

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59281; File No. SR-NYSE-2008-120)

January 22, 2009

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change Relating to the Limited Liability Company Agreement of New York Block Exchange, a Facility of NYSE

I. Introduction

On November 14, 2008, the New York Stock Exchange, LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) a proposed rule change, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² in connection with the formation of a joint venture between NYSE and BIDS Holdings L.P. (“BIDS”), a Delaware limited partnership, to establish a new electronic trading facility of the Exchange, the New York Block Exchange (“NYBX”). The proposed rule change was published for comment in the Federal Register on November 24, 2008.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Overview

NYSE proposes to establish NYBX as a facility⁴ of the Exchange. NYBX would provide for electronic matching and execution of non-displayed orders with the aggregate of all displayed

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 58970 (November 17, 2007), 73 FR 71062 (November 24, 2008) (“Notice”).

⁴ Pursuant to Section 3(a)(2) of the Act, 15 U.S.C. 78c(a)(2), the term “facility” when used with respect to an exchange, includes “its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.”

and non-displayed orders residing within NYBX and the NYSE Display Book. The Exchange represents that NYBX would consider protected quotations of all automated trading centers.⁵

Only securities listed on NYSE would be eligible to trade on NYBX.

NYBX would be owned and operated by the New York Block Exchange LLC (“Company”), a Delaware limited liability company (“LLC”). With this proposed rule change, the Exchange seeks the Commission’s approval of the proposed governance structure of the Company as reflected in the Limited Liability Company Agreement (“LLC Agreement”). In a separate action today, the Commission approved the Exchange’s proposed rule change to establish the trading rules for NYBX.⁶

NYSE and BIDS each would own a 50% economic interest (“Interest”)⁷ in the Company. In addition to its Interest, NYSE would enter into an agreement with the Company (“Services Agreement”) pursuant to which NYSE would perform certain financial, operational, information technology, and development services for the Company.⁸ As a self-regulatory organization (“SRO”), NYSE has regulatory responsibility for all of its facilities, including NYBX. The Exchange has delegated certain of its self-regulatory responsibilities to its wholly owned subsidiary, NYSE Regulation, Inc. (“NYSE Regulation”), which performs the regulatory functions of NYSE pursuant to a delegation agreement. In the LLC Agreement, the Members acknowledge and agree that NYSE Regulation would carry out certain regulatory oversight of

⁵ See Notice, supra note 3, 73 FR at 71062. The terms “protected quotations” and “automated trading centers” will have the same meanings as defined in Rule 600 of Regulation NMS, 17 CFR 242.600.

⁶ See Securities Exchange Act Release No. 59282 (SR-NYSE-2008-119).

⁷ “Interest” means the ownership interest in the Company, including its interest in the capital, profits, losses, and distributions of the Company. See Section 2.1 of the LLC Agreement. A person that holds an economic interest in an LLC generally must become party to the LLC Agreement and is referred to as a “Member.” See *id.*

⁸ See Notice, supra note 3, 73 FR at 71062.

NYBX.⁹

The board of directors of the Company (“Board of Directors”) would manage the business and affairs of the Company¹⁰ but would delegate the day-to-day operations of the Company and the development of NYBX to the Exchange pursuant to the Services Agreement.¹¹ The Board of Directors would consist of two individuals designated by NYSE (“NYSE Directors”) and two individuals designated by BIDS (“BIDS Directors”).¹² The Members would not otherwise participate in the management or control of the Company’s business.¹³

III. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,¹⁵ which, among other things, requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and 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 the exchange. The Commission also finds that the proposed rule change is consistent with Section

⁹ See Section 8.1(c) of the LLC Agreement.

¹⁰ See Sections 8.1(a) and 8.3 of the LLC Agreement.

¹¹ See Section 8.1(b) of the LLC Agreement.

¹² See Section 8.3(a) of the LLC Agreement.

¹³ See Section 7.1(a) of the LLC Agreement.

¹⁴ In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁵ 15 U.S.C. 78f(b)(1).

