

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59400; File No. SR-NYSE-2009-12)

February 12, 2009

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by New York Stock Exchange LLC Amending Its Limited Liability Company Operating Agreement and the Bylaws of Its Wholly-Owned Subsidiary NYSE Market, Inc. to Eliminate, in Each Case, a Requirement That Not Less than Two Members of the Board of Directors must Qualify as “Non-Affiliated Directors” and a Related Requirement That Not Less than Two Members of the Board of Directors Must Qualify as “Fair Representation Candidates”

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on February 2, 2009, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes the amendment of (i) its limited liability company operating agreement and (ii) the bylaws of its wholly-owned subsidiary NYSE Market, Inc. (“NYSE Market”) to eliminate, in each case, a requirement that not less than two members of the board of directors must qualify as “non-affiliated directors” and a related requirement that not less than two members of the board of directors must qualify as “fair representation candidates” (as each of those terms is defined in the foregoing documents). A 20% minimum requirement would remain in place with respect to each of those categories of directors.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing that its parent company, NYSE Group, Inc., as the sole member of the Exchange, a New York limited liability company, amend the Second Amended and Restated Operating Agreement of the Exchange (the “Operating Agreement”) to eliminate the requirements that (a) not less than two members of the board of directors of the Exchange (“Exchange Board”) must be persons who are not members of the board of directors of NYSE Euronext (“NYSE Euronext Board”), and who qualify as independent under the independence policy of the NYSE Euronext Board (“NYSE non-affiliated directors”) and (b) not less than two members of the Exchange Board must be “fair representation candidates” (as defined in the Operating Agreement). In each case, however, the current 20% minimum requirement will continue to apply.

The Exchange is further proposing that the Exchange, the sole stockholder of NYSE Market, amend the Amended and Restated Bylaws of NYSE Market (“Market Bylaws”) to eliminate the requirements that (a) not less than two members of the board of directors of NYSE Market (“Market Board”) must be persons who are not members of the NYSE Euronext Board,

although such directors need not be independent (“Market non-affiliated directors”) and (b) not less than two members of the Market Board must be “fair representation candidates” (as defined in the Market Bylaws). In each case, however, the current 20% minimum requirement will continue to apply.

The practical effect of the proposed rule change is to enable the size of each of the Exchange Board and the Market Board to be reduced from ten members to five members. The Exchange believes that reducing the size of each board to five directors, when combined with the current process for selecting the 20% of directors who meet the fair representation requirement in Section 6(b)(3) of the Securities Exchange Act of 1934 (the “Act”),⁴ is consistent with the Act.

Currently, the Operating Agreement requires that at least 20%, and not less than two, of the members of the Exchange Board must be NYSE non-affiliated directors, and the same numerical requirements are applicable to fair representation candidates.⁵ Similarly, the Market Bylaws currently require that at least 20%, and not less than two, of the members of the Market Board must be Market non-affiliated directors, and the same numerical requirements are applicable to fair representation candidates.⁶

⁴ Section 6(b)(3) requires, as a condition for registration of a national securities exchange, the Commission to determine that, “The rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs”

⁵ As defined in the Operating Agreement, fair representation candidates are Exchange Board members that are determined by member organizations of the Exchange through a specified petition process (“Petition Candidates”) or, in the absence of Petition Candidates, candidates recommended jointly by the Director Candidate Recommendation Committees (the “DCRC”) of NYSE Market and NYSE Regulation, Inc. Fair representation candidates on the Exchange Board also qualify as NYSE non-affiliated directors. In the case of NYSE Market, fair representation candidates on the Market Board are similarly defined except that, in the absence of Petition Candidates, they are individuals recommended by the DCRC of NYSE Market. Fair representation candidates on the Market Board also qualify as Market non-affiliated directors.

⁶ For purposes of calculating the minimum number of non-affiliated directors and fair representation candidates for each of the Exchange and NYSE Market, if the number that

The Exchange believes that elimination of the two-director minimum requirements for fair representation candidates and non-affiliated directors is consistent with the governance structures of other national securities exchanges that have been approved by the Commission. For example, Section 9(a) of the Limited Liability Company Agreement of the NASDAQ Stock Market LLC (the “NASDAQ LLC Agreement”) requires that “[a]t least twenty percent (20%) of the Directors shall be Member Representative Directors”, where a Member Representative Director is the equivalent of a fair representation candidate on the Exchange and NYSE Market.⁷ However, there is no requirement in either the NASDAQ LLC Agreement or the NASDAQ By-Laws for a minimum of two Member Representative Directors. The number of directors constituting the board of directors of the NASDAQ Stock Market LLC is at the complete discretion of the sole member of the NASDAQ Stock Market LLC under the Delaware Limited Liability Company Act.⁸

More recently, in its approval order relating to the acquisition of the American Stock

is equal to 20% of the entire board of directors is not a whole number, such number will be rounded up to the next whole number. This rounding provision is being added to the text of both the limited liability company operating agreement of the Exchange and the bylaws of NYSE Market. The initial implementation of the proposed changes immediately following Commission approval will be accomplished through the voluntary resignation of five of the ten directors from each of the NYSE and NYSE Market boards, including one “fair representation” director from each of the boards, in connection with a reduction in the size of each board to five directors. The Exchange represents that the DCRC is aware of and is in agreement with the proposed plan of implementation. There is otherwise no change to the “fair representation” candidate selection and petition process.

