

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-75991; File No. SR-NYSE-2015-27)

September 28, 2015

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change Amending the Eighth Amended and Restated Operating Agreement of the Exchange to Establish a Regulatory Oversight Committee as a Committee of the Board of Directors of the Exchange and Amending Other Rules of the Exchange

I. Introduction

On June 12, 2015, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”),² and Rule 19b-4 thereunder,³ a proposed rule change to amend the Eighth Amended and Restated Operating Agreement (“Operating Agreement”) of the Exchange and to amend other rules of the Exchange, as described below. The proposed rule change was published for comment in the Federal Register on June 30, 2015.⁴ The Commission received one comment letter on the proposed rule change⁵ and a response to the comment letter from the Exchange.⁶ On August 11, 2015, the Commission extended the time period in which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ See Securities Exchange Act Release No. 75288 (June 24, 2015), 80 FR 37316 (“Notice”).

⁵ See letter from J. Robert Brown, Jr., Professor of Law & Director, Corporate & Commercial Law Program, University of Denver Sturm College of Law, to Brent J. Fields, Secretary, Commission, dated September 8, 2015 and received by the Commission on September 21, 2015 (“Professor Brown Letter”).

⁶ See letter from Martha Redding, Senior Counsel and Assistant Secretary, NYSE, to Brent J. Fields, Secretary, Commission, dated September 24, 2015 and received by the Commission on September 24, 2015 (“NYSE Response Letter”).

to determine whether to disapprove the proposed rule change, to September 28, 2015.⁷ This order approves the proposed rule change.

II. Description of the Proposal

NYSE proposes to: (i) amend the Exchange's Operating Agreement to establish a Regulatory Oversight Committee ("ROC") as a committee of the Exchange's Board of Directors ("Board") and make conforming amendments to Exchange Rules 1, 46, 46A, and 497; (ii) terminate the Delegation Agreement ("Delegation Agreement") among the Exchange, NYSE Market (DE), Inc. ("NYSE Market (DE)"), and NYSE Regulation, Inc. ("NYSE Regulation"), delete Exchange Rule 20, which sets forth the terms of the delegation, and make conforming amendments to Section 4.05 of the Operating Agreement and Exchange Rules 0, 1, 22, 36, 37, 46, 48, 49, 54, 70, 103, 103A, 103B, 104, 422 476A, and 497; (iii) remove from the Exchange Rules certain organizational documents of NYSE Market (DE) and NYSE Regulation in connection with the proposed termination of the Delegation Agreement; (iv) amend the Operating Agreement to establish a Director Candidate Recommendation Committee ("DCRC") as a committee of the Board and set forth the process by which Non-Affiliated Director Candidates are named to the new DCRC; (v) amend the Operating Agreement to establish a Committee for Review ("CFR") as a subcommittee of the ROC and make conforming changes to Exchange Rules 308, 475, 476, 476A, and 9310; and (vi) replace references to the Chief Executive Officer of NYSE Regulation in Exchange Rules 48, 49, and 89 with references to the Chief Regulatory Officer of the Exchange.

⁷ See Securities Exchange Act Release No. 75659, 80 FR 49285 (August 17, 2015).

A. Establishing a ROC and Making Conforming Amendments to Exchange Rules

The Exchange proposes to add subsection (ii) to Section 2.03(h) of the Operating Agreement to establish a ROC and to delineate its composition and functions. The Exchange states that new Section 2.03(h)(ii) of the Operating Agreement would be substantially similar to the recently approved changes by the Exchange's affiliates, NYSE Arca, Inc. ("NYSE Arca") and NYSE MKT LLC ("NYSE MKT"), to establish ROCs,⁸ as well as Article III, Section 5(c) of the By-Laws of the NASDAQ Stock Market LLC ("NASDAQ") ("NASDAQ By-Laws").⁹ The ROC would be appointed annually and would have the following responsibilities:

- oversee the Exchange's regulatory and self-regulatory organization responsibilities and evaluate the adequacy and effectiveness of the Exchange's regulatory and self-regulatory organization responsibilities;
- assess the Exchange's regulatory performance; and
- advise and make recommendations to the Board or other committees of the Board about the Exchange's regulatory compliance, effectiveness and plans.¹⁰

In furtherance of these functions, the Exchange proposes that the ROC shall have the authority and obligation to: (i) review the regulatory budget of the Exchange and specifically inquire into the adequacy of resources available in the budget for regulatory activities; (ii) meet

⁸ See Securities Exchange Act Release Nos. 75148 (June 11, 2015), 80 FR 34751 (June 17, 2015) (approving NYSE MKT's establishment of a ROC of the exchange's Board of Directors) ("NYSE MKT Approval Order") and 75155 (June 11, 2015), 80 FR 34744 (June 17, 2015) (approving NYSE Arca's establishment of a ROC of the exchange's Board of Directors) ("NYSE Arca Approval Order").

⁹ See Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (order granting application of NASDAQ for registration as a national securities exchange) ("NASDAQ Approval Order").

