

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78805; File No. SR-NYSE-2016-51)

September 9, 2016

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving a Proposed Rule Change Amending the Ninth Amended and Restated Operating Agreement of the Exchange

I. Introduction

On July 22, 2016, New York Stock Exchange LLC (“Exchange” or “NYSE”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the Ninth Amended and Restated Operating Agreement of the Exchange (“Operating Agreement”). The proposed rule change was published for comment in the Federal Register on August 3, 2016.³ The Commission received no comments in response to the Notice. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend the Operating Agreement to (1) change the process for nominating non-affiliated directors; and (2) replace an obsolete reference to NYSE Market (DE), Inc. (“NYSE Market (DE)”).

A. Process for Nominating Non-Affiliated Directors

Pursuant to the Operating Agreement, at least 20 percent of the Exchange’s Board of Directors (“Board”) is made up of “Non-Affiliated Directors” (commonly referred to as “fair

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 78436 (July 28, 2016), 81 FR 51249 (“Notice”).

representation directors”).⁴ Pursuant to Section 2.03(a) of the Operating Agreement, the nominating and governance committee (“NGC”) of the board of directors of ICE, the indirect parent of the Exchange, nominates the candidates for Non-Affiliated Directors, who are then elected by NYSE Group, Inc. (“NYSE Group”) as the sole member of the Exchange. The Exchange proposes to amend Section 2.03(a) to have the Director Candidate Recommendation Committee (“DCRC”) of the Exchange assume the role currently served by the ICE NGC and to make a conforming change to Section 2.03(h)(i).⁵

In addition, if the Exchange’s Member Organizations endorse a Petition Candidate for Non-Affiliated Director pursuant to Section 2.03(a)(iv) of the Operating Agreement, the ICE NGC currently makes the determination of whether the person is eligible.⁶ The Exchange proposes to amend Section 2.03(a)(iv) to have the Exchange make such determination instead of the ICE NGC.⁷

⁴ Id. The Exchange notes that pursuant to Section 2.03(a) of the Operating Agreement, Non-Affiliated Directors are persons who are not members of the Board of Directors of Intercontinental Exchange, Inc. (“ICE”) but qualify as independent and that a person may not be a Non-Affiliated Director unless he or she is free of any statutory disqualification, as defined in Section 3(a)(39) of the Act. See id. 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).

⁵ See Notice, supra note 3, at 51249.

⁶ Pursuant to Section 2.02 of the Operating Agreement, “Member Organizations” refers to members, allied members and member organizations of the Exchange. “Petition Candidates” are defined in Section 2.03(a)(iv) of the Operating Agreement as alternate candidates proposed by Member Organizations by petition, pursuant to the requirements of that Section.

⁷ See Notice, supra note 3, at 51249.

The Exchange explains that currently the nomination by the ICE NGC is the final step in the process for electing a Non-Affiliated Director.⁸ First, the DCRC recommends a candidate, whose name then is announced to the Member Organizations.⁹ The Member Organizations may propose alternate candidates by petition, and if there are no Petition Candidates, the DCRC recommends its candidate(s) to the ICE NGC.¹⁰ If Petition Candidates are proposed, the ICE NGC makes the determination of whether the candidates are eligible to serve as a Non-Affiliated Director, and then all eligible candidates are submitted to the Member Organizations for a vote, after which the DCRC recommends to the ICE NGC the candidate receiving the highest number of votes.¹¹ The Exchange states that the ICE NGC is obligated to designate the DCRC-recommended candidate(s) as the nominee, and that NYSE Group is obligated to elect such candidate(s) as a Non-Affiliated Director.¹²

The Exchange believes that obligating the ICE NGC to nominate the candidates for Non-Affiliated Directors based on the DCRC's unalterable recommendation is neither necessary nor meaningful.¹³ The Exchange notes that, pursuant to Section 2.03(a)(iii) of the Operating Agreement, the ICE NGC is obligated to designate whomever the DCRC recommends or, if there is a Petition Candidate, whoever emerges from the petition process.¹⁴ According to the Exchange, the ICE NGC does not have any discretion.¹⁵ The Exchange believes that removing

