

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-77899 ; File No. SR-NYSE-2016-37)

May 24, 2016

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Removing from Its Rules Certain Internal Procedures Regarding the Use of Fine Income

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act” or “Exchange Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on May 13, 2016, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 the Substance of the Proposed Rule Change

The Exchange proposes to remove from its rules certain internal procedures regarding the use of fine income. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

received on the proposed rule change. The text of those 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 parts 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 proposes to remove from its rules certain internal procedures regarding the use of fine income, which were approved in 2007 (the “Fine Income Procedures”) in order to align the Exchange’s use of fine income with other self-regulatory organizations (“SROs”). The Exchange believes that the Fine Income Limitations [sic] are no longer necessary and are duplicative of the limitations on the use of regulatory assets and income, including fine income, set forth in Article IV, Section 4.05 of the operating agreement of the Exchange (“Section 4.05”). Section 4.05 prohibits the Exchange from using any regulatory assets or any regulatory fees, fines or penalties collected by the Exchange’s regulatory staff for commercial purposes or distributing such assets, fees, fines or penalties to NYSE Group, Inc. (“NYSE Group”), the Exchange’s member, or any other entity.<sup>4</sup>

For the reasons discussed below, the Exchange believes that together Section 4.05 and the provisions governing the Regulatory Oversight Committee (“ROC”) of the Exchange’s Board of Directors adequately address the concerns underlying the Fine Income Procedures and provide sufficient protections to ensure the proper use of fine income by the Exchange.

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<sup>4</sup> See Ninth Amended and Restated Operating Agreement of New York Stock Exchange LLC, Art. IV, Sec. 4.05; see also Securities Exchange Act Release No. 75991 (September 28, 2015), 80 FR 59837 (October 2, 2015) (SR-NYSE-2015-27) (“NYSE Approval Order”), at 59839.

## Background

### The Fine Income Procedures

In 2006, New York Stock Exchange, Inc. merged with Archipelago Holdings, Inc. (the “Archipelago Merger”).<sup>5</sup> Prior to approval of rule changes related to the Archipelago Merger, in conversation with the staff of the Securities and Exchange Commission (“Commission”), the Exchange undertook to subsequently file a proposed rule change regarding the use of fines collected from member organizations following disciplinary action against such member organizations.<sup>6</sup> On January 31, 2007, the Commission approved the proposed rule change establishing the Fine Income Procedures.<sup>7</sup>

The Exchange’s Fine Income Procedures referred to actions to be taken by the Exchange’s subsidiary, NYSE Regulation, Inc. (“NYSE Regulation”), and NYSE Regulation’s board of directors (the “NYSE Regulation Board”), because at the time performance of certain of the Exchange’s regulatory functions was delegated to NYSE Regulation. Such delegation was

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<sup>5</sup> See id. The Archipelago Merger had the effect of “demutualizing” New York Stock Exchange, Inc. by separating equity ownership from trading privileges, and converting it to a for-profit entity. See Securities Exchange Act Release No. 53382, 71 FR 11251, 11254 (February 27, 2006) [sic] (SR-NYSE-2005-77) (“Merger Approval Order”). In the resulting re-organization, the Exchange became a wholly-owned subsidiary of NYSE Group, and succeeded to New York Stock Exchange, Inc.’s registration as a national securities exchange under the Exchange Act. See id. at 11255.

<sup>6</sup> See id. at 11270, note 231. Subject to the requirement to file fees with the Commission, the Exchange determines, assesses, collects and retains certain registration and regulatory fees set forth in its Price List.

<sup>7</sup> See Securities Exchange Act Release No. 55216 (January 31, 2007), 72 FR 5779 (February 7, 2007) (NYSE-2006-109) (“Order Approving the Fine Income Procedures”).

made in 2006 pursuant to a Delegation Agreement (the “Delegation Agreement”) between the Exchange, NYSE Regulation, and NYSE Market (DE), Inc. (“NYSE Market (DE)”)<sup>8</sup>

As approved, the Fine Income Procedures provided that:<sup>9</sup>

- Fines would play no role in the annual NYSE Regulation budget process.

Beginning with the preparation of the 2007 operating budget, fines would be budgeted at zero, that is, budgeted expenses of NYSE Regulation would be offset entirely by budgeted income that did not include any anticipated income from fines. Among other things, this meant that fines would not offset amounts budgeted for compensation of NYSE Regulation employees or directors. During the course of a year, income from fines would be considered as available to fund non-compensation expenses of NYSE Regulation, which expenses were not anticipated in the budget process or which could not be included in the budget prepared in advance of the fiscal year because NYSE Regulation was unable to budget sufficient income from sources other than fines to offset the expenses.

