resolution Section (3)); U.S. Exchange Holdings Certificate, Article SIXTEENTH; and U.S. Exchange Holdings Bylaws, Article VI, Section 9.

¹⁰⁷ 15 U.S.C. 78s.

change shall not be effective until filed with, or filed with and approved by, the Commission.¹⁰⁸

The 2012 Trust Agreement, in addition to enforcing the ownership and voting limits,¹⁰⁹ also serves to effectuate compliance with the other commitments made under the Topaz Exchange Resolutions, which incorporate the 2007 Resolutions. To accomplish that purpose, the Trust would determine whether a Material Compliance Event¹¹⁰ has occurred or is continuing. The Trust would determine whether the occurrence and continuation of a Material Compliance Event requires the exercise of the Call Option.¹¹¹ The Trust holds a Call Option over the capital stock of ISE Holdings that may be exercised if a Material Compliance Event has occurred and continues to be in effect, and upon such exercise, the Trust Beneficiary¹¹² and ISE Holdings, as applicable, will take such actions as are necessary to transfer, or cause the transfer to the Trust of

¹⁰⁸ See, e.g., Form of German Parent Corporate Resolutions (Topaz Exchange Resolution Section (3)); U.S. Exchange Holdings Certificate, Article SIXTEENTH; and U.S. Exchange Holdings Bylaws, Article VI, Section 9. The requirement to submit changes to the Topaz Exchange Board endures for as long as U.S. Exchange Holdings directly or indirectly controls Topaz Exchange. See U.S. Exchange Holdings Bylaws, Article VI, Section 9.

¹⁰⁹ See supra notes 61-63 and 73-76 and accompanying text for a discussion of the ownership and voting limits.

¹¹⁰ Under the 2012 Trust Agreement, a “Material Compliance Event” is any state of facts, development, event, circumstance, condition, occurrence, or effect that results in the failure of any of the Non-U.S. Upstream Owners to adhere to its respective commitments under the Resolutions adopted by the respective Non-U.S. Upstream Owners, in any material respect. See 2012 Trust Agreement, Article I, Section 1.1.

¹¹¹ See supra note 73.

¹¹² Under the Trust, the term “Trust Beneficiary” means U.S. Exchange Holdings.

a majority of the Voting Shares then outstanding.¹¹³ The Trust will transfer Deposited Shares from the Trust back to the Trust Beneficiary, as provided in Section 4.2(h) therein, only if no Material Compliance Event is continuing or, notwithstanding its continuation, the Trustees determine that the retention of the Deposited Shares could not reasonably be expected to address the continuing Material Compliance Event, provided that the determination is filed with, or filed with and approved by, the Commission.¹¹⁴

The Commission believes that the provisions discussed above in Sections II.C.2.a. and b., which are designed to help maintain the independence of Topaz Exchange's regulatory function and help facilitate the ability of Topaz Exchange to carry out its regulatory responsibilities and operate in a manner consistent with the Act, are appropriate and consistent with the requirements of the Act, particularly with Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.¹¹⁵ Whether Topaz Exchange operates in compliance with the Act, however, depends on how it and ISE Holdings in practice implement the governance and other provisions that are the subject of this Order.¹¹⁶

¹¹³ See 2012 Trust Agreement, Article IV, Section 4.2. Specifically, if a Material Compliance Event occurs and continues to be in effect, the Trustees must take certain actions, including, after a specified cure period, the exercise of a Call Option for a transfer of the majority of capital stock of ISE Holdings that has the right by its terms to vote in the election of the ISE Holdings Board or on other matters.

¹¹⁴ See 2012 Trust Agreement, Article IV, Section 4.2.

¹¹⁵ 15 U.S.C. 78f(b)(1).

¹¹⁶ The Commission has noted that it is reviewing the various standards and processes it uses to facilitate the registration of national securities exchanges and other entities required to register with the Commission and may issue a concept release designed to collect relevant information to evaluate aspects of these registration standards and processes, including the policy objectives of registration, and how best to achieve those policy objectives through registration and other means, and the relative benefits and costs of the various means available. See Securities Exchange Act Release No. 65543 (October 12, 2011), 76 FR 65784, 65786 fn. 13 (October 24, 2011).

Further, Section 19(h)(1) of the Act¹¹⁷ provides the Commission with the authority “to suspend for a period not exceeding twelve months or revoke the registration of [an SRO], or to censure or impose limitations upon the activities, functions, and operations of [an SRO], if [the Commission] finds, on the record after notice and opportunity for hearing, that [the SRO] has violated or is unable to comply with any provision of [the Act], the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance” with any such provision by its members (including associated persons thereof).¹¹⁸ If Commission staff were to find, or become aware of, through staff review and inspection or otherwise, facts indicating any violations of the Act, including without limitation Sections 6(b)(1)¹¹⁹ and 19(g)(1),¹²⁰ these matters could provide the basis for a disciplinary proceeding under Section 19(h)(1) of the Act.¹²¹

Even in the absence of the provisions described above, under Section 20(a) of the Act,¹²² any person with a controlling interest in Topaz Exchange would be jointly and severally liable with and to the same extent that Topaz Exchange is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act¹²³ creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C

¹¹⁷ See 15 U.S.C. 78s(h)(1).

¹¹⁸ See id.

¹¹⁹ See 15 U.S.C. 78f(b)(1)

¹²⁰ See 15 U.S.C. 78s(g)(1).

¹²¹ See 15 U.S.C. 78s(h)(1).

¹²² See 15 U.S.C. 78t(a).

¹²³ See 15 U.S.C. 78t(e).

of the Act authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.¹²⁴ These provisions are applicable to all entities controlling Topaz Exchange, including the Trust, ISE Holdings, U.S. Exchange Holdings, and the Non-U.S. Upstream Owners.

c. Swiss Resolutions and Procedure with FINMA

As discussed more fully in the Eurex Acquisition Order,¹²⁵ Swiss law is designed to protect Swiss sovereignty concerns and prohibits the direct delivery of information from the Swiss owners of Topaz Exchange to the Commission or Topaz Exchange with respect to the activities of Topaz Exchange. In light of the Swiss penal code,¹²⁶ the Swiss companies agreed to make their books and records relating to the activities of ISE, EDGA and EDGX available for inspection and copying by the Commission through FINMA.¹²⁷ The Swiss companies made the

¹²⁴ See 15 U.S.C. 78u-3(a).

¹²⁵ See *supra* note 15.

¹²⁶ Art. 271 of the Swiss penal code, “Prohibited acts for a foreign state,” states, in part: “Whoever, without being authorized, performs acts for a foreign state on Swiss territory that are reserved to an authority or an official, whoever performs such acts for a foreign party or another foreign organization, whoever aids and abets such acts, shall be punished with imprisonment and, in serious cases, sentenced to the penitentiary.”

¹²⁷ In 2007, the Swiss Federal Banking Commission (“SFBC”) (the predecessor to FINMA) undertook to serve as a conduit for the delivery of information between the Commission and the Swiss companies relating to the activities of ISE. On January 1, 2009, the SFBC, the Swiss Federal Office of Private Insurance and the Swiss Anti-Money Laundering Control Authority merged to form FINMA, a new consolidated financial regulator for Switzerland. In 2009, a new undertaking was expanded to cover EDGA and EDGX and any future U.S. exchanges controlled by ISE Holdings. The 2009 undertaking became effective after the Commission approved the Form 1 applications of EDGA and EDGX. See *DirectEdge Exchanges Order*, *supra* note 70. The 2009 undertaking covers all U.S. markets that currently are, or in the future may be, controlled by ISE Holdings. Accordingly, by its terms, the new undertaking from 2009 also would apply to the activities of Topaz Exchange upon its registration. See http://www.sec.gov/about/offices/oia/oia_bilateral/switzerland_sfbc.pdf.

same agreement in connection with the Eurex Acquisition, and agreed to do so again with respect to the Topaz Exchange prior to the grant of registration to Topaz Exchange as a national securities exchange.¹²⁸ In November 2009, the Commission and FINMA both approved and signed the Undertaking Relating to the Oversight of Affiliated Markets (“2009 Undertaking”) pursuant to which FINMA undertook to serve as a conduit for the delivery of information between the Commission and the Swiss owners of ISE Holdings (“Procedure”)¹²⁹ for any national securities exchange registered under Section 6 of the Act that ISE Holdings controls or would, in the future, control, directly or indirectly.¹³⁰

¹²⁸ See supra note 15. The forms of these agreements are included as part of the Form 1 Application. Form of Swiss Parent Corporate Resolutions; see also Form of EGD Corporate Resolutions. Based on the representation of Topaz Exchange in the submission of its Form 1 Application to the Commission, the resolutions were signed by the respective Swiss companies prior to the grant of registration by the Commission. See Exhibit B to Topaz Exchange Form 1 Application and Amendment No. 3.

¹²⁹ Where necessitated by Swiss law, the Procedure provides: (1) if the Commission makes a request to any of the Swiss Upstream Owners for information related to the activities of a U.S. Market, including books and records related to the activities of such U.S. Market, FINMA shall deliver to the Commission without delay any responsive information provided to FINMA by the Swiss Upstream Owners; (2) written requests for information, including books and records, related to the activities of a U.S. Market shall be made by the Commission directly to the Swiss Upstream Owners, and FINMA would be copied on any such requests; and (3) a FINMA staff member shall participate in any oral exchanges between the Commission and any of the Swiss Upstream Owners. As used in the 2009 Undertaking, “U.S. Markets” means ISE, EDGX, EDGA, and any national securities exchange registered under Section 6 of the Act that ISE Holdings may, in the future, control, directly or indirectly. See 2009 Undertaking, paragraph 6.

Notwithstanding this Procedure, the Swiss Upstream Owners remain fully responsible for meeting all of their obligations as owners of a U.S. securities exchange, to be set forth in binding corporate resolutions.

¹³⁰ FINMA serves as a conduit for the delivery of information and for participation in oral exchanges between the Commission and the Swiss companies, and would serve in that capacity for Topaz Exchange. The 2009 Undertaking explicitly states that it covers changes in Swiss companies that become future direct or indirect owners of the U.S. Markets. Specifically, when SIX Swiss Exchange AG’s transferred its interest to the newly formed Swiss corporation, EGD, EGD was covered by the 2009 Undertaking. See supra note 16.

Subject to the terms and conditions relating to the Procedure, coupled with the fact that under the Topaz Exchange LLC Agreement, all trading records of Topaz Exchange must be maintained in the United States,¹³¹ the Commission believes that the Procedure should not result in a level of access materially different from that agreed to by other entities that control U.S. national securities exchanges.¹³²

3. Regulation of Topaz Exchange

As a prerequisite to the Commission's granting of an exchange's application for registration, an exchange must be so organized and have the capacity to carry out the purposes of the Act.¹³³ Specifically, an exchange must be able to enforce compliance by its members, and persons associated with its members, with the Act and the rules and regulations thereunder and the rules of the exchange.¹³⁴ The discussion below summarizes how Topaz Exchange proposes to structure and conduct its regulatory operations.

a. Corporate Governance Committee and Finance and Audit Committee

Topaz Exchange will have a Chief Regulatory Officer ("CRO") with general responsibility for supervision of the regulatory operations of Topaz Exchange. The CRO will

¹³¹ See Topaz Exchange LLC Agreement, ARTICLE IV, Section 4.1 (Books and Records).

¹³² See Eurex Acquisition Order, supra note 15, at 72 FR 71984 n.66 and accompanying text; see also DirectEdge Exchanges Order, supra note 70. If a Non-U.S. Upstream Owner fails to make its books and record relating to the operation of Topaz Exchange available to the Commission, the Commission could bring an action under, among other provisions, Section 17 of the Act, 15 U.S.C. 78q, and Rule 17a-1(b) thereunder, 17 CFR 240.17a-1(b), against Topaz Exchange pursuant to Section 19(h) of the Act, 15 U.S.C. 78s(h).

¹³³ See Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

¹³⁴ See id. See also Section 19(g) of the Act, 15 U.S.C. 78s(g).

report to the Corporate Governance Committee¹³⁵ and to the President/Chief Executive Officer, although the Topaz Exchange Board would retain the power to call the CRO to report directly to the Board as needed, and the CRO may call special meetings of the Board, as necessary.¹³⁶ The Corporate Governance Committee will meet regularly with the CRO to review regulatory matters.

The Corporate Governance Committee will monitor the regulatory program for sufficiency, effectiveness and independence, and will oversee trade practices and market surveillance, audits, examinations and other regulatory responsibilities with respect to members and the conduct of investigations. The Corporate Governance Committee also will supervise the CRO; will receive an annual report from the CRO assessing Topaz Exchange's self-regulatory program for the Board; will recommend changes that would ensure fair and effective regulation; and will review regulatory proposals and advise the Board as to whether and how such changes may impact regulation. The Corporate Governance Committee will review annually the regulatory budget and specifically inquire into the adequacy of the resources available in the budget for regulatory activities. The Corporate Governance Committee will authorize unbudgeted expenditures for necessary regulatory expenses. In addition, the Finance and Audit Committee will provide oversight over the systems of internal controls established by management and the Board and the Exchange's regulatory and compliance process.¹³⁷

The Compensation Committee will set compensation for the CRO. The Corporate Governance Committee, in its sole discretion, will make hiring and termination decisions with

¹³⁵ The Corporate Governance Committee will consist of at least three directors, all of whom must be Non-Industry Directors. See Topaz Exchange Constitution, Article V, Section 5.4.