6(b)(5) of the Act,¹⁶ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest.

A. NYBX as a Facility of the Exchange

The Commission believes that the proposed rule change is consistent with Section 6(b)(1) of the Act in that, upon establishing NYBX as a facility of the Exchange, NYSE would remain so organized and have the capacity to carry out the purposes of the Act. As an SRO, the Exchange would have regulatory control over NYBX and would be responsible for ensuring its compliance with the federal securities laws and all applicable rules and regulations thereunder. Furthermore, the Company is obligated under the LLC Agreement to operate NYBX in a manner consistent with the regulatory and oversight responsibilities of NYSE and the Act and rules and regulations thereunder. The Commission notes that it previously approved similar structures with respect to the operation of exchange facilities.¹⁷

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ See Securities Exchange Act Release Nos. 55389 (March 2, 2007), 72 FR 10575 (March 8, 2007) (order approving CBOE Stock Exchange as a facility of the Chicago Board Options Exchange) (“CBSX Order”); 54399 (September 1, 2006), 71 FR 53728 (September 12, 2006) (order approving the ISE Stock Exchange as a facility of the International Securities Exchange) (“ISE Stock Order”); 54364 (August 25, 2006), 71 FR 52185 (order approving the Boston Equities Exchange as a facility of the Boston Stock Exchange) (“BeX Order”); and 49065 (January 13, 2004), 69 FR 2768 (January 20, 2004) (order approving the Boston Options Exchange as a facility of the Boston Stock Exchange) (“BOX Order”).

Although the Company does not carry out any regulatory functions, all of its activities must be consistent with the Act. As a facility of a national securities exchange, NYBX is not solely a commercial enterprise but is an integral part of an SRO that is registered pursuant to the Act and therefore subject to obligations imposed by the Act. The Commission believes that the LLC Agreement is reasonably designed to enable the Company to operate in a manner that is consistent with this principle. The LLC Agreement provides that the Company, its Members, and the officers, directors, agents, and employees of the Company and its Members shall comply with the federal securities laws and the rules and regulations promulgated thereunder and cooperate with the Exchange and the Commission.¹⁸ Further, the Company, its Members, and the officers, directors, agents, and employees of the Company and its Members also agree to engage in conduct that fosters and does not interfere with the Company's and the Exchange's ability to carry out their respective responsibilities under the Act.¹⁹

The LLC Agreement likewise provides that the Board of Directors collectively and each member of the Board of Directors individually must comply with the federal securities laws and the rules and regulations thereunder and cooperate with the Exchange and with the Commission.²⁰ Moreover, each NYSE Director and BIDS Director must take into consideration whether his or her actions would cause NYBX or the Company to engage in conduct that fosters, and does not interfere with, the Exchange's or the Company's ability to carry out their respective responsibilities under the Act.²¹

¹⁸ See Section 6.1(c) of the LLC Agreement.

¹⁹ See id.

²⁰ See Sections 8.1(a) and (d) of the LLC Agreement.

²¹ See Section 8.1(d) of the LLC Agreement.

The LLC Agreement stipulates that all confidential information pertaining to the self-regulatory function of the Exchange or the Company (including but not limited to disciplinary matters, trading data, trading practices, and audit information) contained in the books and records of the Company would not be made available to any persons other than to those officers, directors, employees, and agents of the Company and the Members that have a reasonable need to know the contents thereof; would be retained in confidence by the Company and the Members and their respective officers, directors, employees, and agents; and would not be used for any commercial purposes.²² Nothing in the LLC Agreement, however, would limit or impede the rights of the Commission, the Exchange, or NYSE Regulation to access and examine confidential information of the Company pursuant to the federal securities laws or limit or impede the ability of a member of the Board of Directors, any Member, or any officer, director, agent, or employee of a Member or the Company to disclose confidential information to the Commission, the Exchange, or NYSE Regulation.²³

The LLC Agreement also provides that NYSE Regulation will receive notice of planned or proposed changes to the Company (excluding Non-Market Matters²⁴) or NYBX, and NYSE Regulation must not object affirmatively to such changes prior to implementation.²⁵ If NYSE Regulation determines that the planned or proposed changes to the Company or NYBX could cause the Company or NYBX to operate in a manner that is not consistent with the provisions of

²² See Section 14.1(b) of the LLC Agreement.