- The use of fine income by NYSE Regulation would be subject to specific review and approval by the NYSE Regulation board of directors.

On a quarterly basis, the staff of NYSE Regulation would provide to the NYSE Regulation Board a report on the amount of fine income received to date during

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<sup>8</sup> See NYSE Approval Order, *supra* note 4, at 59839. The Exchange’s market functions were delegated to NYSE Market (DE). Although the Delegation Agreement set forth the terms under which the Exchange delegated its functions to NYSE Regulation and NYSE Market (DE), the Exchange retained ultimate responsibility for the operations, rules and regulations developed by NYSE Regulation and NYSE Market (DE) and for their enforcement.

<sup>9</sup> See Securities Exchange Act Release No. 55003 (December 22, 2006), 71 FR 78497, 78498 (December 29, 2006) (NYSE-2006-109) (the “Proposing Release”).

the year and recommendations regarding its proposed use to fund regulatory expenses as above described. The use of the fine income would be subject to NYSE Regulation Board approval. Following each year, the staff of NYSE Regulation would provide the NYSE Regulation Board a report reprising the fines imposed and the utilization of fine income by NYSE Regulation during that year. This report would analyze fines imposed by NYSE Regulation for consistency with precedent from both other NYSE disciplinary cases as well as publicly available disciplinary cases adjudicated by the National Association of Securities Dealers, Inc. and the Commission.

Each year the NYSE Regulation Board would also consider whether unused fine income had accumulated beyond a level reasonably necessary for future contingencies, and could determine to utilize any such excess to fund one or more special projects of NYSE Regulation, to reduce fees charged by NYSE Regulation to its member organizations or the markets that it serves, or for a charitable purpose.

#### Amendment of the Fine Income Procedures

Effective February 16, 2016, the Delegation Agreement terminated and NYSE Regulation ceased performing regulatory functions on behalf of the Exchange, which has re-integrated its regulatory functions. The ROC of the Exchange's Board of Directors now provides independent oversight of the regulatory function of the Exchange.<sup>10</sup>

In its filing proposing the creation of the ROC and termination of the Delegation

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<sup>10</sup> See NYSE Approval Order, *supra* note 4, at 59838. Similarly, following termination of the Delegation Agreement, NYSE Market (DE)'s delegated market responsibilities are performed by the Exchange.

Agreement, the Exchange addressed the Fine Income Procedures. Specifically, it “reiterate[ed] [sic] the previous commitments that fines would play no role in the annual regulatory operating budget process and that the use of fine income by Exchange regulatory staff would be subject to review and approval by the proposed ROC.”<sup>11</sup> Accordingly, the ROC has assumed the responsibilities previously held by the NYSE Regulation Board.

#### Proposed Amendment

The Exchange proposes to delete the Fine Income Procedures from the Exchange rules. The Exchange would remain subject to Section 4.05, which prohibits it from using any regulatory assets or any regulatory fees, fines or penalties collected by the Exchange’s regulatory staff for commercial purposes or distributing such assets, fees, fines or penalties to the Exchange’s member or any other entity.<sup>12</sup>

In its Order Approving the Fine Income Procedures, the Commission stated that the Fine Income Procedures were “to assure the proper exercise by NYSE Regulation of its power to fine member organizations of the Exchange and the proper use by NYSE Regulation of the funds so collected.”<sup>13</sup> The Exchange believes that Section 4.05 and the operating agreement provisions governing the ROC adequately address these concerns.

First, the Exchange believes that limitations on the use of fines is not the most effective way to assure proper exercise by Exchange regulatory staff of the Exchange’s power to fine member organizations. Simply put, usage limitations on fine income do not provide oversight of regulatory performance. They just monitor how the resulting income is spent. The Exchange

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<sup>11</sup> See Securities Exchange Act Release No. 75288 (June 24, 2015), 80 FR 37316 (June 30, 2015) (SR-NYSE-2015-27), note 25.

<sup>12</sup> All fine monies previously collected would remain subject to the restrictions in Section 4.05.