¹⁰ See Notice, supra note 4, at 37317.

regularly with the Chief Regulatory Officer (“CRO”) in executive session; (iii) in consultation with the Exchange’s Chief Executive Officer, establish the goals, assess the performance, and recommend the CRO’s compensation; and (iv) keep the Board informed with respect to the foregoing matters.

With respect to the ROC’s composition, Section 2.03(h)(ii) would provide that the ROC shall consist of at least three members, each of whom shall be a Director of the Exchange who satisfies the independence requirements of the Exchange.¹¹ The Exchange states that a ROC comprised of at least three independent members has been recognized as one of several measures that can help ensure the independence of the regulatory function from the market operations and commercial interests of a national securities exchange.¹²

In addition, Section 2.03(h)(ii) of the Operating Agreement would provide that the Board, on affirmative vote of a majority of Directors, at any time may remove a member of the ROC for cause, and also would provide that a failure of the ROC member to qualify as independent under the Company Director Independence Policy would constitute a basis to remove a member of the ROC for cause. If the term of office of a ROC member terminates, and the remaining term of office of such member at the time of termination is not more than three months, Section 2.03(h)(ii) would provide that during the period of vacancy, the ROC would not be deemed to be in violation of its compositional requirements by virtue of the vacancy. To clarify the process for filling vacancies on any committee of the Exchange, including the ROC, the Exchange also proposes to amend Section 2.03(h) of the Operating Agreement to provide that

¹¹ The Exchange’s independence requirements are set forth in the Company Director Independence Policy of the Exchange. See Securities Exchange Act Release No. 67564 (August 1, 2012), 77 FR 47161 (August 7, 2012) (SR-NYSE-2012-17) (approving, among other things, the Exchange’s Company Director Independence Policy).

¹² See Notice, supra note 4, at 37317.

vacancies in the membership of any committee shall be filled by the Board. The Exchange believes that the proposed rule change creating an independent Board committee to oversee the adequacy and effectiveness of the performance of its self-regulatory responsibilities is consistent with previously approved rule changes for other SROs and would enable the Exchange to undertake its regulatory responsibilities under a corporate governance structure that is consistent with its industry peers.¹³ Moreover, the Exchange believes that the proposed ROC would ensure the continued independence of the regulatory process.¹⁴ The Exchange states that oversight of the Exchange's self-regulatory responsibilities and regulatory performance, including review of the regulatory plan, programs, budget and staffing by a ROC composed of individuals independent of Exchange management and a CRO having general supervision of the regulatory operations of the Exchange that meets regularly with the ROC is integral to the proposal.¹⁵

The Exchange also proposes to make conforming amendments to Exchange Rules 1, 46, 46A and 497 by replacing references to "Board of Directors of NYSE" and "NYSE Regulation Board of Directors" with references to the ROC.

B. Terminating the Delegation Agreement, Deleting Exchange Rule 20, and Conforming the Operating Agreement and other Exchange Rules

The Exchange proposes to terminate the Delegation Agreement and delete Exchange Rule 20, which sets forth the delegation of the Exchange's regulatory functions to NYSE Regulation and the Exchange's market functions to NYSE Market (DE),¹⁶ each of which is a

¹³ See id. See also NASDAQ Approval Order, NYSE MKT Approval Order and NYSE Arca Approval Order, supra notes 8 and 9.

¹⁴ See Notice, supra note 4, at 37317.

¹⁵ See id.

¹⁶ See Exchange Rule 20(a). Exchange Rule 20(b) requires that NYSE Market (DE) establish a Market Performance Committee and that NYSE Regulation establish a

subsidiary of the Exchange created in 2006 following the merger of New York Stock Exchange, Inc. with Archipelago Holdings, Inc.¹⁷ In connection with that transaction, NYSE Regulation became a separate not-for-profit entity, and its Board of Directors assumed the regulatory oversight functions and responsibilities of the Exchange that are proposed to be assumed by the ROC. The Exchange notes that, although the Delegation Agreement sets forth the terms under which the Exchange delegated its functions to NYSE Regulation and NYSE Market (DE), the Exchange retained ultimate responsibility for the operations, rules and regulations developed by NYSE Regulation and NYSE Market (DE) and for their enforcement.¹⁸

With the termination of the Delegation Agreement, the Exchange proposes to re-integrate its regulatory and market functions.¹⁹ The Exchange believes that its proposal to establish a ROC to undertake the independent oversight of the Exchange's regulatory responsibilities would

Regulatory Advisory Committee, each to include persons associated with member organizations and representatives of both those member organizations doing business on the Floor of the Exchange and those who do not do business on the Floor. The Exchange does not propose to retain these committees. Rather, the Exchange proposes that the Committee for Review, which would include persons associated with member organizations and representatives of both those member organizations doing business on the Floor of the Exchange and those who do not do business on the Floor, assume the advisory roles of these committees. See Section II.E., infra.

¹⁷ See Notice, supra note 4, at 37318.