¹³⁶ See Exhibit L to Topaz Exchange Form 1 Application.

¹³⁷ See Exhibit L to Topaz Exchange Form 1 Application. See also Amendment No. 3.

respect to the CRO, in each case taking into consideration any recommendations made by the President/Chief Executive Officer. The Corporate Governance Committee will be informed about the compensation of the CRO, including factors affecting changes thereto.

b. Regulatory Funding

To help assure the Commission that it has and will continue to have adequate funding to be able to meet its responsibilities under the Act, Topaz Exchange represented that, prior to commencing operations as a national securities exchange, ISE Holdings will provide sufficient funding to Topaz Exchange for the exchange to carry out its responsibilities under the Act.¹³⁸ Specifically, Topaz Exchange represented that ISE Holdings will make a cash contribution to Topaz Exchange of \$5 million, in addition to previously provided “in-kind” contributions of legal, regulatory and infrastructure-related services to Topaz Exchange¹³⁹ Topaz Exchange represented in its Form 1 Application that the cash and in-kind contributions to Topaz Exchange will be adequate to operate Topaz Exchange, including its regulatory program.¹⁴⁰ Further, Topaz Exchange, with ISE Holdings as its parent, will be affiliated with an existing exchange, ISE. Individuals currently employed by ISE have been providing, and will continue to provide, services to Topaz Exchange.¹⁴¹

¹³⁸ See Exhibit I to Topaz Exchange Form 1 Application.

¹³⁹ Other applicants for registration as a national securities exchange have noted in their Form 1 applications similar funding commitments and representations. BOX Exchange represented that, prior to launch, BOX Group LLC would allocate sufficient operational assets, including regulatory infrastructure and industry and regulatory memberships, along with a \$1,000,000 loan to BOX Exchange. In MIAX, the exchange represented that Miami International Holdings, Inc. would allocate sufficient operational assets and make a capital contribution of not less than \$2,000,000 into MIAX capital account prior to launching operations. See, e.g., MIAX Order, supra note 30.

¹⁴⁰ See Exhibit I to Topaz Exchange Form 1 Application.

¹⁴¹ See id.

Topaz Exchange represented in its Form 1 Application that there will be a written agreement between Topaz Exchange and ISE Holdings that requires ISE Holdings to provide adequate funding for Topaz Exchange's operation, including the regulation of Topaz Exchange.¹⁴² This agreement further provides that ISE Holdings will reimburse Topaz Exchange for its costs and expenses to the extent Topaz Exchange's assets are insufficient to meet its costs and expenses.¹⁴³ Excess funds, as solely determined by Topaz Exchange, will be remitted to ISE Holdings.¹⁴⁴ Further, Topaz Exchange will receive all fees, including regulatory fees and trading fees, payable by Topaz Exchange's members, as well as any funds received from any applicable market data fees and OPRA tape revenue.¹⁴⁵ Regulatory funds, meaning the fees, fines or penalties derived from the regulatory operations of Topaz Exchange, will be used to fund the legal, regulatory and surveillance operations of Topaz Exchange.¹⁴⁶

¹⁴² See Amendment No. 3. Both BOX and MIAX also represented in their Form 1 applications that there would be explicit agreements with their respective holding companies to provide adequate funding for the exchanges' operations, including regulation.

¹⁴³ See Exhibit I to Topaz Exchange Form 1 Application.

¹⁴⁴ See id.

¹⁴⁵ See id.

¹⁴⁶ See id. See also Topaz Exchange LLC Agreement, Article III, Section 3.3. The Topaz Exchange LLC Agreement defines "Regulatory Funds" as fees, fines or penalties derived from the regulatory operations of the [Topaz Exchange], provided that such term shall not include revenues derived from listing fees, market data revenues, transaction revenues or any other aspect of the commercial operations of the [Topaz Exchange], even if a portion of such revenues are used to pay costs associated with the regulatory operations of the [Topaz Exchange]. Id. This definition is consistent with the rules of other SROs. See, e.g., MIAX LLC Agreement Section 16; and MIAX By-Laws Article IX, Section 9.4.

c. Rule 17d-2 Agreements; Regulatory Contracts with FINRA and ISE

Section 19(g)(1) of the Act,¹⁴⁷ among other things, requires every SRO registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d) or Section 19(g)(2) of the Act.¹⁴⁸ Rule 17d-2 of the Act¹⁴⁹ permits SROs to propose joint plans to allocate regulatory responsibilities amongst themselves for their common rules with respect to their common members.¹⁵⁰ These agreements, which must be filed with and declared effective by the Commission, generally cover areas where each SRO's rules substantively overlap, including such regulatory functions as personnel registration and sales practices. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain

¹⁴⁷ 15 U.S.C. 78s(g)(1).

¹⁴⁸ 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2), respectively.

¹⁴⁹ See Section 17(d)(1) of the Act and Rule 17d-2 thereunder, 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

¹⁵⁰ 17 CFR 240.17d-2. Section 19(g)(1) of the Act requires every SRO to examine its members and persons associated with its members and to enforce compliance with the federal securities laws and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d) of the Act. Section 17(d) was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication with respect to Common Members. See Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976) ("Rule 17d-2 Adopting Release").

memberships in more than one SRO. Such regulatory duplication would add unnecessary expenses for common members and their SROs.

A 17d-2 plan that is declared effective by the Commission relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.¹⁵¹ Many SROs have entered into Rule 17d-2 agreements.¹⁵²

Topaz Exchange has represented to the Commission that it will enter into the following allocation of regulatory responsibilities pursuant to Rule 17d-2 of the Act (“17d-2 Plans”),¹⁵³ including the two existing multiparty plans applicable to options trading:

- Multiparty 17d-2 Plan for the Allocation of Regulatory Responsibility for Options Sales Practice Matters;¹⁵⁴
- Multiparty 17d-2 Plan for the Allocation of Regulatory Responsibility for Options Related Market Surveillance Matters;¹⁵⁵ and

¹⁵¹ See id.

¹⁵² See, e.g., Securities Exchange Act Release Nos. 59218 (January 8, 2009), 74 FR 2143 (January 14, 2009) (File No. 4-575) (Financial Industry Regulatory Authority, Inc. (“FINRA”)/Boston Stock Exchange, Inc.); 58818 (October 20, 2008), 73 FR 63752 (October 27, 2008) (File No. 4-569) (FINRA/BATS Exchange, Inc.); 55755 (May 14, 2007), 72 FR 28087 (May 18, 2007) (File No. 4-536) (National Association of Securities Dealers, Inc. (“NASD”) (n/k/a FINRA) and Chicago Board of Options Exchange, Inc. (“CBOE”) concerning the CBOE Stock Exchange, LLC); 55367 (February 27, 2007), 72 FR 9983 (March 6, 2007) (File No. 4-529) (NASD/ISE) (“ISE Bilateral 17d-2 Plan”); and 54136 (July 12, 2006), 71 FR 40759 (July 18, 2006) (File No. 4-517) (NASD/The Nasdaq Stock Market LLC).

¹⁵³ Rule 17d-2 under the Act permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members (i.e., 17d-2 plans).

¹⁵⁴ See Exhibit L to Topaz Exchange Form 1 Application. See also Securities Exchange Act Release No. 68363 (December 5, 2012), 77 FR 73711 (December 11, 2012) (File No. S7-966) (notice of filing and order approving and declaring effective an amendment to the multiparty 17d-2 plan concerning options-related sales practice matters).

¹⁵⁵ See Exhibit L to Topaz Exchange Form 1 Application. See also Securities Exchange Act Release No. 68362 (December 5, 2012), 77 FR 73719 (December 11, 2012) (File No. 4-

- Bilateral 17d-2 Plan with FINRA that would cover, among other things, general inspection, examination, and enforcement activity.¹⁵⁶

If the Commission declares effective the amendments to the multilateral 17d-2 Plans and the new bilateral 17d-2 Plan, another SRO (often FINRA) would assume certain regulatory responsibility for members of Topaz Exchange that are also members of the SRO that assumes the regulatory responsibilities. This regulatory structure would be consistent with that of other exchanges, including ISE.¹⁵⁷

In addition, Topaz Exchange has entered into a third-party Regulatory Service Agreement (“RSA”) with FINRA.¹⁵⁸ Under the RSA, FINRA¹⁵⁹ will carry out certain specified regulatory activities on behalf of Topaz Exchange. For example, FINRA, in its capacity as service provider to Topaz Exchange, will provide member operation services, including membership application review, conducting market surveillance investigation services, conducting routine and cause examination services, assisting Topaz Exchange with disciplinary proceedings pursuant to Topaz Exchange’s rules including conducting hearings, and providing dispute resolution services to Topaz Exchange members on behalf of Topaz Exchange. Topaz

551) (notice of filing and order approving and declaring effective an amendment to the multiparty 17d-2 plan concerning options-related market surveillance).

¹⁵⁶ See Exhibit L to Topaz Exchange Form 1 Application. See also ISE Bilateral 17d-2 Plan, supra note 152.

¹⁵⁷ Amendments to the multilateral 17d-2 Plans and the new bilateral 17d-2 Plan are not before the Commission as part of this Order and, therefore, the Commission is not acting on them at this time.

¹⁵⁸ See, e.g., Exhibit L to Topaz Exchange Form 1 Application.

¹⁵⁹ FINRA executed a single RSA with both ISE and Topaz Exchange as signatories. The single RSA, however, has two separate statements of work. The first statement of work describes the specified regulatory activities that FINRA will carry out on behalf of ISE. The second statement of work describes the specified regulatory activities that FINRA will carry out on behalf of Topaz Exchange.

Exchange, however, will retain ultimate legal responsibility for the regulation of its members and market.¹⁶⁰ This regulatory structure would be consistent with that of other exchanges.¹⁶¹

Topaz Exchange has also entered into a facilities management agreement (“FMA”) with ISE.¹⁶² Pursuant to the proposed FMA, ISE intends to provide to Topaz Exchange certain services, including, for example, business management services, facilities management services, IT services, fiscal services, as well as Commission and other regulatory compliance services and other legal services, such as surveillance programs, legal programs, systems and other operational services.¹⁶³ Topaz Exchange, however, will retain ultimate legal responsibility for the regulation of its members and market.

The Commission believes that it is consistent with the Act for Topaz Exchange to contract with other SROs to perform certain examination, enforcement, and disciplinary functions.¹⁶⁴ These functions are fundamental elements of a regulatory program, and constitute core self-regulatory functions. The Commission believes that both FINRA, as a SRO that provides contractual services to other SROs, and ISE, as an SRO that currently operates an

¹⁶⁰ See Amendment No. 3.

¹⁶¹ For example, ISE, EDGA, EDGX and BATS have entered into 17d-2 Plans and RSAs with FINRA.

¹⁶² See, e.g., Exhibit L to Topaz Exchange Form 1 Application. The FMA with ISE provides, in part, for the provision of Commission and other regulatory compliance services.

¹⁶³ See Exhibit L of Topaz Exchange Form 1 Application; see also Amendment No. 3.

¹⁶⁴ See, e.g., Regulation ATS Release, supra note 30. See also Securities Exchange Act Release Nos. 50122 (July 29, 2004), 69 FR 47962 (August 6, 2004) (SR-Amex-2004-32) (order approving rule that allowed Amex to contract with another SRO for regulatory services) (“Amex Regulatory Services Approval Order”); 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080) (“NOM Approval Order”); Nasdaq Order, supra note 29; and BATS Order, supra note 29.

options exchange, should have the capacity to perform these functions for Topaz Exchange.¹⁶⁵ However, Topaz Exchange, unless relieved by the Commission of its responsibility,¹⁶⁶ bears the ultimate responsibility for self-regulatory responsibilities and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on Topaz Exchange's behalf. In performing these regulatory functions, however, the SRO retained to perform specified regulatory functions may nonetheless bear liability for causing or aiding and abetting the failure of Topaz Exchange to perform its regulatory functions.¹⁶⁷ Accordingly, although FINRA and ISE will not act on their own behalves under their respective SRO responsibilities in carrying out these regulatory services for Topaz Exchange, as the SROs retained to perform regulatory functions, FINRA and ISE may have secondary liability if, for example, the Commission finds that the contracted functions are being performed so inadequately as to cause a violation of the federal securities laws by Topaz Exchange.