<sup>13</sup> Order Approving the Fine Income Procedures, supra note 7, at 5779.

believes that the responsibility to assure proper exercise by Exchange regulatory staff of the Exchange's power to fine member organizations more properly lies with the ROC, which is responsible to oversee the Exchange's regulatory and self-regulatory organization responsibilities and assess the Company's regulatory performance.<sup>14</sup>

In addition, the disciplinary process itself contains a powerful check on the improper exercise by Exchange regulatory staff of the power to fine members and member organizations, specifically the appellate process, whereby adverse hearing panel determinations can be appealed to the Committee for Review, a committee of the Board of Directors of the Exchange that includes independent directors and individuals associated with member organizations of the Exchange, which recommends a disposition to the Board of Directors of the Exchange. Final actions of the Exchange can be appealed to the Commission, and Commission determinations can be challenged in federal court.

Second, the Exchange believes that, by setting clear limitations on its use, Section 4.05 is sufficient to ensure the proper use by the Exchange of fine income. Section 4.05 addresses this concern by prohibiting the use of fines for commercial purposes or distributions. Indeed, because Section 4.05 encompasses all regulatory assets and income, not just fines, it ensures the proper use by the Exchange of a broader range of regulatory funds, by prohibiting their use for commercial purposes or distributions.

The Commission stated in its Order Approving the Fine Income Procedures that it believed the Fine Income Procedures would "guard against the possibility that fines may be

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<sup>14</sup> See Ninth Amended and Restated Operating Agreement of New York Stock Exchange LLC, Art. II, Sec. 2.03(h)(ii). The ROC is made up entirely of independent directors of the Exchange.

assessed to respond to budgetary needs rather than to serve a disciplinary purpose.”<sup>15</sup> Section 4.05 also guards against this possibility by limiting the use of fines. However, unlike the Fine Income Procedures, Section 4.05 also guards against the possibility that other regulatory income, such as examination, access, registration, qualification, arbitration, dispute resolution and other regulatory fees, or regulatory assets, could be used or assessed to respond to budgetary needs, by making them unavailable for commercial purposes or distributions. At the same time, the ROC is specifically charged with reviewing the regulatory budget of the Exchange and inquiring into the adequacy of resources available in the budget for regulatory activities.<sup>16</sup> Accordingly, the Exchange believes that removing the Fine Income Procedures and relying on Section 4.05 and the provisions governing the ROC would provide adequate protections against the use of regulatory assets, or assessment of regulatory income, to respond to budgetary needs.

The Exchange believes that the circumstances that led to the Fine Income Procedures no longer exist. At the time the Fine Income Procedures were adopted, a predecessor to Section 4.05 was in effect (the “Predecessor Section”). Indeed, the Commission cited that fact when approving the Archipelago Merger:

The Commission further notes that the NYSE has taken steps to safeguard the use of regulatory monies. Specifically, New York Stock Exchange LLC will not be permitted to use any assets of, or any regulatory fees, fines, or penalties collected by, NYSE Regulation for commercial purposes or distribute such assets, fees, fines, or penalties to NYSE Group or any entity other than NYSE Regulation.<sup>17</sup>

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<sup>15</sup> Order Approving the Fine Income Procedures, supra note 7, at 5780.

<sup>16</sup> See note 14, supra.

<sup>17</sup> See Merger Approval Order, supra note 5, at 11263.



At the time, NYSE Regulation performed regulatory functions on behalf of the Exchange. On its face, the Predecessor Section, found in the Exchange’s 2006 operating agreement, only limited the Exchange itself. NYSE Regulation had the obligation under the Delegation Agreement to assure compliance with the rules of the Exchange, but the Fine Income Procedures provided a more direct commitment by NYSE Regulation to ensure the proper exercise of NYSE Regulation’s power to fine member organizations and the proper use by NYSE Regulation of fines collected.

Today, because the Delegation Agreement is no longer in effect, the same entity that fines member organizations is directly subject to the limits of Section 4.05. Accordingly, the Exchange believes that removing the Fine Income Procedures and relying on Section 4.05 and the provisions governing the ROC would provide adequate protections against the concerns cited by the Commission in the Order Approving the Fine Income Procedures. Indeed, as pointed out above, Section 4.05 is wider in scope than the Fine Income Procedures, and so limits the Exchange’s use of all regulatory assets and income, not just fine income.

