

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69045; File No. SR-NYSE-2013-02)

March 5, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change Adopting Investigation, Disciplinary, Sanction, and Other Procedural Rules that are Modeled on the Rules of the Financial Industry Regulatory Authority and To Make Certain Conforming and Technical Changes

I. Introduction

On January 4, 2013, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt rules governing investigations, discipline of members, sanctions that can be imposed as a result of disciplinary proceedings, cease and desist authority, and other procedural rules that are modeled on the rules of the Financial Industry Regulatory Authority (“FINRA”). The proposed rule change was published for comment in the Federal Register on January 24, 2013.<sup>3</sup> The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

On July 30, 2007, the National Association of Securities Dealers, Inc. (“NASD”), the Exchange, and NYSE Regulation, Inc. (“NYSER”) consolidated their member firm regulation operations into a combined organization, FINRA, and entered into a plan to allocate to FINRA

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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> Securities Exchange Act Release No. 68678 (January 16, 2013), 78 FR 5213 (January 24, 2013) (“Notice”).

regulatory responsibility for common rules and common members (“17d-2 Agreement”).<sup>4</sup> The 17d-2 Agreement was entered into in accordance with the requirements of Rule 17d-2 under the Act,<sup>5</sup> which permits self-regulatory organizations (“SROs”) to allocate regulatory responsibilities with respect to common members and common rules. In 2007, the parties also entered into a Regulatory Services Agreement (“RSA”), whereby FINRA was retained to perform certain regulatory services on behalf of NYSE for non-common rules. On June 14, 2010, the Exchange, NYSE, and FINRA amended the RSA and retained FINRA to perform the market surveillance and enforcement functions that had previously been performed by NYSE up to that point.<sup>6</sup> Accordingly, since June 14, 2010, FINRA has been performing all enforcement-related regulatory services on behalf of NYSE, including disciplinary proceedings relating to NYSE-only rules or against both dual members and non-FINRA members.

According to the Exchange, to facilitate FINRA’s performance of these enforcement functions under the RSA and to further harmonize the rules of FINRA and NYSE generally, NYSE is proposing to adopt the text of the FINRA Rule 8000 Series and Rule 9000 Series, which set forth rules for conducting investigations and enforcement actions. The Exchange proposes to adopt most of FINRA’s rules that are set forth in FINRA Rule 8000 and 9000 Series with no modification or only with conforming and technical changes.<sup>7</sup> However, in certain key

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<sup>4</sup> See Securities Exchange Act Release No. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (File No. 4-544) (Notice of Filing and Order Approving and Declaring Effective a Plan for the Allocation of Regulatory Responsibilities).

<sup>5</sup> 17 CFR 240.17d-2.

<sup>6</sup> See Securities Exchange Act Release No. 62355 (June 22, 2010), 75 FR 36729 (June 28, 2010) (SR-NYSE-2010-46).

<sup>7</sup> The following proposed NYSE Rules would be identical to the text of their counterpart FINRA Rules: 9131-9134, 9136-9138, 9142, 9148, 9213-9215, 9222, 9233-9241, 9261, 9263-9266, and 9290. The Exchange also made only conforming and technical changes to certain FINRA rules, such as changing “member” and “associated person” to “member

respects, the proposed NYSE rules would continue to differ from FINRA’s rules. Specifically, as described in more detail below, NYSE proposes, in part, to (1) establish processes for settling disciplinary matters both before and after the issuance of a complaint that differ both from NYSE’s current Stipulation and Consent process and FINRA’s current settlement processes; (2) retain the NYSE selection process for Hearing Panelists, rather than use FINRA’s Panelists; (3) retain the substance of NYSE’s current appellate process; (4) have NYSE’s Chief Regulatory Officer (“CRO”) rather than FINRA’s General Counsel make certain procedural decisions in the proposed rules; (5) have NYSE’s CRO rather than FINRA’s CEO authorize certain proceedings; (6) have FINRA’s Chief Hearing Officer rather than FINRA’s National Adjudicatory Council (“NAC”) review certain decisions; (7) retain the current NYSE list of minor rule violations, with certain technical and conforming amendments, while adopting FINRA’s minor rule violation fine levels and FINRA’s process for imposing them; and (8) not allow proceeds from fines and other monetary sanctions to be used for general corporate purposes. The major differences from the FINRA rules are highlighted below.<sup>8</sup>

## **Transition**

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organization” and “covered person,” respectively; changing cross-references to FINRA rules to cross-references to Exchange rules; and other non-substantive changes. The following proposed NYSE Rules include only such conforming and technical amendments to their counterpart FINRA rule text: 8110, 8120, 8210, 8211, 8311, 8330, 9110, 9143, 9145, 9252, 9262, 9267, 9521, 9527, 9620, and 9870. Proposed NYSE Rule 8130 would set forth retention of jurisdiction provisions modeled on Article IV, Section 6 and Article V, Section 4 of the FINRA Bylaws. The text of the proposed rule is substantially the same as the text in FINRA’s Bylaws, except that in paragraph (d) it contains a provision establishing how the transition period from NYSE Rule 477 will work. NYSE also made certain conforming changes to cross-references outside the 8000 and 9000 series.

<sup>8</sup> A detailed description of NYSE’s current rules and proposed changes can be found in the Notice. See supra note 3.

Following approval of the proposed rule change, the Exchange intends to announce the effective date of the new rules at least 30 days in advance in an Information Memorandum to its members and member organizations. To further facilitate an orderly transition from the current rules to the new rules, the Exchange proposes that certain matters already initiated under the current rules would be completed under such rules.<sup>9</sup>

### **Proposed NYSE Rule 8000 Series**

The Exchange proposes to adopt the text of FINRA Rules 8110 through 8330, Investigation and Sanctions, as NYSE Rules 8110 through 8330, with the differences described below.<sup>10</sup>

Unlike FINRA Rule 8313, proposed NYSE Rule 8313 would provide that the Exchange would publish all final disciplinary decisions issued under the proposed NYSE Rule 9000 Series, other than minor rule violations, on its website.<sup>11</sup> According to the Exchange, this codifies its long-standing practice. By way of comparison, FINRA's Rule 8313 provides that disciplinary complaints and decisions that meet certain criteria will be either published or made available upon request.

Further, unlike FINRA Rule 8320(a), the NYSE Rule would not provide that proceeds from fines and other monetary sanctions could be used for general corporate purposes.

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<sup>9</sup> See Notice, *supra* note 3, 78 FR at 5218-19 (discussing the particular circumstances under which the current rules would continue to apply).