As part of its FMA with ISE, Topaz Exchange proposes to use dual employees to staff its regulatory services program. In other words, current ISE employees will also serve in a similar capacity for Topaz Exchange under the FMA. Topaz Exchange represents that the FMA will contain an obligation on the part of Topaz Exchange and ISE to preserve the other party's

¹⁶⁵ See, e.g., Amex Regulatory Services Approval Order, supra note 164; NOM Approval Order, supra note 164; and Nasdaq Order, supra note 29. The Commission notes that the RSA and FMA are not before the Commission and, therefore, the Commission is not acting on them.

¹⁶⁶ See supra note 149.

¹⁶⁷ For example, if failings by the SRO retained to perform regulatory functions have the effect of leaving an exchange in violation of any aspect of the exchange's self-regulatory obligations, the exchange will bear direct liability for the violation, while the SRO retained to perform regulatory functions may bear liability for causing or aiding and abetting the violation. See, e.g., MIAX Order, supra note 30; BOX Order, supra note 39; and Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10-127) (order granting the exchange registration of ISE) ("ISE Order").

information and materials which are confidential, proprietary and/or trade secrets and prevent unauthorized use or disclosure to third parties.¹⁶⁸

The Commission believes that the use of ISE employees by Topaz Exchange is appropriate, as the operations, rules, and management of ISE and Topaz Exchange will overlap to a considerable degree such that Topaz Exchange should benefit by leveraging the experience of current ISE staff. The Commission has approved such arrangements in a similar context.¹⁶⁹ However, the Commission expects both ISE and Topaz Exchange to monitor the workload of their dual employees and supplement their staffs, if necessary, so that Topaz Exchange maintains sufficient personnel to allow it to carry out the purposes of the Act and enforce compliance with the rules of Topaz Exchange and the federal securities laws.

D. Trading System

1. Access to Topaz Exchange

Access to Topaz Exchange will be through the use of Exchange Rights.¹⁷⁰ Through an application process, organizations will be approved to become members of Topaz Exchange and to exercise trading rights.¹⁷¹ Exchange Rights will not convey any ownership rights, but will

¹⁶⁸ See Exhibit L to Topaz Exchange Form 1 Application; see also Amendment No. 3.

¹⁶⁹ See, e.g., Securities Exchange Act Release No. 61152 (December 10, 2009), 74 FR 66699 (December 16, 2009) (File No. 10-191) (order granting registration to C2 Options Exchange) (“C2 Order”).

¹⁷⁰ See Topaz Exchange Rule 300 Series. “Exchange Rights” means the PMM Rights, CMM Rights and EAM Rights collectively. See Topaz Exchange Rule 100(a)(17). PMM Rights, CMM Rights and EAM Rights have the meaning set forth in Article VI of Topaz Exchange LLC Agreement. See Topaz Exchange Rules 100(a)(12), 100(a)(15) and 100(a)(36).

¹⁷¹ The term “Member” means an organization that has been approved to exercise trading rights associated with Exchange Rights, and the term “Membership” refers to the trading privileges associated with Exchange Rights. See Topaz Exchange Rules 100(a)(23) and 100(a)(24). Under Topaz Exchange Rules 300 and 302(c), Topaz Exchange shall issue Memberships that confer the ability to transact on Topaz Exchange, although no rights

provide for voting rights for representation on the Topaz Exchange Board and will confer the ability to transact on Topaz Exchange.¹⁷² Exchange Rights may not be leased and are not transferable except in the event of a change in control of a member or corporate reorganization involving a member.¹⁷³ There is no limit on the number of Exchange Rights issued by Topaz Exchange.¹⁷⁴

Membership in Topaz Exchange will be open to any broker-dealer registered under Section 15(b) of the Act that meets the standards for membership set forth in the rules of Topaz Exchange.¹⁷⁵ The Exchange's denials from, and impositions of conditions upon, becoming or continuing to be a member may be appealed pursuant to rules governing hearing and review, described in Section II.E below.¹⁷⁶ In addition to its regular membership application process, Topaz Exchange also will provide a process whereby a current member of ISE in good standing that is a registered broker-dealer can submit an abbreviated "waive-in" application to Topaz Exchange.¹⁷⁷ This waive-in process is similar to arrangements in place at other exchanges.¹⁷⁸

shall be conferred upon a Member except those set forth in the Topaz Exchange LLC Agreement or Topaz Exchange Rules as amended from time to time. A Membership shall not convey any ownership interest in the Exchange. See Topaz Exchange Rules 300 and 302(c).

¹⁷² See Topaz Exchange Rules 300 and 302(c); see also Topaz Exchange LLC Agreement, Article VI, Sections 6.1 and 6.3.

¹⁷³ See Topaz Exchange Rule 302(c). In such case, member status may be transferred to a qualified affiliate or successor upon written notice to Topaz Exchange. Id.

¹⁷⁴ See Topaz Exchange Rule 300(a); see also Topaz Exchange LLC Agreement, Article VI, Section 6.1.

¹⁷⁵ See Topaz Exchange Rule 301.

¹⁷⁶ See Topaz Exchange Rule 1700 Series, which incorporates by reference ISE Rule 1700 Series.

¹⁷⁷ See Topaz Exchange Rule 302(a).

¹⁷⁸ See, e.g., C2 Options Exchange, Inc. Rule 3.1(c)(1) (containing a similar expedited waive-in membership process for members of CBOE).

Topaz Exchange will have three classes of membership: (1) PMMs; (2) CMMs; and (3) EAMs.¹⁷⁹ PMM and CMMs may seek appointment to become market makers in one or more options classes traded on the exchange.¹⁸⁰ Topaz Exchange proposes to allow firms that register as market makers to receive special privileges or rights over non-market maker members, such as participation entitlements for PMMs, if they satisfy certain affirmative and negative market making obligations on the exchange.¹⁸¹ This is similar to arrangements in place at other exchanges, such as ISE.¹⁸²

The Commission finds that Topaz Exchange's proposed membership rules are consistent with the Act, including Section 6(b)(2) of the Act,¹⁸³ which requires the rules of an exchange to provide that any registered broker or dealer or natural person associated with a broker or dealer may become a member of such exchange or associated with a member thereof. Topaz Exchange's proposed rules with respect to exchange membership are substantively similar to the rules of other exchanges.¹⁸⁴

¹⁷⁹ See Topaz Exchange Rule 301(c).

¹⁸⁰ See Topaz Exchange Rule 800 Series.

¹⁸¹ See Topaz Exchange Rules 713, 802 and 803. See infra Section II.D.3.b. for further discussion of market maker privileges and obligations.

¹⁸² See, e.g., ISE Rules 713, 802 and 803 (containing similar rights and obligations for market makers on ISE). However, some of Topaz Exchange's proposed access rules differ in some respects from the rules of ISE. For example, as a result of their differing membership structures, there is no limit on the number of PMMs that Topaz Exchange can approve for membership, whereas ISE can appoint only ten PMMs in total. There will still be only one PMM per options class on Topaz Exchange. There also will be no limit to the number of CMMs on Topaz Exchange, whereas ISE can appoint only 160 CMMs in total. EAM rights, however, will be unlimited on both ISE and Topaz Exchange. Topaz Exchange's approach is consistent with the rules of other exchanges that have no limit on the number of exchange rights, or their functional equivalent, that may be issued by the exchange. See, e.g., C2 Order, supra note 169.

¹⁸³ 15 U.S.C. 78f(b)(2).

¹⁸⁴ See, e.g., MIAX Rule 200 Series ("Access").

The Commission notes that pursuant to Section 6(c) of the Act,¹⁸⁵ an exchange must deny membership to any person, other than a natural person, that is not a registered broker or dealer, any natural person that is not, or is not associated with, a registered broker or dealer, and registered broker-dealers that do not satisfy certain standards, such as financial responsibility or operational capacity. As a registered exchange, Topaz Exchange must independently determine if an applicant satisfies the standards set forth in the Act, regardless of whether an applicant is a member of another SRO.¹⁸⁶

In addition, Topaz Exchange also will allow non-members to access Topaz Exchange as “sponsored customers” of a Topaz Exchange member, subject to certain rules.¹⁸⁷ The sponsoring member will be responsible for implementing policies and procedures to supervise and monitor the trading of its sponsored users to ensure compliance with all applicable federal securities laws and rules and Topaz Exchange rules.¹⁸⁸ Topaz Exchange’s proposed sponsored access rules are similar to the rules of other exchanges that provide for sponsored access¹⁸⁹ and are consistent with Rule 15c3-5 under the Act.¹⁹⁰

¹⁸⁵ 15 U.S.C. 78f(c).

¹⁸⁶ See, e.g., MIAX Order, supra note 30, at 77 FR 73074; BOX Order, supra note 39, at 77 FR 26337; BATS Order, supra note 29, at 73 FR 49502; and Nasdaq Order, supra note 29, at 71 FR 3555.

¹⁸⁷ See Topaz Exchange Rule 706, Supplementary Material .01.

¹⁸⁸ See Topaz Exchange Rule 706. See also 17 CFR 240.15c3-5.

¹⁸⁹ See, e.g., ISE Rule 706; see also MIAX Rule 210.

¹⁹⁰ 17 CFR 240.15c3-5.

2. Linkage

Topaz Exchange intends to become a participant in the Plan Relating to Options Order Protection and Locked/Crossed Markets or any successor plan (“Linkage Plan”).¹⁹¹ If admitted as a participant to the Linkage Plan, other plan participants will be able to send orders to Topaz Exchange in accordance with the terms of the plan as applied to Topaz Exchange.

Topaz Exchange rules include relevant definitions; establish the conditions pursuant to which members may enter orders in accordance with the Linkage Plan; impose obligations on Topaz Exchange regarding how it must process incoming orders; establish a general standard that members and Topaz Exchange should avoid trade-throughs; establish potential regulatory liability for members that engage in a pattern or practice of trading through other exchanges; and establish obligations with respect to locked and crossed markets.

The Commission believes that Topaz Exchange has proposed rules that are designed to comply with the requirements of the Linkage Plan.¹⁹² Further, as provided below, before Topaz Exchange can commence operations as an exchange, it must become a participant in the Linkage Plan.

¹⁹¹ See Exhibit E to Topaz Exchange Form 1 Application, Section B (“Non-Member Access”) for a discussion of the Linkage Plan. See also Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4-546) (order approving the National Market System Plan Relating to Options Order Protection and Locked/Crossed Markets Submitted by the Chicago Board Options Exchange, Incorporated, International Securities Exchange, LLC, The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX, Inc., NYSE Amex LLC, and NYSE Arca, Inc.).

¹⁹² See, e.g., Topaz Exchange Rules relating to Intermarket Linkage in Rule 1900 Series, which incorporates by reference ISE Rule 1900 Series. See also Amendment No. 3.

3. Market Makers

a. Registration of Market Makers

Members of Topaz Exchange may apply to become one of two types of market maker: PMMs or CMMs (collectively, “Market Makers”). Market Makers are entitled to receive certain benefits and privileges in exchange for fulfilling certain affirmative and negative market-making obligations.¹⁹³ Each class of Market Maker will receive a specific level of benefits and privileges in exchange for a specific level of obligation that such Market Maker assumes to the Topaz Exchange market.

To begin the process of registering as a PMM or CMM, a member will be required to file a written application with Topaz Exchange.¹⁹⁴ In reviewing a member’s application for membership, Topaz Exchange will consider, among other things, the applicant’s market making ability.¹⁹⁵ To qualify for registration as a Market Maker, a member of Topaz Exchange must meet the requirements established in Rule 15c3-1 under the Act¹⁹⁶ and the general requirements set forth in Topaz Exchange Rule 800 series, including the minimum financial requirements of Topaz Exchange Rule 809.¹⁹⁷ All members who are approved to become Market Makers will be designated as specialists on Topaz Exchange for all purposes under the Act and rules

¹⁹³ Market Makers’ benefits and obligations are discussed in greater detail in the following section.

¹⁹⁴ See Topaz Exchange Rule 800(b).

¹⁹⁵ See id. The provision permitting Topaz Exchange to consider “such other factors as [it] deems appropriate” must be applied in a manner that is consistent with the Act, including provisions that prohibit an exchange from acting in an unfairly discriminatory manner. See 15 U.S.C. 78f(b)(5); see also MIAX Order, supra note 30, at 77 FR 73074 n.149.

¹⁹⁶ 17 CFR 240.15c3-1.

¹⁹⁷ See Topaz Exchange Rule 800 Series. See also Topaz Exchange Rule 1300 Series relating to Net Capital Requirements, which incorporates by reference ISE Rule 1300 Series.

thereunder.¹⁹⁸ Topaz Exchange will not limit the number of qualifying entities that may become Market Makers.¹⁹⁹

In addition, all ISE market makers in good standing will be eligible for an Exchange Right in the same membership category in which they operate on ISE to trade on Topaz Exchange.²⁰⁰ For example, a CMM in good standing on ISE will be eligible to become a CMM on Topaz Exchange, through the submission and approval of a Topaz Exchange Waive-In Membership Application.²⁰¹

Once approved, a Market Maker may seek appointment to make markets in one or more options classes traded on the Topaz Exchange.²⁰² Topaz Exchange will provide non-ISE Members with at least sixty days advance written notice of the date upon which the Exchange will allocate options classes and appoint market makers in order to ensure that non-ISE Members have a reasonable opportunity to participate in those processes.²⁰³ A market participant must have completed a membership application to be eligible to participate in the appointment and allocation processes.²⁰⁴

Either the Topaz Exchange Board or a committee thereof²⁰⁵ will appoint classes of options contracts traded on Topaz Exchange to Market Makers taking into consideration: (1) the

¹⁹⁸ See Topaz Exchange Rule 800(a).

