

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59683; File No. SR-NYSE-2009-12)

April 1, 2009

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

I. Introduction

On February 2, 2009, the New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend: (i) its Second Amended and Restated Operating Agreement (“NYSE Operating Agreement”); and (ii) the bylaws of its wholly-owned subsidiary NYSE Market, Inc. (“NYSE Market”) (“NYSE Market Bylaws”), to eliminate the requirement that not less than two members of the board of directors of NYSE (“NYSE Board”) and of NYSE Market (“NYSE Market Board”), respectively, must qualify as “non-affiliated directors” and the requirement that not less than two members of such boards must qualify as “fair representation candidates” (as each of those terms is defined in the NYSE Operating Agreement and NYSE Market Bylaws, respectively). The requirements that at least 20% of NYSE Board’s directors and NYSE Market Board’s directors must be “non-affiliated directors” and “fair representation candidates” would remain in place. The proposed rule change was published for comment in the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Federal Register on February 20, 2009.³ The Commission received no comments on the proposal.

II. Description of the Proposal

The Exchange proposes that its parent company, NYSE Group, Inc., as the sole member of the Exchange, amend the NYSE Operating Agreement to eliminate the requirements that: (i) not less than two members of NYSE Board must be persons who are not members of the board of directors of NYSE Euronext (“NYSE Euronext Board”), and who qualify as independent under the independence policy of the NYSE Euronext Board (“NYSE non-affiliated directors”); and (ii) not less than two members of the NYSE Board must be “fair representation candidates” (as defined in the NYSE Operating Agreement). In each case, however, the current requirements that a minimum of 20% of NYSE Board’s directors must be NYSE non-affiliated directors and that a minimum of 20% of NYSE Board’s directors must be fair representation candidates would continue to apply.⁴

The Exchange also proposes that the Exchange, as the sole stockholder of NYSE Market, amend the NYSE Market Bylaws to eliminate the requirements that: (i) not less than two members of the NYSE Market Board must be persons who are not members of the NYSE Euronext Board, although such directors need not be independent (“NYSE Market non-affiliated directors”); and (ii) not less than two members of the NYSE Market Board must be “fair representation candidates” (as defined in the NYSE Market Bylaws). In each case, however, the current requirements that a minimum of 20% of NYSE Market Board’s directors must be NYSE Market non-affiliated directors and that a minimum of 20% of NYSE Market Board’s directors

³ See Securities Exchange Act Release No. 59400 (February 12, 2009), 74 FR 7945.

⁴ The Exchange has represented that fair representation candidates on the NYSE Board qualify as NYSE non-affiliated directors.

must be fair representation candidates would continue to apply.⁵

The Exchange also proposes to specify in the NYSE Operating Agreement and the NYSE Market Bylaws that, for purposes of calculating the minimum number of non-affiliated directors and fair representation candidates for each the NYSE Board and the NYSE Market Board, if the number that is equal to 20% of the total number of directors on their respective boards is not a whole number, such number would be rounded up to the next whole number.⁶

The Exchange has stated that the practical effect of the proposed rule change would be to enable the size of both the NYSE Board and the NYSE Market Board to be reduced from ten members to five members. The Exchange has represented that the initial implementation of the proposed changes immediately following approval by the Commission would be accomplished through the voluntary resignation of five of the ten directors from the NYSE Board and NYSE Market Board, respectively, including one “fair representation” director from each of the boards, in connection with a reduction in the size of each board to five directors. The Exchange’s proposal would not revise the current fair representation candidate selection and petition process for, or the appointment or election of a fair representation candidate to, the NYSE Board and the NYSE Market Board.⁷

⁵ The Exchange has represented that fair representation candidates on the NYSE Market Board qualify as NYSE Market non-affiliated directors.

⁶ See Section 2.03(a)(i) and (iii) of the NYSE Operating Agreement and Article III, Section 1(A) and (B) of the NYSE Market Bylaws.

