

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69869; File No. SR-NYSE-2013-32)

June 27, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change Proposing an Amendment to the Bylaws of its Wholly-Owned Subsidiary, NYSE Regulation, Inc. (“NYSE Regulation”), to Eliminate a Requirement That Not Less Than Two Members of the Board of Directors of NYSE Regulation Must Qualify as “Fair Representation Candidates”

I. Introduction

On May 8, 2013, the New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the bylaws of its wholly-owned subsidiary NYSE Regulation, Inc. (“NYSE Regulation”) to eliminate a requirement that not less than two members of the board of directors of NYSE Regulation (“NYSE Regulation Board” or “Board”) must qualify as “fair representation candidates” (as that term is defined in those bylaws). A requirement that such directors constitute a minimum of 20% of the NYSE Regulation Board would remain in place. The proposed rule change was published for comment in the Federal Register on May 22, 2013.<sup>3</sup> The Commission received no comments on the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend the Fourth Amended and Restated Bylaws of NYSE Regulation (“NYSE Regulation Bylaws”) to eliminate the requirement that not less than two

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 69590 (May 16, 2013), 78 FR 30378 (“Notice”).

members of the NYSE Regulation Board must be “fair representation candidates” (as defined in the NYSE Regulation Bylaws). However, the current requirement that such directors constitute a minimum of 20% of the Board would continue to apply. Furthermore, under the proposal, if the number that is equal to 20% of the entire Board is not a whole number, such number would be rounded up to the next whole number, and a provision so stating would be added to the NYSE Regulation Bylaws.

As defined in the NYSE Regulation Bylaws, the fair representation candidates are Board members who are determined by member organizations of the Exchange through a specified petition process (“Petition Candidates”) or, in the absence of a sufficient number of Petition Candidates, candidates would be recommended by the Director Candidate Recommendation Committee (“DCRC”) of NYSE Regulation. In addition, fair representation candidates for the NYSE Regulation Board must qualify as “non-affiliated directors” (as such term is defined in the NYSE Regulation Bylaws), *i.e.*, such persons must be U.S. Persons who are not members of the board of directors of NYSE Euronext and qualify as independent under the director independence policy of NYSE Regulation.<sup>4</sup> Finally, like all members of the NYSE Regulation Board except for the Chief Executive Officer, the fair representation candidates must qualify as independent under the director independence policy of NYSE Regulation.<sup>5</sup> The Exchange stated

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<sup>4</sup> See Securities Act Release No. 67564 (August 1, 2012), 77 FR 47161 (August 7, 2012) (SR-NYSE-2012-17) (approving a new director independence policy for NYSE, NYSE Regulation, NYSE Market, Inc., and NYSE MKT LLC).

<sup>5</sup> The NYSE Regulation Bylaws require that a majority of the NYSE Regulation Board must consist of non-affiliated directors. The remaining directors are comprised of the Chief Executive Officer of NYSE Regulation and members of the board of directors of NYSE Euronext that qualify as independent under the NYSE Euronext independence policy. The NYSE Regulation Bylaws do not require any affiliated directors other than the Chief Executive Officer of NYSE Regulation.

that it is not proposing to change the NYSE Regulation independence requirements.<sup>6</sup>

The NYSE Regulation Bylaws provide that the Board shall consist of not less than three persons and that the number of directors shall be fixed from time to time by the Exchange, as sole equity member of NYSE Regulation. The size of the NYSE Regulation Board is currently fixed at five members, of which four positions are currently filled and one position is open.<sup>7</sup> The Exchange represented that both the Exchange and NYSE Regulation believe that a board consisting of five members is sufficiently large to effectively perform the NYSE Regulation Board's oversight responsibilities.<sup>8</sup> In addition, with a Board size of five directors, the Exchange stated that it believes that retaining the requirement that at least two directors must be "fair representation candidates" is now unwarranted, because such directors would constitute 40% of the Board rather than 20% as was the case when the number of directors was fixed at ten members.<sup>9</sup>

The Exchange represented that the DCRC of NYSE Regulation is aware of and is in agreement with the proposed plan of implementation. The Exchange also represented that there is otherwise no change to the fair representation candidate selection and petition process.<sup>10</sup>

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<sup>6</sup> See Notice, 78 FR at 30379.