The proposed change would have the benefit of bringing the Exchange’s restrictions on the use of regulatory assets and income into greater conformity with those of its affiliates NYSE MKT LLC and NYSE Arca, Inc. NYSE MKT LLC has substantially the same provision as Section 4.05 its operating agreement.<sup>18</sup> The bylaws of NYSE Arca, Inc. also preclude the use of

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<sup>18</sup> See Eighth Amended and Restated Operating Agreement of NYSE MKT LLC, Art. IV, Sec. 4.05 (“The Company shall not use any regulatory assets or any regulatory fees, fines or penalties collected by Exchange regulatory staff for commercial purposes or distribute such assets, fees, fines or penalties to the Member or any other entity.”).

regulatory fees and penalties for commercial operations or dividends, limiting their use to funding legal, regulatory and surveillance operations.<sup>19</sup>

In addition, removing the Fine Income Procedures from its rules would make the Exchange's rules more consistent with the limitations on the use of regulatory assets and income of other SROs. Indeed, no other SRO limits the use of fine income to extra-budgetary use or subjects the use of fine income to specific review and approval by a regulatory oversight committee or any other body. Rather, other SROs' limitations on the use of regulatory funds are generally similar to Section 4.05, in that they provide that regulatory funds shall be used to fund the relevant SRO's legal, regulatory and (in some cases) surveillance operations, and shall not be used to make a distribution to the SRO's member or stockholder, as the case may be.

For example, the limited liability company agreement of the BOX Options Exchange ("BOX") provides that regulatory funds shall be used to the [sic] fund legal, regulatory and surveillance operations of BOX, and BOX shall not make any distribution to members using regulatory funds. BOX defines "regulatory funds" to include fees, fines or penalties derived from its regulatory operations.<sup>20</sup> Similarly, the limited liability company agreements of International Securities Exchange, LLC, and its affiliates ISE Gemini, LLC and ISE Mercury, LLC provide that regulatory funds shall not be used for non-regulatory purposes, but rather shall be used to

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<sup>19</sup> See Bylaws of NYSE Arca, Inc., Art. II, Sec. 2.06 ("Any revenues received by the Exchange from regulatory fees or regulatory penalties will be applied to fund the legal, regulatory and surveillance operations of the Exchange and will not be used to pay dividends. For purposes of this Section, regulatory penalties shall include restitution and disgorgement of funds intended for customers.").

<sup>20</sup> See Box Options Exchange Limited Liability Company Agreement, Art. 1, Sec. 1.1 and Art. 8, Sec. 8.1. The definition also states that "Regulatory Funds shall not include revenues derived from listing 6 A/72816686.20 [sic] fees, market data revenues, transaction revenues or any other aspect of the commercial operations of the Exchange or a facility of the Exchange, even if a portion of such revenues are used to pay costs associated with the regulatory operations of the Exchange." Id.

fund legal, regulatory and surveillance operations, and the SRO shall not make any distribution to its member using regulatory funds.<sup>21</sup>

Section 4.05 is more restrictive than the provisions of some other SROs, whose rules allow the use of regulatory funds for restitution and disgorgement of funds intended for customers. For example, the governing documents of affiliates BATS BZX Exchange, Inc., BATS BYX Exchange, Inc., BATS EDGX Exchange, Inc., and EDGA Exchange, Inc. provide that revenues received from fees derived from the regulatory function or regulatory penalties may be used to pay restitution and disgorgement of funds intended for customers, as well as to fund legal and regulatory operations, including surveillance and enforcement activities. Such funds may not be used for non-regulatory purposes or distributed to the stockholder.<sup>22</sup> The

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<sup>21</sup> Such agreements define “Regulatory Funds” to mean “fees, fines or penalties derived from the regulatory operations of the Company, provided that Regulatory Funds shall not include revenues derived from listing fees, market data revenues, transaction revenues or any other aspect of the commercial operations of the Company or a facility of the Company, even if a portion of such revenues are used to pay costs associated with the regulatory operations of the Company.” See Third Amended and Restated Limited Liability Company Agreement of International Securities Exchange, LLC, Art. III, Sec. 3.3(ii); Second Amended and Restated Limited Liability Company Agreement of ISE Gemini, LLC, Art. III, Sec. 3.3(ii); and Limited Liability Company Agreement of ISE Mercury, LLC, Art. III, Sec. 3.3(ii).