¹⁹⁹ See Topaz Exchange Rule 300. See also Exhibit E to Topaz Exchange Form 1 Application, Section A (“Introduction”).

²⁰⁰ See Topaz Exchange Rule 302(a).

²⁰¹ See *id.* See also Exhibit F to Topaz Exchange Form 1 Application.

²⁰² See Topaz Exchange Rule 802(a).

²⁰³ See Topaz Exchange Rule 302(b).

²⁰⁴ See Exhibit E to Topaz Exchange Form 1 Application, Section A (“Introduction”).

²⁰⁵ See Topaz Exchange Rule 802(a). Topaz Exchange Rule 1700 Series provides the process for hearings, review, and arbitration of claims by persons economically aggrieved

financial resources available to the Market Maker; (2) the Market Maker's experience and expertise in market making or options trading; and (3) the maintenance and enhancement of competition among Market Makers in each option class to which they are appointed.²⁰⁶ No appointment of a Market Maker will be without the Market Maker's consent to such appointment, provided that refusal to accept an appointment may be deemed sufficient cause for termination or suspension of a market maker's registration.²⁰⁷ Topaz Exchange will appoint a PMM to each options class traded on Topaz Exchange.²⁰⁸ Once appointed, Topaz Exchange will surveil a Market Maker's activity for continued compliance with all applicable rules and requirements, which are discussed in more detail below.²⁰⁹

The Commission finds that Topaz Exchange's proposed rules for the registration and appointment of Market Makers are consistent with the Act. In particular, Topaz Exchange's rules provide an objective process by which a member could become a Market Maker on Topaz Exchange and provide for oversight by Topaz Exchange to monitor for continued compliance by Market Makers with the terms of their application for such status. The Commission notes that Topaz Exchange's proposed Market Maker registration and appointment requirements are similar to those of other options exchanges.²¹⁰

b. Market Maker Obligations

Pursuant to Topaz Exchange rules, Market Makers will be subject to a number of general

by Topaz Exchange action, which would include denial of registration as a Market Maker.

²⁰⁶ See id.

²⁰⁷ See id.

²⁰⁸ See Topaz Exchange Rule 802(b).

²⁰⁹ See Topaz Exchange Rule 802(e).

²¹⁰ See, e.g., ISE Rules 800 and 801 and MIAX Rule 600 (registration); ISE Rule 802 and MIAX Rule 602 (appointment).

obligations. In particular, the transactions of a Market Maker should constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market and a Market Maker should not make bids or offers or enter into transactions that are inconsistent with such a course of dealings.²¹¹ A Market Maker has a continuous obligation to engage, to a reasonable degree under the existing circumstances, in dealings for his own account when there exists, or it is reasonably anticipated that there will exist, a lack of price continuity, a temporary disparity between the supply of and demand for a particular options contract, or a temporary distortion of the price relationships between options contracts of the same class.²¹² For all series of option classes which the Market Maker is appointed, the Market Maker is expected to: (1) compete with other Market Makers to improve the market; (2) make markets that, absent changed market conditions, will be honored for the number of contracts entered into the Topaz Exchange's system; (3) update market quotations in response to changed market conditions; (4) price options contracts fairly by, among other things, bidding and offering so as to create the prescribed bid/ask differentials.²¹³ These provisions are similar to arrangements in place at other options exchanges.²¹⁴

²¹¹ See Topaz Exchange Rule 803(a).

²¹² See Topaz Exchange Rule 803(b).

²¹³ See Topaz Exchange Rule 803(b)(1)-(4). Specifically under Topaz Exchange Rule 803(b)(4), following the opening rotation, Market Makers must create differences of no more than \$5 between the bid and offer. Prior to the opening rotation, spread differentials shall be no more than \$.25 between the bid and offer for each options contract for which the bid is less than \$2, no more than \$.40 where the bid is at least \$2 but does not exceed \$5, no more than \$.50 where the bid is more than \$5 but does not exceed \$10, no more than \$.80 where the bid is more than \$10 but does not exceed \$20, and no more than \$1 where the bid is \$20 or greater, provided that the Topaz Exchange may establish differences other than the above for one or more options series.

²¹⁴ See, e.g., ISE Rules 802 and 803 (containing similar rights and obligations for market makers on ISE). However, some of Topaz Exchange's access rules differ in some respect from the rules of ISE. See also supra note 182.

Further, Market Makers must maintain minimum net capital in accordance with Topaz Exchange rules, including the minimum financial requirement of Topaz Exchange Rule 809, in addition to the Act and rules and regulations thereunder.²¹⁵ Market Makers also must maintain information barriers between their market making activity and Other Business Activities²¹⁶ that are reasonably designed to prevent the misuse of material, non-public corporate or market information in the possession of persons on one side of the barrier from influencing the conduct of persons on the other side of the barrier.²¹⁷

Topaz Exchange's rules governing Market Maker quoting obligations are tailored to the specific class of Market Maker (that is, PMM or CMM).²¹⁸ Specifically, a PMM will be subject to the highest standard applicable on Topaz Exchange, as a PMM must enter continuous two-sided quotations and enter into any resulting transactions in all of the series listed on the Topaz Exchange of the options classes to which it is appointed on a daily basis.²¹⁹ PMMs are also required to participate in the opening rotation.²²⁰ Although a CMM is not required to enter quotations in the options classes to which it is appointed, whenever a CMM does enter a quote in

²¹⁵ See Topaz Exchange Rule 1300 Series, which incorporates by reference ISE Rule 1300 Series; see also Topaz Exchange Rule 809.

²¹⁶ "Other Business Activities" means: (1) conducting an investment or banking or public securities business; (2) making markets in the stocks underlying the options in which it makes markets; or (3) handling listed options orders as agent on behalf of Public Customers or broker-dealers; (4) conducting non-market making proprietary listed options trading activities. See Topaz Exchange Rule 810(a).

²¹⁷ See Topaz Exchange Rule 810.

²¹⁸ See Topaz Exchange Rule 804.

²¹⁹ See Topaz Exchange Rule 804(e)(1); see also Topaz Exchange Rule 804(c). A PMM shall be deemed to have provided continuous quotes pursuant to paragraph (e)(1) of Rule 804 if it provides two-sided quotes for 90% of the time that an options class is open for trading on the Topaz Exchange. See Topaz Exchange Rule 804, Supplementary Material .01; see also Amendment No. 3.

²²⁰ See Topaz Exchange Rule 701(b)(1). See also Amendment No. 3.

an options class to which it is appointed, the CMM must then provide continuous quotations in that class for 60% of the time the options class is open for trading on the Topaz Exchange.²²¹ Further, CMMs may be called upon by a Topaz Exchange official to submit a single quote or maintain continuous quotes in one or more series of options class to which the CMM is appointed whenever, in the judgment of such official, it is necessary to do so in the interest of fair and orderly markets.²²² For purposes of meeting the continuous quoting obligations discussed herein, a Market Maker's quote must meet the bid/ask differential requirements of Topaz Exchange Rule 803(b)(4).²²³

In options classes other than to which it is appointed, a Market Maker should not engage in transactions in an account in which it has an interest that are disproportionate in relation to, or in derogation of, the performance of its market making obligations as specified in the Topaz Exchange rules.²²⁴ Further, the total number of contracts executed during a quarter by a CMM in options classes to which it is not appointed may not exceed 25% of the total number of contracts traded by such CMMs in classes to which it is appointed and with respect to which it was quoting pursuant to Topaz Exchange Rule 804(e)(2).²²⁵ Similarly, the total number of contracts executed during a quarter by a PMM in options classes to which it is not appointed may not

²²¹ See Topaz Exchange Rule 804(e)(2). A CMM must maintain continuous quotations for at least 90% of the time the options class for which it receives Preferred Orders is open for trading on the Topaz Exchange. See Topaz Exchange Rule 804(e)(2)(iii); see also Topaz Exchange Rule 713, Supplementary Material .03 regarding Preferred Orders.

²²² See Topaz Exchange Rule 804(e)(2)(iv).

²²³ See Topaz Exchange Rule 804(e)(1)-(2). See also supra note 213.

²²⁴ See Topaz Exchange Rule 803(d). Among other things, a Market Maker should not effect purchases or sales on the Topaz Exchange except in a reasonable and orderly manner. See id.

²²⁵ See Topaz Exchange Rule 805(b)(2).

exceed 10% of the total number of contracts traded per each PMM membership.²²⁶

If Topaz Exchange finds any failure by a Market Maker to properly perform as a market maker, such Market Maker may be subject to suspension or termination.²²⁷ Topaz Exchange may suspend or terminate any appointment of a Market Maker under Topaz Exchange Rule 802 and may make additional appointments whenever, in Topaz Exchange’s judgment, the interests of a fair and orderly market are best served by such action.²²⁸

Market Makers receive certain benefits for carrying out their responsibilities.²²⁹ For example, a broker-dealer or other lender may extend “good faith” credit to a member of a national securities exchange or registered broker-dealer to finance its activities as a market maker or specialist.²³⁰ PMMs are also entitled to certain participation entitlements.²³¹ In addition, market makers are excepted from the prohibition in Section 11(a) of the Act.²³²

The Commission believes that a market maker must be subject to sufficient and commensurate affirmative obligations, including the obligation to hold itself out as willing to buy and sell options for its own account on a regular or continuous basis, to justify favorable treatment.²³³ The Commission further believes that the rules of all U.S. options markets need not

²²⁶ See Topaz Exchange Rule 805(b)(3).

²²⁷ See Topaz Exchange Rule 800.

²²⁸ See Topaz Exchange Rule 802(d).

²²⁹ See, e.g., MIAX Order, *supra* note 30 (discussing the benefits and obligations of market makers).

²³⁰ See 12 CFR 221.5 and 12 CFR 220.7; see also 17 CFR 240.15c3-1(a)(6) (capital requirements for market makers).

²³¹ See Topaz Exchange Rule 713, Supplementary Material .01(b)-(c). See also *infra* notes 261-268 and accompanying text (describing the PMM participation entitlements).

²³² 15 U.S.C. 78k(a).

²³³ See MIAX Order, *supra* note 30, at 77 FR 73076; and BOX Order *supra* note 39; see also, e.g., C2 Order, *supra* note 169.

provide the same standards for market maker participation, so long as they impose affirmative obligations that are consistent with the Act.²³⁴

The Commission believes that Topaz Exchange's Market Maker participation requirements impose appropriate affirmative obligations on Topaz Exchange's Market Makers that are commensurate with the benefits afforded to such participants, as discussed above, and, accordingly, are consistent with the Act. The Commission believes that the specific levels of benefits conferred on the different classes of Market Makers (PMMs and CMMs) are appropriately balanced by the obligations imposed by Topaz Exchange's rules. The Commission further believes that Topaz Exchange's market maker requirements,²³⁵ which are identical to ISE's rules²³⁶ and similar to other options exchanges' rules,²³⁷ impose sufficient appropriate obligations that are consistent with the Act.

Finally, the Commission believes that the Act does not mandate a particular market model for exchanges, and while Market Makers may become an important source of liquidity on Topaz Exchange, they will likely not be the only source as Topaz Exchange is designed to match buying and selling interest of all Topaz Exchange participants.

4. Order Display, Execution, and Priority

Topaz Exchange proposes to operate a fully automated electronic options trading platform to buy or sell securities with a continuous, automated matching function.²³⁸ Liquidity will be derived from Topaz Exchange members acting as principal or as agent electronically

²³⁴ See id.

²³⁵ See Topaz Exchange Rule 803.

²³⁶ See, e.g., ISE Rule 800 Series.

²³⁷ See, e.g., MIAX Order, supra note 30, and BOX Order, supra note 39.

²³⁸ See Exhibit E to Topaz Exchange Form 1 Application.

submitting quotes as well as market and various types of limit orders to buy or to sell.²³⁹ Non-members also may access Topaz Exchange pursuant to Topaz Exchange rules governing “sponsored access.”²⁴⁰ All of these electronic submissions to Topaz Exchange will be from remote locations, as there will be no trading floor.²⁴¹ Topaz Exchange’s Optimise system generally will automatically execute incoming orders.²⁴² Non-opening trades will occur when a buy order/quote and a sell order/quote match on the Topaz Exchange’s order book.²⁴³ All options will be traded in decimals on Topaz Exchange and will be consistent with the Penny Pilot.²⁴⁴

²³⁹ See id.

²⁴⁰ See id.