¹⁸ The Exchange notes that functions delegated to NYSE Market (DE) included, among other things, operating the NYSE marketplace, including the automated systems supporting it; providing and maintaining a communications network infrastructure linking market participants for the efficient process and handling of quotations, orders, transaction reports and comparisons of transactions; acting as a Securities Information Processor for quotations and transaction information related to securities traded on NYSE and other trading facilities operated by NYSE Market (DE); administering the Exchange's participation in National Market System Plans; and collecting, processing, consolidating and providing to NYSE Regulation accurate information requisite to operation of the surveillance audit trail. See id. at 37318 n.21.

¹⁹ See Notice, supra note 4, at 37322.

ensure independent oversight of the regulatory process and would have the additional benefit of aligning the Exchange’s corporate governance practices with its industry peers.²⁰

The Exchange proposes to functionally separate its regulatory functions from its business lines.²¹ The Exchange’s CRO would head the Exchange’s regulatory department and continue to manage the Exchange’s regulatory functions, under the oversight of the proposed ROC. The regulatory staff supporting the regulatory functions of NYSE would report to the CRO. The Exchange believes that a CRO reporting to an independent ROC should add a “significant degree of independence” and should “insulate” regulatory activity from economic pressures and potential conflicts of interest.²²

The Exchange proposes to make certain conforming amendments to its Rules to reflect the termination of the Delegation Agreement and the re-integration of its regulatory and market operations. As further described in the Notice,²³ the Exchange proposes conforming amendments in Section 4.05 of the Exchange’s Operating Agreement, and Exchange Rules 0, 1, 22, 36 (Supplementary Material .30), 37, 46, 48, 49, 54(b), 70 (subparts (1) and (7) of Supplementary Material .40), 103, 103A, 103B, 104, 422, 476A and 497, by removing references to NYSE Regulation and NYSE Market²⁴ and, where applicable, replacing such deletions with references to the Exchange or to the applicable Exchange personnel, as

²⁰ See id. at 37318.

²¹ See id.

²² See id. (citing Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678, 74687 (December 24, 2003)).

²³ See id. at 37318-19.

²⁴ The Exchange notes that NYSE Market (DE) was formerly known as “NYSE Market, Inc.” Accordingly, references to “NYSE Market” in the Exchange Rules and Operating Agreement are references to NYSE Market (DE).

appropriate, who will be carrying out the regulatory responsibilities on behalf of the Exchange following the termination of the Delegation Agreement.

C. Deleting NYSE Market (DE) and NYSE Regulation's Organizational Documents As Rules of the Exchange

With the termination of the Delegation Agreement, NYSE Regulation and NYSE Market (DE) no longer would be performing the Exchange's regulatory and market functions, respectively. According to the Exchange, the previously filed constituent documents of NYSE Regulation and NYSE Market (DE) therefore no longer would constitute "rules of [the] exchange" under Section 3(a)(27) of the Act.²⁵ As a result, the Exchange proposes to remove the following NYSE Regulation and NYSE Market (DE) constituent documents as rules of the Exchange upon termination of the Delegation Agreement:

- Restated Certificate of Incorporation of NYSE Regulation, Inc.;
- Seventh Amended and Restated Bylaws of NYSE Regulation, Inc.;
- Independence Policy of NYSE Regulation, Inc.;
- Third Amended and Restated Certificate of Incorporation of NYSE Market (DE), Inc.;
- Fourth Amended and Restated Bylaws of NYSE Market (DE), Inc.; and
- Independence Policy of NYSE Market (DE), Inc.²⁶

²⁵ 15 U.S.C. 78c(a)(27).

²⁶ The Commission notes that on September 22, 2015, NYSE MKT LLC filed a proposed rule change to add the Third Amended and Restated Certificate of Incorporation of NYSE Market (DE), Inc. and the Eighth Amended and Restated Operating Agreement of New York Stock Exchange LLC as "rules of [the] exchange" of NYSE MKT in light of NYSE Market (DE), Inc.'s majority ownership interest in a facility of NYSE MKT. See Securities Exchange Act Release No. 75984 (September 25, 2015) (SR-NYSEMKT-2015-71).

D. Establishing a DCRC and Naming Non-Affiliated Director Candidates

Section 2.03(a)(iii) of the Operating Agreement provides that Non-Affiliated Director Candidates (also known as “Fair Representation Candidates”) are nominated by the nominating and governance committee (“NGC”) of the Intercontinental Exchange, Inc. (“ICE”) Board of Directors, which must designate as Non-Affiliated Director Candidates the candidates recommended jointly by the NYSE Market (DE) DCRC and the NYSE Regulation DCRC. Section 2.03(a)(iv) of the Operating Agreement describes the process whereby member organizations can nominate alternate candidates to those candidates selected by the NYSE Market (DE) DCRC and the NYSE Regulation DCRC.