²³ See Section 14.1(c) of the LLC Agreement.

²⁴ “Non-Market Matters” means matters relating solely to one or more of the following: marketing, administrative matters, personnel matters, social or team-building events, meetings of Members, communication with Members, finance, location and timing of Board of Directors meetings, market research, real property, equipment, furnishings, personal property, intellectual property, insurance, contracts unrelated to the operation of NYBX, and de minimis items. See Section 2.1 of the LLC Agreement.

²⁵ See Section 8.1(e) of the LLC Agreement.

the LLC Agreement, the rules of the Exchange, or the federal securities laws governing NYBX or NYSE Market Participants,²⁶ or that otherwise impedes the Exchange’s ability to regulate NYBX or NYSE Market Participants, or to fulfill its obligations under the Act as an SRO (each a “Regulatory Deficiency”²⁷), NYSE Regulation may direct the Company to, and the Company must, modify the planned or proposed changes as necessary to ensure that they do not cause a Regulatory Deficiency.²⁸ Likewise, if NYSE Regulation determines that a Regulatory Deficiency exists or is planned, NYSE Regulation may direct the Company to, and the Company must, undertake such modifications to the Company (excluding Non-Market Matters) or NYBX as are necessary or appropriate to eliminate or prevent the Regulatory Deficiency and allow NYSE Regulation to perform and fulfill its delegated regulatory responsibilities.²⁹

Furthermore, before any amendment to or repeal of any provision of the LLC Agreement becomes effective, such amendment or repeal must be filed with, or filed with and approved by, the Commission under Section 19 of the Act.³⁰ In the alternative, an amendment or repeal must be submitted to the board of directors of the Exchange and, if the Exchange’s board of directors determines that such amendment or repeal must be filed with, or filed with and approved by, the Commission before it can be effectuated, then such amendment or repeal would not be effectuated until filed with, or filed with and approved by, the Commission.³¹

²⁶ “NYSE Market Participant” means any person that is registered with the Exchange for purposes of participating in equities trading on one or more of the U.S. markets operated by NYSE Euronext, the parent company of NYSE. See Section 2.1 of the LLC Agreement.

²⁷ See Section 2.1 of the LLC Agreement (defining “Regulatory Deficiency”).

²⁸ See Section 8.1(e) of the LLC Agreement.

²⁹ See id.

³⁰ See Section 13.1 of the LLC Agreement.

³¹ See id.

The Commission believes that certain additional provisions in the LLC Agreement that make accommodation for NYSE as the SRO for NYBX are consistent with the Act, because they enhance the ability of NYSE to carry out its self-regulatory responsibilities with respect to NYBX. The LLC Agreement provides that the Board of Directors, by a majority vote, may suspend or terminate a Member’s voting privileges or membership if the Member materially violates a provision of the LLC Agreement relating to certain regulatory matters³² or any federal or state securities law; such Member is subject to statutory disqualification,³³ or such action is necessary or appropriate in the public interest or for the protection of investors.³⁴ The directors designated by the Member subject to sanction would be excluded from any vote to suspend or terminate such Member.³⁵ Moreover, in the event of a meeting of the Board of Directors solely with respect to the business of suspending or terminating a Member’s voting privileges or membership, the presence of directors designated by the Member subject to sanction would not be required to constitute a quorum to transact the business.³⁶

To reflect that NYBX is not solely a commercial enterprise, the LLC Agreement also stipulates that any individual designated to the Board of Directors may not be subject to any applicable statutory disqualification.³⁷ Further, any director who becomes subject to a statutory

³² See Section 7.1(b) of the LLC Agreement (enumerating the sections of the LLC Agreement for which violations thereof by a Member would permit the Board of Directors to suspend or terminate the Member’s voting privileges).