<sup>22</sup> See Fourth Amended and Restated Bylaws of BATS BZX Exchange, Inc., Art. X, Sec. 4; Fourth Amended and Restated Bylaws of BATS BYX Exchange, Inc., Art. X, Sec. 4; Fifth Amended and Restated Bylaws of BATS EDGX Exchange, Inc., Art. X, Sec. 4; and Fifth Amended and Restated Bylaws of BATS EDGA Exchange, Inc., Art. X, Sec. 4.

limited liability company agreement of Miami International Securities Exchange, LLC, and bylaws of National Stock Exchange, Inc., have similar provisions.<sup>23</sup>

The limitations imposed on the NASDAQ Stock Market LLC (“Nasdaq”) in its operating agreement are also less restrictive than the limitations imposed on the Exchange by Section 4.05. They simply limit Nasdaq from making a distribution to its member using regulatory funds. “Regulatory funds” is defined to mean fees, fines, or penalties derived from the regulatory operations of Nasdaq.<sup>24</sup> When the NASDAQ OMX Group, Inc. acquired the Boston Stock Exchange (“BSE”), the BSE by-laws were amended to include a similar provision that dividends could not be paid to the stockholders using regulatory funds, also defined as fees, fines, or penalties derived from regulatory operations.<sup>25</sup> The Commission described the provision as

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<sup>23</sup> See Second Amended and Restated Limited Liability Company Agreement of Miami International Securities Exchange, LLC, Art. IX, Sec. 9.4 (“Any Regulatory Funds will not be used for non-regulatory purposes or distributed to the LLC Member, but rather, shall be applied to fund the legal and regulatory operations of the Company (including surveillance and enforcement activities), or, as the case may be, shall be used to pay restitution and disgorgement of funds intended for customers.”); Amended and Restated By-laws of National Stock Exchange, Inc., [sic] Art. X, Sec. 10.4 (“Any revenues received by the Exchange from fees derived from its regulatory function or regulatory penalties will not be used to pay dividends and shall be applied to fund the legal and regulatory operations of the Exchange (including surveillance and enforcement activities), or, as the case may be, shall be used to pay restitution and disgorgement of funds intended for customers.”); see also Amended and Restated By-Laws of Miami International Securities Exchange, LLC, Art. IX, Sec. 9.4.

<sup>24</sup> See Second Amended Limited Liability Company Agreement of The NASDAQ Stock Market LLC, Sec. 15. The definition of Regulatory Funds also states that “‘Regulatory Funds’ shall not be construed to include revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of the Company, even if a portion of such revenues are used to pay costs associated with the regulatory operations of the Company.” Id., Sch. A. See also by-laws of NASDAQ BX, Inc., Art. IX, Sec. 9.8, and Second Amended Limited Liability Company Agreement of NASDAQ PHLX LLC, Sec. 14.

<sup>25</sup> See Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR–BSE–2008–02; SR–BSE–2008–23; SR–BSE–2008–25; SR–BSECC–2008–01), at 46942.

“intended to preclude BSE from using its authority to raise regulatory funds for the purpose of benefiting its shareholders, or for other non-regulatory purposes, such as executive compensation.”<sup>26</sup> The Exchange believes that Section 4.05, which is more expansive in its scope, meets the same goal.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act<sup>27</sup> in general, and Section 6(b)(1)<sup>28</sup> in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. Deletion of the Fine Income Procedures would not diminish the Exchange’s ability to adequately ensure the proper exercise of the Exchange’s power to fine member organizations and the proper use by the Exchange of the funds collected through the disciplinary process.

The Exchange believes that Section 4.05 and the operating agreement provisions governing the ROC adequately address the concerns underlying adoption of the Fine Income Procedures, rendering the Fine Income Procedures superfluous. First, the Fine Income Procedures cannot assure the proper exercise by Exchange regulatory staff of the Exchange’s power to fine member organizations of the Exchange, as usage limitations on fine income do not provide oversight of regulatory performance. The responsibility more properly lies with the

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<sup>26</sup> See Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR-BSE-2008-02; SR-BSE-2008-23; SR-BSE-2008-25; SR-BSECC-2008-01), at 46942.

<sup>27</sup> 15 U.S.C. 78f(b).

<sup>28</sup> 15 U.S.C. 78f(b)(1).