⁷ See Article I, paragraph (q) of the By-Laws of the NASDAQ Stock Market LLC (the “NASDAQ By-Laws), which states that, “ ‘Membership Representative Director’ means a Director who has been elected or appointed after having been nominated by the Member Nominating Committee or by a Nasdaq Member pursuant to these By-Laws.”

⁸ See Section 9(a) of the NASDAQ LLC Agreement.

Exchange LLC (“Amex”) by NYSE Euronext (the “Approval Order”),⁹ the Commission, after noting (1) that the board of directors of NYSE Alternext US LLC (“NYSE Alternext US”), the successor to Amex, “will be composed of a number of directors as determined by NYSE Group from time to time, as sole owner of NYSE Alternext US”¹⁰ and (2) Amex’s representation that, immediately following the acquisition, “the NYSE Alternext US Board will have five directors, one of which will be a Non-Affiliated Director . . .”¹¹, stated, “The Commission finds that the proposed governance structure of NYSE Alternext US is consistent with the Act . . .”¹² The Approval Order further notes that “at least twenty percent of the directors [of NYSE Alternext US] will be persons who are not members of the board of directors of NYSE Euronext and who do not need to be independent under the NYSE Euronext Independence Policy (‘Non-Affiliated Directors’).”¹³ This requirement for non-affiliated directors of NYSE Alternext US tracks the non-affiliated director requirements of the NYSE and NYSE Market,¹⁴ but there is no requirement that there be a minimum of two such directors.¹⁵ The Approval Order also

⁹ See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-Amex-2008-62).

¹⁰ Id., 73 FR at 57711.

¹¹ See Approval Order, supra note 9, 73 FR at 57712.

¹² Id.

¹³ Id.

¹⁴ The Exchange’s requirements for non-affiliated directors are somewhat more restrictive than those of NYSE Alternext US, in that such directors on the Exchange Board must also be independent as well. See Section 2.03(a)(i) of the Operating Agreement.

¹⁵ The Approval Order does note that, “For purposes of calculation of the minimum number of Non-Affiliated Directors, if twenty percent of the directors is not a whole number, such number of directors to be nominated and selected by NYSE Alternext US members will be rounded up to the next whole number.” See Approval Order, supra note 9, at note 57. See also supra note 6 regarding the commitment of the Exchange and NYSE Market to round up the number of non-affiliated directors and fair representation candidates in the same manner under the proposed rule change.

described the selection process for non-affiliated directors of NYSE Alternext US, including a written petition process by members which is very similar to that of the Exchange and NYSE Market for the selection of fair representation candidates. The Approval Order then concluded, “The Commission finds that the requirement that at least twenty percent of the NYSE Alternext US Directors be Non-Affiliated Directors, and the process for selecting such Non-Affiliated Directors, are designed to ensure the fair representation of NYSE Alternext US members on the NYSE Alternext US Board.”¹⁶ In conclusion, we again note that the proposed governance structure of NYSE Alternext US that was approved by the Commission in the Approval Order had no additional requirement for a minimum of two fair representation candidates. Consequently, elimination of this requirement will leave the Exchange and NYSE Market with governance structures that are completely consistent with similar structures that the Commission has approved for other national securities exchanges.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)¹⁷ of the Securities Exchange Act of 1934 (the “Act”), in general, and furthers the objectives of Section 6(b)(5)¹⁸ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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. More specifically, the NYSE believes that, by eliminating, for itself and its subsidiary, the current requirement for a minimum of two non-affiliated directors and fair

¹⁶ Id.

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(5).

representation candidates, it will be able to improve administrative efficiency and effectiveness by operating with a smaller number of directors while continuing to fulfill its statutory obligations regarding the fair representation of its members. The proposed rule change will thereby contribute to perfecting the mechanism of a free and open market and a national market system, which is also consistent with the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which Amex consents, the Commission will:

- (A) by order approve such proposed rule change; or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2009-12 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSE-2009-12. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make

available publicly. All submissions should refer to File Number SR-NYSE-2009-12 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Florence E. Harmon
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).