³³ See Section 3(a)(39) of the Act, 15 U.S.C. 78c(a)(39) (defining “statutory disqualification”).

³⁴ See Section 7.1(b) of the LLC Agreement.

³⁵ See id.

³⁶ See Section 8.3(f) of the LLC Agreement.

³⁷ See Section 8.3(a) of the LLC Agreement.

disqualification would be deemed to have automatically resigned from the Board of Directors.³⁸

B. Regulatory Jurisdiction over the Company and Its Members

The Commission also believes that the terms of the LLC Agreement provide clarification of the Commission's and NYSE's regulatory jurisdiction over the Company and its Members. The LLC Agreement provides that, to the extent related to the Company's business, the books, records, premises, officers, directors, agents, and employees of the Company and its Members would be deemed to be the books, records, premises, officers, directors, agents, and employees of the Exchange for purposes of, and subject to oversight pursuant to, the Act.³⁹ The LLC Agreement also provides that the books and records of the Company must be maintained at the principal office of the Company in New York and would be subject at all times to inspection and copying by the Commission and the Exchange at no additional charge to the Commission or the Exchange.⁴⁰

The LLC Agreement further provides that the Company, its Members, and the officers, directors, agents, and employees of the Company and its Members irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and the 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, activities of the Company and waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action, or proceeding, any claims that they are not personally subject to the jurisdiction of the Commission; the suit, action, or proceeding is an inconvenient forum; the venue of the suit, action, or proceeding is improper;

³⁸ See Section 8.3(b) of the LLC Agreement.

³⁹ See Section 6.1(a) of the LLC Agreement.

⁴⁰ See id.

or that the subject matter may not be enforced in or by such courts or agency.⁴¹ Moreover, the Company and each Member must take such action as is necessary to ensure that the Company's and such Member's officers, directors, agents, and employees consent in writing to the application to them of the provisions in the LLC Agreement with respect to their activities relating to the Company.⁴²

The Commission believes that these provisions are consistent with the Act because they are reasonably designed to facilitate the Commission's and NYSE's regulatory jurisdiction over the Company and NYBX. These provisions clarify the Commission's authority under the Act to inspect the Company's books and records by deeming them to be the books and records of a national securities exchange. Further, these provisions clarify that the Commission may exercise its authority under Section 19(h)(4) of the Act⁴³ with respect to the officers and directors of the Company and its Members, because such officers and directors are deemed to be officers and directors of the Exchange. Finally, the LLC Agreement clarifies that, to the extent that they are related to the Company's business, the books and records of the Company are subject to the Commission's examination authority under Section 17(b)(1) of the Act.⁴⁴

⁴¹ See Section 6.1(b) of the LLC Agreement.

⁴² See Section 8.1(d) of the LLC Agreement.

⁴³ 15 U.S.C. 78s(h)(4) (authorizing the Commission, by order, to remove from office or censure any officer or director of a national securities exchange if it finds, after notice and an opportunity for hearing, that such officer or director has: (1) willfully violated any provision of the Act or the rules and regulations thereunder, or the rules of a national securities exchange; (2) willfully abused his or her authority; or (3) without reasonable justification or excuse, has failed to enforce compliance with any such provision by a member or person associated with a member of the national securities exchange).

⁴⁴ 15 U.S.C. 78q(b)(1).

Even in the absence of these provisions, Section 20(a) of the Act⁴⁵ provides that any person with a controlling interest in the Company would be jointly and severally liable with and to the same extent that the Company 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. Moreover, NYSE is required to enforce compliance with these provisions, because they are “rules of the exchange” within the meaning of Section 3(a)(27) of the Act.⁴⁶ A failure on the part of NYSE to enforce its rules could result in suspension or revocation of its registration, pursuant to Section 19(h)(1) of the Act.⁴⁷

C. Changes of Ownership Interests in the Company

The Commission believes that the provisions in the LLC Agreement relating to changes of Interests in, and changes in control of, the Company are consistent with the Act. The LLC Agreement provides that NYSE’s Interest would not decline below 50% unless and until NYSE had delivered to the Board of Directors a notice in writing of its intention to Transfer⁴⁸ its Interest such that the Exchange, either alone or together with its Related Persons,⁴⁹ would hold less than a 50% Interest in the Company.⁵⁰ Furthermore, before the Exchange could reduce its Interest to less than 50%, the Exchange must first file a proposed rule change with the

⁴⁵ 15 U.S.C. 78t(a).