The Exchange proposes to establish a NYSE DCRC as a committee of the Board by adding new subsection (h)(i) to Section 2.03 of the Operating Agreement, and making conforming changes to Section 2.03(a)(iii) and Section 2.03(a)(iv) by substituting the proposed NYSE DCRC for the NYSE Market (DE) DCRC and NYSE Regulation DCRC in the nominating process for Non-Affiliated Director Candidates. The Exchange states that, once the Delegation Agreement is terminated, neither the NYSE Market (DE) DCRC nor the NYSE Regulation DCRC should have a role in the nomination of Non-Affiliated Director Candidates process, as the Exchange no longer would be delegating any market or regulatory responsibilities to either entity.²⁷

Proposed Section 2.03(h)(i) of the Operating Agreement provides that the Board would appoint the members of the NYSE DCRC on an annual basis and that the NYSE DCRC would be responsible for recommending Non-Affiliated Director Candidates to the ICE NGC. Proposed Section 2.03(h)(i) also sets forth the compositional requirements for the NYSE

²⁷ See Notice, supra note 4, at 37320.

DCRC.²⁸ Specifically, the NYSE DCRC would include individuals who are associated with a member organization, and would include at least one individual from each of the following categories, that:

- engages in a business involving substantial direct contact with securities customers;
- is registered as a Designated Market Maker (“DMM”) and spends a substantial part of their time on the trading floor; and
- spends a majority of their time on the trading floor of the Exchange and has as a substantial part of their business the execution of transactions on the trading floor of the Exchange for other than their own account or the account of his or her Member Organization, but is not registered as a DMM.

As proposed, Section 2.03(h)(i) would provide that the Board appoint such individuals after appropriate consultation with representatives of member organizations. Furthermore, the Exchange proposes to replace references to “NYSE Market DCRC” and “NYSE Regulation DCRC” with “NYSE DCRC” in Section 2.03(a)(iii) and Section 2.03(a)(iv) of the Operating Agreement.

²⁸ The proposed requirements are substantially similar to the requirements for the DCRCs of NYSE Regulation, NYSE Market (DE), and NYSE MKT. See Seventh Amended and Restated Bylaws of NYSE Regulation, Inc., Article III, Section 5; Fourth Amended and Restated Bylaws of NYSE Market (DE), Inc., Article III, Section 5; and Sixth Amended and Restated Operating Agreement of NYSE MKT LLC, Section 2.03(h). The Exchange notes that NYSE MKT has a fourth category of requirements similar to the third category noted above but it includes an individual that engages in the execution of transactions on NYSE MKT’s trading floor for the associate person’s own account. Because neither the NYSE Market (DE) DCRC nor the NYSE Regulation DCRC, which the NYSE DCRC is replacing, has this fourth category, the Exchange does not propose to include it in the revised Operating Agreement. See Notice, supra note 4, at 37320 n.37.

According to the Exchange, one benefit of the proposed rule change is that the Exchange's process for selecting Non-Affiliated Director Candidates would be harmonized with a similar process in place at NYSE MKT, an affiliate of the Exchange.²⁹ Further, the Exchange believes that the proposed rule change would allow the Board to have a more direct role in the appointment of Non-Affiliated Director Candidates while complying with the fair representation requirement under Section 6(b)(3) of the Act,³⁰ which is intended to give members a voice in the selection of an exchange's directors and the administration of its affairs.³¹ In particular, the Exchange notes that, as is the case with the NYSE Regulation DCRC and NYSE Market (DE) DCRC, the proposed NYSE DCRC would be comprised of persons associated with Exchange member organizations and selected after appropriate consultation with those member organizations. The proposed Operating Agreement also retains a process by which members could directly petition and vote for representation on the Board.³² The Exchange therefore believes that the proposal would continue to allow members to have a voice in the Exchange's use of its self-regulatory authority, consistent with Section 6(b)(3) of the Act.³³

E. Establishing a Committee for Review and Conforming Exchange Rules

The Exchange proposes to establish a Committee for Review ("CFR") as a subcommittee of the ROC by adding a new subsection (h)(iii) to Section 2.03 of the Operating Agreement and to make conforming changes to Exchange Rules 308, 475, 476, 476A, and 9310.³⁴ The proposed

²⁹ See Notice, supra note 4, at 37316.

³⁰ See 15 U.S.C. 78f(b)(3).

³¹ See Notice, supra note 4, at 37320.

³² NYSE's Operating Agreement, Section 2.03(a)(iv).

³³ See Notice, supra note 4, at 37320 and 15 U.S.C. 78f(b)(3).

³⁴ See Notice, supra note 4, at 37320-21.

CFR would be the successor to the current CFR, which is a committee of NYSE Regulation's Board of Directors.³⁵ Section 2.03(h)(iii) of the Operating Agreement would provide that the Board shall annually appoint the members of the CFR. The Exchange notes that the proposed Section 2.03(h)(iii) of the Operating Agreement incorporates member organization association requirements of the current CFR.³⁶ The proposed CFR would be comprised of both Exchange directors who satisfy the NYSE's independence requirements as well as non-directors.³⁷ The Exchange notes that because the majority of the Board would be independent and any Non-Affiliated Director must be independent, as a functional matter if the Exchange were to have a five-person Board, four of the five directors would qualify for CFR membership.³⁸ Non-directors serving on the proposed CFR would include representatives of member organizations that engage in a business involving substantial direct contact with securities customers (upstairs firms), DMMs, and floor brokers.³⁹ The Exchange notes that the proposed CFR, like the current CFR, would be selected after appropriate consultation with those members. The Exchange notes further that for any CFR vote, a majority of the members of the CFR casting votes would have to be directors of the Exchange.

