

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-55293; File No. SR-NYSE-2006-120)

February 14, 2007

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Granting Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Regarding the Proposed Combination Between NYSE Group, Inc. and Euronext N.V.

I. Introduction

On December 29, 2006, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended, (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change regarding the proposed business combination (“Combination”) between NYSE Group, Inc. (“NYSE Group”) and Euronext N.V. (“Euronext”). The proposed rule change was published for comment in the Federal Register on January 8, 2007.<sup>3</sup> The Commission has received two comments on the proposal.<sup>4</sup> The Exchange filed a response to comments on February 14, 2007.<sup>5</sup>

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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. 55026 (December 29, 2006), 72 FR 814 (“Notice”).

<sup>4</sup> See letter from Andrew Rothlein, to Nancy Morris, Secretary, Commission, dated January 17, 2007 (“OTR Investors Letter”); and letter from Professor J. Robert Brown, Jr., University of Denver Sturm College of Law, to Nancy Morris, Secretary, Commission, received by the Commission, February 13, 2007 (“Brown Letter”).

<sup>5</sup> See letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy M. Morris, Secretary, Commission, dated February 14, 2007 (“NYSE Response to Comments”).

On February 13, 2007, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>6</sup> This order approves the proposed rule change, grants accelerated approval to Amendment No. 1, and solicits comments from interested persons on Amendment No. 1.

The Commission has reviewed carefully the proposed rule change, the comment letters, and the NYSE Response to Comments, and finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>7</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b) of the Exchange Act,<sup>8</sup> 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 Exchange Act and to enforce compliance by its members and persons associated with its members with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the exchange, and assure the 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. Section 6(b) of the Exchange Act<sup>9</sup> also requires that the rules of the exchange be designed to promote just and equitable principles of trade, to remove impediments to and

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<sup>6</sup> See Partial Amendment dated February 13, 2007 (“Amendment No. 1”). The text of Amendment No. 1 and Exhibits 5C, 5D, 5F, 5G, 5H, 5I, 5J, and 5M, which set forth certain governing documents as proposed to be amended, are available on the Commission’s Web site (<http://www.sec.gov/rules/sro.shtml>), at the Commission’s Public Reference Room, at the NYSE, and on the NYSE’s Web site (<http://www.nyse.com>).

<sup>7</sup> 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).

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> Id.

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. Accelerated Approval of Amendment No. 1

As set forth below, the Commission finds good cause for approving Amendment No. 1 prior to the thirtieth day after publishing notice of Amendment No. 1 in the Federal Register pursuant to Section 19(b)(2) of the Exchange Act.<sup>10</sup>

In Amendment No. 1, NYSE made changes to the Purpose Section of Form 19b-4 to (1) provide an explanation of the purpose of the proposed change from the current independence policy of NYSE Group to no longer provide as a categorical matter that a person fails to be independent if he or she is a director of an affiliate of a member organization; (2) specify that the Exchange has proposed to make a change to the ownership limitation in the NYSE Group Certificate of Incorporation to match the voting limitation, and add that the board of directors must determine that share ownership in excess of the concentration limitation will not impair the ability of NYSE Group to discharge its responsibilities under the Exchange Act and the rules and regulations thereunder; (3) clarify the process for nominating directors for the NYSE Euronext (“NYSE Euronext”) board of directors; (4) clarify that it is requesting that the Commission allow NYSE Euronext alone to wholly own and vote all of the outstanding common stock of NYSE Group; and (5) clarify that the organizational documents of the Exchange, NYSE Market, Inc. (“NYSE Market”), and NYSE Regulation, Inc. (“NYSE Regulation”) provide that any person not meeting the board qualifications in the relevant organizational documents will not be

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<sup>10</sup> 15 U.S.C. 78s(b)(2). Pursuant to Section 19(b)(2) of the Exchange Act, the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission finds good cause for so doing.

qualified to serve, and therefore will not be eligible to serve as a director. The Exchange made a corresponding clarifying change to the proposed Second Amended and Restated Operating Agreement of the Exchange (“proposed NYSE Operating Agreement”) and the proposed Amended and Restated Bylaws of NYSE Market (“proposed NYSE Market Bylaws”). Additionally, the Exchange made a change to the proposed Second Amended and Restated Bylaws of NYSE Regulation (“proposed NYSE Regulation Bylaws”) to add that any person who is not elected or appointed in accordance with the qualifications set forth in Section 1(A) of Article III of the proposed NYSE Regulation Bylaws shall not be qualified to serve as a director and therefore shall not be elected to serve as a director. This proposed change was described in the Notice,<sup>11</sup> but was inadvertently omitted from the proposed NYSE Regulation Bylaws. The Exchange also made technical revisions to proposed Article VII, Section 2 of the proposed Amended and Restated Certificate of Incorporation of NYSE Group (“proposed NYSE Group Certificate of Incorporation”) relating to quorum requirements for each meeting of stockholders.<sup>12</sup> The Exchange also is amending the Trust Agreement (as defined below) to specify that the shares of Archipelago Holdings, Inc. (“Archipelago”) may also be held directly by the Trust (as defined below). These changes are necessary to clarify the proposal. The Commission finds good cause to accelerate approval of these changes prior to the thirtieth day after publication in the Federal Register because they clarify the Exchange’s rules, which should facilitate the Exchange’s compliance with its rules and the Commission’s ability to ensure

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<sup>11</sup> See Notice, supra note 3, at 831.

<sup>12</sup> In the Notice, the Exchange mistakenly showed proposed deletions to the current quorum requirements. The Exchange is not proposing to change the quorum requirements that exist in the current NYSE Group Certificate of Incorporation.

compliance with such rules, and assist members and investors in understanding the application and scope of the rules.

In addition, the Exchange made certain clarifying, conforming, technical, non-material, and non-substantive changes to the Purpose Section of Form 19b-4, the Independence Policy of the NYSE Euronext Board of Directors (“Independence Policy”), the proposed NYSE Group Certificate of Incorporation, the proposed Second Amended and Restated Certificate of Incorporation of NYSE Market (“proposed NYSE Market Certificate of Incorporation”), the proposed Restated Certificate of Incorporation of NYSE Regulation<sup>13</sup> (“proposed NYSE Regulation Certificate of Incorporation”), and the Trust Agreement, which raise no new or novel issues. These changes are non-substantive and technical in nature and are necessary to reflect the changes from the current rules of the Exchange and clarify the proposal. The Commission finds good cause exists to accelerate approval of these changes prior to the thirtieth day after publication in the Federal Register because they clarify the Exchange’s rules, which should facilitate the Exchange’s compliance with its rules, the Commission’s ability to ensure compliance with such rules, and assist members and investors in understanding the application and scope of the rules.

The Commission finds that the changes proposed in Amendment No. 1 are consistent with the Exchange Act and therefore finds good cause to accelerate approval of Amendment No. 1, pursuant to Section 19(b)(2) of the Exchange Act.<sup>14</sup>

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<sup>13</sup> In Amendment No. 1, the Exchange proposed to change the name of this document to conform to New York State law. See Amendment No. 1, supra note 6.

<sup>14</sup> 15 U.S.C. 78s(b)(2).

B. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether Amendment No. 1 is consistent with the Exchange 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-2006-120 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSE-2006-120. 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. Copies of such filing also will be available for inspection and copying at the principal office of NYSE. 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 Amendment No. 1 of File Number SR-NYSE-2006-120 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

## II. Discussion

The Exchange has submitted the proposed rule change in connection with the Combination of NYSE Group with Euronext. As a result of the Combination, the businesses of NYSE Group (including the businesses of the Exchange and NYSE Arca, Inc. (a Delaware corporation, registered national securities exchange and self-regulatory organization (“NYSE Arca”))), and Euronext will be held under a single, publicly traded holding company named NYSE Euronext, a Delaware corporation. Following the Combination, each of NYSE Group and Euronext will be a separate subsidiary of NYSE Euronext, and their respective businesses and assets will continue to be held as they are currently held (subject to any post-closing corporate reorganization of Euronext). The proposed rule change is necessary to effectuate the consummation of the Combination and will not be operative until the consummation of the Combination.

### A. Corporate Structure

After the Combination, the Exchange will remain a wholly owned subsidiary of NYSE Group. NYSE Market, a Delaware corporation, will remain a wholly owned subsidiary of the Exchange and conduct the Exchange’s business. NYSE Regulation, a New York Type A not-for-profit corporation, will remain a wholly owned subsidiary of the Exchange, and continue to perform the regulatory responsibilities for the Exchange pursuant to a delegation agreement with the Exchange and many of the regulatory functions of NYSE Arca pursuant to a services agreement with NYSE Arca.

Archipelago, a Delaware corporation, will remain a wholly owned subsidiary of NYSE Group. NYSE Arca Holdings, Inc., a Delaware corporation (“NYSE Arca Holdings”), and NYSE Arca L.L.C., a Delaware limited liability company (“NYSE Arca LLC”), will remain wholly owned subsidiaries of Archipelago. NYSE Arca will remain a wholly owned subsidiary of NYSE Arca Holdings, and NYSE Arca Equities, Inc. (“NYSE Arca Equities”), a Delaware corporation formerly known as PCX Equities, Inc., will remain a wholly owned subsidiary of NYSE Arca. NYSE Arca will continue to maintain its status as a registered national securities exchange and self-regulatory organization. Archipelago’s businesses and assets will continue to be held by it and its subsidiaries. Pursuant to a regulatory services agreement, NYSE Regulation will continue to perform many of the regulatory functions of NYSE Arca. The governing documents of Archipelago will remain unchanged other than amendments to the Certificate of Incorporation of Archipelago to allow the Trust (as defined below) to exceed the voting limitation and ownership concentration limitation as provided for in the Trust Agreement.<sup>15</sup>

The Exchange represents that the Combination will have no effect on the ability of any party to trade securities on NYSE Market, NYSE Arca, or NYSE Arca Equities. Euronext and its subsidiaries will continue to operate their business and operations in substantially the same

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<sup>15</sup> These amendments are the subject of a proposed rule change filed by NYSE Arca, which proposed rule change the Commission is approving today. See Securities Exchange Act Release No. 55294 (February 14, 2007) (approval order). See also Securities Exchange Act Release No. 55109 (January 16, 2007), 72 FR 2578 (January 19, 2007) (notice of proposed rule change of NYSE Arca). The Combination involves certain modifications to the organizational documents of NYSE Group and of NYSE Euronext, which upon consummation of the Combination will be the new indirect parent company of NYSE Arca. The organizational documents and independence policies of NYSE Group and NYSE Euronext and the Trust Agreement constitute rules of NYSE Arca. The resolutions of the board of directors of NYSE Group are also rules of NYSE Arca requiring Commission approval. Accordingly, NYSE Arca has submitted a proposed rule change to reflect the rule changes to be implemented in connection with the Combination.

manner as they are conducted currently, with any changes subject to the approval of the European Regulators to the extent required.