²⁴¹ See id.

²⁴² See Topaz Exchange Rule 714.

²⁴³ See Exhibit E to Topaz Exchange Form 1 Application.

²⁴⁴ See Topaz Exchange Rule 710 and Supplementary Material .01. The Commission has approved exchange rules on a pilot basis that permit an exchange to quote series with premiums under \$3 in pennies and series with premiums of \$3 and over in nickels in approximately 360 options classes (“Penny Pilot”). In addition, these rules allow all series in QQQQs, IWM, and SPY to be quoted in pennies. See, e.g., Securities Exchange Act Release Nos. 60711 (September 23, 2009), 74 FR 49419 (September 28, 2009); 61061 (November 24, 2009), 74 FR 62857 (December 1, 2009) (File No. SR-NYSEArca-2009-44) (approving Penny Pilot program expansions for NYSE Arca). Proposed Supplementary Material .01 to Rule 710 would permit Topaz Exchange to operate a pilot to permit certain options classes to be quoted and traded in increments as low as \$0.01, consistent with these previously approved rules. Specifically, this pilot is consistent with the penny pilot on ISE, which was last extended on June 21, 2013 and is scheduled to expire on December 31, 2013. See Securities Exchange Act Release No. 69828 (June 21, 2013), 78 FR 38745 (June 27, 2013) (File No. SR-ISE-2013-40). Similar to ISE, Topaz Exchange has further agreed to submit to the Commission such reports regarding the Penny Pilot as the Commission may request. See Exhibit B to Topaz Exchange Form 1 Application.

All orders submitted to Topaz Exchange's trading platform must have a designated price and size (limit orders)²⁴⁵ or must be orders to buy or sell a stated amount of a security at the national best bid or offer when the order reaches Topaz Exchange (market orders).²⁴⁶ Members may submit the following orders to Topaz Exchange: Market Orders; Limit Orders (including Marketable Limit, Fill-or-Kill, Immediate or Cancel, Non-Displayed Penny Order, Intermarket Sweep, and Stopped Orders);²⁴⁷ or Contingency Orders (including All-Or-None, Stop, Stop Limit, Customer Participation, Reserve, Attributable, Customer Cross, Qualified Contingent Cross, Minimum Quantity,²⁴⁸ Do-Not-Route, Add Liquidity, Opening Only, and Good-Till-Date

²⁴⁵ A limit order is an order to buy or sell a stated number of options contracts at a specified price or better. Topaz Exchange Rule 715(b).

²⁴⁶ A market order is an order to buy or sell a stated number of options contracts that is to be executed at the best price obtainable when the order reaches Topaz Exchange. Topaz Exchange Rule 715(a).

²⁴⁷ See Topaz Exchange Rule 715. A Marketable Limit Order is a limit order to buy (sell) at or above (below) the best offer (bid) on the Topaz Exchange. A Fill-or-Kill Order is a limit order that is to be executed in its entirety as soon as it is received and, if not so executed, treated as cancelled. An Immediate-or-Cancel Order is a limit order that is to be executed in whole or in part upon receipt and any portion not so executed is to be treated as cancelled. A Non-Displayed Penny Order is a limit order that specifies a one-cent price increment in a security that has a minimum trading increment pursuant to Topaz Exchange Rule 710 that is larger than one-cent. An Intermarket Sweep Order is a limit order that meets the requirements of Topaz Exchange Rule 1900(h), which incorporates by reference ISE Rule 1900(h). A Stopped Order is a limit order that meets the requirements of Topaz Exchange Rule 1901(b)(8), which incorporates by reference ISE Rule 1901(b)(8). To execute Stopped Orders, members must enter them into the Facilitation Mechanism or Solicited Order Mechanism pursuant to Topaz Exchange Rule 716.

²⁴⁸ The NASDAQ Letter noted that both Topaz Exchange Rules 715(l) and 715(q) appear to describe Minimum Quantity Orders and urged that Topaz Exchange clarify the difference between these two types of Minimum Quantity Orders. See NASDAQ Letter, supra note 6. Topaz Exchange stated that it will correct the duplicative definition. See Topaz Exchange Response Letter, supra note 7, and Amendment No. 3. The Commission believes that Topaz Exchange's revision to Topaz Exchange Rule 715(l) appropriately addresses the commenter's concern.

Orders).²⁴⁹ Like ISE, Topaz Exchange also will permit flash mechanisms, which thereby permit certain orders to first be exposed at the NBBO to all Topaz Exchange members for execution at the National Best Bid or Offer (“NBBO”) before an unaffiliated broker will, under contract with Topaz Exchange, route the order to another market for execution.²⁵⁰

²⁴⁹ See Topaz Exchange Rule 715. An All-or-None Order is a limit or market order that is to be executed in its entirety or not at all. A Stop Order is an order that becomes a market order when the stop price is elected. A Stop Limit Order is an order that becomes a limit order when the stop price is elected. A Customer Participation Order is a limit order on behalf of a Public Customer (as defined in Topaz Exchange Rule 100(a)(38)) that, in addition to the limit order price in standard increments according to Topaz Exchange Rule 710, includes a price stated in one-cent increments at which the Public Customer wishes to participate in trades executed in the same options series in penny increments through the Price Improvement Mechanism pursuant to Topaz Exchange Rule 723. A Reserve Order is a limit order that contains both a displayed portion and a non-displayed portion. An Attributable Order is a market or limit order which displays the user firm ID for purposes of electronic trading on Topaz Exchange. A Customer Cross Order is comprised of a Priority Customer Order (as defined in Topaz Exchange Rule 100(a)(37B) to buy and a Priority Customer Order to sell at the same price and for the same quantity. A Qualified Contingent Cross order is comprised of an order to buy or sell at least 1000 contracts that is identified as being part of a qualified contingent trade (as defined in Topaz Exchange Rule 715, Supplementary Material .02) coupled with a contra-side order to buy or sell an equal number of contracts. A Minimum Quantity Order is an order that is initially available for partial execution only for a specified number of contracts or greater. A Do-Not-Route Order is a market or limit order that is to be executed in whole or in part on Topaz Exchange only. An Add Liquidity Order is a limit order that is to be executed in whole or in part on Topaz Exchange (i) only after being displayed on Topaz Exchange’s limit order book; and (ii) without routing any portion of the order to another market center. An Opening Only Order is a limit order that can be entered for the opening rotation only. A Good-Till-Date Order is a limit order to buy or sell which, if not executed, will be cancelled at the sooner of the end of the expiration date assigned to the order, or the expiration of the series. These order types are the same order types that are available on ISE, except that ISE also includes several complex order types that are not proposed for Topaz Exchange. See Topaz Exchange Rule 715; ISE Rules 715 and 722; see also Exhibit B to Topaz Exchange Form 1 Application.

²⁵⁰ See Topaz Exchange Rule 1901, Supplementary Material .02 (which incorporates by reference ISE Rule 1901, Supplementary Material .02). See also Amendment No. 3 (removing exposure and routing obligation from PMMs under Topaz Exchange Rule 800 Series).

Quotes entered by PMMs and CMMs must, like Limit Orders, be priced and have a designated size.²⁵¹ Orders will be accepted for any security traded on Topaz Exchange, whether submitted by a member on a proprietary or agency basis in any size,²⁵² whereas quotes for any security traded on Topaz Exchange may only be submitted by PMMs and CMMs and only in the options classes to which the market makers are appointed.²⁵³ Topaz Exchange will be required to maintain a full audit trail of every incoming and outgoing message (including all orders and quotes) submitted to the Topaz Exchange's system.²⁵⁴ Members may receive status reports regarding orders submitted to Topaz Exchange or change or cancel an order at any time before that order is executed on Topaz Exchange, except as otherwise specified in Topaz Exchange Rule 723 (Price Improvement Mechanism for Crossing Transactions).²⁵⁵

All orders and quotes submitted to Topaz Exchange will be displayed unless designated otherwise by the member submitting the order.²⁵⁶ Displayed orders and quotes will be displayed on an anonymous basis (except for Attributable Orders,²⁵⁷ which will allow voluntary disclosure

²⁵¹ See Topaz Exchange Rule 804(b). The NASDAQ Letter noted that proposed Topaz Exchange Rule 804(g) and Supplementary Material .01 appear to be identical and urged that Topaz Exchange clarify this provision. See NASDAQ Letter, *supra* note 6. Topaz Exchange stated that it will correct the duplicative provision. See Topaz Exchange Response Letter, *supra* note 7, and Amendment No. 3. The Commission believes that Topaz Exchange's revision to Topaz Exchange Rule 804, Supplementary Material .01 appropriately addresses the commenter's concern.

²⁵² See Topaz Exchange Rule 713(a).

²⁵³ See Topaz Exchange Rule 804(a).

²⁵⁴ See 17 CFR 240.17a-5. See also Exhibit E to Topaz Exchange Form 1 Application, Section C.

²⁵⁵ See Exhibit E to Topaz Exchange Form 1 Application, Section C.

²⁵⁶ See Topaz Exchange Rule 704.

²⁵⁷ An Attributable Order is a market or limit order which displays the user firm's ID for purposes of trading on the Topaz Exchange. Use of Attributable Orders would be voluntary. This order type is consistent with similar order types on other exchanges. See, e.g., CBOE Rule 6.53(o) (attributable order type).

of firm identification information) at a member's specified price. Non-Displayed Orders (the non-displayed portion of a Reserve Order or a Non-Displayed Penny Order) will not be displayed to anyone and will not have time priority over displayed orders at the same price.²⁵⁸

Topaz Exchange will utilize a pro-rata priority scheme with a Priority Customer preference.²⁵⁹ This scheme is the same as what the Commission has approved for ISE.²⁶⁰

In addition, under Topaz Exchange rules, PMMs are granted certain participation entitlements. For example, PMMs will be entitled to a participation entitlement with respect to each incoming order if they have a quote at the NBBO.²⁶¹ The PMM participation entitlement will apply only to any remaining balance after any Priority Customer²⁶² orders have first been

²⁵⁸ See Topaz Exchange Rules 715(b)(4) and 715(g).

²⁵⁹ See Topaz Exchange Rule 713, Supplementary Material 01. Under this priority methodology, the highest bid and lowest offer will have priority except that Priority Customer Orders will have priority over professional interest and all market maker interest at the same price. Subject to certain limits, Professional Orders and market maker quotes at the best price receive allocations based upon the percentage of the total number of contracts available at the best price that is represented by the size of the Professional Order or quote. If there were two or more Priority Customer Orders for the same options series at the same price, priority will be afforded based on the sequence in which such orders were received. Topaz Exchange rules will define "Priority Customer" as a person or entity that is not a broker or dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial accounts. "Professional Orders," *i.e.*, orders for the account of a person or entity that is not a Priority Customer, will be subordinate to Priority Customer Orders for priority and fee purposes. Professional Orders will include orders of broker-dealers and orders of those Public Customers that are not Priority Customers. See Topaz Exchange Rules 100(a)(37A)-(37C) for definitions of Priority Customer, Priority Customer Order and Professional Order, respectively.

²⁶⁰ See, e.g., ISE Rule 713, Priority of Quotes and Orders.

²⁶¹ See Topaz Exchange Rule 713, Supplementary Material .01. Specifically, the PMM's participation entitlement will be equal to the greater of: (i) the proportion of the total size at the best price represented by the size of its quote, or (ii) 60% of the contracts to be allocated if there is only one other Market Maker quotation at the NBBO or 40% if there are two or more other Market Maker quotes at the NBBO. See Topaz Exchange Rule 713, Supplementary Material .01(b).

²⁶² See supra note 259 for the definition of Priority Customer.

satisfied.²⁶³ The PMM will not be allocated a total quantity greater than the quantity it is quoting at the execution price, and it will not receive any further allocation of an order if it receives a participation entitlement.²⁶⁴ Another such entitlement provides that small size orders (i.e., five or fewer contracts) will be allocated in full to the PMM if it has a quote at the NBBO.²⁶⁵

These participation entitlements for PMMs are consistent with provisions that the Commission has approved for other exchanges.²⁶⁶ The Commission believes that these entitlements are appropriately balanced by the obligations imposed on these classes of market makers, as discussed in detail above.²⁶⁷ In particular, PMMs are subject to higher quoting obligations than other Market Makers who are not eligible to receive the aforementioned participation entitlements.²⁶⁸ Therefore, the Commission believes that the proposed rules regarding participation entitlements are consistent with the Act.

Topaz Exchange proposes to make available certain additional order processing and matching features, largely based on features available on ISE.²⁶⁹ Mechanisms that will be utilized by Topaz Exchange include: a Price Improvement Mechanism (which affords the

²⁶³ See Topaz Exchange Rule 713, Supplementary Material .01.

²⁶⁴ See id.

²⁶⁵ See Topaz Exchange Rule 713, Supplementary Material .01(c). The rule provides that Topaz Exchange will review the functioning of this provision quarterly to make sure that small size orders do not account for more than 40% of the volume executed on Topaz Exchange. Id.