ROC, which is responsible for overseeing the Exchange's regulatory and self-regulatory organization responsibilities and assessing its regulatory performance, including reviewing the regulatory budget and inquiring into the adequacy of resources available in the budget for regulatory activities.<sup>29</sup> In addition, the disciplinary process itself contains a powerful check on the improper exercise by Exchange regulatory staff of the power to fine members and member organizations, specifically, the appellate process, whereby adverse hearing panel determinations can be appealed to the Committee for Review, which recommends a disposition to the Board of Directors of the Exchange. Final actions of the Exchange can be appealed to the Commission, and Commission determinations can be challenged in federal court. Second, by setting clear imitations [sic] on its use, Section 4.05 is not only sufficient to ensure the proper use by the Exchange of fine income but also, because it encompasses all regulatory assets and income, ensures the proper use by the Exchange of a broader range of regulatory funds, by prohibiting their use for commercial purposes or distributions.

Finally, the Exchange believes that Section 4.05 and the operating agreement provisions governing the ROC would provide adequate protections against the assessment of regulatory income, or the use of regulatory assets, to respond to budgetary needs. By limiting their use, Section 4.05 guards against the possibility that fines may be assessed to respond to budgetary needs rather than to serve a disciplinary purpose. However, unlike the Fine Income Procedures, Section 4.05 also guards against the possibility that other regulatory income, such as examination, access, registration, qualification, arbitration, dispute resolution and other regulatory fees, or regulatory assets, could be used or assessed to respond to budgetary needs, by making them unavailable for commercial purposes or distributions.

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<sup>29</sup> See note 14, supra.

For the same reasons, the Exchange believes that the proposed deletion of the Fine Income Procedures is consistent with Section 6(b)(4),<sup>30</sup> which requires that the rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among the exchange's members and issuers and other persons using its facilities, and Section 6(b)(5),<sup>31</sup> which requires that the rules of the 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. As noted, the Exchange believes that the responsibility to assure the proper exercise by Exchange regulatory staff of the Exchange's power to fine member organizations more properly lies with the ROC, and that, by setting clear imitations [sic] on its use, Section 4.05 is not only sufficient to ensure the proper use by the Exchange of fine income but also, because it encompasses all regulatory assets and income, ensures the proper use by the Exchange of a broader range of regulatory funds, by prohibiting their use for commercial purposes or distributions. Finally, the Exchange believes that Section 4.05 and the operating agreement provisions governing the ROC would provide adequate protections against the assessment of regulatory income, or the use of regulatory assets, to respond to budgetary needs. Section 4.05 not only guards against the possibility that fines may be assessed to respond to budgetary needs rather than to serve a disciplinary purpose, but also guards against the possibility that other regulatory income or regulatory assets could be used or assessed in that manner, by making them unavailable for commercial purposes or distributions.

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<sup>30</sup> 15 U.S.C. 78f(b)(4).

<sup>31</sup> 15 U.S.C. 78f(b)(5).

The Exchange believes that the proposed deletion of the Fine Income Procedures is consistent with the Exchange's present governance structure, centered on a ROC. Today, because the Delegation Agreement is no longer in effect, the same entity that fines member organizations is directly subject to the limits of Section 4.05. Accordingly, the proposed deletion is consistent with ensuring that the Exchange is so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

The Exchange notes that the proposed change would have the additional benefit of making the Exchange's rules more consistent with the limitations on the use of regulatory assets and income of other SROs and bringing the Exchange's restrictions on the use of regulatory assets and income into greater conformity with those of its affiliates NYSE MKT LLC and NYSE Arca, Inc. Indeed, no other SRO limits the use of fine income to extra-budgetary use or subjects the use of fine income to specific review and approval by a regulatory oversight committee or any other body.<sup>32</sup> Rather, other SROs' limitations on the use of regulatory funds are generally similar to Section 4.05, in that they provide that regulatory funds shall be used to fund the relevant SRO's legal, regulatory and (in some cases) surveillance operations, and shall not be used to make a distribution to the SRO's member or stockholder, as the case may be. In fact, Section 4.05 is more restrictive than the provisions of some other SROs, whose rules allow the use of regulatory funds for restitution and disgorgement of funds intended for customers, or simply limit the SRO from making a distribution to its member using regulatory funds.

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<sup>32</sup> See notes 20-25 [sic] and accompanying text.



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 Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with the administration and functioning of the Exchange.

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

- (A) by order approve or disapprove the 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2016-37 on the subject line.

##### Paper comments:

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

All submissions should refer to File Number SR-NYSE-2016-37. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such 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-2016-37, 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.<sup>33</sup>

Robert W. Errett  
Deputy Secretary

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<sup>33</sup> 17 CFR 200.30-3(a)(12).