The proposed CFR would be responsible for reviewing the disciplinary decisions on behalf of the Board and reviewing determinations to limit or prohibit the continued listing of an

³⁵ See id. at 37320.

³⁶ See id. at 37321.

³⁷ See id. at 37320-21.

³⁸ See id. at 37320-21 n.42.

³⁹ See id. at 37321.

issuer's securities on the Exchange.⁴⁰ Additionally, the Exchange proposes to incorporate the role of the Market Performance and Regulatory Advisory Committees into the proposed CFR.⁴¹ As a result, the proposed CFR would be charged with acting in an advisory capacity to the Board with respect to disciplinary matters, the listing and delisting of securities, regulatory programs, rulemaking and regulatory rules, including trading rules. The Exchange states that the proposed CFR would therefore serve in the same advisory capacity as the Market Performance and Regulatory Advisory Committees.⁴²

According to the Exchange, member participation on the proposed CFR would be sufficient to provide for the fair representation of members in the administration of the affairs of the Exchange, including rulemaking and the disciplinary process, consistent with Section 6(b)(3) of the Act.⁴³

Finally, the Exchange proposes to make conforming amendments to Exchange Rules 308, 475, 476, 476A and 9310 by generally replacing references to the current NYSE Regulation CFR with references to the "Committee for Review."

⁴⁰ The Exchange notes that these powers are currently set forth in the charter of the NYSE Regulation CFR, which also states that the CFR can provide general advice to the NYSE Regulation Board of Directors in connection with disciplinary, listing and other regulatory matters. The Exchange proposes to delineate the appellate and advisory powers of the proposed CFR in Section 2.03(h)(iii) of the Operating Agreement. Appeals of delisting determinations are governed by Rule 804.00 of the Exchange's Listed Company Manual, which provides that delisting determinations are to be reviewed by a "Committee of the Board of Directors of the Exchange". See Notice, supra note 4, at 37321 n.44.

⁴¹ Id. at 37321. The Exchange notes that the same profile of members who historically served on these advisory committees would be represented on the proposed CFR. Id.

⁴² See Notice, supra note 4, at 37321.

⁴³ See id. and 15 U.S.C. 78f(b)(3).

F. Modifying Exchange Rules to Reference the Exchange’s Chief Regulatory Officer

The Exchange also proposes to amend Exchange Rule 48 (Exemptive Relief — Extreme Market Volatility Condition), Exchange Rule 49 (Emergency Powers) and Exchange Rule 86 (NYSE BondsSM) by replacing references to the Chief Executive Officer of NYSE Regulation with references to the CRO of the Exchange.

Exchange Rule 48 currently provides that, for purposes of the rule, a “qualified Exchange officer” means the Chief Executive Officer of ICE, or his or her designee, or the Chief Executive Officer of NYSE Regulation, or his or her designee. Exchange Rule 48 provides that the Exchange can invoke an extreme market volatility condition at the open (or reopen of trading following a market-wide halt of securities) during which time the Exchange could suspend Exchange Rules 15, 79A.30, and 123D(1) regarding obtaining certain prior Floor Official approvals and requirements for mandatory indications. Exchange Rule 49 addresses the Exchange’s emergency powers and defines the term “qualified Exchange officer” as, inter alia, the “NYSE Regulation, Inc. Chief Executive Officer” or his or her designee. Exchange Rule 86 currently provides that Clearly Erroneous Execution panels in connection with trades on NYSE MKT Bonds be comprised of the Chief Executive Officer of NYSE Regulation or a designee and representatives from two members or member organizations that are users of NYSE Bonds.⁴⁴

The Exchange notes that “Chief Executive Officer” of NYSE Regulation is used in these three rules but CRO is used throughout the Exchange’s rules to designate the same person.⁴⁵ The Exchange, thus, proposes to replace references to “Chief Executive Officer” of NYSE

⁴⁴ NYSE Bonds is the Exchange’s electronic bond trading platform. Rule 86 prescribes what bonds are eligible to trade on the NYSE Bonds platform and how bonds are traded on the platform, including the receipt, execution and reporting of bond transactions. See Notice, supra note 4, at 37321 n.50.

⁴⁵ See, e.g., Exchange Rules 13, 107B, 107C and 128.

Regulation in Exchange Rules 48, 49 and 86 with either the term “Chief Regulatory Officer” or “CRO”, as appropriate.