A core aspect of the structure of the Combination is local regulation of the marketplace, members, and issuers. Therefore, securities exchanges, members, and issuers of NYSE Group and Euronext will continue to be regulated in the same manner as they are currently regulated. The Commission notes that this conclusion (i.e., that securities exchanges, members, and issuers of NYSE Group and Euronext will continue to be regulated in the same manner as they are currently regulated) is based on the structure of the Combination as described in this proposal.

#### 1. NYSE Euronext

Following the Combination, NYSE Euronext will be a for-profit, publicly traded stock corporation and will act as a holding company for the businesses of the NYSE Group and Euronext. NYSE Euronext will own all of the equity interests in NYSE Group and its subsidiaries, including the Exchange and NYSE Arca, and a majority (if not all) of the equity interests in Euronext and its respective subsidiaries. Section 19(b) of the Exchange Act and Rule 19b-4 thereunder require a self-regulatory organization (“SRO”) to file proposed rule changes with the Commission. Although NYSE Euronext is not an SRO, certain provisions of its proposed Amended and Restated Certificate of Incorporation (“proposed NYSE Euronext Certificate of Incorporation”) and proposed Amended and Restated Bylaws (“proposed NYSE Euronext Bylaws”) are rules of an exchange<sup>16</sup> if they are stated policies, practices, or

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<sup>16</sup> See Section 3(a)(27) of the Exchange Act, 15 U.S.C. 78c(a)(27). If NYSE Euronext decides to change its Certificate of Incorporation or Bylaws, NYSE Euronext must submit such change to the board of directors of the Exchange, NYSE Market, NYSE Regulation, NYSE Arca, and NYSE Arca Equities, and if any or all of such board of directors shall determine that such amendment or repeal must be filed with or filed with and approved by the Commission pursuant to Section 19 of the Exchange Act and the

interpretations, as defined in Rule 19b-4 under the Exchange Act, of the exchange, and must be filed with the Commission pursuant to Section 19(b)(4) of the Exchange Act and Rule 19b-4 thereunder. Accordingly, the Exchange has filed the proposed NYSE Euronext Certificate of Incorporation and the proposed NYSE Euronext Bylaws with the Commission.

a. Board of Directors

Because directors of NYSE Euronext will also serve on the boards of the Exchange, NYSE Market, and NYSE Regulation, the composition of, and selection process for, the NYSE Euronext's board of directors is described below. It is currently contemplated that immediately after the Combination, the NYSE Euronext board of directors will consist of twenty-two directors. The initial NYSE Euronext board of directors will have an equal number of U.S. Persons<sup>17</sup> and European Persons.<sup>18</sup> Eleven directors will be the directors of NYSE Group as of immediately prior to the consummation of the Combination (including the chief executive officer and chairman of the board of NYSE Group). Nine directors will be members of the supervisory

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rules thereunder, such change shall not be effective until filed with or filed with and approved by the Commission, as applicable. See proposed NYSE Euronext Certificate of Incorporation, Article X and proposed NYSE Euronext Bylaws, Article X, Section 10.10(C).

<sup>17</sup> A "U.S. Person" shall mean, as of the date of his or her most recent election or appointment as a director, any person whose domicile as of such date is and for the immediately preceding 24 months shall have been the United States. See proposed NYSE Euronext Bylaws, Article III, Section 3.2(A).

<sup>18</sup> A "European Person" shall mean, as of the date of his or her most recent election or appointment as a director, any person whose domicile as of such date is and for the immediately preceding 24 months shall have been a country in Europe. See proposed NYSE Euronext Bylaws, Article III, Section 3.2(A).

board of Euronext<sup>19</sup> as of immediately prior to the consummation of the Combination (including the chairman of the Euronext supervisory board). One director will be the chief executive officer of Euronext as of immediately prior to the consummation of the Combination, and the remaining director will be a European Person approved by both the NYSE Group board of directors and the Euronext supervisory board. The term of the initial directors of NYSE Euronext will end with the first annual meeting of stockholders to be held by NYSE Euronext, at which meeting the existing directors of NYSE Euronext will be nominated as directors of NYSE Euronext by the nominating and governance committee of the NYSE Euronext board of directors. Thereafter, the directors elected will serve one-year terms.

Beginning with the first annual meeting of stockholders,<sup>20</sup> nominees to the NYSE Euronext board of directors will be nominated by the nominating and governance committee of the NYSE Euronext board of directors, which committee shall be comprised of an equal number of European Persons and U.S. Persons. The proposed NYSE Euronext Bylaws provide that in any election of directors, the nominees who shall be elected to the NYSE Euronext board of directors shall be nominees who receive the highest number of votes such that, immediately after such election: (1) U.S. Persons as of such election shall constitute at least half of, but no more than the smallest number of directors, that will constitute a majority of the directors on the NYSE Euronext board of directors; and (2) European Persons as of such election shall constitute the remainder of the directors on the NYSE Euronext board of directors.<sup>21</sup>

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<sup>19</sup> The supervisory board of a Dutch company such as Euronext, is the functional equivalent of a board of directors of a U.S. company but is not permitted to include members of management.

<sup>20</sup> See Amendment No. 1, supra note 6.

<sup>21</sup> See proposed NYSE Euronext Bylaws, Article III, Section 3.2(A).

The proposed NYSE Euronext Bylaws also provide that either the chairman of the board shall be a U.S. Person and the chief executive officer shall be a European Person, or the chairman of the board shall be a European Person and the chief executive officer shall be a U.S. Person.<sup>22</sup> The chief executive officer and deputy chief executive officer may be, but are not required to be, members of the board of directors of NYSE Euronext.

Each member of the NYSE Euronext board of directors (other than the chief executive officer and deputy chief executive officer of NYSE Euronext if they are members of the board of directors) must satisfy the independence requirements set forth in the Independence Policy, as amended from time to time.<sup>23</sup>

The NYSE Euronext board of directors may create one or more committees. It is expected that upon consummation of the Combination, the NYSE Euronext board of directors will have an audit committee, a human resource and compensation committee, and a nominating and governance committee. Each of the audit committee, human resource and compensation

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<sup>22</sup> See proposed NYSE Euronext Bylaws, Article III, Section 3.3.

<sup>23</sup> The chief executive officer and deputy chief executive officer, if they are members of the board of directors, will be recused from any act of the board of directors, whether it is acting as the board of directors or as a committee of the board, with respect to any act of any board committee that is required to be comprised solely of independent directors. See proposed NYSE Euronext Bylaws, Article III, Section 3.4. To clarify and continue NYSE Group board's current practice of soliciting the input of NYSE Group management for certain board and committee matters, the Exchange proposes to use the word "acts" instead of the word "deliberations" and "acts" instead of the word "activities" in the proposed NYSE Euronext Bylaws (See Amendment No. 1, *supra* note 6), each of which are currently used in the Amended and Restated Bylaws of NYSE Group ("current NYSE Group Bylaws") but will be deleted as part of the proposed changes to the Amended and Restated Certificate of Incorporation of NYSE Group ("current NYSE Group Certificate of Incorporation"). (See Amendment No. 1, *supra* note 6.) This same clarification to board practice will also be made to the Bylaws of NYSE Market ("current NYSE Market Bylaws") and the Amended and Restated Bylaws of NYSE Regulation ("current NYSE Regulation Bylaws").

committee, and nominating and governance committee of the NYSE Euronext board of directors will consist solely of directors meeting the independence requirements of NYSE Euronext.

These committees also will perform relevant functions for NYSE Group, the Exchange, NYSE Market, NYSE Regulation, Archipelago, NYSE Arca, and NYSE Arca Equities, as well as other subsidiaries of NYSE Euronext, except that the board of directors of NYSE Regulation will continue to have its own compensation committee and nominating and governance committee.

b. Voting and Ownership Limitations; Changes in Control of the Exchange

The proposed NYSE Euronext Certificate of Incorporation includes restrictions on the ability to vote and own shares of stock of NYSE Euronext. Under the proposed NYSE Euronext Certificate of Incorporation, no person (either alone or together with its related persons)<sup>24</sup> will be entitled to vote or cause the voting of shares of stock of NYSE Euronext beneficially owned by such person or its related persons, in person or by proxy or through any voting agreement or other arrangement, to the extent that such shares represent in the aggregate more than 10% of the then outstanding votes entitled to be cast on such matter. No person (either alone or together with its related persons) may acquire the ability to vote more than 10% of the then outstanding votes entitled to be cast on any such matter by virtue of agreements or arrangements entered into with other persons not to vote shares of NYSE Euronext's outstanding capital stock. NYSE Euronext shall disregard any such votes purported to be cast in excess of these limitations.<sup>25</sup>

In addition, no person (either alone or together with its related persons) may at any time beneficially own shares of stock of NYSE Euronext representing in the aggregate more than 20%

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<sup>24</sup> See proposed NYSE Euronext Certificate of Incorporation, Article V, Section 1(L) and note 19 of the Notice for the definition of "related person."

<sup>25</sup> See proposed NYSE Euronext Certificate of Incorporation, Article V, Section 1(A).

of the then outstanding votes entitled to be cast on any matter.<sup>26</sup> In the event that a person, either alone or together with its related persons, beneficially owns shares of stock of NYSE Euronext in excess of the 20% threshold, such person and its related persons will be obligated to sell promptly, and NYSE Euronext will be obligated to purchase promptly, to the extent that funds are legally available for such purchase, that number of shares necessary to reduce the ownership level of such person and its related persons to below the permitted threshold, after taking into account that such repurchased shares will become treasury shares and will no longer be deemed to be outstanding.<sup>27</sup>

NYSE also has proposed to permit the NYSE Euronext board of directors to require any stockholder that the NYSE Euronext board of directors reasonably believes to be subject to the voting or ownership limitations summarized above, and any person (either alone or together with its related persons) that at any time beneficially owns 5% or more of NYSE Euronext's outstanding capital stock (which ownership has not been reported to NYSE Euronext), to provide to NYSE Euronext information regarding such ownership upon the request of the NYSE Euronext board of directors.<sup>28</sup> This requirement will allow NYSE Euronext to monitor potential changes in control to ensure that none of the limits are reached.