<sup>10</sup> FINRA does not have a Rule 8212. Moreover, the Exchange is retaining NYSE Rule 410B, which concerns reports of listed securities transactions effected off the Exchange. As such, the Exchange is not proposing to adopt FINRA Rule 8213. NYSE is also not proposing to adopt FINRA Rule 8312, which describes FINRA's BrokerCheck disclosures. As such, to maintain consistency with FINRA's rule numbering, the Exchange has designated proposed NYSE Rules 8212, 8213 and 8312 as "Reserved."

<sup>11</sup> According to the Exchange, consistent with current practice, a determination in a statutory disqualification proceeding under the proposed NYSE Rule 9520 Series would not be considered a disciplinary decision and thus would not be subject to publication.

Currently, the Exchange uses fine monies for regulatory purposes subject to the approval of the NYSE Board.<sup>12</sup> The remainder of the proposed rule is substantially the same as the text in FINRA’s counterpart rule, with only conforming and technical amendments.

### **Proposed NYSE Rule 9000 Series**

The Exchange proposes to adopt the text of FINRA Rules 9110 through 9290, Code of Procedure, as NYSE Rules 9110 through 9290, with the differences described below.<sup>13</sup>

### **Proposed NYSE Rule 9130 through 9138**

Proposed NYSE Rules 9130 through 9138 would govern the service of a complaint or other procedural documents under the NYSE Rules. The text of these proposed rules, other than proposed NYSE Rule 9135, is identical to FINRA’s counterpart rules. Proposed NYSE Rule 9135 differs from its FINRA counterpart because it deletes a reference to filing an appeal with FINRA’s Office of Hearing Officer. As previously noted, the Exchange is retaining its current appeals process.

### **Proposed NYSE Rules 9140 through 9148**

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<sup>12</sup> See Securities Exchange Act Release Nos. 55003 (December 22, 2006), 71 FR 78497 (December 29, 2006) (SR-NYSE-2006-109) and 55216 (January 31, 2007), 72 FR 5779 (February 7, 2007).

<sup>13</sup> Proposed NYSE Rule 9120 would set forth definitions and is based on FINRA Rule 9120, which certain conforming changes for NYSE’s proposed rules. Certain defined terms in FINRA Rule 9120 would be inapplicable in the Exchange’s rules – “Counsel to the National Adjudicatory Council,” “District Committee,” “Extended Proceeding,” “Extended Proceeding Committee,” “FINRA Board,” “FINRA Regulation Board,” “General Counsel,” “Governor,” “Market Regulation Committee,” “Primary District Committee,” “Review Subcommittee,” “Statutory Disqualification Committee,” and “Subcommittee” – and therefore are not included in the proposed rule change. The Exchange also proposes to include certain definitions that are not included in FINRA’s rule text. “Board of Directors,” “Chief Regulatory Officer” or “CRO,” “covered person,” “Department of Market Regulation,” “Department of Member Regulation,” “Exchange,” “Floor-Based Panelist,” “Head of Market Regulation,” and “Office of Hearing Officers” are definitions that appear in subsequent proposed rules and are necessary for harmonization with the Exchange’s rules.

Proposed NYSE Rules 9140 through 9148 are among the rules that would govern the conduct of disciplinary proceedings. Proposed NYSE Rule 9141 would govern appearances in a proceeding, notice of appearances, and representation.<sup>14</sup>

Generally, the text of proposed NYSE Rules 9142 through 9148 is substantially the same as the text of FINRA's counterpart rules, with only confirming and technical changes. However, proposed NYSE Rules 9144, 9146, and 9147 differ from FINRA's counterpart rules to reflect that the Exchange would retain its appellate process by replacing FINRA's NAC and Review Subcommittee with the Exchange's Board of Directors.

#### **Proposed NYSE Rule 9150**

Proposed NYSE Rule 9150 would provide that a representative can be excluded by an Adjudicator for improper or unethical conduct. The text of the proposed rule is substantially the same as the text in FINRA's counterpart rule, except for conforming and technical amendments and an amendment to reflect the Exchange's retention of its appellate process by replacing the NAC with the Exchange's Board of Directors.

#### **Proposed NYSE Rule 9160**

Proposed NYSE Rule 9160 would provide that no person may act as an Adjudicator if he has a conflict of interest or bias, or circumstances exist where his fairness could reasonably be questioned. In such case, the person must recuse himself or may be disqualified. The proposed

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<sup>14</sup> The text of the proposed rule is the same as the text of FINRA's counterpart rule, except that the Exchange does not propose to adopt the text of FINRA Rule 9141(c), which provides that no former officer of FINRA shall, within one year after termination of employment with FINRA, make an appearance before an adjudicator on behalf of any other person under the Rule 9000 Series. The Exchange does not believe that it is necessary to bar its former employees from such appearances because its employees generally are not involved in the regulatory and disciplinary functions carried out by FINRA on behalf of the Exchange; as such, their appearance does not create the same type of conflict of interest. Thus, proposed NYSE Rule 9141(c) is marked "Reserved."

rule would cover the recusal or disqualification of an Adjudicator, the Chair of the Exchange Board of Directors, or a Director. The text of the proposed rule is substantially the same as the text in FINRA’s counterpart rule.<sup>15</sup>

### **Proposed NYSE Rules 9200 through 9217**

Proposed NYSE Rule 9200 would cover disciplinary proceedings. Generally, proposed NYSE Rules 9211, and 9213 through 9215 are substantially the same as the text in FINRA’s counterpart rule, with only conforming and technical changes.

Proposed NYSE Rule 9212 would set forth the requirements of the complaint, amendments to the complaint, withdrawal of the complaint, and service of the complaint. The text of the proposed rule is modeled on the text in FINRA’s counterpart rule, except that FINRA Rule 9212(a)(2) permits the Department of Enforcement or Department of Market Regulation to propose that the Chief Hearing Officer select one Panelist from the Market Regulation Committee if certain trading-related violations, described in FINRA Rule 9120(u), are alleged in the complaint. The Exchange proposes instead to permit the Chief Hearing Officer to select one Floor-Based Panelist, who would be a person who is, or, if retired, was, active on the Floor of the Exchange, to serve on a Hearing Panel if the complaint alleges at least one cause of action involving activities on the Floor of the Exchange. Each subsequent reference in the FINRA rules to a Market Regulation Committee Panelist would be substituted with a reference to a Floor-Based Panelist in the proposed NYSE Rules.<sup>16</sup>

Proposed NYSE Rule 9216 would establish the acceptance, waiver, and consent

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<sup>15</sup> The rule does not reference certain Adjudicators used by FINRA that the Exchange will not utilize in its proceedings (e.g., NAC and Review Subcommittee); as such, proposed NYSE Rules 9160(b) and (c) are designated as “Reserved.”