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

this step would make the NYSE process with respect to the nomination of Non-Affiliated Directors more efficient.¹⁶ Moreover, the Exchange believes that having the Exchange determine whether persons endorsed to be Petition Candidates are eligible to serve as Non-Affiliated Directors would be more efficient, as it would not require action by the ICE NGC, thereby potentially removing the possibility of any delay in the process.¹⁷ The Exchange further states that the proposed change would be consistent with the petition processes of the Exchange's affiliate, NYSE MKT LLC ("NYSE MKT"), and of the Nasdaq Stock Market LLC, because each of these exchanges determines the eligibility of proposed nominees.¹⁸

The Exchange also believes that the proposed changes will make its process more consistent with the process by which its affiliates, NYSE MKT and NYSE Arca, Inc. ("NYSE Arca"), designate their fair representation directors, in which the ICE NGC plays no role.¹⁹

Accordingly, the Exchange proposes to revise Section 2.03(a)(iii)-(v) of the Operating Agreement to amend the process for electing Non-Affiliated Directors.²⁰ First, as is currently the

¹⁶ Id.

¹⁷ Id.

¹⁸ Id. See also Article II, Section 2.03(a) of the Ninth Amended and Restated Operating Agreement of NYSE MKT LLC; Securities Exchange Act Release No. 77901 (May 25, 2016), 81 FR 35092 (June 1, 2016) (SR-NYSEMKT-2016-26) ("NYSE MKT 2016 Release"); By-Laws of the Nasdaq Stock Market LLC, Art. II, Sec. 1(b) ("The Company may require any proposed nominee to furnish such other information as it may reasonably require to determine the eligibility of such proposed nominee to serve as a Member Representative Director.").

¹⁹ See Notice, supra note 3, at 51249-50. See also Article II, Section 2.03(a) of the Ninth Amended and Restated Operating Agreement of NYSE MKT LLC; NYSE MKT 2016 Release, supra note 18; Article III, Section 3.02 of the NYSE Arca Bylaws and NYSE Arca Rule 3.2(b)(2). The Exchange also notes that the board of directors of The NASDAQ OMX Group, Inc., the sole member of the Nasdaq Stock Market LLC, similarly plays no role in nominating or determining the eligibility of Member Representative Directors. See By-Laws of the Nasdaq Stock Market LLC, Art. II, Sec. 1.

²⁰ See Notice, supra note 3, at 51250.

case, the DCRC would recommend a candidate, whose name would be announced to the Member Organizations, and the Member Organizations could propose alternate candidates by petition.²¹ Next, if there were no Petition Candidates, the DCRC would nominate the candidate(s) whom it had previously recommended.²² If there were Petition Candidates, the Exchange would make the eligibility determination regarding the Petition Candidates; all eligible candidates would be submitted to the Member Organizations for a vote; and the DCRC would nominate the candidate receiving the highest number of votes.²³ Finally, NYSE Group would be obligated to elect the DCRC-nominated candidate as a Non-Affiliated Director.²⁴

In addition, the Exchange would make a conforming change to Section 2.03(h)(i) to state that the DCRC “will be responsible for nominating Non-Affiliated Director Candidates.”²⁵

Currently, the provision states that the DCRC “will be responsible for recommending Non-Affiliated Director Candidates to the ICE NGC.”²⁶

B. Reference to NYSE Market (DE), Inc.

Section 2.02 of the Operating Agreement sets forth the Board’s general supervision over Member Organizations and approved persons in connection with their conduct with or affecting Member Organizations. It provides that the Board “shall have supervision relating to the collection, dissemination and use of quotations and of reports of prices on NYSE Market (DE), Inc.”²⁷ The Exchange proposes to amend Section 2.02 to replace the reference to NYSE Market

²¹ Id.

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ See Article II, Section 2.02 of the Operating Agreement.

(DE) with a reference to “the exchange operated by the Company.”²⁸

The Exchange explains that following the merger of New York Stock Exchange, Inc. with Archipelago Holdings, Inc., the Exchange and its subsidiaries NYSE Market (DE) and NYSE Regulation, Inc. entered into a Delegation Agreement, pursuant to which the Exchange delegated its market functions to NYSE Market (DE) and its regulatory functions to NYSE Regulation, Inc.²⁹

The Exchange states that the Delegation Agreement terminated in April 2016 and, accordingly, NYSE Market (DE) no longer is delegated the Exchange’s market functions, making the reference to NYSE Market (DE) in Section 2.02 of the Operating Agreement obsolete.³⁰ The Exchange, therefore, proposes to update the reference to NYSE Market (DE) with a reference to “the exchange operated by the Company.”³¹