The NYSE Euronext board of directors may waive the provisions regarding voting and ownership limits, subject to a determination by the NYSE Euronext board of directors that the exercise of such voting rights (or the entering into of a voting agreement) or ownership, as applicable:

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<sup>26</sup> See proposed NYSE Euronext Certificate of Incorporation, Article V, Section 2(A).

<sup>27</sup> See proposed NYSE Euronext Certificate of Incorporation, Article V, Section 2(D).

<sup>28</sup> See proposed NYSE Euronext Certificate of Incorporation, Article V, Section 4.

- will not impair the ability of any of the Exchange, NYSE Market, NYSE Regulation, NYSE Arca LLC, NYSE Arca, and NYSE Arca Equities (each a “U.S. Regulated Subsidiary” and together, “U.S. Regulated Subsidiaries”), NYSE Euronext or NYSE Group to discharge their respective responsibilities under the Exchange Act and the rules and regulations thereunder;
- will not impair the ability of any of the European Market Subsidiaries or NYSE Euronext or Euronext to discharge their respective responsibilities under the European Exchange Regulations;<sup>29</sup>
- is otherwise in the best interest of NYSE Euronext, its stockholders, the U.S. Regulated Subsidiaries and the European Market Subsidiaries; and
- will not impair the Commission’s ability to enforce the Exchange Act or the European Regulators’ ability to enforce the European Exchange Regulations.

Such resolution expressly permitting such voting or ownership must be filed with and approved by the Commission under Section 19 of the Exchange Act<sup>30</sup> and filed with and approved by each European Regulator having appropriate jurisdiction and authority.

In addition, for so long as NYSE Euronext directly or indirectly controls the Exchange or NYSE Market, the NYSE Euronext board of directors cannot waive the voting and ownership limits above the 20% threshold for any person if such person or its related persons is a “member” or “member organization” of the Exchange (as defined in Exchange Rules). In addition, for so long as NYSE Euronext directly or indirectly controls NYSE Arca, NYSE Arca Equities, or any

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<sup>29</sup> See proposed NYSE Euronext Bylaws, Article VII, Section 7.3(A), (B), and (E) and note 23 of the Notice for the definitions of “European Exchange Regulations,” “European Market Subsidiary,” and “Euronext College of Regulators.”

<sup>30</sup> 15 U.S.C. 78s

facility of NYSE Arca, the NYSE Euronext board of directors cannot waive the voting and ownership limits above the 20% threshold if such person or its related persons is an ETP Holder of NYSE Arca Equities, or an OTP Holder or an OTP Firm of NYSE Arca.<sup>31</sup> Further, the NYSE Euronext board of directors also cannot waive the voting and ownership limits above the 20% threshold if such person or its related persons is subject to any statutory disqualification (as defined in Section 3(a)(39) of the Exchange Act) (a “U.S. Disqualified Person”) or has been determined by a European Regulator to be in violation of laws or regulations adopted in accordance with the European Directive on Markets in Financial Instruments applicable to any European Market Subsidiary requiring such person to act fairly, honestly and professionally (a “European Disqualified Person”).

Members that trade on an exchange traditionally have ownership interests in such exchange. As the Commission has noted in the past, however, a member’s interest in an exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.<sup>32</sup> A member that is a controlling shareholder of an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently

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<sup>31</sup> ETP Holder is defined in the NYSE Arca Equities rules of NYSE Arca. OTP Holder and OTP Firm are defined in the rules of NYSE Arca.

<sup>32</sup> See Securities Exchange Act Release Nos. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving merger of New York Stock Exchange, Inc. and Archipelago, and demutualization of New York Stock Exchange, Inc. (“NYSE Inc.-Archipelago Merger Order”)); 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR-CHX-2004-26); 49718 (May 17, 2004), 69 FR 29611 (May 24, 2004) (SR-PCX-2004-08); 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003-73); and 49067 (January 13, 2004), 69 FR 2761 (January 20, 2004) (SR-BSE-2003-19).

monitor and surveil the member's conduct or diligently enforce its rules and the federal securities laws with respect to conduct by the member that violates such provisions.

The Commission finds the ownership and voting restrictions in the proposed NYSE Euronext Certificate of Incorporation are consistent with the Exchange Act. These requirements should minimize the potential that a person could improperly interfere with or restrict the ability of the Commission, the Exchange, or its subsidiaries to effectively carry out their regulatory oversight responsibilities under the Exchange Act.

## 2. NYSE Group

Following the Combination, NYSE Group will merge with a wholly owned subsidiary of NYSE Euronext and the surviving corporation will be a wholly owned subsidiary of NYSE Euronext.<sup>33</sup> Section 19(b) of the Exchange Act and Rule 19b-4 thereunder require an SRO to file proposed rule changes with the Commission. Although NYSE Group is not an SRO, certain provisions of the current NYSE Group Certificate of Incorporation and current NYSE Group Bylaws are rules of an exchange<sup>34</sup> if they are stated policies, practices, or interpretations, as

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<sup>33</sup> NYSE proposes to amend certain provisions of NYSE Group's organizational documents to reflect that, after the Combination, NYSE Group will be an intermediate holding company. The number of authorized shares of NYSE Group will be decreased. Provisions requiring a supermajority vote of shareholders to amend or repeal certain sections of the NYSE Group certificate of incorporation will be deleted. Also, provisions prohibiting NYSE Group shareholders from calling shareholder meetings, taking shareholder action by written consent and postponing shareholder meetings will be deleted. Provisions requiring advance notice from shareholders of shareholder director nominations or shareholder proposals will be eliminated. Finally, provisions relating to the mechanics of shareholders' meetings, such as the appointment of an inspector of elections, inspection of shareholder lists and opening and closing of polls will be deleted.

<sup>34</sup> See Section 3(a)(27) of the Exchange Act, 15 U.S.C. 78c(a)(27). As under the current NYSE Group Certificate of Incorporation and current NYSE Group Bylaws, under the proposed NYSE Group Certificate of Incorporation and proposed NYSE Group Bylaws, if NYSE Group decides to change the proposed NYSE Group Certificate of Incorporation

defined in Rule 19b-4 of the Exchange Act, of the exchange, and must be filed with the Commission pursuant to Section 19(b)(4) of the Exchange Act and Rule 19b-4 thereunder. Accordingly, the Exchange has filed the proposed NYSE Group Certificate of Incorporation and proposed NYSE Group Bylaws with the Commission.

The Exchange has proposed to change the voting and ownership limitations of NYSE Group to include a statement that such limitations will not be applicable so long as NYSE Euronext and the Trust collectively own all of the capital stock of NYSE Group. Instead, while NYSE Group is a wholly owned subsidiary of NYSE Euronext, or as provided for in the Trust Agreement, there shall be no transfer of the shares of NYSE Group held by NYSE Euronext without the approval of the Commission.<sup>35</sup> If NYSE Group ceases to be wholly owned by NYSE Euronext or the Trust, the current voting and ownership limitations will apply.<sup>36</sup>

In addition, pursuant to the proposed NYSE Operating Agreement, except as otherwise provided for in the Trust Agreement, NYSE Group may not transfer or assign its interest in the

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or proposed NYSE Group Bylaws, NYSE Group must submit such change to the board of directors of the Exchange, NYSE Market, NYSE Regulation, NYSE Arca, and NYSE Arca Equities, and if any or all of such board of directors shall determine that such amendment or repeal is required by law or regulation to be filed with or filed with and approved by the Commission pursuant to Section 19 of the Exchange Act and the rules thereunder, such change shall not be effective until filed with or filed with and approved by the Commission, as applicable. See current NYSE Group Certificate of Incorporation, Article XIII, current NYSE Group Bylaws, Article VIII, Section 7.9(b), proposed NYSE Group Certificate of Incorporation, Article XII, and proposed NYSE Group Bylaws, Article VII, Section 7.9(b).

<sup>35</sup> See proposed NYSE Group Certificate of Incorporation, Article IV, Section 4(a).

<sup>36</sup> See proposed NYSE Group Certificate of Incorporation, Article IV, Section 4(b). The Exchange also proposed to eliminate transfer restrictions on the common stock of NYSE Group issued to persons in connection with the merger of New York Stock Exchange, Inc. and Archipelago that exist in the current NYSE Group Certificate of Incorporation, as unnecessary, since upon the consummation of the Combination, all common stock will be wholly owned by NYSE Euronext.

Exchange, in whole or part, to any person or entity, unless such transfer or assignment is filed with and approved by the Commission under Section 19 of the Exchange Act.<sup>37</sup>

The Commission finds the changes to the ownership and voting restrictions in the proposed NYSE Group Certificate of Incorporation and the change in control provisions in the proposed NYSE Operating Agreement are consistent with the Exchange Act. These requirements should minimize the potential that a person could improperly interfere with or restrict the ability of the Commission, the Exchange, or its subsidiaries to effectively carry out their regulatory oversight responsibilities under the Exchange Act.

In addition, to allow NYSE Euronext to wholly own and vote all of NYSE Group stock upon consummation of the Combination, NYSE Euronext delivered a written notice to the board of directors of NYSE Group pursuant to the procedures set forth in the current NYSE Group Certificate of Incorporation requesting approval of its ownership and voting of NYSE Group stock in excess of the NYSE Group ownership limitation and NYSE Group voting limitation.<sup>38</sup> The board of directors of NYSE Group must resolve to expressly permit ownership or voting in excess of the NYSE Group ownership limitation and NYSE Group voting limitation. Such resolution of the NYSE Group board of directors must be filed with and approved by the Commission under Section 19(b) of the Exchange Act, and become effective thereunder. Further, the board of directors may not approve any voting or ownership in excess of the limitations unless it determines that such ownership or exercise of voting rights will not impair

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<sup>37</sup> See proposed NYSE Operating Agreement, Article III, Section 3.03.