<sup>16</sup> See proposed NYSE Rules 9221(a)(3), 9231(b) and (c), and 9232. The term “Floor-Based Panelist” would be defined in proposed NYSE Rule 9120(p).

(“AWC”) procedures by which a Respondent, before a complaint is issued, may execute a letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive the right to a hearing, appeal, and certain other procedures.<sup>17</sup> It also would establish procedures for executing a minor rule violation plan letter.

The proposed rule is similar to FINRA Rule 9216, except that the Office of Disciplinary Affairs, on behalf of the Exchange Board of Directors, would be authorized to accept or reject an AWC or minor rule violation plan letter. If the AWC or minor rule violation plan letter were accepted by the Office of Disciplinary Affairs, it would be deemed final. If the letter were rejected by the Office of Disciplinary Affairs, the Exchange would be permitted to take any other appropriate disciplinary action with respect to the alleged violation or violations. If the letter were rejected, the member organization or covered person would not be prejudiced by the execution of the AWC or minor rule violation plan letter and such document could not be introduced into evidence in connection with the determination of the issues set forth in any complaint or in any other proceeding.<sup>18</sup>

The proposed AWC process also differs from the Exchange’s current Stipulation and Consent procedure in NYSE Rule 476(g). Under current NYSE Rule 476(g), a Hearing Officer must act on a Stipulation and Consent submitted by either party – the “respondent” or “any authorized officer or employee of the Exchange” – and may choose to convene a Hearing Panel. No Hearing Officer would be involved in the process under the proposed rule. Furthermore, any member of the Exchange Board of Directors, any member of the NYSE Committee for Review,

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<sup>17</sup> Proposed NYSE Rule 9270 would address settlement procedures after the issuance of a complaint.

<sup>18</sup> Under FINRA’s rule, the Review Subcommittee or Office of Disciplinary Affairs may accept the AWC or letter or refer it to FINRA’s NAC for acceptance or rejection, or the Review Subcommittee may reject the AWC or letter or refer it to the NAC for acceptance or rejection.

and any Executive Floor Governor may require a review by the Exchange Board of Directors of any determination or penalty, or both, imposed by a Hearing Panel or Hearing Officer in connection with a Stipulation and Consent. In addition, the Respondent or the Division which entered into the written consent may require a review by the Exchange Board of Directors of any rejection of a Stipulation and Consent by the Hearing Panel. There would be no appeals or reviews of AWCs by the Exchange Board of Directors under the proposed rule change.

The Exchange also proposes to adopt aspects of FINRA's process and fine levels for minor rule violations while retaining the specific list of rules included in the Exchange's current minor rule violation plan, with certain technical and conforming amendments. Proposed NYSE Rule 9216(b) would be similar to FINRA Rule 9216(b), with technical amendments and amendments to make it consistent with proposed NYSE Rule 9216(a) in that the Office of Disciplinary Affairs could accept or reject the minor rule violation letter. While FINRA Rule 9216(b) would provide that a member or associated person that executes a minor rule violation letter waives any right to claim bias or prejudice on the part of FINRA's General Counsel, the NAC, or any member of the NAC, the Exchange's proposed rule would provide that a member organization or covered person could not claim bias or prejudice on the part of the CRO, the Exchange Board of Directors, Counsel to the Exchange Board of Directors, or any Director in order to conform with the Exchange's proposed rules.

Proposed NYSE Rule 9217 would set forth the rules that are included in the NYSE's minor rule violation plan under which a member organization or covered person could be fined, as described in proposed NYSE Rule 9216(b). The Exchange would retain the list of rules

currently set forth in NYSE Rule 476A with certain technical and conforming changes under proposed NYSE Rule 9217, rather than adopt the list of rules in FINRA's plan.<sup>19</sup>

### **Proposed NYSE Rules 9220 through 9222**

Proposed NYSE Rules 9221 and 9222 would describe how a Respondent can request a hearing, how the notice of a hearing will be provided, and timing considerations. The text of the proposed rules is the same as that in FINRA's counterpart rules, except that it permits a Respondent to request a Floor-Based Panelist rather than a Market Regulation Committee Panelist.

### **Proposed NYSE Rules 9230 through 9235**

Proposed NYSE Rules 9231 and 9232 would govern the composition of Hearing Panels and Extended Hearing Panels. The rules also govern how panel members are approved and the criteria for selection of a Replacement Hearing Officer, Panelists, Replacement Panelists, and Floor-Based Panelists. Under the proposed rule change, the Exchange would use FINRA's Chief

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<sup>19</sup> The technical and conforming changes are as follows. First, the NYSE's current list of minor rules includes a reference to the record retention provisions in NYSE Rule 472(c); the reference would be corrected to refer to NYSE Rule 472(d). Second, the reference to the submission of blue sheets under NYSE Rule 410A would be supplemented with a reference to proposed NYSE Rule 8211. Third, the reference to the submission of books and records under NYSE Rule 476(a)(11) would be supplemented with a reference to proposed NYSE Rule 8210. Finally, there is a reference to NYSE Rule 1000-1005. NYSE Rule 1005 was deleted from the NYSE rules in 2006 and as such the Exchange proposes to change the reference to NYSE Rule 1000-1004. See Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR-NYSE-2004-05). The current list of NYSE minor rules includes some rules that have been more recently removed from the NYSE rules as part of the FINRA rule harmonization process, including NYSE Rules 312(h), 382(a), 352(b) and (c), 392, and 445(4). The Exchange proposes to maintain the references to these former rules in its current list of minor rules in proposed NYSE Rule 9217. By doing so, the Exchange could continue to resolve violations of them that occurred before the harmonization via a minor rule violation letter. This rationale for maintaining references to prior rules in the list of minor rule violations was noted in Securities Exchange Act Release No. 62940 (September 20, 2010), 75 FR 58452 (September 24, 2010) (SR-NYSE-2010-66).

Hearing Officer and Hearing Officers from FINRA's Office of Hearing Officers; however, the Exchange would not use FINRA's pool of Panelists but would instead continue to draw Panelists appointed from the Exchange Hearing Board. As it is today, the Hearing Board would be appointed annually by the Chairman and would be composed of members of the Exchange who are not members of the Exchange Board of Directors and registered employees and non-registered employees of member organizations, as well as former members, former allied members, or registered and non-registered employees of member organizations who have retired from the securities industry.<sup>20</sup> As is the case under current NYSE Rule 476(b), Panelists are required to be persons of integrity and judgment. There is one change in Hearing Board eligibility in the proposed rule. Currently, the Exchange requires that a Panelist cannot have been retired from the securities industry for more than five years. The Exchange is eliminating the five-year restriction in order to have the largest number of potential retired Panelists.