²⁶⁶ See, e.g., ISE Rule 713, Supplementary Materials .01 and .03; see also MIAX Order, supra note 30.

²⁶⁷ See supra Section II.D.3.b (discussing market maker obligations).

²⁶⁸ For example, as discussed above, supra Section II.D.3.b., PMMs must provide continuous two-sided quotes in each appointed option class.

²⁶⁹ The primary difference between Topaz Exchange's order processing and matching features and those of ISE previously approved by the Commission will be that Topaz Exchange will not accept complex orders.

opportunity for price improvement after an auction for eligible orders above the NBBO);²⁷⁰ a Facilitation Mechanism (which affords members an opportunity to cross orders after an auction and provides the facilitating member the opportunity to receive 40% of the agency order);²⁷¹ and a Solicited Order Mechanism (which allows members representing agency orders the opportunity to cross large size solicited orders after an auction).²⁷² These mechanisms are consistent with

²⁷⁰ See Topaz Exchange Rule 723. Topaz Exchange will operate a pilot program whereby there will be no minimum size requirements for orders to be eligible for the PIM. See Exhibit B to Topaz Exchange Form 1 Application; see also Topaz Exchange Rule 723, Supplementary Material .03.

²⁷¹ See Topaz Exchange Rule 716(d). The NASDAQ Letter stated that it appears that the rule concerning the Facilitation Mechanism was internally inconsistent in part. Specifically, the NASDAQ Letter noted that proposed Topaz Exchange Rule 716(d)(3)(i) stated that Priority Customer bids (offers) that are priced higher (lower) than the facilitation price will be executed at the facilitation price, and further noted that the same section of the rule also stated that a facilitation order would be cancelled at the end of the exposure period if an execution would take place a price that is inferior to the best bid (offer) on Topaz. See NASDAQ Letter, *supra* note 6. The NASDAQ Letter suggested that this means that a Priority Customer bidding higher than the facilitation price would cause the facilitation order to be cancelled. See *id.* Topaz Exchange clarified this point by explaining that, because Topaz Exchange is a price priority exchange, Topaz Exchange will not execute a facilitation order at a price that is inferior to the Topaz Exchange best bid or offer (“Topaz BBO”) at the time of execution. Topaz Exchange noted that, since interest on the opposite side of a facilitation order participates in the execution of the facilitation order, the only instance where a better priced Priority Customer Order might be outside of the Topaz BBO is when the order is on the same side of the market as the facilitation order. In other words, the text of Rule 716(d) means that better-priced Priority Customer Orders on the opposite side of the market from the order being facilitated will be given the benefit of executing at the facilitation price, whereas better-priced Priority Customer Orders on the same side of the market as the order being facilitated will cause the facilitation order to be cancelled. See Topaz Exchange Response Letter, *supra* note 7.

²⁷² See Topaz Exchange Rule 716(e). With respect to the Block Order, Facilitation and Solicited Order Mechanisms described in Topaz Exchange Rule 716(b), (d) and (e), the NYSE Euronext Letter II recommended clarifying language to describe what terms, if any, should be contained within a “broadcast message.” See NYSE Euronext Letter II, *supra* note 6. Topaz Exchange stated that it would amend the various sections of the rule to clarify the terms of the broadcast message. See Topaz Exchange Response Letter, *supra* note 7, and Amendment No. 3. The Commission believes that Topaz Exchange’s revisions to Topaz Exchange Rule 716(b), (d), and (e) appropriately address the commenter’s concerns.

substantially similar mechanisms currently existing on other options exchanges, including identical mechanisms on ISE with respect to non-complex orders.²⁷³

Members will be able to access Topaz Exchange through a variety of electronic systems, and non-members will be able to access Topaz Exchange pursuant to sponsored access arrangements with Topaz Exchange members, pursuant to Topaz Exchange rules.²⁷⁴ As noted above, Topaz Exchange also intends to become a participant in the Linkage Plan.²⁷⁵ The manner in which Topaz Exchange proposes to comply with the Linkage Plan is identical to the manner in which ISE complies with the Linkage Plan.²⁷⁶ To comply with the Linkage Plan, Topaz Exchange, among other things, will prohibit its members from effecting a transaction at a price that is inferior to the NBBO, unless an exception applies.²⁷⁷ Topaz Exchange will provide a centralized process for sending intermarket sweep orders to other exchanges on behalf of Public Customer Orders.²⁷⁸ Topaz Exchange will contract with one or more unaffiliated brokers to route orders to other exchanges when necessary to comply with the Linkage Plan. In circumstances where marketable Public Customer Orders are received when Topaz Exchange is

²⁷³ See ISE Rules 716 and 723.

²⁷⁴ See, e.g., Topaz Exchange Rule 706, Supplementary Material .01.

²⁷⁵ See Topaz Exchange Rule 1900 Series, which incorporates by reference ISE Rule 1900 Series.

²⁷⁶ The Commission recently approved a change in the way in which ISE complies with the Linkage Plan by now contracting with one or more unaffiliated brokers to route intermarket sweep orders of Public Customers to other exchanges when necessary. See Securities Exchange Act Release No. 69396 (April 18, 2013), 78 FR 24273 (April 24, 2013) (File No. SR-ISE-2013-18). PMMs no longer have the responsibility of either executing the Public Customer Order at a price that at least matches the NBBO or obtaining better prices from the away market(s) by sending one or more intermarket sweep orders on the Public Customer's behalf. See also Amendment No. 3 (removing exposure and routing obligation from PMMs under Topaz Exchange's Rule 800 Series).

²⁷⁷ See Topaz Exchange Rule 714; see also ISE Rule 714.

²⁷⁸ See Topaz Exchange Rule 1901, which incorporates by reference ISE Rule 1901.

not at the NBBO or orders are received that would lock or cross another market, they will be exposed to Topaz Exchange members for up to one second.²⁷⁹ If, after a Public Customer Order is exposed, such order cannot be executed in full on Topaz Exchange at the then-current NBBO or better and is marketable, the lesser of the full displayed size of the protected bid(s) or protected offer(s) that are priced better than the Topaz Exchange's quote or the balance of the order will be sent to a contracted unaffiliated broker, and any additional balance of the order that is not marketable against the then-current NBBO will be placed on the Topaz Exchange book.²⁸⁰

The Commission believes that Topaz Exchange's proposed display, execution, and priority rules are consistent with the Act. In particular, the Commission finds that the proposed rules are consistent with Section 6(b)(5) of the Act,²⁸¹ which, among other things, requires that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating 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, and to not permit unfair discrimination between customers, issuers, or dealers. The Commission also finds that the proposed rules are consistent with Section 6(b)(8) of the Act,²⁸² which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The trading rules of Topaz Exchange are substantially similar to the current ISE trading rules, which were approved at the time ISE's registration as a

²⁷⁹ See Topaz Exchange Rule 1901, Supplementary Material .02, which incorporates by reference ISE Rule 1901, Supplementary Material .02.

²⁸⁰ See *id.* Any additional balance of the order will be executed on Topaz Exchange if it is marketable.

²⁸¹ 15 U.S.C. 78f(b)(5).

²⁸² 15 U.S.C. 78f(b)(8).

national securities exchange was granted²⁸³ or filed with and approved by the Commission (or otherwise became effective) pursuant to Section 19(b) of the Act.²⁸⁴ The Commission believes that Topaz Exchange’s trading rules, in general, do not raise any novel or controversial issues.²⁸⁵

5. Section 11(a) of the Act

Section 11(a)(1) of the Act²⁸⁶ prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion (collectively, “covered accounts”), unless an exception applies. The Exchange has represented that it has analyzed its rules proposed hereunder, and believes that they are consistent with Section 11(a) of the Act and rules thereunder. For the reasons set forth below, based on Topaz Exchange’s representations,

²⁸³ See ISE Order, supra note 167.

²⁸⁴ The Commission notes, however, that some of Topaz Exchange’s rules differ in some respects from the rules of ISE. For example, Topaz Exchange is not proposing to incorporate ISE’s rules relating to the trading of equity securities or to incorporate any rules concerning the trading of complex or multi-legged orders at this time.

²⁸⁵ With respect to clearing rules, the three commenters recommended clarifying language with respect to Topaz Exchange Rule 712(b), specifically “. . . or other guarantee given by such Clearing Member to such Member” The commenters noted that this language lacks clarity whether Topaz Exchange Rule 712(b) requires some form of written authorization between a clearing member and a member in order for the member to give up the name of a particular clearing member. See CBOE Letter, NASDAQ Letter and NYSE Euronext Letter I, supra note 6. The NASDAQ Letter noted that a written, transparent and auditable authorization is needed to provide proper safeguards and protections for clearing members and to ensure clearing members are in compliance with aspects of the Commission Rule 15c3-3 in general. See NASDAQ Letter, supra note 6. The NYSE Euronext Letter I noted that the requirements for a letter of authorization were also not clearly defined and that Topaz Exchange should have rule text that governs the terms and revocation of letters of authorization. Topaz Exchange clarified this point by noting that ISE has interpreted and applied its identical rule to require the submission of written authorization in order for an ISE member to give up a particular clearing member’s name. Topaz Exchange further noted that it would amend the rule to make clear that written authorization is required. See Topaz Exchange Response Letter, supra note 7, and Amendment No 3. The Commission believes that Topaz Exchange’s revision to Topaz Exchange Rule 712(b) appropriately addresses the commenters’ concerns.

²⁸⁶ 15 U.S.C. 78k(a)(1).

the Commission believes that Topaz Exchange’s order execution algorithm, including the Facilitation, Solicitation and Customer Cross processes (but excluding the Price Improvement Mechanism), will allow members to meet the requirements of Rule 11a2-2(T) for executions on Topaz Exchange. Additionally, the Commission believes that Topaz Exchange members’ executions that occur through the Price Improvement Mechanism will be consistent with the requirements in Section 11(a)(1)(G) of the Act and rule 11a1-1(T) thereunder.

a. Rule 11a2-2(T)

Rule 11a2-2(T) under the Act,²⁸⁷ known as the “effect versus execute” rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2-2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute the transactions on the exchange. To comply with Rule 11a2-2(T)’s conditions, a member: (i) may not be affiliated with the executing member; (ii) must transmit the order from off the exchange floor; (iii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;²⁸⁸ and (iv) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule.

In a letter to the Commission,²⁸⁹ Topaz Exchange requested that the Commission concur with its conclusion that Topaz Exchange members that enter orders through the Topaz Exchange

²⁸⁷ 17 CFR 240.11a2-2(T).

²⁸⁸ The member may, however, participate in clearing and settling the transaction. See Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978) (regarding the NYSE’s Designated Order Turnaround System) (“1978 Release”).

²⁸⁹ See Letter from Michael Simon, General Counsel, Secretary and Chief Regulatory Officer, Topaz Exchange, to Elizabeth Murphy, Secretary, Commission, dated December 14, 2012 (“Exchange 11(a) Request Letter”).

system, including the Facilitation, Solicitation and Customer Cross processes, (but excluding those transactions effected through the PIM process), satisfy the requirements of Rule 11a2-2(T). For the reasons set forth below, the Commission believes that Topaz Exchange members that enter orders through the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes, but excluding those transactions effected through the PIM process, will satisfy the conditions of Rule 11a2-2(T).

Rule 11a2-2(T)'s first condition is that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that the requirement is satisfied when automated exchange facilities, such as the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages over non-members in handling their orders after transmitting them to the Exchange.²⁹⁰ Topaz Exchange has represented that the design of the trading platform ensures that no member has any special or unique trading advantage in the handling of its orders after transmitting its orders to Topaz Exchange.²⁹¹ Based on the Exchange's representation, the Commission believes that the Topaz Exchange trading system, including the Facilitation,

²⁹⁰ In considering the operation of automated execution systems operated by an exchange, the Commission noted that while there is no independent executing exchange member, the execution of an order is automatic once it has been transmitted into each system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2-2(T). *See* Securities Exchange Act Release No. 15533 (January 29, 1979), 44 FR 6084, 6086 n.25 (January 31, 1979) (File No. S7-613) (regarding the American Stock Exchange (“Amex”) Post Execution Reporting System, the Amex Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX Communications and Execution System, and the Philadelphia Stock Exchange Automated Communications and Execution System (“1979 Release”).

²⁹¹ *See* Exchange 11(a) Request Letter, *supra* note 289.

Solicitation and Customer Cross processes, will satisfy this requirement.

Second, Rule 11a2-2(T) requires orders for covered accounts to be transmitted from off the exchange floor. Topaz Exchange will not have a physical trading floor, and like other automated systems, will receive orders electronically through remote terminals or computer-to-computer interfaces. In the context of other automated trading systems, the Commission has found that the off-floor transmission requirement is met if a covered account order is transmitted from a remote location directly to an exchange's floor by electronic means.²⁹² Orders sent to Topaz Exchange, regardless of where it executes within the Topaz Exchange system, including as a Facilitation, a Solicitation or a Customer Cross process, will be transmitted from remote terminals directly to Topaz Exchange by electronic means. Since the Topaz Exchange trading system receives all orders electronically through remote terminals or computer-to-computer interfaces, the Commission believes that the trading system, including the Facilitation, Solicitation and Customer Cross processes, will satisfy the off-floor transmission requirement.