<sup>38</sup> Prior to permitting any person to exceed the ownership limitation and voting limitation, such person must deliver notice of such person's intention to own or vote shares in excess of the ownership limitation or voting limitation to the NYSE Group board of directors. See current NYSE Group Certificate of Incorporation, Article V, Sections 1(A) and 2(B).

the ability of the Exchange, NYSE Market, NYSE Regulation, NYSE Arca LLC, NYSE Arca, or NYSE Arca Equities to discharge their respective responsibilities under the Exchange Act and the rules and regulations thereunder and is otherwise in the best interests of NYSE Group, its stockholders, and the U.S. Regulated Subsidiaries, and will not impair the Commission’s ability to enforce the Exchange Act.<sup>39</sup> For so long as NYSE Group directly or indirectly controls the Exchange or NYSE Market, the NYSE Group board of directors cannot waive the voting and ownership limits above the 20% threshold if such person or its related persons is a “member” or “member organization” of the Exchange (as defined in Exchange Rules).<sup>40</sup> In addition, for so long as NYSE Group directly or indirectly controls NYSE Arca, NYSE Arca Equities, or any facility of NYSE Arca, the NYSE Group board of directors cannot waive the voting and ownership limits above the 20% threshold if such person or its related persons is an ETP Holder of NYSE Arca Equities, or an OTP Holder or an OTP Firm of NYSE Arca.<sup>41</sup> Further, the NYSE Group board of directors cannot waive the voting and ownership limits above the 20% threshold if such person or its related persons is a U.S. Disqualified Person.

The notice from NYSE Euronext included representations of NYSE Euronext that neither it, nor any of its related persons, are: (1) ETP Holders of NYSE Arca Equities, OTP Holders or OTP Firms of NYSE Arca; (2) members or member organizations of the Exchange; or (3) subject to any statutory disqualification (as defined in Section 3(a)(39) of the Exchange Act). The NYSE Group board of directors adopted a resolution approving NYSE Euronext’s request that it be permitted, either alone or with its related persons, to exceed the NYSE Group

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<sup>39</sup> See current NYSE Group Certificate of Incorporation, Article V, Section 1(A)(x).

<sup>40</sup> See current NYSE Group Certificate of Incorporation, Article V, Section 1(A)(y).

<sup>41</sup> Id.

ownership limitation and the NYSE Group voting limitation.<sup>42</sup> The Exchange proposed that NYSE Euronext wholly own and vote all of the outstanding common stock of NYSE Group upon the consummation of the Combination.<sup>43</sup>

The Commission believes it is consistent with the Exchange Act to allow NYSE Euronext to wholly own and vote all of the outstanding common stock of NYSE Group. The Commission notes that NYSE Euronext and the Exchange represents that neither NYSE Euronext nor any of its related persons is subject to any statutory disqualification (as defined in Section 3(a)(39) of the Exchange Act), or is an ETP Holder of NYSE Arca Equities, OTP Holder or OTP Firm of NYSE Arca or member or member organization of the Exchange. Moreover, NYSE Euronext has comparable voting and ownership limitations to NYSE Group.<sup>44</sup> NYSE Euronext has also included in its corporate documents certain provisions designed to maintain the independence of the U.S. Regulated Subsidiaries' self-regulatory functions from NYSE Euronext and NYSE Group.<sup>45</sup> Accordingly, the Commission believes that the acquisition of ownership and exercise of voting rights of NYSE Group common stock by NYSE Euronext will not impair the ability of the Commission or any of the U.S. Regulated Subsidiaries to discharge their respective responsibilities under the Exchange Act.

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<sup>42</sup> Such resolutions of the NYSE Group board of directors were filed as part of the proposed rule change. See Exhibit K to the Notice, which exhibit is available on the Commission's Web site (<http://www.sec.gov/rules/sro.shtml>), at the Commission's Public Reference Room, at the NYSE, and on the NYSE's Web site (<http://www.nyse.com>).

<sup>43</sup> See Amendment No. 1, supra note 6.

<sup>44</sup> See supra notes 24-32 and accompanying text.

<sup>45</sup> See infra notes 65-85 and accompanying text.

### 3. The Exchange, NYSE Market and NYSE Regulation

Following the Combination, the Exchange, which is registered as a national securities exchange and is an SRO, will remain a wholly owned subsidiary of NYSE Group.<sup>46</sup> NYSE Market will remain a wholly owned subsidiary of the Exchange and conduct the Exchange's business. The Combination will have no effect on the ability of any party to trade securities on NYSE Market. NYSE Regulation will remain a wholly owned subsidiary of the Exchange, and will continue to perform the regulatory responsibilities for the Exchange pursuant to a delegation agreement with the Exchange and many of the regulatory functions of NYSE Arca pursuant to a regulatory services agreement with NYSE Arca.

Currently, directors of NYSE Group serve on the boards of the Exchange, NYSE Market, and NYSE Regulation, and the organizational documents of these entities refer to the independence requirements of NYSE Group. The Exchange has proposed to amend the organizational documents of the Exchange, NYSE Market, and NYSE Regulation to replace all references to NYSE Group with NYSE Euronext. Thus, a majority of the directors of each of the Exchange and NYSE Market must be U.S. Persons who are directors of NYSE Euronext that satisfy the independence requirements of the board of directors of NYSE Euronext. In addition, the Exchange's non-affiliated directors<sup>47</sup> must qualify as independent under the Independence Policy. All of the directors of NYSE Regulation (other than the chief executive officer of NYSE

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<sup>46</sup> The Exchange proposes to amend various rules to delete all references to "NYSE Group, Inc." or "NYSE Group" in the Exchange Rules and replace those references with "NYSE Euronext," which will be the indirect parent company of the Exchange following the Combination.

<sup>47</sup> The Exchange's non-affiliated directors are persons who are not members of the board of directors of NYSE Euronext, but qualify as independent under the independence policy of the board of directors of NYSE Euronext. See proposed NYSE Operating Agreement, Article II, Section 2.03.

Regulation) must satisfy the independence requirements of the board of directors of NYSE Euronext. For this reason, the independence requirements of the board of directors of NYSE Euronext are relevant to the Commission's consideration of whether the boards of directors of the Exchange, NYSE Market, and NYSE Regulation are consistent with the Exchange Act.

Under the Independence Policy, the NYSE Euronext board of directors must make a determination that each director, other than the chief executive officer and deputy chief executive officer of NYSE Euronext, does not have any material relationships with NYSE Euronext and its subsidiaries.<sup>48</sup> In addition, the Independence Policy requires each member of the NYSE Euronext board of directors, other than the chief executive officer and deputy chief executive officer of NYSE Euronext, to be independent from: (1) NYSE Euronext and its subsidiaries (including NYSE Group, Euronext and their respective subsidiaries); (2) any member or member organization of the Exchange, NYSE Arca, or NYSE Arca Equities;<sup>49</sup> (3) any non-member broker-dealer that is registered under the Exchange Act and engages in business involving substantial direct contact with securities customers; and (4) any issuer of securities listed on the

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<sup>48</sup> The Commission also notes that as a company listed on the Exchange, NYSE Euronext's board of directors must also meet the independence requirements applicable to a listed company's board of directors, as contained in Section 303A of the Exchange's Listed Company Manual.

<sup>49</sup> This will include members, allied members (each as defined in the Exchange Rules) and allied persons (as defined in the NYSE Arca and NYSE Arca Equities Rules), member organizations of the Exchange, OTP Firms and OTP Holders of NYSE Arca (each as defined in the Exchange Rules and the rules of NYSE Arca, respectively, as may be in effect from time to time) and ETP Holders of NYSE Arca Equities (as defined in the rules of NYSE Arca Equities, as may be in effect from time to time).

Exchange or NYSE Arca, unless such issuer is a “foreign private issuer” as defined under Rule 3b-4 promulgated under the Exchange Act.<sup>50</sup>

In contrast to the current independence policy of NYSE Group, the Independence Policy will not provide that a person fails to be independent: (1) if he or she is an executive officer of a foreign private issuer of securities listed on the Exchange or NYSE Arca; (2) is a director of an affiliate of a member organization of the Exchange, NYSE Arca, or NYSE Arca Equities;<sup>51</sup> or (3) is a European Person on the board of directors of NYSE Euronext prior to the annual meeting of NYSE Euronext stockholders in 2008. However, the Independence Policy states an executive officer of an issuer whose securities are listed on the Exchange or NYSE Arca (regardless of whether such issuer is a foreign private issuer) and a director of an affiliate of a member organization of the Exchange, NYSE Arca, or NYSE Arca Equities cannot qualify as an independent director of the Exchange, NYSE Market, or NYSE Regulation. In addition, a European Person on the NYSE Euronext board of directors who would not satisfy the independence requirements in the Independence Policy, but for the transition period, cannot qualify as an independent director of the Exchange, NYSE Market, or NYSE Regulation. The prohibition on these persons serving as independent directors of the Exchange, NYSE Market, and NYSE Regulation should help assure that the boards of directors of the Exchange, NYSE

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<sup>50</sup> 17 CFR 240.3b-4. The Exchange also has proposed that there be a transition period so that the Independence Policy will not apply to the European Persons on the NYSE Euronext board of directors until the annual meeting of NYSE Euronext stockholders in 2008.

<sup>51</sup> NYSE further proposes to amend Exchange Rule 2B to clarify that, if a director of an affiliate of a member organization serves as a director of NYSE Euronext, this fact shall not cause such member organization to be an affiliate of the Exchange, or an affiliate of an affiliate of the Exchange. The Commission finds that the Exchange Rule 2B as proposed to be changed, is consistent with the Exchange Act.

Market, and NYSE Regulation are controlled by persons not subject to potential conflicts of interest, and thereby further the goals of Section 6(b)(1) of the Exchange Act.<sup>52</sup>

One commenter<sup>53</sup> expressed concerns that the Independence Policy reflected a weaker independence standard than the current independence policy of NYSE Group. The commenter notes the transition period for European Persons on the NYSE Euronext board of directors as an example of such weakening, among other things. Further, the commenter asserts that the changes will impact the board of directors of NYSE Regulation. In its response to the comments, the Exchange notes that the Independence Policy specifically prohibits: (1) an executive officer of an issuer whose securities are listed on the Exchange or NYSE Arca (regardless of whether such issuer is a foreign private issuer); (2) a European Person on the NYSE Euronext board of directors who would not satisfy the independence requirements in the independence policy but for the transition period; or (3) any director of an affiliate of a member organization from qualifying as an independent director of the Exchange, NYSE Market, or NYSE Regulation.<sup>54</sup> The Exchange also notes that the modifications to the current independence policy of NYSE Group relate only to categorical prohibitions; the NYSE Euronext board of directors will still be required to determine that such persons do not have any material relationship with NYSE Euronext and its subsidiaries in order for them to qualify as independent directors.<sup>55</sup> Further, the Exchange notes that the Independence Policy does not change the

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<sup>52</sup> 15 U.S.C. 78f(b)(1).