In addition, as noted above, while FINRA's rules permit the Chief Hearing Officer to select one Panelist from the Market Regulation Committee if certain trading-related violations are alleged in the complaint, the Exchange proposes instead to permit the Chief Hearing Officer to select one Floor-Based Panelist to serve on a Hearing Panel if the complaint alleges at least one cause of action involving activities on the Floor of the Exchange, consistent with the Exchange's practice under current NYSE Rule 476(b).

Proposed Rule 9232 would also include certain Panelist selection criteria that are included in FINRA Rule 9232. These criteria are expertise, absence of any conflict of interest or bias or any appearance thereof, availability, and the frequency with which a person has served as

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<sup>20</sup> The Exchange no longer has allied members, but former allied members would continue to be eligible to be appointed to the Hearing Board, and the text of proposed NYSE Rule 9232 reflects that.

a Panelist in the last two years, favoring the selection of a person as a Panelist who has never served or who has served infrequently as a Panelist during the period.

### **Proposed NYSE Rules 9240 through 9242**

Proposed NYSE Rules 9241 and 9242 would govern the substantive and procedural requirements for pre-hearing conferences and pre-hearing submissions. The text of the proposed rules is identical to FINRA's counterpart rules, except that the Exchange does not propose to adopt the text of FINRA Rule 9242(b).<sup>21</sup>

### **Proposed NYSE Rules 9250 through 9253**

Proposed NYSE Rules 9250 through 9253 would address discovery, including the requirements and limitations relating to the inspection and copying of documents in the possession of Exchange staff, requests for information and limitations on such requests, and the production of witness statements and any harmless error relating to the production of witness statements. Proposed NYSE Rule 9252 is substantially the same as FINRA's counterpart rule with only technical amendments.

Proposed NYSE Rule 9251 would generally require the Department of Enforcement or Department of Market Regulation to make available to a Respondent any documents prepared or obtained in connection with the investigation that led to the proceedings, except that certain privileged or other internal documents, such as examination or inspection reports or documents that would reveal an examination, investigation, or enforcement technique or confidential source,

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<sup>21</sup> Rule 9242(b) provides that no former officer of FINRA may, within one year after termination of employment with FINRA, appear as an expert witness in a proceeding under the Rule 9000 Series except on behalf of FINRA. The Exchange does not believe that it is necessary to bar its former employees from such appearances because its employees generally are not involved in the regulatory and disciplinary functions carried out by FINRA on behalf of the Exchange; as such, their appearance does not create the same type of conflict of interest.

or documents that are prohibited from disclosure under federal law, are not required to be made available. A Hearing Officer may require preparation of a withheld document list. Proposed NYSE Rule 9251 also sets forth procedures for inspection and copying of documents that have been produced. In addition, if a Document required to be made available to a Respondent pursuant to the proposed rule was not made available by the Department of Enforcement or the Department of Market Regulation, no rehearing or amended decision of a proceeding already heard or decided would be required unless the Respondent establishes that the failure to make the Document available was not harmless error. The Hearing Officer, or, upon review under proposed NYSE Rule 9310, the Exchange Board of Directors, would determine whether the failure to make the document available was not harmless error, applying applicable Exchange, FINRA, SEC, and federal judicial precedent.<sup>22</sup>

Under proposed NYSE Rule 9253, a Respondent could file a motion to obtain certain witness statements. The text of the proposed rule is substantially the same as FINRA's counterpart rule, except for conforming and technical changes and changes to reflect the Exchange's retention of its current appeals process.

### **Proposed NYSE Rules 9260 through 9269**

Proposed NYSE Rules 9260 through 9269 would govern hearings and decisions. These rules, other than proposed NYSE Rule 9268, are substantially the same as FINRA's rules. Proposed NYSE Rule 9268 would set forth the timing and the contents of a decision of the Hearing Panel or Extended Hearing Panel and the procedures for a dissenting opinion, service of

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<sup>22</sup> The text of the proposed rule is substantially the same as FINRA's counterpart rule, except for conforming and technical changes and changes to reflect the Exchange's retention of its current appeals process, and the addition of the Exchange's consideration of its own precedent with respect to determining harmless error. The proposed rule would not establish any preference for Exchange versus other precedent in this respect; rather the Adjudicators could determine in their discretion what precedent to apply.

the decision, and any requests for review. The text of the proposed rule is similar to FINRA Rule 9268, with conforming and technical changes, changes to reflect the Exchange's retention of its appeals process, and an additional provision to address the fact that the Exchange has member affiliates.<sup>23</sup> As such, in proposed NYSE Rule 9268, the Exchange proposes to include text providing that a disciplinary decision concerning a member that is an affiliate of the Exchange would not be subject to review under proposed NYSE Rule 9310 but instead would be treated as a final disciplinary action subject to Commission review.

### **Proposed NYSE Rule 9270**

Proposed NYSE Rule 9270 would provide for a settlement procedure for a Respondent who has been notified that a proceeding has been instituted against him. The proposed settlement procedure would differ from FINRA Rule 9270, as noted below.

Proposed NYSE Rule 9270(c) would set forth the required content of the proposal, which would include a statement consenting to findings of fact and violations and a proposed sanction. The proposed rule would be substantially the same as FINRA's rule, except for conforming and technical changes and except that it would not require that the proposed sanction be consistent with FINRA's Sanction Guidelines. According to the Exchange, it currently does not have Sanction Guidelines and does not propose to follow FINRA's because they are tailored to FINRA's rules, not the Exchange's rules.

Proposed NYSE Rule 9270(d) would provide that by submitting a settlement offer a Respondent waives the right to a hearing, to claim bias or violations of the prohibition on ex parte communications, and to review by the Exchange Board of Directors, the Commission, or

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<sup>23</sup> The Exchange has one member, Archipelago Securities, Inc., that is an affiliate of the Exchange that is used for inbound and outbound routing of certain orders. See NYSE Rule 17(c). The Exchange also has a joint venture with BIDS Holding, LP, an affiliate of which, BIDS Trading L.P., is a member of the Exchange. See NYSE Rule 2B.01.

the courts. This differs from current NYSE Rule 476(g), which allows either party to request a hearing on a Stipulation and Consent or a Hearing Officer to convene a hearing on a Stipulation and Consent in certain circumstances; in addition, current NYSE Rule 476(g) allows the Exchange Board of Directors to call for review a determination or penalty imposed by a Hearing Panel or Hearing Officer.<sup>24</sup>

Proposed Rule 9270(e) would address contested settlement offers. Under the proposed rule, if a Respondent made an offer of settlement and the Department of Enforcement or the Department of Market Regulation opposed it, the offer of settlement would be contested and thereby deemed rejected, and thus the proceeding would proceed under the proposed NYSE Rule 9200 Series.<sup>25</sup>