Third, Rule 11a2-2(T) requires that the member not participate in the execution of its order once it has been transmitted to the member performing the execution.²⁹³ Topaz Exchange

²⁹² See, e.g., Securities Exchange Act Release Nos. 59154 (December 23, 2008) 73 FR 80468 (December 31, 2008) (SR-BSE-2008-48) (order approving proposed rules of BX); 49068, (January 13, 2004), 69 FR 2775 (January 20, 2004) (SR-BSE-2002-15) (establishing, among other things, BOX as an options trading facility of BSE); 44983, (October 25, 2001), 66 FR 55225 (November 1, 2001) (SR-PCX-00-25) (approving the PCX's use of the Archipelago Exchange as its equity trading facility); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (SR-NYSE-90-52 and SR-NYSE-90-53) (regarding NYSE's Off-Hours Trading Facility). See 1978 Release, supra note 288. See also 1979 Release, supra note 290.

²⁹³ The member may cancel or modify the order, or modify the instructions for executing the order, but only from off the Exchange floor. See 1978 Release, supra note 288, at 43 FR 11547. The Commission has stated that the non-participation requirement is satisfied under such circumstances so long as such modifications or cancellations are also transmitted from off the floor. See id. (stating that the "non-participation requirement does not prevent initiating members from canceling or modifying orders (or the

represented that at no time following the submission of an order is a member able to acquire control or influence over the result or timing of an order's execution. According to Topaz Exchange, orders submitted through the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes, also meet the non-participation requirement. The execution of a member's order depends not on the member entering the order, but rather on what orders, bids, or offers are present in the system at the time the member submits the order and on the priority of those orders, bids or offers.²⁹⁴ Topaz Exchange represents that orders sent to Topaz Exchange and through the Facilitation, Solicitation and Customer Cross processes will be centrally processed and executed automatically by Topaz Exchange.²⁹⁵ Topaz Exchange further represents that orders sent to Topaz Exchange will be transmitted from remote terminals directly to the system by electronic means.²⁹⁶ Once an order is submitted to Topaz Exchange, the order is executed against another order based on the established matching algorithms for the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes.²⁹⁷ Trades will execute when orders or quotations on Topaz Exchange match one another based on their priority.²⁹⁸ As Topaz Exchange stated in its Exchange 11(a) Request Letter, the execution does not depend on the participant but rather upon what other orders are entered into the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes, at or around the same time as the subject order; what orders are on Topaz Exchange; or submitted as

instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor”).

²⁹⁴ See Exchange 11(a) Request Letter, supra note 289.

²⁹⁵ See id.

²⁹⁶ See id.

²⁹⁷ See id.

²⁹⁸ See id.

Responses; and where the order is ranked based on the priority ranking algorithm.²⁹⁹ Therefore, at no time following the submission of an order to the Topaz Exchange system, including through the Facilitation, Solicitation or Customer Cross processes, is a participant able to acquire control or influence the result or timing of orders submitted to the Topaz Exchange system, including through the Facilitation, Solicitation or Customer Cross processes.³⁰⁰ Accordingly, the Commission believes that the non-participation requirement will be met when orders are executed automatically through use of the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2-2(T).³⁰¹ Topaz Exchange members trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's

²⁹⁹ See id.

³⁰⁰ See id.

³⁰¹ 17 CFR 240.11a2-2(T)(a)(2)(iv). In addition, Rule 11a2-2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated person thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member in connection with effecting transactions for the account during the period covered by the statement. See 17 CFR 240.11a2-2(T)(d). See also 1978 Release, supra note 288, at 43 FR 11548 (stating “[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests”).

exemption.³⁰²

b. Section 11(a)(1)(G) and Rule 11a1-1(T)

Section 11(a)(1)(G) of the Act provides an additional exemption from the general prohibition set forth in Section 11(a)(1) for any transaction for a member's own account, provided that: (i) such member is primarily engaged in certain underwriting, distribution, and other activities generally associated with broker-dealers and whose gross income is derived principally from such business and related activities; and (ii) the transaction is effected in compliance with the rules of the Commission, which, as a minimum, assure that the transaction is not inconsistent with the maintenance of fair and orderly markets and yields priority, parity, and precedence in execution to orders for the account of persons who are not members or associated with members of the exchange.³⁰³ In addition, Rule 11a1-1(T) under the Act specifies that a transaction effected on a national securities exchange for the account of a member which meets the requirements of Section 11(a)(1)(G)(i) of the Act is deemed, in accordance with the requirements of Section 11(a)(1)(G)(ii), to be not inconsistent with the maintenance of fair and orderly markets and to yield priority, parity, and precedence in execution to orders for the account of non-members or persons associated with non-members of the exchange, if such transaction is effected in compliance with certain requirements.³⁰⁴

³⁰² See Exchange 11(a) Request Letter, supra note 289.

³⁰³ See 15 U.S.C. 78k(a)(1)(G).

³⁰⁴ Rule 11a1-1(T)(a)(1)-(3) provides that each of the following requirements must be met: (1) A member must disclose that a bid or offer for its account is for its account to any member with whom such bid or offer is placed or to whom it is communicated, and any member through whom that bid or offer is communicated must disclose to others participating in effecting the order that it is for the account of a member; (2) immediately before executing the order, a member (other than the specialist in such security) presenting any order for the account of a member on the exchange must clearly announce or otherwise indicate to the specialist and to other members then present for the trading in such security on the exchange that he is presenting an order for the account of a member;

Topaz Exchange represented that its Price Improvement Mechanism, or PIM, is a process set forth in Topaz Exchange Rule 723 whereby an EAM can provide price improvement opportunities for a transaction.³⁰⁵ As Topaz Exchange stated in its Exchange 11(a) Request Letter, Topaz Exchange’s proposed PIM rules will require that Priority Customer interest, at any given price, be executed in full before Professional Orders and market maker quotes.³⁰⁶ Additionally, Topaz Exchange’s proposed PIM rules will require non-member Professional Orders to be executed in full before any proprietary interest of members (i.e., proprietary interest from EAMs and market makers).³⁰⁷ Because Topaz Exchange Rule 723(d) will require Topaz Exchange members to yield priority to Priority Customers and non-member Professional Orders in the PIM process, the Commission believes that the proposal with respect to transactions effected through the PIM process will be consistent with Section 11(a)(1)(G) and Rule 11a1-1(T) thereunder.³⁰⁸ The Commission also reminds exchanges and their members, however, that, in

and (3) notwithstanding rules of priority, parity, and precedence otherwise applicable, any member presenting for execution a bid or offer for its own account or for the account of another member must grant priority to any bid or offer at the same price for the account of a person who is not, or is not associated with, a member, irrespective of the size of any such bid or offer or the time when entered. See 17 CFR 240.11a1-1(T)(a)(1)-(3).

³⁰⁵ The PIM is a process wherein an EAM may seek to facilitate an order it represents as agent, and/or a transaction wherein the EAM solicited interest to execute against an order it represents as agent (a “Crossing Transaction”). A Crossing Transaction is comprised of the order the EAM represents as agent (the “Agency Order”) and a counter-side order for the full size of the Agency Order (the “Counter-Side Order”). The Counter-Side Order may represent interest for the Member’s own account, or interest the Member has solicited from one or more other parties, or a combination of both. See Exchange 11(a) Request Letter, supra note 289. See also Topaz Exchange Rule 723.

³⁰⁶ See Exchange 11(a) Request Letter, supra note 289. See also Topaz Exchange Rule 723(d)(1).

³⁰⁷ See Exchange 11(a) Request Letter, supra note 289. See also Topaz Exchange Rule 723(d)(3).

³⁰⁸ See Securities Exchange Act Release No. 50819 (December 8, 2004), 69 FR 75093 (December 15, 2004) (File No. SR-ISE-2003-06).

addition to yielding priority to non-member orders at the same price, members must also meet the other requirements under Section 11(a)(1)(G) of the Act and Rule 11a1-1(T) thereunder (or satisfy the requirements of another exception) to effect transactions for their own accounts.

E. Discipline and Oversight of Members

As noted above, one prerequisite for the Commission's grant of an exchange's application for registration is that a proposed exchange must be so organized and have the capacity to be able to carry out the purposes of the Act.³⁰⁹ Specifically, an exchange must be able to enforce compliance by its members and persons associated with its members with the Act and the rules and regulations thereunder and the rules of the exchange.³¹⁰

Topaz Exchange rules codify Topaz Exchange's disciplinary jurisdiction over its members, thereby facilitating its ability to enforce its members' compliance with its rules and the federal securities laws.³¹¹ Topaz Exchange's rules permit it to sanction members for violations of the Act and the rules and regulation thereunder and Topaz Exchange's rules by, among other things, expelling or suspending members; limiting members' activities, functions, or operations; fining or censuring members; suspending or barring a person from being associated with a member; or any other fitting sanction in accordance with Topaz Exchange rules.³¹²

Topaz Exchange's disciplinary and oversight functions will be administered in accordance with Chapter 16 of the Topaz Exchange rules, which incorporates by reference Chapter 16 of ISE rules, governing disciplinary jurisdiction. Unless delegated to another SRO

³⁰⁹ See 15 U.S.C. 78f(b)(1).

³¹⁰ See id.

³¹¹ See Topaz Exchange Rule 1600(a) (which incorporates by reference ISE Rule 1600(a)).

³¹² See id. See also MIA X Rule 1000 and BOX Exchange Rule 12000 Series (containing identical provisions).

pursuant to the terms of an effective 17d-2 Plan,³¹³ Topaz Exchange regulatory staff (including regulatory staff of another SRO that may be acting on Topaz Exchange's behalf pursuant to a regulatory services agreement) will, among other things, investigate potential securities laws violations and initiate charges pursuant to Topaz Exchange rules.³¹⁴

Upon a finding of probable cause of a violation within the disciplinary jurisdiction of Topaz Exchange and where further proceedings are warranted,³¹⁵ Topaz Exchange will conduct a hearing on disciplinary matters before a professional hearing officer³¹⁶ and two members of the Business Conduct Committee³¹⁷ ("Panel").³¹⁸ The Topaz Exchange member (or its associated

³¹³ See supra notes 154-156 and accompanying text (concerning the multiparty 17d-2 Plans to which Topaz Exchange has committed to join).

³¹⁴ See Topaz Exchange Rule 1602 (which incorporates by reference ISE Rule 1602). As noted above, Topaz Exchange has entered into an RSA with FINRA and a FMA with ISE under which FINRA and ISE, respectively, will perform certain regulatory functions on behalf of Topaz Exchange. Topaz Exchange may perform some or all of the functions specified in Chapter 16 of the Topaz Exchange Rules. See Topaz Exchange Rule 1615 (which incorporates by reference ISE Rule 1615).

³¹⁵ See Topaz Exchange Rule 1604 (which incorporates by reference ISE Rule 1604). If there is probable cause for finding a violation, Topaz Exchange's regulatory staff will prepare a statement of charges including the allegations and specifying the provisions of the Act and the rules and regulations promulgated thereunder, provisions of the Topaz Exchange Constitution or rules, or interpretations or resolutions of which such acts are in violation. The CRO must approve the statement of charges.

³¹⁶ See Topaz Exchange Rule 1606 (which incorporates by reference ISE Rule 1606); see also Topaz Exchange Rule 1615, Supplemental Material .01 (which incorporates by reference ISE Rule 1615, Supplemental Material .01).

³¹⁷ Pursuant to a Resolution of the Topaz Exchange Board, the President and CEO shall establish Topaz Exchange's Business Conduct Committee, pursuant to a charter. The Committee shall consist of no more than 21 persons, all of whom are employees of members of Topaz Exchange, representing members as follows: at least three persons shall represent PMMs; at least three persons shall represent CMMs that are not also PMMs; and at least four persons shall represent EAMs that neither are, nor are affiliated with, a PMM or CMM. See Amendment No. 3.