<sup>53</sup> See Brown Letter, supra note 4.

<sup>54</sup> See NYSE Response to Comments, supra note 5.

<sup>55</sup> Id.

independence requirements for NYSE Regulation directors.<sup>56</sup> The Exchange also notes that the Independence Policy was drafted to ensure that it still adequately ensures the independence of the directors of a company controlling U.S. securities exchanges. The Commission believes that the Independence Policy maintains a level of independence that should help to minimize conflicts of interest at the Exchange, NYSE Market, and NYSE Regulation. The Commission finds that these proposals, taken together, are consistent with the Exchange Act, particularly with Section 6(b)(1),<sup>57</sup> which requires an exchange to be so organized and have the capacity to carry out the purposes of the Exchange Act.

The organizational documents of the Exchange, NYSE Market, and NYSE Regulation will be modified to require that a majority of the directors of the boards of each of the Exchange, NYSE Market, and NYSE Regulation be U.S. Persons and any vacancies on such boards created by the departure of a U.S. Person must be filled with a U.S. Person. Additionally, the organizational documents of the Exchange, NYSE Market and NYSE Regulation<sup>58</sup> will be amended to state that any person not meeting the board qualifications of the relevant organizational documents will not be qualified to serve, and therefore will not be eligible to serve, as a director.<sup>59</sup> The Nominating and Governance Committee of NYSE Euronext will be responsible for nominating the candidates to the boards of directors of the Exchange and NYSE Market, and for determining the eligibility of such candidates to serve on such boards (including whether such person qualifies as independent under the Independence Policy, and whether such

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<sup>56</sup> Id.

<sup>57</sup> 15 U.S.C. 78f(b)(1).

<sup>58</sup> See supra note 11 and related text.

<sup>59</sup> See proposed NYSE Operating Agreement, Article II, Section 2.03, and proposed NYSE Market Bylaws, Article III, Section 1.

person is not a U.S. Disqualified Person). The Commission finds that these proposals, taken together, are consistent with the Exchange Act, particularly Section 6(b)(1),<sup>60</sup> which requires an exchange to be so organized and have the capacity to carry out the purposes of the Exchange Act.

Immediately following the consummation of the Combination, none of the directors of the Exchange, NYSE Market or NYSE Regulation who will serve on such boards will have been elected or appointed by the Nominating and Governance Committee of NYSE Euronext as prescribed in the proposed governing documents of the Exchange, NYSE Market, and NYSE Regulation. However, the Exchange represented that the board members of the Exchange, NYSE Market, and NYSE Regulation immediately preceding the consummation of the Combination – including the directors selected to meet the fair representation requirements of the Exchange Act<sup>61</sup> (“fair representation” directors or candidates) – will be qualified to serve on, and will remain on, the boards of each of the Exchange, NYSE Market, and NYSE Regulation, respectively, following the consummation of the Combination. In light of these circumstances, the Commission believes that the composition of the boards of directors of the Exchange, NYSE Market, and NYSE Regulation is consistent with the Exchange Act.

The NYSE Market Bylaws will be amended to delete the requirement that the chief executive officer of NYSE Group be the chief executive officer of NYSE Market, and to require instead that the chief executive officer of NYSE Market be a U.S. Person.

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<sup>60</sup> 15 U.S.C. 78f(b)(1).

<sup>61</sup> See proposed NYSE Operating Agreement, Article II, Section 2.03, proposed NYSE Market Bylaws, Article III, Section 1, and proposed NYSE Regulation Bylaws, Article III, Section 1.

The amended organizational documents of the Exchange, NYSE Market, and NYSE Regulation will change the time period for member organizations to vote for “fair representation” candidates to 20 calendar days. Currently, if the number of “fair representation” candidates nominated for election to the boards of directors of each of the Exchange, NYSE Market and NYSE Regulation exceeds the number of available “fair representation” positions on such boards, member organizations of the Exchange have 20 business days to submit their votes for the “fair representation” candidates.<sup>62</sup> The Commission believes that the proposed amendment is consistent with Section 6(b)(3) of the Exchange Act,<sup>63</sup> which requires that the rules of an exchange assure fair representation of its members in the selection of its directors and administration of its affairs. Reducing the period for submission of votes from 20 business days to 20 calendar days should still afford members adequate time to consider and submit their votes. The Commission finds that these proposals, taken together, are consistent with the Exchange Act, particularly with Section 6(b)(1),<sup>64</sup> which requires an exchange to be so organized and have the capacity to carry out the purposes of the Exchange Act.

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<sup>62</sup> The Commission notes that other than the changes specified in this Section IIA3, the Exchange is not proposing to change any of the provisions relating to (i) assure the fair representation of the members of the Exchange in the selection of its directors and administration of its affairs or (ii) one or more directors of the exchange being representative of issuers and investors and not being associated with a member of the exchange or with a broker dealer, each as required under Section 6(b)(3) of the Exchange Act. 15 U.S.C. 78f(b)(3).

<sup>63</sup> 15 U.S.C. 78f(b)(3).

<sup>64</sup> 15 U.S.C. 78f(b)(1).

B. Relationship of NYSE Euronext, NYSE Group, and the U.S. Regulated Subsidiaries; Jurisdiction over NYSE Euronext

Although NYSE Euronext itself will not carry out regulatory functions, its activities with respect to the operation of any of the U.S. Regulated Subsidiaries must be consistent with, and not interfere with, the U.S. Regulated Subsidiaries' self-regulatory obligations. The proposed NYSE Euronext corporate documents include certain provisions that are designed to maintain the independence of the U.S. Regulated Subsidiaries' self-regulatory functions from NYSE Euronext and NYSE Group, enable the U.S. Regulated Subsidiaries to operate in a manner that complies with the U.S. federal securities laws, including the objectives and requirements of Sections 6(b) and 19(g) of the Exchange Act,<sup>65</sup> and facilitate the ability of the U.S. Regulated Subsidiaries and the Commission to fulfill their regulatory and oversight obligations under the Exchange Act.<sup>66</sup>

For example, under the proposed NYSE Euronext Bylaws, NYSE Euronext shall comply with the U.S. federal securities laws, the European Exchange Regulations, and the respective rules and regulations thereunder; shall cooperate with the Commission, the European Regulators, and the U.S. Regulated Subsidiaries.<sup>67</sup> Also, each director, officer, and employee of NYSE Euronext, in discharging his or her responsibilities shall comply with the U.S. federal securities laws and the rules and regulations thereunder, cooperate with the Commission, and cooperate with the U.S. Regulated Subsidiaries.<sup>68</sup> In addition, in discharging his or her responsibilities as a member of the board, each director of NYSE Euronext must, to the fullest extent permitted by

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<sup>65</sup> 15 U.S.C. 78f(b) and 15 U.S.C. 78s(g).

<sup>66</sup> See proposed NYSE Euronext Certificate of Incorporation, Article XIII, and proposed NYSE Euronext Bylaws, Article III, Section 3.15, Article VII, Article VIII, Article IX, and Article X, Section 10.10.

<sup>67</sup> See proposed NYSE Euronext Bylaws, Article IX, Sections 9.1 and 9.2.

<sup>68</sup> See proposed NYSE Euronext Bylaws, Article III, Section 3.15.

applicable law, take into consideration the effect that NYSE Euronext's actions would have on the ability of the U.S. Regulated Subsidiaries to carry out their responsibilities under the Exchange Act, on the ability of the European Market Subsidiaries to carry out their responsibilities under the European Exchange Regulations as operators of European Regulated Markets, and on the ability of NYSE Group and NYSE Euronext to carry out their responsibilities under the Exchange Act.<sup>69</sup> NYSE Euronext, its directors, officers and employees shall give due regard to the preservation of the independence of the self-regulatory function of the U.S. Regulated Subsidiaries (to the extent of each U.S. Regulated Subsidiary's self-regulatory function) and the European Market Subsidiaries (to the extent of each European Market Subsidiaries' self-regulatory function).<sup>70</sup> Further, NYSE Euronext agrees to keep confidential, to the fullest extent permitted by applicable law, all confidential information pertaining to: (1) the self-regulatory function of the Exchange, NYSE Market, NYSE Regulation, NYSE Arca and NYSE Arca Equities (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of any of the U.S. Regulated Subsidiaries; and (2) the self-regulatory function of the European Market Subsidiaries under the European Exchange Regulations as operator of a European Regulated Market (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of the European Market Subsidiaries, and not use such information for any commercial<sup>71</sup> purposes.<sup>72</sup>

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<sup>69</sup> See proposed NYSE Euronext Bylaws, Article III, Section 3.15.

<sup>70</sup> See proposed NYSE Euronext Bylaws, Article IX, Sections 9.4 and 9.5.

<sup>71</sup> The Commission believes that any non-regulatory use of such information would be for a commercial purpose.

In addition, NYSE Euronext’s books and records shall be subject at all times to inspection and copying by the Commission, the European Regulators, any U.S. Regulated Subsidiary (provided that such books and records are related to the operation or administration of such U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated Subsidiary has regulatory authority or oversight) and any European Market Subsidiary (provided that such books and records are related to the operation or administration of such European Market Subsidiary or any European Regulated Market over which such European Market Subsidiary has regulatory authority or oversight).<sup>73</sup> NYSE Euronext’s books and records related to U.S. Regulated Subsidiaries shall be maintained within the United States, and NYSE Euronext’s books and records related to European Market Subsidiaries shall be maintained in the home jurisdiction of one or more of the European Market Subsidiaries.<sup>74</sup> To the extent that any of NYSE Euronext’s books and records relate to both the U.S. Regulated Subsidiaries and the European Market Subsidiaries (each such book and record, an “Overlapping Record”), NYSE Euronext shall be entitled to maintain such books and records in either the United States or the home jurisdiction of one or more of the European Market Subsidiaries.<sup>75</sup> To facilitate compliance with the requirements of Rule 17a-1(b) under the Exchange Act, NYSE Euronext shall maintain in the United States originals or copies of Overlapping Records covered by Rule 17a-1(b) promptly after creation of such Overlapping Records. The Commission notes that NYSE Euronext is liable for any books and records it is required to produce for inspection and

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<sup>72</sup> See proposed NYSE Euronext Bylaws, Article VIII, Section 8.1.