Proposed NYSE Rule 9270(f) and (h) would address uncontested settlement offers. Under the proposed rule, if a hearing on the merits had not begun, the Office of Disciplinary Affairs could accept the settlement offer; if a hearing on the merits had begun, the Hearing Panel or Extended Hearing Panel could accept the settlement offer.<sup>26</sup> If they did not, the offer would

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<sup>24</sup> Proposed NYSE Rule 9270(d) would also differ from FINRA's counterpart rule to reflect the Exchange's retention of its appellate process and its designation of its CRO, rather than FINRA's General Counsel, to determine certain procedural matters. In addition, the text of the rule would differ from FINRA's counterpart in that it would delete references to General Counsel, the NAC, or any member of the NAC with respect to waiving claims of bias and replace them with references to the CRO, the Exchange Board of Directors, Counsel to the Exchange Board of Directors, or any Director to conform those provisions to the Exchange's proposed rules.

<sup>25</sup> The contested offer of settlement would not be transmitted to the Office of Hearing Officers, Office of Disciplinary Affairs, or Hearing Panel or Extended Hearing Panel, and would not constitute a part of the record in any proceeding against the Respondent making the offer. The proposed rule differs from FINRA's counterpart rule, FINRA Rule 9270(f), which permits a Hearing Panel or Extended Hearing Panel and the NAC to act on contested offers of settlement.

<sup>26</sup> Because the Exchange does not have sanction guidelines, the Office of Disciplinary Affairs, Hearing Panel, or Extended Hearing Panel, as applicable, would consider

be deemed withdrawn and the matter would proceed under the proposed NYSE Rule 9200 Series; the settlement offer would not be part of the record. The proposed text is modeled in part on FINRA's counterpart rules, FINRA Rule 9270(e) and (h), but differs in certain key respects. Under FINRA's rules, the NAC ultimately must accept the offer of settlement. The Exchange is retaining its appellate process and not utilizing the NAC. Therefore, the Exchange is not proposing to replicate this aspect of FINRA's rules. Further, the Exchange believes that it is unnecessary to have a second level of review of an uncontested settlement offer that is accepted by the Office of Disciplinary Affairs, Hearing Panel, or Extended Hearing Panel, as applicable, because all parties are in agreement with respect to the resolution of the matter.

Proposed NYSE Rule 9270(j) would provide that a Respondent may not be prejudiced by a rejected offer of settlement nor may it be introduced into evidence. The text of the proposed rule is substantially the same as FINRA Rule 9270(j).<sup>27</sup>

### **Proposed NYSE Rule 9280**

Proposed NYSE Rule 9280 would set forth sanctions for contemptuous conduct by a Party or attorney or other representative, which may include exclusion from a hearing or conference, and sets forth a process for reviewing such exclusions. The text of the proposed rule is substantially the same as that in FINRA's counterpart rule, except that rather than having the NAC review exclusions, the Exchange proposes to have the Chief Hearing Officer review exclusions.

### **Proposed NYSE Rule 9290**

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Exchange precedent or such other precedent as it deemed appropriate in determining whether to accept the settlement offer.

<sup>27</sup> The only difference is that proposed NYSE Rule 9270(j) references the Office of Disciplinary Affairs and does not include references to the NAC and Review Subcommittee, which the Exchange does not propose to utilize.

The Exchange proposes to adopt the text of FINRA Rule 9290 for expedited disciplinary proceedings without any changes.

### **Proposed NYSE Rules 9300 through 9310**

The Exchange is not proposing to adopt FINRA's appellate and call for review processes as set forth in the FINRA Rule 9300 Series. Rather, the text of current NYSE Rule 476(f) and (l) would be moved to proposed NYSE Rule 9310, with certain technical and substantive changes described below.

Under proposed NYSE Rule 9310(a)(1), any Party, any Director, and any member of the NYSEER Committee for Review could require a review by the Exchange Board of Directors of any determination or penalty, or both, imposed by a Hearing Panel or Extended Hearing Panel under the proposed NYSE Rule 9200 Series, except that neither Party could request a review by the Exchange Board of Directors of a decision concerning an Exchange member that is an affiliate. A request for review would be made by filing a written request with the Secretary of the Exchange, which states the basis and reasons for the review, within 25 days after notice of the determination and/or penalty was served upon the Respondent. The Secretary of the Exchange would give notice of any such request for review to the Parties.

The proposed rule differs from the current rule in one substantive respect. It would eliminate the authority of an Executive Floor Governor to require a review of a disciplinary decision. According to the Exchange, this authority is no longer necessary because the Exchange has moved away from a Floor-only trading model, and the Exchange's roster of member organizations includes those without any Floor presence. The Exchange believes that Executive

Floor Governors no longer represent the full community of market participants who may be subject to disciplinary action.<sup>28</sup>

Under proposed NYSE Rule 9310(a)(2), the Secretary of the Exchange would direct the Office of Hearing Officers to complete and transmit a record of the disciplinary proceeding in accordance with NYSE Rule 9267. Within 21 days after the Secretary of the Exchange gives notice of a request for review to the Parties, or at such later time as the Secretary of the Exchange could designate, the Office of Hearing Officers would assemble and prepare an index to the record, transmit the record and the index to the Secretary of the Exchange, and serve copies of the index upon all Parties. The Hearing Officer who participated in the disciplinary proceeding, or the Chief Hearing Officer, would certify that the record transmitted to the Secretary of the Exchange was complete. Current NYSE Rule 476(f) does not contain such requirements; the text is modeled on FINRA Rule 9321.

Proposed NYSE Rule 9310(b) governing review is substantially the same as provided in current NYSE Rule 476(f), other than conforming and technical changes to align it with terms used in the remainder of the proposed NYSE Rule 9000 Series.

Proposed NYSE Rule 9310(c) governs requests for leave to adduce additional evidence; it is substantially the same as provided in current NYSE Rule 476(f), other than conforming and technical changes to align it with terms used in the remainder of the proposed NYSE Rule 9000 Series.

Proposed NYSE Rule 9310(d) prohibits the CEO from requiring a review by the Exchange Board of Directors and governs the CEO's recusal from reviews by the Exchange

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<sup>28</sup> The text also contains certain conforming and technical changes to align it with terms used in the remainder of the proposed NYSE Rule 9000 Series.

Board of Directors. It is substantially the same as NYSE Rule 476(l), other than conforming and technical changes to align it with terms used in the remainder of the proposed NYSE Rule 9000 Series.

### **Proposed NYSE Rules 9500 through 9527**

The proposed NYSE Rule 9500 Series governs all other proceedings under the Exchange Rules.