<sup>7</sup> The Exchange noted that the number of directors on the NYSE Regulation Board was reduced from ten to five in early 2013 in connection with the Financial Industry Regulatory Authority's ("FINRA") completion of specified milestones in the regulatory services agreement by and among FINRA, NYSE Group, Inc., NYSE, NYSE Regulation, NYSE Arca, Inc., and NYSE MKT LLC pursuant to which FINRA assumed responsibility for performing the market surveillance and enforcement functions previously conducted by NYSE Regulation. See Notice, 78 FR at 30379 n.6.

<sup>8</sup> See Notice, 78 FR at 30379.

<sup>9</sup> See id.

<sup>10</sup> See Notice, 78 FR at 30379 n.7.

The Exchange stated that it believes that the elimination of the two-director minimum requirement for fair representation candidates is consistent with the governance structures of other national securities exchanges that have been approved by the Commission.<sup>11</sup> The Exchange pointed out that similar changes were approved subsequently to the Commission's approval of a structure for the board of NYSE Alternext US LLC (now NYSE MKT LLC), an affiliate of the Exchange, that included a requirement that at least 20% of that exchange's board constitute fair representation directors, but without the requirement that there be no less than two such directors.<sup>12</sup> The Exchange also noted that, more recently, the Commission approved a similar change when it considered a proposal to revise the Operating Agreement and Bylaws of the Exchange's wholly owned subsidiary, NYSE Market, Inc.<sup>13</sup>

### III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>14</sup> In particular, the

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<sup>11</sup> See Notice, 78 FR at 30379. The Exchange noted that, for example, Article III, Section 5(e) of the By-Laws of the of the NASDAQ Stock Market LLC ( "NASDAQ") requires that the Regulatory Oversight Committee of the NASDAQ Board of Directors ("NASDAQ ROC"), which has an oversight role comparable to that of the NYSE Regulation Board, must consist of three members, each of whom must be a "Public Director" (i.e., "a Director who has no material business relationship with a broker or dealer, [NASDAQ] or its affiliates, or FINRA") and an "independent director" as defined by NASDAQ Marketplace Rule 4200. The Exchange also noted that there is no requirement that the NASDAQ ROC have any members who would be the equivalent of a fair representation candidate on the NYSE Regulation Board.

<sup>12</sup> See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707, 57711-12 (October 3, 2008) (SR-Amex-2008-62).

<sup>13</sup> Securities Exchange Act Release No. 59683 (April 1, 2009), 74 FR 15799 (April 7, 2009) (SR-NYSE-2009-12).

<sup>14</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Commission finds that the proposal is consistent with the requirements of Section 6(b)(3) of the Act, which provides that the rules of an exchange must 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.<sup>15</sup>

The fair representation requirement in Section 6(b)(3) of the Act is intended to give members a voice in the selection of the exchange's directors and the administration of its affairs. Moreover, the Section 6(b)(3) requirement helps to ensure that members are protected from unfair, unfettered actions by an exchange and that, in general, an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities. The Commission notes that the requirement that at least 20% of the directors on the NYSE Regulation Board be fair representation candidates is designed to ensure the fair representation of NYSE members on its Board. The Commission notes that, while the proposal eliminates the requirement regarding a specific minimum number of fair representation candidates on the Board, it does not alter the minimum 20% requirement for fair representation candidates or the process by which members can directly petition and vote for representatives on the NYSE Regulation Board. Moreover, the Commission notes that the proposal adds to the NYSE Regulation Bylaws a provision that whenever 20% of the Board would not result in a whole number, such number would in all cases be rounded up to the nearest whole number, thus ensuring that the fair representation candidates never constitute less than 20% of the Board. Furthermore, as the Exchange noted, the proposed change to the NYSE Regulation Bylaws is

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<sup>15</sup> 15 U.S.C. 78f(b)(3).

consistent with previous proposals approved by the Commission.<sup>16</sup> The Commission therefore finds that the Exchange's proposal is consistent with Section 6(b)(3) of the Act.<sup>17</sup>

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>18</sup> that the proposed rule change (SR-NYSE-2013-32) is approved.

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

Kevin M. O'Neill  
Deputy Secretary

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<sup>16</sup> See supra notes 12 and 13 and accompanying text.

<sup>17</sup> 15 U.S.C. 78f(b)(3).

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).