As noted above, the Commission received one comment letter on the proposed rule change.⁴⁶ The commenter states that, with respect to the existing system of the Exchange’s governance, the proposed rule change would replace a structural separation with a functional separation, in particular, by terminating the Delegation Agreement and establishing a ROC in lieu of NYSE Regulation.⁴⁷ The commenter expresses the concern that the Exchange’s proposal would not ensure sufficient insulation of the Exchange’s regulatory function from the commercial interests of its holding company.⁴⁸ The commenter enumerates the following specific concerns with the proposal: unlike NYSE Regulation, the Exchange is a “for profit” entity; NYSE Regulation has a board consisting entirely of independent directors; NYSE Regulation limits the number of directors from the holding company who can sit on its board to less than a majority, while the Board could include a super-majority of directors from the holding company; the ROC would have little substantive authority and can only “review” the regulatory budget and “inquire” about the adequacy of resources for regulatory activities; the ROC would not be sufficiently insulated from the business activities of the holding company because the ROC’s membership could be composed of persons who also are directors of the holding company; the CRO position would not be adequately insulated from the commercial interests of

⁴⁶ See Professor Brown Letter, supra note 5.

⁴⁷ Id. at 4-5.

⁴⁸ Id. at 6.

the holding company; and the CFR would not effectively insulate the disciplinary review process from possible commercial influences.⁴⁹

The commenter offers a number of suggested revisions to the proposed rule change that in his view would strengthen the independence of the Exchange's regulatory function: the Board should consist entirely of independent directors, other than the Chief Executive Officer, and should not include any holding company directors or directors of affiliates; the ROC should consist entirely of independent directors; the ROC should have greater substantive authority over its budget and other critical functions and should have greater authority with respect to the CRO and the CRO's compensation; CFR membership should be limited to members of the ROC and persons appointed by the ROC; and the provision regarding removal of a director "for cause" should be defined so as to restrict the Board from easily changing the ROC's membership.⁵⁰ The commenter suggests that the Delegation Agreement could remain in place and the Exchange could seek modifications to, rather than replace, the existing governance system.⁵¹

The Exchange submitted a letter responding to the commenter's letter.⁵² The Exchange discusses each of the commenter's issues with its proposal and the commenter's recommendations for revision.⁵³ With respect to the elimination of NYSE Regulation and the creation of a ROC, the Exchange states that, as a self-regulatory organization ("SRO"), it has always retained the "ultimate responsibility for the fulfillment of its statutory and self-regulatory

⁴⁹ Id. at 6-7.

⁵⁰ Id. at 8-9.

⁵¹ Id. at 8.

⁵² See NYSE Response Letter, supra note 6.

⁵³ Id.

obligations under the Act.”⁵⁴ With respect to the composition of the ROC, the Exchange notes that under the proposal the ROC would be required to be composed of at least three members, each of whom would be required to be a director of the Exchange that satisfies the independence requirements of the Company Director Independence Policy, which, according to the Exchange, is virtually identical to the NYSE Regulation Independence Policy.⁵⁵ The Exchange further states that its Operating Agreement recently was amended to remove the requirement that the Board consist of at least a majority of independent directors of the holding company.⁵⁶ In addition, the Exchange points out that its proposed ROC was modeled on the NASDAQ ROC and has the same powers and its responsibilities are substantially similar to the ROCs of other SROs.⁵⁷ The Exchange also notes that the proposal “clearly provides that the CRO would report to the ROC”⁵⁸ and, given that fact, the ROC “clearly has the power to retain or dismiss the CRO, only it must do so in consultation with the Exchange’s Chief Executive Officer as part of the process of establishing goals, assessing performance, and recommending the CRO’s compensation.”⁵⁹

The Exchange also addresses the commenter’s suggested revisions to the Exchange’s proposal. As an initial matter, the Exchange states that the commenter “has not provided any credible reason why the current structure should remain or why the Exchange’s Proposal is not

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Id.

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Id.

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Id. at 7 (citing Securities Exchange Act Release No. 75105 (June 4, 2015), 80 FR 33005 (June 10, 2015)).

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Id. at 8.

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Id.

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Id. at 9.

consistent with the requirements of the Act.”⁶⁰ The Exchange does not believe that directors that meet its independence standards are less independent because they also serve as directors of ICE or ICE affiliates.⁶¹ The Exchange further states that it “rejects the proposition that directors of NYSE Regulation are inherently more independent than independent directors of ICE that serve as independent directors of the Exchange.”⁶² Regarding the commenter’s suggestions about the ROC, the Exchange reiterated its position that the proposed ROC and its authority is consistent with prior exchanges’ provisions relating to ROCs that were found by the Commission to be consistent with the Act.⁶³ Regarding the commenter’s suggestion that the CFR be limited to members of the ROC and members appointed by the ROC, the Exchange states its view that the requirement that members of the CFR be independent directors of the Exchange is sufficient to ensure the integrity of the disciplinary appeals process.⁶⁴ With respect to the commenter’s suggestion that the proposal permitting removal of a ROC member “for cause” be revised to limit the Board’s ability to easily change the ROC’s membership, the Exchange notes that at least one SRO does not require “cause” as a basis for removing a ROC member.⁶⁵

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities

⁶⁰ Id. at 10.