⁴⁶ 15 U.S.C. 78c(a)(27).

⁴⁷ 15 U.S.C. 78s(h)(1).

⁴⁸ See Section 9.1 of the LLC Agreement (defining “Transfer”).

⁴⁹ “Related Person” means, with respect to any person, any other person that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with, such person. See id. “Control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person, whether through ownership or voting of securities, by contract or otherwise. See id.

⁵⁰ See Section 9.8(c) of the LLC Agreement.

Commission under Section 19(b) of the Act and obtain the Commission’s approval of that proposal.⁵¹ NYSE’s regulatory obligations for NYBX would endure as long as NYBX is a facility of the Exchange, regardless of the size of NYSE’s Interest in the Company.⁵²

Nevertheless, the Commission believes that it is reasonable for the Exchange to alert the Commission of any reduction in its Interest in the Company. Such a reduction could warrant additional review of the LLC Agreement to ensure that NYSE’s responsibilities as the SRO for NYBX are not compromised.

The LLC Agreement also provides that no person that is not a Member as of the effective date of the LLC Agreement, either alone or together with its Related Persons, may directly own an Interest in the Company exceeding 20% (“Concentration Limitation”).⁵³ The Concentration Limitation, however, would not apply to the Exchange.⁵⁴ Further, the LLC Agreement permits the Concentration Limitation to be waived if the Board of Directors determines not to oppose the acquisition of an Interest exceeding the Concentration Limitation and the waiver has been filed

⁵¹ See id.

⁵² See Securities Exchange Act Release Nos. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (order approving the transfer of the Boston Stock Exchange’s ownership interest in the Boston Options Exchange Group, the operator of the BOX facility, to MX US 2, Inc., a wholly owned subsidiary of the Montréal Exchange); 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (order approving the establishment of Archipelago Exchange as a facility of the Pacific Exchange where Pacific Exchange’s ownership interest in Archipelago Exchange, L.L.C. (“Arca L.L.C.”), the operator of Archipelago Exchange, consisted solely of a 10% interest in Archipelago Holdings, LLC, the parent company of Arca L.L.C.); 41210 (March 24, 1999), 64 FR 15857 (April 1, 1999) (order approving electronic system operated as a facility of Philadelphia Stock Exchange (“Phlx”), which had no ownership interest in the operation of the system); and 54538 (September 29, 2006), 71 FR 59184 (October 6, 2006) (order approving Phlx’s New Equity Trading system and operation of optional outbound router as a facility of Phlx, which had no ownership interest in the third-party operator).

⁵³ See Section 9.8(b) of the LLC Agreement.

⁵⁴ See Section 9.8(b)(i) of the LLC Agreement.

as a proposed rule change under Section 19(b) of the Act and approved by the Commission.⁵⁵

Nevertheless, the Board of Directors may not waive the Concentration Limitation if the person or any of its Related Persons seeking to exceed the Concentration Limitation is subject to any applicable statutory disqualification or is a member or member organization of the Exchange.⁵⁶

Moreover, the LLC Agreement provides that, if any person, alone or together with any Related Person, acquires a direct or indirect ownership of 25% or more of the total voting power of a Member (such person, a “Controlling Person,” and such interest a “Controlling Interest”⁵⁷), and the Member, alone or together with any Related Person, holds an Interest in the Company equal to or greater than 20%, then such Controlling Person must become a party to the LLC Agreement and abide by its terms.⁵⁸ The LLC Agreement also provides that the Exchange must file with the Commission, pursuant to Section 19(b) of the Act, any amendment to the LLC Agreement caused by the addition of a Controlling Person.⁵⁹ The non-economic rights and privileges, including all voting rights, of the Member in which such Controlling Interest is acquired would be suspended until the proposed rule change has become effective under the Act or until the Controlling Person ceased to have a Controlling Interest in such Member.⁶⁰