The Exchange states that the proposed change would be consistent with Article II, Section 2.02 of the operating agreement of the Exchange’s affiliate NYSE MKT, which states that its board of directors “shall have supervision relating to the collection, dissemination and use of quotations and of reports of prices on the exchange operated by the Company.”³²

Finally, the Exchange proposes to make technical and conforming changes to the recitals and signature page of the Operating Agreement.³³

²⁸ See Notice, supra note 3, at 51250. The Exchange notes that references to the “Company” in the Operating Agreement are to the Exchange. Id.

²⁹ See id. See also Securities Exchange Act Release No. 75991 (September 28, 2015), 80 FR 59837 (October 2, 2015) (SR-NYSE-2015-27), at 59839.

³⁰ See Notice, supra note 3, at 51250.

³¹ Id.

³² Id. (citing Article II, Section 2.02 of the Ninth Amended and Restated Operating Agreement of NYSE MKT LLC).

³³ Id.

III. Discussion and Commission's Findings

The Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act³⁴ and the rules and regulations thereunder applicable to a national securities exchange.³⁵

The Commission finds that the proposed rule change is consistent with Section 6(b)(1),³⁶ which requires, among other things, that a national securities exchange 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 provisions of the Act, the rules and regulation thereunder, and the rules of the exchange. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(3) of the Act,³⁷ which requires, among other things, that the rules of a national securities exchange assure a fair representation of its members in the selection of its directors and administration of its affairs.

The proposed rule change would remove the requirement that the ICE NGC nominate the candidates for Non-Affiliated Directors and instead have the DCRC nominate the candidates for Non-Affiliated Director directly.³⁸ Because the ICE NGC currently is required to nominate the candidate recommended to it by the DCRC, this proposed change would remove an additional step in the process of nominating candidates for Non-Affiliated Director positions and thus may improve the efficiency of the nomination process.

³⁴ 15 U.S.C. 78f.

³⁵ The Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³⁶ 15 U.S.C. 78f(b)(1).

³⁷ 15 U.S.C. 78f(b)(3).

³⁸ The Commission notes that the DCRC is appointed by the Board. See Section 2.03(h)(i) of the Operating Agreement.

In addition, the proposed rule change would remove the requirement that the ICE NGC make the determination of whether persons endorsed to be Petition Candidates are eligible to be a Non-Affiliated Director, and would have the Exchange make such determination instead. The proposed process would maintain an independent review of the eligibility of any Petition Candidates, while avoiding the potential conflict of interest that could arise if, for example, the DCRC were to be responsible for both proposing and nominating candidates and making eligibility determinations of Petition Candidates proposed by Member Organizations. The Commission previously considered and approved rules of other exchanges that similarly provide for those exchanges to determine the eligibility of proposed Petition Candidates.³⁹

Finally, replacing the reference to NYSE Market (DE) in Section 2.02 of the Operating Agreement with a reference to “the exchange operated by the Company” would remove an obsolete reference to NYSE Market (DE) from the Operating Agreement. The Exchange explains that the Delegation Agreement pursuant to which the Exchange delegated its market functions to NYSE Market (DE) has expired, thereby making the reference to NYSE Market (DE) in Section 2.02 obsolete.⁴⁰ The Commission finds that eliminating such an obsolete reference would add clarity to the Exchange’s rules and is consistent with the public interest and the protection of investors. The proposed addition of a reference to “the exchange operated by the Company” in Section 2.02 would clarify that the Board has general supervision relating to the collection, dissemination and use of quotations and of reports of prices on the Exchange.

The Commission finds that the foregoing revisions to the Operating Agreement are consistent with the Act.

³⁹ See supra note 18. See generally Securities Exchange Act Release No. 56876 (November 30, 2007), 72 FR 70357 (December 11, 2007) (SR-NASDAQ-2007-068) (approving process for electing Member Representative Directors).

⁴⁰ See Notice, supra note 3, at 51250.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁴¹ that the proposed rule change (SR-NYSE-2016-51) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴²

Brent J. Fields
Secretary

⁴¹ 15 U.S.C. 78s(b)(2).

⁴² 17 CFR 200.30-3(a)(12).