<sup>73</sup> See proposed NYSE Euronext Bylaws, Article VIII, Section 8.3.

<sup>74</sup> See proposed NYSE Euronext Bylaws, Article VIII, Sections 8.4 and 8.5.

<sup>75</sup> See proposed NYSE Euronext Bylaws, Article VIII, Section 8.6.

copying by the Commission that are created outside the United States and where the law of a foreign jurisdiction prohibits NYSE Euronext from providing such books and records to the Commission for inspection and copying.

In addition, for so long as NYSE Euronext directly or indirectly controls any U.S. Regulated Subsidiary, the books, records, premises, officers, directors, and employees of NYSE Euronext shall be deemed to be the books, records, premises, officers, directors, and employees of the U.S. Regulated Subsidiaries for purposes of and subject to oversight pursuant to the Exchange Act, and for so long as NYSE Euronext directly or indirectly controls any European Market Subsidiary, the books, records, premises, officers, directors, and employees of NYSE Euronext shall be deemed to be the books, records, premises, officers, directors, and employees of such European Market Subsidiaries for purposes of and subject to oversight pursuant to the European Exchange Regulations.<sup>76</sup>

NYSE Euronext, its directors and officers, and those of its employees whose principal place of business and residence is outside of the United States irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission with respect to activities relating to the U.S. Regulated Subsidiaries, and to the jurisdiction of the European Regulators and European courts with respect to activities relating to the European Market Subsidiaries.<sup>77</sup>

Each of NYSE Euronext, NYSE Group, the Exchange and NYSE Market acknowledges that it is responsible for referring possible rule violations to NYSE Regulation. In addition, there will be an explicit agreement among NYSE Euronext, NYSE Group, the Exchange, NYSE

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<sup>76</sup> See proposed NYSE Euronext Bylaws, Article VIII, Sections 8.4 and 8.5.

<sup>77</sup> See proposed NYSE Euronext Bylaws, Article VII, Sections 7.1 and 7.2.

Market and NYSE Regulation to provide adequate funding for NYSE Regulation, as is currently the case among the NYSE Group entities.

Finally, the proposed NYSE Euronext Certificate of Incorporation and proposed NYSE Euronext Bylaws require that, for so long as NYSE Euronext controls, directly or indirectly, any of the U.S. Regulated Subsidiaries, any changes to the proposed NYSE Euronext Certificate of Incorporation and proposed NYSE Euronext Bylaws be submitted to the board of directors of the Exchange, NYSE Market, NYSE Regulation, NYSE Arca, and NYSE Arca Equities, and if any such boards of directors determines that such amendment is required to be filed with or filed with and approved by the Commission pursuant to Section 19 of the Exchange Act<sup>78</sup> and the rules thereunder, such change shall not be effective until filed with or filed with and approved by, the Commission.<sup>79</sup>

The Commission finds that these provisions are consistent with the Exchange Act, and that they are intended to assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Exchange Act. With respect to the maintenance of books and records of NYSE Euronext, the Commission notes that while NYSE Euronext has the discretion to maintain Overlapping Records in either the United States or the home jurisdiction of one or more of the European Market Subsidiaries, NYSE Euronext has represented to the Commission that it will maintain in the United States originals or copies of Overlapping Records covered by Rule 17a-1(b) under the Exchange Act<sup>80</sup> promptly after

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<sup>78</sup> 15 U.S.C. 78s.

<sup>79</sup> See proposed NYSE Group Certificate of Incorporation, Article XII and proposed NYSE Group Bylaws, Article VII, Section 7.9.

<sup>80</sup> 17 CFR 240.17a-1(b).

creation of such Overlapping Records. The Commission believes that such actions by NYSE Euronext with respect to its books and records are necessary to ensure that the U.S. Regulated Subsidiaries comply with the requirements of Section 17 of the Exchange Act<sup>81</sup> and Rule 17a-1(b) thereunder.<sup>82</sup>

Under Section 20(a) of the Exchange Act,<sup>83</sup> any person with a controlling interest in the Exchange or NYSE Arca shall be jointly and severally liable with and to the same extent that the Exchange and NYSE Arca are liable under any provision of the Exchange Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Exchange Act<sup>84</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Exchange Act or rule thereunder. Further, Section 21C of the Exchange Act<sup>85</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Exchange Act through an act or omission that the person knew or should have known would contribute to the violation. These provisions are applicable to NYSE Euronext’s and NYSE Group’s dealings with the U.S. Regulated Subsidiaries.

### C. Trust

NYSE Euronext will operate several regulated entities located in the United States and in various jurisdictions in Europe. As described in the Notice, in connection with obtaining

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<sup>81</sup> 15 U.S.C. 78q.

<sup>82</sup> 17 CFR 240.17a-1(b).

<sup>83</sup> 15 U.S.C. 78t(a).

<sup>84</sup> 15 U.S.C. 78t(e).

<sup>85</sup> 15 U.S.C. 78u-3.

regulatory approval of the Combination, NYSE Euronext proposed to implement two standby structures, one involving a Delaware trust and one involving a Dutch foundation (“Dutch Foundation”). Pursuant to the terms of the Trust Agreement,<sup>86</sup> the Delaware trust (“Trust”) will be empowered to take actions to mitigate the effects of any material adverse change in European law that has an “extraterritorial” impact on the non-European issuers listed on NYSE Group securities exchanges, non-European financial services firms that are members of any NYSE Group securities exchange, or any NYSE Group securities exchange.<sup>87</sup>

Upon the occurrence of a material adverse change of law<sup>88</sup> that continues after the cure periods described below, the Trust may exercise certain remedies that result in a total or partial loss by NYSE Euronext of operating control over some of its securities exchanges. The Trust may require that NYSE Euronext transfer control over a substantial portion of its business and assets to the direction of the Trust. As a result, control of NYSE Group or any NYSE Group securities exchange may be assumed by the Trust. As discussed above, Section 19(b) of the Exchange Act and Rule 19b-4 thereunder require an SRO to file a proposed rule change with the Commission. Although the Trust is not an SRO, certain provisions of the Trust Agreement are

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<sup>86</sup> See proposed Trust Agreement, by and among NYSE Euronext, NYSE Group, the Delaware trustee, and the trustees, attached as Exhibit 5M to Amendment No. 1 (“Trust Agreement”).

<sup>87</sup> The Dutch Foundation will be empowered to take actions intended to mitigate the effects of any material adverse change in U.S. law that has an “extraterritorial” impact on non-U.S. issuers listed on Euronext markets, non-U.S. financial services firms that are members of Euronext markets or holders of exchange licenses with respect to the Euronext markets. The Exchange described the proposed Dutch Foundation in the Notice, supra note 3.

<sup>88</sup> What constitutes a material adverse change of law is described in the Notice, supra note 3, at 824-825.

rules of an exchange<sup>89</sup> if they are stated policies, practice, or interpretations, as defined in Rule 19b-4 under the Exchange Act,<sup>90</sup> of the exchange, and must be filed with the Commission pursuant to Section 19(b)(4) of the Exchange Act<sup>91</sup> and Rule 19b-4 thereunder. Accordingly, the Exchange has filed the Trust Agreement with the Commission.

1. Governance of the Trust

The Trust will be administered by a board of three trustees.<sup>92</sup> The initial trustees of the Trust will be selected jointly by NYSE Group and Euronext prior to the Combination, with successor members to be selected by the nominating and governance committee of the NYSE Euronext board of directors.<sup>93</sup>

Pursuant to the Trust Agreement, actions of the Trust will require majority approval of the members of the board of trustees, following reasonable consultation and good-faith

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<sup>89</sup> See Section 3(a)(27) of the Exchange Act, 15 U.S.C. 78c(a)(27). If NYSE Euronext decides to change its Amended and Restated Certificate of Incorporation or Amended and Restated Bylaws, NYSE Euronext must submit such change to the board of directors of the Exchange, NYSE Market, NYSE Regulation, NYSE Arca, and NYSE Arca Equities, and if any or all of such board of directors shall determine that such amendment or repeal must be filed with or filed with and approved by the Commission pursuant to Section 19 of the Exchange Act and the rules thereunder, such change shall not be effective until filed with or filed with and approved by the Commission, as applicable. See proposed NYSE Euronext Certificate of Incorporation, Article X and proposed NYSE Euronext Bylaws, Article X, Section 10.10(C).

<sup>90</sup> 17 CFR 240.19b-4.

<sup>91</sup> 15 U.S.C. 78s(b).

<sup>92</sup> See Trust Agreement, Article III, Section 3.2.

<sup>93</sup> See Trust Agreement, Article III, Section 3.4. The initial term of the Trust will be ten years from the date of the consummation of the Combination, renewable for successive one-year terms; provided, however, that any extension that would cause the term of the Trust to continue past the 20th anniversary of the date of the consummation of the Combination shall require the prior written consent of NYSE Euronext. See Trust Agreement, Article II, Section 2.5.

cooperation with NYSE Euronext.<sup>94</sup> In determining whether a material adverse change of law has occurred and the exercise of the remedies, and in exercising its rights and powers during the pendency of a material adverse change of law, the duty of the Trust and its trustees shall be to act in the public interests of the markets operated by NYSE Group and its subsidiaries if and only to the extent necessary to avoid or eliminate the impact or effect of a material adverse change of law. In all other circumstances, the duty of the Trust and its trustees shall be to act in the best interests of NYSE Euronext.<sup>95</sup> In addition, the Trust and trustees shall comply with the U.S. federal securities laws and the rules and regulations thereunder and shall cooperate (and take reasonable steps necessary to cause its agents to cooperate) with the Commission and the U.S. Regulated Subsidiaries pursuant to and to the extent of their respective regulatory authority.<sup>96</sup>

Under the Trust Agreement, if a material adverse change in law occurs with respect to a NYSE Group securities exchange (an “affected subsidiary”) and shall continue after the cure periods specified below, the board of trustees of the Trust may exercise several remedies following prior notice to, and, if required under then applicable laws, prior approval by, the Commission.