A proposed rule change submitted in any of the circumstances noted above would afford the Commission an opportunity to ensure that a change to the LLC Agreement or a change in the ownership of the Company would be consistent with the Act, including whether the Commission and NYSE would retain sufficient regulatory jurisdiction over the proposed indirect controlling

⁵⁵ See Section 9.8(b)(ii) of the LLC Agreement.

⁵⁶ See Section 9.8(b)(iii) of the LLC Agreement.

⁵⁷ See Section 2.1 of the LLC Agreement.

⁵⁸ See Sections 9.8(d)(i) and (ii) of the LLC Agreement.

⁵⁹ See Section 9.8(d)(iv) of the LLC Agreement.

⁶⁰ See id.

party. The Commission understands that the LLC Agreement would apply to any ultimate parent of the Company, no matter how many levels of ownership are involved, provided that a Controlling Interest exists between each link of the ownership chain.

Finally, the LLC Agreement requires the Company to provide the Commission with written notice ten days prior to the closing date of any acquisition of an Interest by a person that results in a Member's percentage ownership interest in the Company, alone or together with any Related Person of such Member, meeting or crossing the 5%, 10%, or 15% thresholds.⁶¹ This notice requirement is analogous to a requirement in Form 1,⁶² the application and amendments to the application for registration as a national securities exchange. Exhibit K of Form 1 requires any exchange that is a corporation or partnership to list any persons that have an ownership interest of 5% or more in the exchange.⁶³ Additionally, Rule 6a-2(a)(2) under the Act⁶⁴ requires an exchange to update its Form 1 within ten days after any action that renders inaccurate the information previously filed in Exhibit K.

Exhibit K imposes no obligation on an exchange to report parties whose ownership interest in the exchange is less than 5%. Likewise, the Commission does not believe that a change to the LLC Agreement that reflects the taking of less than a 5% interest in a facility of a national securities exchange (or an increase that does not cross any of the additional thresholds) is a "rule of the exchange" that must be filed pursuant to Section 19(b) of the Act.

⁶¹ See Section 9.8(a) of the LLC Agreement.

⁶² 17 CFR 249.1 and 17 CFR 249.1a.

⁶³ This reporting requirement applies only to exchanges that have one or more owners, shareholders, or partners that are not also members of the exchange. See Form 1, Exhibit K.

⁶⁴ 17 CFR 240.6a-2(a)(2).

D. Ownership Interest of BIDS

Under this proposal, BIDS would hold a 50% Interest in the Company, the operator of NYBX. The Commission has previously expressed concern regarding the potential for unfair competition and conflicts of interest where a member of an exchange owns more than 20% of that exchange or a facility thereof.⁶⁵ Although it is common for a member to have an ownership interest in an exchange or a facility of an exchange, such member's interest could become so large as to raise questions whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member. A member that has a controlling interest in the exchange or a facility might attempt to direct the exchange to refrain from diligently surveilling the member's conduct or from punishing any improper conduct.

The Commission believes that BIDS's Interest is consistent with the Act because the LLC Agreement is reasonably designed to address these concerns. The LLC Agreement provides that if, during at least four of the preceding six calendar months, the average daily trading volume in NYBX exceeds 10% of the aggregate average daily trading volume of NYSE⁶⁶ and a Member (other than NYSE), either alone or together with its Related Persons, owns Interests exceeding the Concentration Limitation, then, within 180 days: (1) an independent third-party SRO engaged by the Company must begin to conduct market surveillance of the Member with respect to such Member's trading activity in both NYBX and the Exchange; or (2) the Member must reduce its Interest in the Company such that it does not exceed the Concentration Limitation.⁶⁷ The Commission believes that, if NYBX accounts for a

⁶⁵ See, e.g., BeX Order, BOX Order, CBSX Order, and ISE Stock Order, *supra* note 17.