The proposed NYSE Rule 9520 Series would govern eligibility proceedings for persons subject to statutory disqualifications who are not FINRA members.<sup>29</sup> The scope of the proposed NYSE Rule 9520 Series is meant to be the same as FINRA Rule 9520 Series.<sup>30</sup>

The text of proposed NYSE Rule 9523 is similar to that in FINRA's counterpart rules, except for conforming and technical changes and except as follows. First, under proposed NYSE Rule 9523, if the disqualified member organization, sponsoring member organization, and/or disqualified person executed a letter consenting to a supervisory plan, it would be submitted to the Exchange's CRO. Under FINRA's rule, the letter is submitted to FINRA's Office of General Counsel, which submits it to the Chairman of the Statutory Disqualification Committee, acting on behalf of the NAC; the Chairman may accept or reject the plan or refer it to the NAC for action. The Exchange does not propose to utilize the NAC or the Statutory Disqualification Committee Chairman for this purpose. In addition, under FINRA's rule, the waiver of bias or prejudice is with respect to the Department of Member Regulation, the FINRA General Counsel, the NAC and any member thereof, while under proposed NYSE Rule 9523, the waiver

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<sup>29</sup> FINRA has been processing statutory disqualification applications on behalf of the Exchange since 2007. See supra notes 4 and 6.

<sup>30</sup> NYSE intends to issue a notice similar to FINRA Regulatory Notice 09-19.

would be with respect to the Department of Member Regulation, the CRO, the Exchange Board of Directors, or any member thereof to conform to the Exchange's proposed rules.

Under proposed NYSE Rule 9524, if the CRO rejects the plan, the member organization or applicant may request a review by the Exchange Board of Directors. This differs from FINRA's process, which provides for a hearing before the NAC and further consideration by the FINRA Board of Directors. Because the Exchange does not propose to utilize the NAC, the Exchange proposes instead that the Exchange Board of Directors may hear any appeal.<sup>31</sup>

### **Proposed NYSE Rules 9550 through 9559**

Proposed NYSE Rules 9550 through 9559 would govern expedited proceedings, which are substantially similar to FINRA Rules 9550 through 9559, with the following changes to those rules.<sup>32</sup> The Exchange is not proposing to adopt the text of FINRA Rule 9551, which concerns failure to comply with the advertising and sales literature requirements in NASD Rule 2210. According to the Exchange, all NYSE member organizations that circulate advertising or sales literature are by definition doing business with the public, and therefore must be members of FINRA and are already subject to FINRA Rules 2210 and 9551. In addition, under the SEC Rule 17d-2 Agreement, FINRA is allocated responsibility for NYSE Rule 472, NYSE's counterpart to NASD Rule 2210.<sup>33</sup>

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<sup>31</sup> FINRA Rule 9525 also allows for discretionary review by the FINRA Board; the Exchange does not propose to adopt a comparable rule. Further, the Exchange also does not propose to adopt the text of FINRA Rule 9526, which provides for expedited proceedings by the FINRA Board of Governors in certain instances.

<sup>32</sup> NYSE proposed Rules 9552, 9554 and 9555 are substantially the same as FINRA's counterpart rules, except that NYSE's proposed rules do not carry over FINRA's notice provisions because it would be duplicative of proposed NYSE Rule 8313.

<sup>33</sup> See supra note 4.

The Exchange also does not propose to adopt the text of FINRA Rule 9553, which concerns failure to pay fees, dues, assessments or other charges. The Exchange proposes to adopt the text of FINRA Rule 8320, which addresses the non-payment of fines and monetary sanctions and would continue to use NYSE Rule 309 for non-payment of all other amounts due to the Exchange.

Proposed NYSE Rule 9556 would provide procedures and consequences for a failure to comply with temporary and permanent cease and desist orders, which would be authorized by proposed NYSE Rule 9810. The text of proposed NYSE Rule 9556 is the same as FINRA Rule 9556, except in the following respects. First, the text contains conforming and technical changes. Second, under FINRA's rule, FINRA's CEO authorizes proceedings under FINRA Rule 9556; under the Exchange's proposed rule, the Exchange's CRO would have the authority. Third, FINRA's rule permits service of process by facsimile; the Exchange does not believe that this alternative service method is necessary and the service methods permitted under proposed NYSE Rule 9134 (which are identical to FINRA Rule 9134) would be sufficient. Finally, the Exchange does not propose to include a notice to its membership of decisions under the rule, as FINRA does, it would be duplicative of proposed NYSE Rule 8313.

Proposed NYSE Rule 9557 would allow the Exchange to issue a notice directing a member organization to comply with the provisions of NYSE Rule 4110 (Capital Compliance), 4120 (Regulatory Notification and Business Curtailment), or 4130 (Regulation of Activities of Section 15C Member Organizations Experiencing Financial and/or Operational Difficulties) or otherwise directing it to restrict its business activities. The notice would be immediately effective, except that a timely request for a hearing would stay the effective date for 10 business days (unless the Exchange's CRO determined otherwise) or until an order was issued by the

Office of Hearing Officers, whichever occurs first. The notice could be withdrawn upon a showing that all the requirements were met.

The text of the proposed rule change is substantially the same as that in FINRA Rule 9557, except in the following respects. First, the text contains conforming and technical changes. Second, under FINRA's rule, FINRA's CEO exercises authority with respect to stays under the rule; under the Exchange's proposed rule, the Exchange's CRO would have the authority. Third, FINRA's rule permits service of process by facsimile; the Exchange does not believe that this alternative service method is necessary for the reasons stated above. Finally, the Exchange does not propose to include a notice to its membership of decisions under the rule, as FINRA does, because it would be duplicative of proposed NYSE Rule 8313.

Proposed NYSE Rule 9558 would allow the Exchange's CRO to provide written authorization to the Exchange staff to issue a written notice for a summary proceeding for an action authorized by Section 6(d)(3) of the Act. Such notice would be immediately effective. The text of the proposed rule change is substantially the same as that in FINRA Rule 9558, except as follows. First, the text contains conforming and technical changes. Second, under FINRA's rule, FINRA's CEO authorizes such proceedings. Third, the Exchange would not permit service of process by facsimile. Finally, the Exchange does not propose to include a notice to its membership of decisions under the rule, as FINRA does, because it would be duplicative of proposed NYSE Rule 8313.