³¹⁸ See Topaz Exchange Rule 1606 (which incorporates by reference ISE Rule 1606). A Panel may make a determination without a hearing and may impose a penalty as to violations that the member or associated person has admitted or has failed to answer or

person) or the Topaz Exchange regulatory staff may petition for review of the Panel's decision by the Topaz Exchange Board.³¹⁹ Any review will be conducted by the Topaz Exchange Board or a committee thereof composed of at least three of its directors, at least one of which shall be an Industry Director³²⁰ (whose decision must be ratified by the Topaz Exchange Board).³²¹ In addition, the Topaz Exchange Board on its own motion may order review of a disciplinary decision.³²² The Topaz Exchange Board may affirm, reverse, or modify, in whole or in part, the Panel's decision.³²³ The decision of the Topaz Exchange Board will be in writing and will be final.³²⁴

Appeals from any determination that impacts access to Topaz Exchange, such as termination or suspension of membership, will be instituted under, and governed by, the provisions in the Chapter 17 of the Topaz Exchange rules, which incorporates by reference the provisions in Chapter 17 of ISE rules. Topaz Exchange's Chapter 17 applies to persons

that otherwise do not appear to be in dispute. See Topaz Exchange Rule 1608 (which incorporates by reference ISE Rule 1608). A member or associated person alleged to have committed a disciplinary violation may submit a written offer of settlement to the Panel, or CRO if a Panel is not yet been appointed, which the Panel or CRO may accept or reject. See Topaz Exchange Rule 1609 (which incorporates by reference ISE Rule 1609). If the second offer of settlement is rejected (such decision is not subject to review), a hearing will proceed in accordance with Topaz Exchange Rule 1606 (which incorporates by reference ISE Rule 1606). See also Topaz Exchange Rule 1609 (which incorporates by reference ISE Rule 1609).

³¹⁹ See Topaz Exchange Rule 1610 (which incorporates by reference ISE Rule 1610).

³²⁰ See Topaz Exchange Rule 1704 (which incorporates by reference ISE Rule 1704) (detailing the composition of the Appeals Committee); see also Amendment No. 3. Any director who participated in a matter before it was appealed to the Topaz Exchange Board shall not participate in any review of the action by the Board concerning the matter. See Topaz Exchange Rule 1704.

³²¹ See Topaz Exchange Rule 1610 (which incorporates by reference ISE Rule 1610).

³²² See id.

³²³ See id.

³²⁴ See id.

economically aggrieved by any of the following actions of Topaz Exchange including, but not limited to: (a) denial of an application to become a Member; (b) barring a person from becoming associated with a Member; and (c) limiting or prohibiting services provided by the Topaz Exchange or services of any exchange member.³²⁵

Any person aggrieved by an action of Topaz Exchange within the scope of the Chapter 17 may file a written application to be heard within thirty days³²⁶ after such action has been taken.³²⁷ Applications for hearing and review will be referred to the Business Conduct Committee, which will appoint a hearing panel of no less than three members of such Committee.³²⁸ The decision of the hearing panel made pursuant to Chapter 17 of the Topaz Exchange rules is subject to review by the Topaz Exchange Board, either on its own motion, or upon written request submitted by the applicant or the President of Topaz Exchange.³²⁹ The

³²⁵ See Topaz Exchange Rule 1700 (which incorporates by reference ISE Rule 1700). As noted above, Topaz Exchange has entered into an RSA with FINRA and a FMA with ISE under which FINRA and ISE, respectively, will perform certain regulatory functions on behalf of Topaz Exchange. For example, FINRA may perform some or all of the functions specified in Chapter 17 of Topaz Exchange rules. See supra notes 158-160 and accompanying text. See also Topaz Exchange Rule 1706 (which incorporates by reference ISE Rule 1706).

³²⁶ An applicant may file for an extension of time within thirty days of Topaz Exchange's action. An application for such an extension will be ruled upon by the Chairman of the Business Conduct Committee and is not subject to appeal. See Topaz Exchange Rule 1701 (which incorporates by reference ISE Rule 1701).

³²⁷ See Topaz Exchange Rule 1701 (which incorporates by reference ISE Rule 1701).

³²⁸ See Topaz Exchange Rule 1702 (which incorporates by reference ISE Rule 1702).

³²⁹ See Topaz Exchange Rule 1704 (which incorporates by reference ISE Rule 1704). The Topaz Exchange Board, or a committee of the Topaz Exchange Board, will have sole discretion to grant or deny either request. See id.

review will be conducted by the Topaz Exchange Board or a committee of the Topaz Exchange Board composed of at least three directors.³³⁰

The Commission finds that Topaz Exchange's proposed disciplinary and oversight rules and structure, as well as its proposed process for persons economically aggrieved by certain Topaz Exchange actions, are consistent with the requirements of Sections 6(b)(6) and 6(b)(7) of the Act³³¹ in that they provide fair procedures for the disciplining of members and persons associated with members. The Commission further finds that the proposed Topaz Exchange rules, which incorporate by reference ISE rules, are designed to provide Topaz Exchange with the ability to comply, and with the authority to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of Topaz Exchange.³³² The Commission notes that Topaz Exchange's proposed disciplinary and oversight rules and structures are similar to the rules of other exchanges.³³³

F. Listing Requirements

Topaz Exchange does not intend to offer original listings when it commences operations. Instead, Topaz Exchange will list and trade only standardized option contracts that are listed on other national securities exchanges and cleared by the Options Clearing Corporation.³³⁴ Topaz Exchange's listing rules, including the criteria for the underlying securities of the options to be

³³⁰ See Topaz Exchange Rule 1704 (which incorporates by reference ISE Rule 1704). The Topaz Exchange Board or its designated committee may affirm, reverse, or modify in whole or in part, the decision of the hearing panel. The decision of the Topaz Exchange Board or its designated committee will be in writing and will be final. See Topaz Exchange Rule 1704 (which incorporates by reference ISE Rule 1704).

³³¹ 15 U.S.C. 78f(b)(6) and (b)(7), respectively.

³³² See Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

³³³ See, e.g., MIAX Order, supra note 30, and BOX Order, supra note 39.

³³⁴ See Exhibit H to Topaz Exchange Form 1 Application.

traded, incorporate by reference all of the listing rules of ISE.³³⁵ The Commission finds that Topaz Exchange's proposed initial and continued listing rules are consistent with the Act, including Section 6(b)(5),³³⁶ in that they are designed to protect investors and the public interest and to promote just and equitable principles of trade. Before beginning operation, Topaz Exchange will need to become a participant in the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Act ("OLPP").³³⁷ In addition, before beginning operation, Topaz Exchange will need to become a participant in the Options Clearing Corporation.

III. Exemption from Section 19(b) of the Act With Regard to ISE, CBOE, NYSE, and FINRA Rules Incorporated by Reference

Topaz Exchange proposes to incorporate by reference certain ISE, CBOE, NYSE and FINRA rules.³³⁸ Thus, for certain Topaz Exchange rules, Topaz Exchange members will comply

³³⁵ See Topaz Exchange Rule 500 Series (which incorporates by reference ISE Rule 500 Series) (Securities Traded on the Exchange). See also MIA X Rule 400 Series and BOX Rule 5000 Series.

³³⁶ 15 U.S.C. 78f(b)(5).

³³⁷ 15 U.S.C. 78k-1(a)(3)(B).

³³⁸ Specifically, Topaz Exchange proposes to incorporate by reference the following ISE Rules: Chapter 4 (Business Conduct), Chapter 5 (Securities Traded on the Exchange), Chapter 6 (Doing Business with the Public), Chapter 10 (Closing Transactions), Chapter 11 (Exercises and Deliveries), Chapter 12 (Margins), Chapter 13 (Net Capital Requirements), Chapter 14 (Records, Reports and Audits), Chapter 15 (Summary Suspension), Chapter 16 (Discipline), Chapter 17 (Hearings and Review), Chapter 18 (Arbitration), Chapter 19 (Order Protection; Locked and Crossed Market), Chapter 20 (Index Rules), Chapter 22 (Rate-Modified Foreign Currency Options Rules). The following rules are cross-referenced in the ISE rules: ISE Rule 1202 (Margin Requirements) cross-references the same CBOE and NYSE rules that may be in effect from time to time; ISE Rule 1615 (Disciplinary Functions) cross-references the FINRA Code of Procedure and ISE Rule 1800 cross-references the 12000 and 13000 Series of the FINRA Manual and FINRA Rule 2268.

with a Topaz Exchange rule by complying with the referenced ISE, CBOE, NYSE or FINRA rule.

In connection with the proposal to incorporate the ISE, CBOE, NYSE and FINRA rules by reference, Topaz Exchange requested, pursuant to Rule 240.0-12 under the Act,³³⁹ an exemption under Section 36 of the Act from the rule filing requirements of Section 19(b) of the Act for changes to the Topaz Exchange rules that are effected solely by virtue of a change to a cross-referenced ISE, CBOE, NYSE or FINRA rule.³⁴⁰ Topaz Exchange proposes to incorporate by reference categories of rules, rather than individual rules within a category, that are not trading rules. In addition, Topaz Exchange agrees to provide written notice to its members whenever FINRA, ISE, CBOE or NYSE proposes a change to a cross-referenced rule³⁴¹ and whenever any such proposed changes are approved by the Commission or otherwise become effective.³⁴²

Using the authority under Section 36 of the Act, the Commission previously exempted certain SROs from the requirement to file proposed rule changes under Section 19(b) of the Act.³⁴³ The Commission is hereby granting Topaz Exchange's request for exemption, pursuant

³³⁹ 17 CFR 240.0-12.

³⁴⁰ See Letter from Michael Simon, General Counsel, Secretary and Chief Regulatory Officer, Topaz Exchange, to Elizabeth M. Murphy, Secretary, Commission, dated December 14, 2012 ("Section 19(b) Exemption Request").

³⁴¹ See id.

³⁴² Topaz Exchange will provide such notice through a posting on the same website location where Topaz Exchange posts its own rule filings pursuant to Rule 19b-4 under the Act, within the required time frame. The website posting will include a link to the location on the FINRA, ISE, CBOE or NYSE website where FINRA's, ISE's, CBOE's or NYSE's proposed rule change is posted. See id.

³⁴³ See, e.g., DirectEdge Exchanges Order, supra note 70, BATS Order, supra note 29, C2 Order, supra note 169, Nasdaq Order, supra note 29 and NOM Approval Order, supra note 164.

to Section 36 of the Act, from the rule filing requirements of Section 19(b) of the Act with respect to the rules that Topaz Exchange proposes to incorporate by reference. The exemption is conditioned upon Topaz Exchange providing written notice to Topaz Exchange members whenever FINRA, ISE, CBOE or NYSE proposes to change an incorporated by reference rule and when the Commission approves any such changes. The Commission believes that the exemption is appropriate in the public interest and consistent, with the protection of investors because it will promote more efficient use of Commission's and SROs' resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought to be implemented by more than one SRO.

IV. Conclusion

IT IS ORDERED that the application of Topaz Exchange for registration as a national securities exchange be, and it hereby is, granted.

IT IS FURTHERED ORDERED that operation of Topaz Exchange is conditioned on the satisfaction of the requirements below:

A. Participation in National Market System Plans Relating to Options Trading.

Topaz Exchange must join: (1) The Plan for the Reporting of Consolidated Options Last Sale Reports and Quotation Information (Options Price Reporting Authority); (2) the OLPP; (3) the Linkage Plan; and (4) the Plan of the Options Regulatory Surveillance Authority.

B. Participation in Multiparty Rule 17d-2 Plans. Topaz Exchange must become a party to the multiparty Rule 17d-2 agreements concerning options sales practice regulation and market surveillance.

C. Participation in the Options Clearing Corporation. Topaz Exchange must become an Options Clearing Corporation participant exchange.

D. Participation in the Intermarket Surveillance Group. Topaz Exchange must join the Intermarket Surveillance Group.

E. Effective Regulation. Topaz Exchange must have, and represent in a letter to the staff in the Commission's Office of Compliance Inspections and Examinations that it has, adequate procedures and programs in place to effectively regulate Topaz Exchange.

F. Trade Processing and Exchange Systems. Topaz Exchange must have, and represent in a letter to the staff in the Commission's Division of Trading and Markets that it has, adequate procedures and programs in place, as detailed in Commission Automation Policy Review guidelines, to effectively process trades and maintain the confidentiality, integrity, and availability of Topaz Exchange's systems.³⁴⁴

³⁴⁴ On November 16, 1989, the Commission published its first Automation Review Policy ("ARP I"), in which the Commission created a voluntary framework for SROs to establish comprehensive planning and assessment programs to determine systems capacity and vulnerability. On May 9, 1991, the Commission published its second Automation Review Policy ("ARP II") to clarify the types of review and reports expected from SROs. See Securities Exchange Act Release Nos. 27445 (November 16, 1989), 54 FR 48703 (November 24, 1989) and 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991). The Commission has proposed Regulation Systems Compliance and Integrity, which, if adopted, would replace this policy. See Securities Exchange Act Release No. 69077 (March 8, 2013), 78 FR 18084 (March 25, 2013) (File No. S7-01-13).

IT IS FURTHER ORDERED, pursuant to Section 36 of the Act,³⁴⁵ that Topaz Exchange shall be exempted from the rule filing requirements of Section 19(b) of the Act with respect to the FINRA, ISE, CBOE and NYSE rules that Topaz Exchange proposes to incorporate by reference, subject to the conditions specified in this Order that Topaz Exchange provide written notice to Topaz Exchange members whenever FINRA, ISE, CBOE or NYSE propose to change an incorporated by reference rule and when the Commission approves any such changes.

By the Commission.

Kevin M. O'Neill
Deputy Secretary

³⁴⁵ 15 U.S.C. 78mm.