⁷ As defined in the NYSE Operating Agreement, fair representation candidates are NYSE Board members that are determined by member organizations of the Exchange through a specified petition process (“Petition Candidates”) or, in the absence of Petition Candidates, candidates recommended jointly by the Director Candidate Recommendation Committee (“DCRC”) of NYSE Market and of NYSE Regulation, Inc. In the case of NYSE Market, fair representation candidates on the Market Board are determined similarly except that, in the absence of Petition Candidates, they are individuals recommended by the DCRC of NYSE Market.

The Exchange has stated that its proposal is consistent with the governance structures of other national securities exchanges that have been approved by the Commission. The Exchange has noted, for example, that The NASDAQ Stock Market LLC (“Nasdaq”) has a 20% fair representation requirement, without specifying a minimum number of fair representation directors,⁸ and that Nasdaq has complete discretion as to the number of board members.⁹ The Exchange also has noted that in the approval order relating to the acquisition of the American Stock Exchange LLC by NYSE Euronext, the Commission similarly approved a discretionary board size (noting that Amex intended to have a five-member board), a 20% fair representation requirement, and no minimum number of fair representation directors.¹⁰ The Exchange indicated that, by eliminating, for itself and NYSE Market, the current requirements for a minimum of two non-affiliated directors and two fair representation candidates, it will be able to improve administrative efficiency and effectiveness by operating with a smaller number of directors, while continuing to fulfill its statutory obligations regarding the fair representation of its members.

III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.¹¹ In particular, the

⁸ See Article I, paragraph (q) of the By-Laws of the NASDAQ Stock Market LLC, which states that, “ ‘Membership Representative Director’ means a Director who has been elected or appointed after having been nominated by the Member Nominating Committee or by a Nasdaq Member pursuant to these By-Laws.”

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

¹⁰ See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-Amex-2008-62).

¹¹ In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Commission finds that the proposal is consistent with the requirements of Section 6(b)(3) of the Act, which provides that the rules of an exchange must assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issues and investors and not be associated with a member of the exchange, broker, or dealer.¹²

The fair representation requirement in Section 6(b)(3) of the Act is intended to give members a voice in the selection of the exchange's directors and the administration of its affairs. Moreover, the Section 6(b)(3) requirement helps to ensure that members are protected from unfair, unfettered actions by an exchange and that, in general, an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities. The Commission notes that the requirement that at least 20% of the directors on the NYSE and NYSE Market boards be non-affiliated directors and fair representation candidates is designed to ensure the fair representation of NYSE members on the NYSE Board and the NYSE Market Board.¹³ The Commission notes that, while the proposal eliminates the requirement regarding a specific minimum number of non-affiliated directors and fair representation candidates on the boards, it does not alter the minimum 20% requirement for non-affiliated directors or fair representation candidates or the process by which members can directly petition and vote for representatives on the boards. Moreover, the proposal adds to the NYSE Operating Agreement and NYSE Market Bylaws a provision that: whenever 20% of the board would not result in a whole number, such number would in all cases be rounded up to the nearest whole number, thus ensuring that the non-affiliated directors and fair representation candidates never constitute less than 20% of the board. The Commission further notes that the proposed changes to the NYSE

¹² 15 U.S.C. 78f(b)(3).

¹³ See supra notes 4 and 5.

Operating Agreement and NYSE Market Bylaws are consistent with previous proposals approved by the Commission for other exchanges, which also do not specify the number of fair representation directors and which allow discretion as to the size of their boards.¹⁴ The Commission therefore finds that the Exchange's proposal is consistent with Section 6(b)(3) of the Act.¹⁵

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁶ that the proposed rule change (SR-NYSE-2009-12) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Florence E. Harmon
Deputy Secretary

¹⁴ See, e.g., Section 9(a) of the NASDAQ Stock Market LLC Agreement and Article IV, Section 4-1 of the NASDAQ OMX PHLX, Inc. By-Laws.

¹⁵ 15 U.S.C. 78f(b)(3).

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ 17 CFR 200.30-3(a)(12).