⁶⁶ The aggregate average daily trading volume in NYBX would be calculated based upon the trading volume of NYBX itself combined with trading volume in the NYSE Display Book that originated in NYBX, if any.

⁶⁷ See Section 9.9 of the LLC Agreement.

material percentage of the Exchange's volume, there is a risk that the Exchange's business interests could undermine its ability to vigorously regulate BIDS. The LLC Agreement provides for two reasonable ways of addressing that risk: (1) require an independent SRO to conduct market surveillance of BIDS if NYBX accounts for a material percentage of the Exchange's volume; or (2) reduce the business conflict faced by NYSE by requiring BIDS to lower its Interest in the Company to below 20%. The Commission further believes that 180 days is a reasonable period in which to implement one of these two actions.

E. NYSE Rule 2B

NYSE Rule 2B provides, in relevant part, that: “[w]ithout prior SEC approval, the Exchange or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member organization. In addition, a member organization shall not be or become an affiliate of the Exchange, or an affiliate of any affiliate of the Exchange.”⁶⁸ The Exchange, through its wholly owned subsidiary NYSE Market, Inc. (“NYSE Market”), a Delaware corporation, currently owns 8.75% of the aggregate limited partnership interests in BIDS,⁶⁹ which will become a member of NYSE in connection with the establishment of NYBX.⁷⁰ In addition, BIDS is an affiliate of an affiliate of the Exchange because BIDS and NYSE will each hold a 50% Interest in the Company.⁷¹ Thus, both NYSE Market's ownership interest in BIDS and BIDS's affiliation with the Company would violate NYSE rules, absent

⁶⁸ NYSE Rule 2B states that the term “affiliate” would have the meaning specified in Rule 12b-2 under the Act, 17 CFR 240.12b-2.

⁶⁹ As a result of this ownership interest, NYSE Market is a limited partner in BIDS. The Exchange has stated that it and its affiliates do not have any voting or other control arrangements with any of the other limited partners or general partner of BIDS. See Notice, supra note 3, 73 FR at 71068.

⁷⁰ See Notice, supra note 3, 73 FR at 71062.

⁷¹ Specifically, the Company is an affiliate of the Exchange and BIDS is an affiliate of the Company.

Commission approval under Section 19(b) of the Act.

As part of its proposal, NYSE has requested that the Commission approve these two exceptions to Rule 2B, subject to the following limitations and conditions:⁷²

1. NYSE and the Financial Industry Regulatory Authority (“FINRA”) have entered into an agreement pursuant to Rule 17d-2 under the Act,⁷³ under which FINRA is allocated regulatory responsibilities to review BIDS’s compliance with certain NYSE rules.⁷⁴
2. NYSE Regulation will monitor BIDS for compliance with NYSE’s trading rules and will collect and maintain certain related information.⁷⁵
3. NYSE Regulation has agreed with NYSE that NYSE Regulation will provide a report to NYSE’s CRO, on a quarterly basis, that: (i) quantifies all alerts (of which NYSE Regulation is aware) that identify BIDS as a participant that has potentially violated NYSE or Commission rules, and (ii) quantifies the number of all investigations that identify BIDS as a participant that has potentially violated NYSE or Commission rules.
4. NYSE has proposed an amendment to Rule 2B (in this filing) that will require

⁷² See Notice, supra note 3, 73 FR at 71068-71069.

⁷³ 17 CFR 240.17d-2.

⁷⁴ NYSE also stated that BIDS is subject to independent oversight by FINRA, its Designated Examining Authority, for compliance with financial responsibility requirements. See Notice, supra note 3, 73 FR at 71068.

⁷⁵ Specifically, NYSE Regulation “will collect and maintain the following information of which NYSE Regulation staff becomes aware – namely, all alerts, complaints, investigations and enforcement actions where BIDS (in its capacity as an NYSE member) is identified as a participant that has potentially violated NYSE or applicable SEC rules – in an easily accessible manner so as to facilitate any review conducted by the SEC’s Office of Compliance Inspections and Examination.” Notice, supra note 3, 73 FR at 71068.