Proposed NYSE Rule 9559 would set forth uniform hearing procedures for all expedited proceedings under the proposed NYSE Rule 9550 Series. Proposed NYSE Rule 9559 differs from FINRA Rule 9559 as follows. First, any call for review would be conducted by the Exchange's Board of Directors rather than FINRA's NAC. Second, the Exchange would not

utilize current or former members of the FINRA Financial Responsibility Committee for proceedings initiated under proposed NYSE Rule 9557, as FINRA does under its counterpart rule. The Exchange would use the same pool of Hearing Panelists from the Hearing Board as it uses for other proceedings. Third, any instance in FINRA's rule that authorized FINRA's CEO to act would instead authorize the Exchange's CRO to act. Fourth, the Exchange does not propose to adopt the text of FINRA Rule 9559(r), which provides for the publication of decisions under the Rule, because it would be duplicative of proposed NYSE Rule 8313. Fifth, the Exchange does not propose to adopt the text of FINRA Rule 9559(q)(1) that sets forth 14-day and 21-day call for review periods because a call for review period would be described in proposed NYSE Rule 9310. Proposed NYSE Rule 9559(q)(1) would instead state that calls for review would be conducted in accordance with proposed NYSE Rule 9310, which, consistent with the time period in current NYSE Rule 476(f), would provide for a 25-day call for review period. Finally, the proposed text contains conforming and technical changes.

### **Proposed NYSE Rule 9600 Series**

The Exchange proposes to adopt a new NYSE Rule 9600 Series, which would set forth procedures by which a member organization could seek exemptive relief from current NYSE Rules 4311(carrying agreements) and 4360 (fidelity bonds) and proposed NYSE Rule 8211 (submission of electronic blue sheet data). The rule text would be modeled on FINRA's Rule 9600 Series; the Exchange's proposed rules primarily differ from FINRA's in that they contain technical and conforming changes and that the Exchange's CRO, rather than FINRA's Office of

General Counsel, would receive the request and any notice of appeal, and the CRO, rather than FINRA's NAC, would carry out the proposed appellate process.<sup>34</sup>

### **Proposed NYSE Rule 9700 Series**

FINRA's Rule 9700 Series provides redress for persons aggrieved by the operations of any automated quotation, execution, or communication system owned or operated by FINRA. As this would be inapplicable to the Exchange, the Exchange proposes to designate the proposed NYSE Rule 9700 Series as reserved to maintain consistency with FINRA's rule numbering conventions. The Exchange notes that under current NYSE Rule 18, if a member organization suffers a loss related to an Exchange system failure, it can submit a claim pursuant to that rule.

### **Proposed NYSE Rule 9800 Series**

The Exchange proposes to adopt a new NYSE Rule 9800 Series to set forth procedures for issuing temporary cease and desist orders.

The proposed rule text would be substantially the same as that in FINRA's Rule 9800 Series, except for conforming and technical amendments and except that the Exchange's CRO, rather than FINRA's CEO, would authorize the initiation of temporary cease and desist proceedings and the initiation of suspension or cancellation proceedings for a violation of a temporary cease and desist order.

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<sup>34</sup> Currently, the FINRA Rule 9600 Series also permits FINRA members to seek exemptive relief from other rules – NASD Rules 1021, 1050, 1070, 2210, 2340, 3010(b)(2), or 3150, or FINRA Rules 2114, 2310, 2359, 2360, 4210, 4320, 5110, 5121, 5122, 5130, 6183, 6625, 6731, 7470, 8213, 11870, or 11900, or Municipal Securities Rulemaking Board Rule G-37. If NYSE adopts similar rules in the future as part of the rules harmonization project, it will consider permitting member organizations to seek exemptive relief through the NYSE Rule 9600 Series.

### III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act.<sup>35</sup> The Commission believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>36</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>37</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. In addition, the Commission believes that the proposed rule furthers the objectives of Section 6(b)(7) of the Act,<sup>38</sup> in that it provides fair procedures for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange or a member thereof. In addition, the Commission believes that the proposed rule change furthers the objectives of Section 6(b)(3) of the Act,<sup>39</sup> in that it supports the fair representation of members in the administration of the Exchange's affairs.

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<sup>35</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>36</sup> 15 U.S.C. 78f(b).

<sup>37</sup> 15 U.S.C. 78f(b)(5).

<sup>38</sup> 15 U.S.C. 78f(b)(7).

<sup>39</sup> 15 U.S.C. 78f(b)(3).

The Commission believes that it is consistent with the Act for NYSE to adopt FINRA's disciplinary rules, which have previously been approved by the Commission.<sup>40</sup> According to the Exchange, most of its member organizations are members of FINRA and as such are already subject to the FINRA Rule 8000 Series and Rule 9000 Series.<sup>41</sup> Moreover, FINRA already administers much of the disciplinary process for NYSE under both its 17d-2 Agreement with NYSE and the RSA.<sup>42</sup> As noted above, since June 14, 2010, FINRA has been performing all enforcement-related regulatory services on behalf of NYSE, including disciplinary proceedings relating to NYSE-only rules or against both dual members and non-FINRA members. Further, according to the Exchange, those member organizations that are not members of FINRA are members of The NASDAQ Stock Market ("Nasdaq"), which has disciplinary rules that are similar to FINRA's rules.<sup>43</sup> Thus, all Exchange members, by virtue of their membership either in FINRA or Nasdaq, are already complying with the FINRA rules described herein. Accordingly, the proposed changes will provide greater harmonization between Exchange and FINRA rules of similar purpose, such that dual members will be subject to more consistent rules which should eliminate confusion potentially resulting from differing procedures and requirements. As such, the Commission believes the proposed rule change will foster cooperation and coordination with

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<sup>40</sup> See Order Approving Proposed Rule Change Relating to the Adoption of NASD Rules 4000 through 10000 Series and the 12000 through 14000 Series as FINRA Rules in the New Consolidated FINRA Rulebook, Securities Exchange Act Release No. 58643 (September 25, 2008), 73 FR 57174 (October 1, 2008) ("Order Adopting NASD Rules").

<sup>41</sup> See Notice, *supra* note 3, 78 FR at 5214..

<sup>42</sup> See *supra* notes 4 and 6 and accompanying text.