After a cure period of six months, the board of trustees of the Trust may deliver confidential or public and non-binding or binding advice to NYSE Group and NYSE Euronext with respect to the affected subsidiary relating to decisions regarding: (1) changes to the rules of an affected subsidiary; (2) decisions to enter into (or not enter into) or alter the terms of listing agreements of an affected subsidiary; (3) decisions to enter into (or not enter into) or alter the

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<sup>94</sup> See Trust Agreement, Article III, Sections 3.5 and 3.6.

<sup>95</sup> See Trust Agreement, Article II, Section 2.3 and Article III, Section 3.6.

<sup>96</sup> See Trust Agreement, Article V, Sections 5.2 and 5.3.

terms of contractual arrangements with any non-European financial services firms in relation to an affected subsidiary; (4) changes in information and communications technologies for an affected subsidiary; and (5) changes in clearing and settlement for an affected subsidiary ((1) through (5), together the “Assumed Matters”).<sup>97</sup>

After a cure period of six months, the board of trustees of the Trust may assume management responsibilities of NYSE Group or its affected subsidiary with respect to some or all of the Assumed Matters. The board of trustees of the Trust may exercise a call option over priority shares issued by NYSE Group or its affected subsidiary, which priority shares will carry no or a limited economic right or interest and the right to vote on, make proposals with respect to and impose consent requirements to approve actions in relation to, the Assumed Matters.<sup>98</sup>

After a cure period of nine months, the board of trustees of the Trust may exercise a call option over the common stock or voting securities of NYSE Group or its affected subsidiary, in each case, with such common stock, ordinary shares or voting securities being the minimum number necessary, in the reasonable opinion of the trustees of the Trust, to cause all affected subsidiaries to cease to be subject to a material adverse change of law.<sup>99</sup>

Furthermore, subject to any required approval by the Commission, the Trust shall be entitled to give confidential non-binding advice to NYSE Euronext at any time before the end of the above-mentioned cure period and NYSE Euronext shall be entitled, in its sole discretion, to implement any remedy at any time before the end of such cure period.<sup>100</sup>

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<sup>97</sup> See Trust Agreement, Article IV, Section 4.1.

<sup>98</sup> See Trust Agreement, Article IV, Section 4.1.

<sup>99</sup> Id.

<sup>100</sup> Id.

Any of the above remedies may be imposed only if and to the extent that such remedy: (1) causes all affected subsidiaries to cease to be subject to a material adverse change of European law; and (2) is the remedy available that causes the least intrusion on the conduct of the business and operations of NYSE Euronext and NYSE Group, and its subsidiaries, including the affected subsidiaries, by their respective governing bodies.<sup>101</sup>

In addition, prior to the exercise of a call option, the board of trustees of the Trust must determine that no other remedy can cause all of the affected subsidiaries to cease to be subject to a material adverse change of law; consult with the NYSE Euronext board of directors; and, in the case of a material adverse change in law with respect to a NYSE Group securities exchange, consult with the NYSE Group board of directors and the Commission to consider the solutions available to address the situation that has arisen and would trigger the right of the Trust to exercise the remedies described above, taking into account any possible adverse consequences for NYSE Euronext or NYSE Group in terms of taxation or accounting treatment.<sup>102</sup>

If and when any of the conditions of a material adverse change of law cease, any and all remedies shall be immediately unwound. NYSE Euronext shall have the right, at any time and regardless of whether a change of law continues to be a material adverse change of law, to request and cause the unwinding of any remedy for the purpose of and to the extent necessary to

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<sup>101</sup> Id. In determining whether a remedy causes the least intrusion, negative control by the Trust shall be preferred over affirmative control by the Trust, and authority of the Trust shall be asserted over the fewest and most narrow decisions of NYSE Euronext and its subsidiaries. A remedy covering fewer entities and subsidiary entities shall be preferred over a remedy covering more entities and parent entities. The call option over the priority shares shall be viewed as a remedy of last resort among the remedies that are available after the six-month cure period, and the call option over the common stock, ordinary shares and voting securities shall be viewed as a remedy of last resort among all remedies. See Trust Agreement, Article IV, Section 4.1.

<sup>102</sup> See Trust Agreement, Article IV, Section 4.1.

effect a divestiture or spin-off of all or part of its interest in NYSE Group or NYSE Euronext, as applicable, or any subsidiary of NYSE Euronext operating an exchange that is affected by a material adverse change of law, as the case may be.<sup>103</sup>

2. Relationship of the Trust, NYSE Group, and the U.S. Regulated Subsidiaries; Jurisdiction Over the Trust

Although the Trust itself will not carry out regulatory functions, its activities with respect to the operation of NYSE Group and any of the U.S. Regulated Subsidiaries must be consistent with, and not interfere with, the U.S. Regulated Subsidiaries' self-regulatory obligations. The Trust Agreement includes certain provisions that are designed to maintain the independence of the U.S. Regulated Subsidiaries' self-regulatory functions from the Trust, enable the U.S. Regulated Subsidiaries to operate in a manner that complies with the U.S. federal securities laws, including the objectives and requirements of Sections 6(b) and 19(g) of the Exchange Act, and facilitate the ability of the U.S. Regulated Subsidiaries and the Commission to fulfill their regulatory and oversight obligations under the Exchange Act.<sup>104</sup>

For example, under the Trust Agreement, the Trust shall comply with the U.S. federal securities laws and the rules and regulations thereunder, and shall cooperate with the Commission and the U.S. Regulated Subsidiaries.<sup>105</sup> Also, each trustee, officer, and employee of the Trust, in discharging his or her responsibilities in such capacity, shall comply with the U.S. federal securities laws and the rules and regulations thereunder, cooperate with the Commission,

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<sup>103</sup> See Trust Agreement, Article IV, Section 4.4.

<sup>104</sup> See Trust Agreement, Articles V, VI, and VIII.

<sup>105</sup> See Trust Agreement, Article V, Section 5.3(a).

and cooperate with the U.S. Regulated Subsidiaries.<sup>106</sup> In addition, in discharging his or her responsibilities as a trustee, each trustee must, to the fullest extent permitted by applicable law, take into consideration the effect that the Trust's actions would have on the ability of the U.S. Regulated Subsidiaries, NYSE Euronext and NYSE Group to discharge their respective responsibilities under the Exchange Act.<sup>107</sup> The Trust, trustees, and the officers and employees of the Trust shall give due regard to the preservation of the independence of the self-regulatory function of the U.S. Regulated Subsidiaries (to the extent of each U.S. Regulated Subsidiary's self-regulatory function) and shall not take any action that would interfere with the effectuation of any decision by the board of directors or managers of the U.S. Regulated Subsidiaries relating to their regulatory responsibilities or that would interfere with the ability of the U.S. Regulated Subsidiaries to carry out their respective responsibilities under the Exchange Act.<sup>108</sup> The Trust, the trustees, and the officers and employees of the Trust whose principal place of business and residence is outside of the United States irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission with respect to activities relating to the U.S. Regulated Subsidiaries.<sup>109</sup>

In addition, the Trust's books and records shall be subject at all times to inspection and copying by the Commission, NYSE Euronext, NYSE Group, and any U.S. Regulated Subsidiary (provided that such books and records are related to the operation or administration of such U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated

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<sup>106</sup> See Trust Agreement, Article V, Section 5.2 (a).

<sup>107</sup> See Trust Agreement, Article V, Section 5.1(a).

<sup>108</sup> See Trust Agreement, Article V, Section 5.1(b).

<sup>109</sup> See Trust Agreement, Article V, Section 5.4.

Subsidiary has regulatory authority or oversight).<sup>110</sup> The Trust's books and records related to U.S. Regulated Subsidiaries shall be maintained within the United States.<sup>111</sup>

In addition, for so long as the Trust directly or indirectly controls any U.S. Regulated Subsidiary, the books, records, premises, officers, trustees, and employees of the Trust shall be deemed to be the books, records, premises, officers, trustees, and employees of the U.S. Regulated Subsidiaries for purposes of and subject to oversight pursuant to the Exchange Act.<sup>112</sup> Further, the Trust agrees to keep confidential, to the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of the Exchange, NYSE Market, NYSE Regulation, NYSE Arca and NYSE Arca Equities (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of any of the U.S. Regulated Subsidiaries and not use such information for any commercial<sup>113</sup> purposes.<sup>114</sup> The Commission notes that the proposed governing documents of NYSE Euronext and NYSE Group contain similar confidentiality provisions regarding information pertaining to the self-regulatory function of the Exchange, NYSE Market, NYSE

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<sup>110</sup> See Trust Agreement, Article VI, Section 6.3.

<sup>111</sup> See Trust Agreement, Article VI, Section 6.1(b).

<sup>112</sup> Id.

<sup>113</sup> The Commission believes that any non-regulatory use of such information would be for a commercial purpose.

<sup>114</sup> See Trust Agreement, Article VI, Section 6.1. The Trust Agreement states that none of its provisions shall be interpreted so as to limit or impede the rights of the Commission or any of the U.S. Regulated Subsidiaries to have access to and examine such confidential information pursuant to the U.S. federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any trustees, officers, directors, employees, or agents of NYSE Euronext or the Trust to disclose such confidential information to the Commission or the U.S. Regulated Subsidiaries. See Trust Agreement, Article VI, Section 6.2.

Regulation, NYSE Arca, and NYSE Arca Equities.<sup>115</sup> The Commission believes that confidentiality provisions in the proposed NYSE Euronext Bylaws and proposed NYSE Group Certificate of Incorporation apply to any such confidential information obtained by NYSE Euronext or NYSE Group, including that which comes into their possession through the Trust.