NYSE and BIDS to establish and maintain procedures and internal controls reasonably designed to ensure that BIDS and its affiliates do not have access to non-public information relating to the Exchange, obtained as a result of its affiliation with NYSE, until such information is available generally to similarly situated members of NYSE.⁷⁶ Under the proposed rule, BIDS and its affiliates may have access to non-public information relating to the parties' obligations under the LLC Agreement, and such non-public information shall be kept confidential in accordance with Section 14.1 of the LLC Agreement.⁷⁷

5. Section 9.9 of the LLC Agreement provides that if, during at least four of the preceding six calendar months, the average daily trading volume in NYBX exceeds 10% of the aggregate daily trading volume of NYSE, then, within 180 days, either an independent third-party SRO engaged by the Company must begin to conduct surveillance of BIDS with respect to BIDS's trading activity in both NYBX and NYSE, or BIDS must reduce its interest in the Company such that it does not exceed the Concentration Limitation.⁷⁸
6. NYSE Market currently owns less than a 9% equity interest in BIDS and does not have any veto or other special voting rights with respect to the management or operation of BIDS. NYSE, or any of its affiliates, may not directly or indirectly increase such equity interest without prior Commission approval.
7. The proposed exception from NYSE Rule 2B to permit NYSE's ownership

⁷⁶ See proposed NYSE Rule 2B, commentary .01.

⁷⁷ See *id.* See also *supra* notes 22 and 23 and accompanying text.

⁷⁸ See *supra* notes 53 to 56 and accompanying text for a discussion of the Concentration Limitation.

interest in BIDS and BIDS's affiliation with the Company (which is an affiliate of NYSE) would be for a pilot period of 12 months.

The Commission finds that the proposed exception from NYSE Rule 2B to permit NYSE's ownership interest in BIDS and BIDS's affiliation with the Company is consistent with the Act. In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,⁷⁹ which requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members raises potential conflicts of interest and the potential for unfair competitive advantage.⁸⁰ NYSE Market's ownership interest in BIDS and the joint ownership of the Company by NYSE and BIDS raise similar concerns. The Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange holds an ownership interest in a member or is affiliated with one of its members.

⁷⁹ 15 U.S.C. 78f(b)(5).

⁸⁰ See, e.g., Securities Exchange Act Release Nos. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving combination of NYSE and Archipelago Holdings, Inc.); and 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-Amex-2008-62) (order approving acquisition of the American Stock Exchange by NYSE Euronext).

Nevertheless, in view of the conditions described above, the Commission believes that it is consistent with the Act to permit the proposed exceptions to NYSE Rule 2B. These conditions appear reasonably designed to mitigate concerns about potential conflicts of interest and unfair competitive advantage. FINRA will conduct member regulation of BIDS and – if trading volume from the facility grows sufficiently large and BIDS does not wish to reduce its ownership interest in the Company – might also be required to conduct market regulation of BIDS. Furthermore, NYSE’s CRO will be provided quarterly reports of any alerts or investigations relating to BIDS. These conditions appear reasonably designed to promote robust and independent regulation of BIDS. NYSE and BIDS also must establish and maintain procedures and internal controls that are reasonably designed to prevent BIDS and its affiliates from deriving any unfair informational advantage resulting from its affiliation with NYSE. Finally, NYSE has proposed that the exception from NYSE Rule 2B be on a pilot basis, which will provide NYSE and the Commission an opportunity to assess whether there might be any adverse consequences of the exception and whether a permanent exception is warranted. The Commission believes that, taken together, these conditions are reasonably designed to mitigate potential conflicts between the Exchange’s commercial interest in BIDS and its regulatory responsibilities with respect to BIDS.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁸¹ that the proposed rule change (SR-NYSE-2008-120) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸²

Florence E. Harmon
Deputy Secretary

⁸¹ 15 U.S.C. 78s(b)(2).

⁸² 17 CFR 200.30-3(a)(12).