<sup>43</sup> See Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt Certain FINRA Rules Relating to Trading Halts and Disclosure of Disciplinary Information, Securities Exchange Act Release No. 56204 (August 3, 2007), 72 FR 45288 (August 13, 2007) ("To ensure that FINRA members did not incur significant regulatory burdens as a result of Nasdaq separating from FINRA and registering as a national securities exchange, Nasdaq based its rules governing regulatory standards and disciplinary processes on FINRA rules, to a significant extent.").

persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Commission also believes that it is consistent with the Act for NYSE to retain some of its current procedures. For example, NYSE would retain its appeals process and the use of NYSE Panelists; codify its notice provision in Rule 8313 governing how it releases its disciplinary decisions; and limit the use of fines, in proposed Rule 8320. The Commission notes that the Act requires that the rules of an exchange provide, in part, a “fair procedure for the disciplining of members and persons associated with members.”<sup>44</sup> The Act, however, does not dictate what those procedures should be and therefore, exchanges are not required by the Act to follow one process. The Commission notes that proposed NYSE Rule 9310, Review by Exchange Board of Directors, merely codifies the Exchange’s current appeals process under NYSE Rule 476(f) and (l) into NYSE’s proposed rules. Similarly, the Commission also believes that it is consistent with the Act for the Exchange to retain its current selection process for Hearing Panelists. According to the Exchange, Hearing Panelists cannot be drawn solely from a pool of FINRA members and associated persons, but rather must include NYSE-only member organizations and persons with experience in NYSE Floor matters in order for the Exchange’s members to have a fair representation in its affairs.<sup>45</sup> Finally, the Commission also believes that it is consistent with the Act for the Exchange to codify its policy regarding the publication of disciplinary decisions and to limit the use of proceeds from fines and other monetary sanctions. The Commission notes with respect to publishing disciplinary decisions, that proposed Rule 8313 would require the Exchange to publish all final disciplinary actions other than minor rule violations, and is therefore, non-discriminatory and non-discretionary. Further, the Commission

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<sup>44</sup> See Section 6(b)(7), 15 U.S.C. 78f(b)(7).

<sup>45</sup> See Notice, supra note 3, 78 FR at 5235.

believes that not allowing monies from fines and sanctions to be used for general corporate purposes is consistent with the Commission's prior order regarding the use of such monies.<sup>46</sup>

The Commission also believes that it is consistent with the Act for the Exchange to modify FINRA's Rule 9268 to reflect that the Exchange has member affiliates. With regard to proposed Rule 9268, the Commission believes that it is appropriate that a disciplinary decision concerning an affiliate of the Exchange not be subject to review by the Exchange Board of Directors, but instead be treated as final action subject to review by the Commission. The Commission notes that Nasdaq, which also has a member affiliate, has a rule that is substantially the same as the Exchange's proposed rule.<sup>47</sup> In approving Nasdaq's rule, the Commission determined that such a rule would insulate Nasdaq's role as a SRO from its commercial interests.<sup>48</sup> Similarly, the Commission believes that NYSE's rule is designed to protect the integrity of the disciplinary process and is consistent with the Act.

The Commission also notes that in certain instances the Exchange has replaced FINRA's General Counsel or Chief Executive Officer with the Exchange's CRO, as well as replaced FINRA's NAC with its Chief Hearing Officer.<sup>49</sup> The Commission believes that this is consistent with the Act and that these changes reflect that FINRA is providing services to a

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<sup>46</sup> See Order Granting Approval of Proposed Rule Change Relating to NYSE Regulation, Inc. Policies Regarding Exercise of Power To Fine NYSE Member Organizations and Use of Money Collected as Fines, Securities Exchange Act Release No. 55216 (January 31, 2007), 72 FR 5779 (February 7, 2007) (finding that limitation on the uses of fines to be consistent with Section 6 of the Act in order to guard against the possibility that fines may be assessed to respond to budgetary needs rather than to serve a disciplinary purpose). Unlike FINRA, the Exchange is a publicly traded company.

<sup>47</sup> See Nasdaq Rule 9268(e)(2).

<sup>48</sup> See Order Granting Approval of Proposed Rule Change as Amended by Amendment No. 1 Regarding Restrictions on Affiliations between Nasdaq and its Members, Securities Exchange Act Release No. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006).

<sup>49</sup> See e.g., proposed NYSE Rules 9523, 9556, and 9280.

separate SRO. The Exchange believes that its CRO is better suited to resolving certain procedural matters and rendering certain decisions under the proposed rule change, because the Exchange's CRO would have greater familiarity with the Exchange's rules and membership.<sup>50</sup> Moreover, the Exchange has represented that the CRO is independent of the Department of Member Regulation and as such can provide an appropriate review.<sup>51</sup> The Exchange also believes that it is appropriate for FINRA's Chief Hearing Officer, in lieu of the NAC or the Exchange Board of Directors, to review certain decisions, such as exclusions from a hearing or conference, since the Exchange Board of Directors does not currently review such decisions.<sup>52</sup>

The Commission believes that it is consistent with the Act for NYSE to modify its proposed rules in a way that is neither its current practice nor FINRA's rules. The Exchange does so for procedures relating to AWCs pursuant to proposed NYSE Rule 9216 and settlements pursuant to proposed NYSE Rule 9270. The Commission believes that the proposed processes for settling disciplinary are fair and reasonable. Although by adopting proposed NYSE Rule 9216 the Exchange would be changing the type of review associated with settlement procedures, the Commission believes that the proposed process provides appropriate controls to assure consistency and protect against aberrant settlements. Specifically, FINRA's Office of Disciplinary Affairs, which is an independent body from FINRA's Department of Enforcement,<sup>53</sup> would be reviewing all proposed AWCs or minor rule violation plan letters. Accordingly, FINRA's Office of Disciplinary Affairs would serve the role currently being performed by a Hearing Officer under NYSE rules to review a proposed settlement. Similarly,

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<sup>50</sup> See Notice, supra note 3, 78 FR at 5235.

<sup>51</sup> See id. at 5231.

<sup>52</sup> See id. at 5330.

<sup>53</sup> See FINRA Regulatory Notice 09-17.

the Office of Disciplinary Affairs would be reviewing any uncontested offers of settlement before a hearing pursuant to proposed NYSE Rule 9270.<sup>54</sup> If the parties are unable to reach an agreement on settlement, the matter would proceed under the proposed 9200 Series and the processes provided therein.

Finally, the Commission believes that it is consistent with the Act for the Exchange to retain its list of minor rule violations, which have been approved by the Commission,<sup>55</sup> with certain technical and conforming amendments, while adopting FINRA's minor rule violation fine levels and process for imposing them, which also have been approved by the Commission.<sup>56</sup>

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<sup>54</sup> A Hearing Panel or Extended Hearing Panel would have to accept or reject an uncontested offer of settlement after a hearing has begun. See proposed NYSE Rule 9270(f).

<sup>55</sup> The most recent amendments to the Exchange's minor rule violation plan were approved in Securities Exchange Act Release No. 66758 (April 6, 2012), 77 FR 22032 (April 12, 2012) (SR-NYSE-2012-05).

<sup>56</sup> See Order Adopting NASD Rules, supra note 40.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>57</sup> that the proposed rule change (SR-NYSE-2013-02) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>58</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>57</sup> 15 U.S.C. 78s(b)(2).

<sup>58</sup> 17 CFR 200.30-3(a)(12).