The Trust Agreement provides that in no event shall the Trust sell, transfer, convey, assign, dispose, pledge (or agree to sell, transfer, convey, assign, dispose or pledge) any property of the Trust, except pursuant to the unwinding of the remedies, or in circumstances permitted by the Trust Agreement and pursuant to written instructions from NYSE Euronext approved by the board of directors of NYSE Euronext. In addition to the foregoing, any transfer, conveyance, assignment, disposition or pledge by the Trust or any trustee of any equity interest in, or all or substantially all of the assets of, the Exchange, NYSE Market, NYSE Regulation, NYSE Arca LLC, NYSE Arca, or NYSE Arca Equities (other than any such transfer or disposition to NYSE Euronext or its subsidiaries pursuant to the unwinding of remedies) shall not be effected until filed with the Commission under Section 19 of the Exchange Act.<sup>116</sup>

The Trust Agreement requires that it may only be amended with prior written approval of the Commission, as and to the extent required under the Exchange Act.<sup>117</sup> Further, for so long as NYSE Euronext or the Trust shall control, directly or indirectly, any of the U.S. Regulated

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<sup>115</sup> See proposed NYSE Euronext Bylaws, Article VIII and proposed NYSE Group Certificate of Incorporation, Article X.

<sup>116</sup> See Trust Agreement, Article IV, Section 4.3. The proposed rule change also includes modifications to the organizational documents of the Exchange, NYSE Market, and NYSE Regulation so that the a transfer of the equity interests of the Exchange, NYSE Market, and NYSE Regulation pursuant to the terms of the Trust Agreement is permitted under such organizational documents.

<sup>117</sup> See Trust Agreement, Article VIII, Section 8.2.

Subsidiaries, before any amendment or repeal of any provision of the Trust Agreement shall be effective, such amendment or repeal must be submitted to the boards of directors of the Exchange, NYSE Market, NYSE Regulation, NYSE Arca, and NYSE Arca Equities. If any such boards of directors determines that such amendment or repeal is required to be filed with or filed with and approved by the Commission pursuant to Section 19 of the Exchange Act<sup>118</sup> and the rules thereunder, such change shall not be effective until filed with or filed with and approved by the Commission.<sup>119</sup>

The Commission finds that the Trust Agreement's provisions are designed to enable the U.S. Regulated Subsidiaries to operate in a manner that complies with the federal securities laws, including the objectives and requirements of Sections 6(b) and 19(g) of the Exchange Act,<sup>120</sup> facilitate the ability of the U.S. Regulated Subsidiaries and the Commission to fulfill their regulatory and oversight obligations under the Exchange Act,<sup>121</sup> and are consistent with the provisions other entities that directly or indirectly own or control an SRO have instituted and that have been approved by the Commission.<sup>122</sup> The Commission finds that the Trust's provisions are consistent with the Exchange Act, and that they are intended to assist the Exchange in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Exchange Act.

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<sup>118</sup> 15 U.S.C. 78s.

<sup>119</sup> See Trust Agreement, Article VIII, Section 8.2.

<sup>120</sup> 15 U.S.C. 78f(b) and 15 U.S.C. 78s(g).

<sup>121</sup> See Trust Agreement, Articles V, VI, and VIII.

<sup>122</sup> See, e.g., NYSE Inc.-Archipelago Merger Order, supra note 32.

Under Section 20(a) of the Exchange Act,<sup>123</sup> any person with a controlling interest in the Exchange or NYSE Arca shall be jointly and severally liable with and to the same extent that the Exchange and NYSE Arca are liable under any provision of the Exchange Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Exchange Act<sup>124</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Exchange Act or rule thereunder. Further, Section 21C of the Exchange Act<sup>125</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Exchange Act through an act or omission that the person knew or should have known would contribute to the violation. These provisions are applicable to the Trust and all other entities controlling the U.S. Regulated Subsidiaries.

D. Automatic Suspension and Repeal of Certain Provisions in the NYSE Euronext Organizational Documents

Under the organizational documents of NYSE Euronext, immediately following the exercise of a call option over a substantial portion of Euronext’s business (a “Euronext call option”), whereby the priority shares or ordinary shares of Euronext are transferred from NYSE Euronext to the Dutch Foundation, and for so long as the Dutch Foundation shall continue to hold any priority shares or ordinary shares of Euronext, or the voting securities of one or more of

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<sup>123</sup> 15 U.S.C. 78t(a).

<sup>124</sup> 15 U.S.C. 78t(e).

<sup>125</sup> 15 U.S.C. 78u-3.

the subsidiaries of Euronext that, taken together, represent a substantial portion of Euronext's business, then certain provisions of the proposed NYSE Euronext Bylaws shall be suspended.<sup>126</sup>

In addition, if after a period of six months following the exercise of a Euronext call option, the Dutch Foundation shall continue to hold any ordinary or priority shares of Euronext or any ordinary or priority shares or similar voting securities of one or more subsidiaries of Euronext that, taken together, represent a substantial portion of Euronext's business, or if at any time, NYSE Euronext no longer holds a direct or indirect controlling interest in Euronext or in one or more subsidiaries of Euronext that, taken together, represent a substantial portion of Euronext's business, then certain provisions of the proposed NYSE Euronext Bylaws and the proposed NYSE Euronext Certificate of Incorporation shall be revoked.<sup>127</sup> In addition, any officer or director of NYSE Euronext who is a European Person shall resign or be removed from his or her office.

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<sup>126</sup> These include the requirement that European Persons are represented in a certain proportion on the NYSE Euronext board of directors and the nominating and governance committee of the NYSE Euronext board of directors; the requirement of supermajority board or shareholder approval for certain extraordinary transactions; the provisions granting jurisdiction to European regulators over certain actions of NYSE Euronext and the NYSE Euronext board of directors; and references to European regulators, European market subsidiaries and European disqualified persons appearing in the proposed NYSE Euronext Bylaws.

<sup>127</sup> These include the provisions of the proposed NYSE Euronext Bylaws subject to suspension; the references in the proposed NYSE Euronext Certificate of Incorporation and proposed NYSE Euronext Bylaws to European regulators, European exchange regulations, European market subsidiaries, European regulated markets, Europe and European disqualified persons; the provisions in the proposed NYSE Euronext Certificate of Incorporation and proposed NYSE Euronext Bylaws requiring that amendments to such certificate of incorporation or bylaws be submitted to the European market subsidiaries and, if applicable, filed with and approved by a European regulator; and the provisions in the proposed NYSE Euronext Bylaws requiring approval of either two-thirds or more of the NYSE Euronext directors or 80% of the votes entitled to be cast by the holders of the then-outstanding shares of capital stock of NYSE Euronext entitled to vote generally in the election of directors to amend certain bylaw provisions.

The Commission finds the suspension or repeal of the above described provisions of the proposed NYSE Euronext Bylaws and the proposed NYSE Euronext Certificate of Incorporation under circumstances in which the Dutch Foundation controls a substantial portion of Euronext's business, is consistent with the Exchange Act.

E. Listing of NYSE Euronext's or an Affiliate's Securities

NYSE Euronext intends to list its shares of common stock for trading on the Exchange, as well as on Euronext Paris. Pursuant to the proposed amendments to NYSE Rule 497, any security of NYSE Euronext and its affiliates shall not be approved for listing on the Exchange unless NYSE Regulation determines that such securities satisfy the Exchange's rules for listing, and such finding is approved by the NYSE Regulation board of directors.<sup>128</sup> The Commission finds that the proposed procedure for the initial listing of NYSE Euronext common stock is consistent with the Exchange Act.

NYSE Regulation will be responsible for all Exchange listing-compliance decisions with respect to NYSE Euronext as an issuer. As in the case of NYSE Group under current Exchange Rule 497, NYSE Regulation will prepare a quarterly report summarizing its monitoring of NYSE Euronext common stock's compliance with such listing standards and its monitoring of trading in such securities. This report will be provided to the NYSE board of directors and to the Commission. Any notification of lack of compliance with any applicable listing standard from NYSE Regulation to NYSE Euronext or an affiliate, and any corresponding plan of compliance, must be reported to the Commission. Once a year, an independent accounting firm will review NYSE Euronext's or any affiliated issuer's compliance with the Exchange's listing standards and

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<sup>128</sup> The Exchange proposes to delete Exchange Rule 497T (Transition Rules for the First Listed Security Issued by NYSE Group, Inc.), which is now obsolete.

a copy of this report will be forwarded to the Commission. The Commission believes that the procedures for monitoring of the listing of and trading of NYSE Euronext's or an affiliate's securities are consistent with the Act.

F. Options Trading Rights

The Commission received a comment letter<sup>129</sup> on the proposed rule change regarding certain Option Trading Rights (“OTRs”) that were separated from full New York Stock Exchange, Inc.<sup>130</sup> seats (“Separated OTRs”). All New York Stock Exchange seat ownership (with or without OTRs) was extinguished in the 2006 demutualization of New York Stock Exchange, Inc.<sup>131</sup> Although the commenter supports the Combination, it contends that the owners of Separated OTRs retained their Separated OTRs, even after the New York Stock Exchange, Inc. exited the options business in 1997, with the expectation that their ownership of the Separated OTRs would afford them full rights to trade options under the auspices of New York Stock Exchange, Inc. or its successor entity. The commenter contends that such ownership gives a right to trade options on NYSE Market and NYSE Arca, and after the Combination, Euronext. The commenter refers to its comment letters in connection with the demutualization of New York Stock Exchange, Inc. in its merger with Archipelago.<sup>132</sup>

The issue of the rights of owners of Separated OTRs is not before the Commission in the context of this rule filing. Pursuant to Section 19(b)(1) of the Exchange Act,<sup>133</sup> an SRO (such as

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<sup>129</sup> See OTR Investors Letter, supra note 4.

<sup>130</sup> New York Stock Exchange, Inc. is the predecessor entity to NYSE. See NYSE Inc.-Archipelago Merger Order, supra note 32.

<sup>131</sup> See NYSE Inc.-Archipelago Merger Order, supra note 32.

<sup>132</sup> See NYSE Inc.-Archipelago Merger Order, supra note 32, at note 6.

<sup>133</sup> 15 U.S.C. 78s(b)(1).

NYSE) is required to file with the Commission any proposed rule or any proposed change in, addition to, or deletion from the rules of such SRO. Further, pursuant to Section 19(b)(2) of the Exchange Act,<sup>134</sup> the Commission shall approve a proposed rule change filed by an SRO if the Commission finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the SRO. The NYSE is not proposing in this filing a change in the trading rights on the Exchange.

### III. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act<sup>135</sup> that the proposed rule change (SR-NYSE-2006-120) is approved, and Amendment No. 1 is approved on an accelerated basis.

By the Commission.

Nancy M. Morris  
Secretary

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<sup>134</sup> 15 U.S.C. 78s(b)(2).

<sup>135</sup> Id.