⁶¹ Id.

⁶² Id.

⁶³ Id. at 10-11.

⁶⁴ Id. at 11.

⁶⁵ Id.

exchange.⁶⁶ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act, which requires an exchange to be so organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the Act, the rules and regulations thereunder, and the rules of the exchange.⁶⁷ The Commission finds that the proposal also is consistent with the requirements of Section 6(b)(3) of the Act, which provides that the rules of an exchange must assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.⁶⁸ In addition, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act, which requires that the rules of the exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.⁶⁹ Finally, the Commission finds that the proposal is consistent with Section 6(b)(6) of the Act, which requires that the rules of the exchange provide that its members and persons associated with its members shall be appropriately disciplined for violation of the provisions of the Act, the rules or regulations thereunder, or the rules of the exchange.⁷⁰

⁶⁶ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁶⁷ 15 U.S.C. 78f(b)(1).

⁶⁸ 15 U.S.C. 78f(b)(3).

⁶⁹ 15 U.S.C. 78f(b)(5).

⁷⁰ 15 U.S.C. 78f(b)(6).

As noted above, the commenter expresses the concern that the Exchange's proposal would not ensure sufficient insulation of the Exchange's regulatory function from the commercial interests of its holding company.⁷¹ The commenter also questions the adequacy of the independence of the directors of the Exchange's Board.⁷² In response, the Exchange states that the commenter has not provided an adequate reason why the Exchange's current structure should remain or why the proposal is not consistent with the requirements of the Act.⁷³

As a preliminary matter, the Commission notes that several concerns raised by the commenter relate to the fact that the Exchange is part of a holding company structure. In that regard, the commenter suggests that the replacement of NYSE Regulation with the ROC would not provide sufficient insulation of the Exchange's regulatory functions from the commercial interests of the holding company.⁷⁴ The Commission notes that, although the Exchange may be part of a holding company structure, the Exchange is obligated to satisfy its self-regulatory obligations under the Act and rules and regulations thereunder.⁷⁵ The Commission believes that the regulatory structure proposed by the Exchange is consistent with the Act and the rules and regulations thereunder, and is substantially similar to regulatory structures that were approved by

⁷¹ See Professor Brown Letter, supra note 5, at 6.

⁷² Id.

⁷³ See NYSE Response Letter, supra note 6, at 10.

⁷⁴ See Professor Brown Letter, supra note 5, at 6-7.

⁷⁵ The Commission previously has stated that there is no "overriding regulatory reason to require exchanges to be not-for-profit membership organizations." See Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70880 (December 22, 1998) ("Regulation ATS Adopting Release"). In the Regulation ATS Adopting Release, the Commission also noted that "it is possible for a for-profit exchange to meet the standards set forth in Section 6(b) of the Exchange Act." Id.

the Commission for other exchanges.⁷⁶ In addition, contrary to the commenter’s understanding that the Operating Agreement “requires that the Board consist of at least a majority of independent directors from the holding company,”⁷⁷ the Operating Agreement no longer contains such a requirement pursuant to amendments to the Operating Agreement that recently were approved by the Commission.⁷⁸ The Commission notes that the Operating Agreement also requires that the Board consist of a majority of directors that satisfy the Company Director Independence Policy.⁷⁹

The commenter expresses the view that the ROC would not have sufficient substantive authority over the Exchange’s regulatory program.⁸⁰ In response, the Exchange states that the ROC was modeled on the NASDAQ ROC and has the same powers, including the power to review the regulatory budget and inquire about available regulatory resources.⁸¹ The Commission believes that the Exchange’s proposal to establish a ROC, as an independent committee of the Exchange to oversee the adequacy and effectiveness of the Exchange’s regulatory operations, should help the Exchange to fulfill its statutory obligation to comply, and to enforce compliance by its members and persons associated with its members, with the Act, the rules and regulations thereunder, and the rules of the Exchange.⁸² In addition, the Commission

⁷⁶ See NASDAQ Approval Order, NYSE MKT Approval Order and NYSE Arca Approval Order, supra notes 8 and 9.

⁷⁷ See Professor Brown Letter, supra note 5, at 6.

⁷⁸ See Securities Exchange Act Release No. 75105 (June 4, 2015), 80 FR 33005 (June 10, 2015).

⁷⁹ NYSE’s Operating Agreement, Section 2.03(a)(i).

⁸⁰ See Professor Brown Letter, supra note 5, at 7.

⁸¹ See NYSE Response Letter, supra note 6, at 8.

⁸² The Commission notes that, under proposed Section 2.03(h)(ii) of the Operating Agreement, the responsibilities, enumerated functions, and authority of the ROC are

believes that the composition of the ROC, which would consist of at least three members of the Board that satisfy the Company Director Independence Policy, should help ensure the independence of the regulatory function of the ROC. The Commission also believes that the Exchange's proposal to make conforming changes to various Exchange Rules to reflect the creation of the ROC is appropriate.⁸³ The Commission therefore finds that the proposed provisions relating to the ROC and its composition are consistent with the Act, including Sections 6(b)(1) and 6(b)(5) of the Act.

The commenter also raises a concern about the proposed functional separation, rather than the existing structural separation, between the Exchange's regulatory and market functions that would result from the Exchange's proposal to terminate the Delegation Agreement and delete Exchange Rule 20.⁸⁴ In response, the Exchange states that the Commission's prior approval of its current regulatory structure would not preclude alternative regulatory structures, such as a functional separation, that also would be consistent with the Act.⁸⁵ The Commission believes that the Exchange's proposal to re-integrate its regulatory and market functions into the Exchange, rather than to continue to have certain regulatory and market duties performed by its subsidiaries, NYSE Regulation and NYSE Market, respectively, is consistent with the Act, and thus it is appropriate for the Exchange to terminate the Delegation Agreement and delete Exchange Rule 20, particularly in light of the Exchange's proposal to establish a ROC. The Commission notes that under the Delegation Agreement, the Exchange ultimately was

substantially similar to those of other exchanges. See NASDAQ Approval Order, NYSE MKT Approval Order and NYSE Arca Approval Order, supra notes 8 and 9.

⁸³ See Notice, supra note 4, at 37317-18.

⁸⁴ See Professor Brown Letter, supra note 5, at 6.

⁸⁵ See NYSE Response Letter, supra note 6, at 4.

responsible for fulfilling the self-regulatory obligations delegated to NYSE Regulation and NYSE Market (DE).⁸⁶ Thus, upon termination of the Delegation Agreement and deletion of Exchange Rule 20, the Exchange's regulatory responsibilities would remain unchanged; the major difference would be that the Exchange itself would directly carry out the regulatory responsibilities and market operations previously performed by its subsidiaries. The Commission also finds that it is consistent with the Act for the Exchange to make conforming changes to Exchange Rules to reflect the termination of the Delegation Agreement and deletion of Exchange Rule 20.⁸⁷

The commenter further states that the CFR would not effectively insulate the disciplinary review process from the possibility of commercial influences and expresses concern about the composition of the CFR.⁸⁸ In response, the Exchange states that the CFR would be appointed annually by the Board as a subcommittee of the ROC and would be comprised of both Exchange directors who satisfy the Company Director Independence Policy as well as member participants.⁸⁹ According to the Exchange, the CFR's mandate would include acting in an advisory capacity to the Board with respect to disciplinary matters, the listing and delisting of securities, regulatory programs, and rulemaking and regulatory rules, including trading rules.⁹⁰ The Commission believes that the Exchange's proposal to establish a CFR is appropriate and would provide for the fair representation of members in the administration of the Exchange's affairs, and also would help enable the Exchange to ensure that members and persons associated

⁸⁶ See Delegation Agreement, Section I.

⁸⁷ See Notice, supra note 4, at 37318-19.

⁸⁸ See Professor Brown Letter, supra note 5, at 7.

⁸⁹ See NYSE Response Letter, supra note 6, at 4.

⁹⁰ Id.

with its members shall be appropriately disciplined for violations of the provisions of the Act, the rules or regulations thereunder, or the rules of the Exchange.⁹¹ The Commission therefore finds that the proposed provisions relating to the CFR are consistent with the Act, including Sections 6(b)(3) and 6(b)(6) thereunder.⁹²

The Commission believes that the Exchange's proposal to create the NYSE DCRC as a committee of the Board that would recommend to the ICE NGC the Non-Affiliated Director candidates to serve on the Board, in place of the NYSE Regulation DCRC and the NYSE Market DCRC, provides an appropriate process for the nomination of Exchange members to serve on the Board. The Commission believes that the composition of the NYSE DCRC, along with the provision in the Operating Agreement that would allow members to directly nominate Non-Affiliated Director candidates through a petition process,⁹³ and the requirement that NYSE Group, Inc. must appoint or elect as the Non-Affiliated Directors those candidates nominated by the ICE NGC (or designate as Non-Affiliated Directors the candidates that emerge from the petition and voting process), should help to ensure the fair representation of members in the selection of the Exchange's directors. Thus the Commission finds that the proposal to establish the NYSE DCRC is consistent with the Act, including Section 6(b)(3) thereunder.⁹⁴

Finally, the Commission believes that it is consistent with the Act for the Exchange to make conforming revisions to various Exchange Rules to reflect the proposed changes to its governance structure. In this regard, the Commission believes that it is appropriate for the Exchange to delete the organizational documents of NYSE Regulation and NYSE Market (DE)

⁹¹ 15 U.S.C. 78f(b)(3) and 15 U.S.C. 78(b)(6).

⁹² Id.

⁹³ NYSE's Operating Agreement, Section 2.03(a)(iv).

⁹⁴ 15 U.S.C. 78f(b)(3).

and to replace references to the Chief Executive Officer of NYSE Regulation with references to the CRO in Exchange Rules 48, 49, and 86.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NYSE-2015-27) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁵

Robert W. Errett
Deputy Secretary

⁹⁵ 17 CFR 200.30-3(a)(12).