

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-77008; File No. SR-NYSEMKT-2015-106)

February 1, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Order Approving Proposed Rule Change Amending the Seventh Amended and Restated Operating Agreement of the Exchange to Establish a Committee for Review as a Sub-Committee of the ROC and Make Conforming Changes to Rules and the NYSE MKT Company Guide

I. Introduction

On December 11, 2015, NYSE MKT LLC (“Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> a proposed rule change to amend the Seventh Amended and Restated Operating Agreement (“Operating Agreement”) of the Exchange and to amend various rules of the Exchange, as described below. The proposed rule change was published for comment in the Federal Register on December 18, 2015.<sup>4</sup> The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

As part of a regulatory restructuring, NYSE proposes to: (i) amend the Operating Agreement to establish a Committee for Review (“CFR”) as a subcommittee of the Regulatory Oversight Committee (“ROC”)<sup>5</sup> and make conforming changes to Exchange Rules 475, 476,

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> See Securities Exchange Act Release No. 76638 (December 14, 2015), 80 FR 79117 (“Notice”).

<sup>5</sup> The Commission recently approved the Exchange’s proposal to establish the ROC as a committee of the Exchange’s Board of Directors (“Board”) to be composed solely of

476A, 20—Equities, 308—Equities and Sections 1201, 1204, 1205, 1206, 1211, and 1212T of the Company Guide; (ii) delete references to “NYSE Regulation, Inc.” and “NYSE Regulation”<sup>6</sup> in Section 4.05 of the Operating Agreement as well as Exchange Rules 0, 1—Equities, 22—Equities, 36—Equities, 48—Equities, 49—Equities, 54—Equities, 70—Equities, 103—Equities, 103A—Equities, 103B—Equities, 422—Equities, 497—Equities, and 902NY; (iii) replace references to the Chief Executive Officer of NYSE Regulation in Exchange Rules 48—Equities, 49—Equities, and 86—Equities with references to the Chief Regulatory Officer of the Exchange; and (iv) make certain technical and non-substantive changes.

The Exchange proposes that these rule revisions would be operative simultaneously with the termination of the Regulatory Services Agreement between the Exchange and NYSE Regulation, but no later than June 30, 2016, on a date to be determined by the Board.<sup>7</sup>

#### A. 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 475, 476, 476A, 20—Equities, 308—Equities and Sections 1201, 1204, 1205, 1206, 1211, and 1212T of the Company Guide.<sup>8</sup> The proposed CFR would be the successor to the current CFR, which is a committee of NYSE Regulation’s Board

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directors who satisfy the Exchange’s independence requirements, as set forth in the Exchange’s Independence Policy of the Board of Directors. See Securities Exchange Act Release No. 75148 (June 11, 2015), 80 FR 34751 (June 17, 2015).

<sup>6</sup> NYSE Regulation, Inc. (“NYSE Regulation”), a not-for-profit subsidiary of the Exchange’s affiliate New York Stock Exchange LLC (“NYSE”), performs regulatory functions for the Exchange pursuant to an intercompany Regulatory Services Agreement (“RSA”) that gives the Exchange the contractual right to review NYSE Regulation’s performance. See Notice, supra note 4, at 79117 n.4.

<sup>7</sup> See id.

<sup>8</sup> See id. at 79118.

of Directors that reviews appeals of Exchange disciplinary actions, and the Committee on Securities, which is a Board committee that reviews determinations to limit or prohibit the continued listing of an issuer's securities on the Exchange.<sup>9</sup>

Section 2.03(h)(iii) of the Operating Agreement would provide that the Board shall annually appoint a CFR as a subcommittee of the ROC. The Exchange notes that proposed Section 2.03(h)(iii) of the Operating Agreement incorporates member organization association requirements of the current CFR.<sup>10</sup> The proposed CFR would be comprised of both Exchange directors who satisfy the Exchange's independence requirements as well as non-directors.<sup>11</sup> The Exchange notes that, because the majority of the Board would be independent directors, as a functional matter if the Exchange were to have a five-person Board, at least three of the five directors would qualify for CFR membership.<sup>12</sup> 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 or specialists, and floor brokers.<sup>13</sup> The Exchange notes that the proposed CFR, like the current CFR, would be selected after appropriate consultation with those members.<sup>14</sup> The Exchange notes further that,

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<sup>9</sup> See id.

<sup>10</sup> See id.

<sup>11</sup> See id. at 79118 n.8 and accompanying text (citing the Independence Policy of the Board of Directors).

<sup>12</sup> See id. at 79118 n.8.

<sup>13</sup> See id. at 79118. The Exchange notes that market makers on the Exchange's equity market are called DMMs and on NYSE Amex Options are called specialists. See id. at 79918 n.9.

<sup>14</sup> The Exchange does not propose to incorporate from the current CFR the category of a NYSE MKT member that is associated with a NYSE MKT member organization that spends a majority of their time on the trading floor and has a substantial part of their business the execution of transactions on the trading floor for their own account or the

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 issuer's securities on the Exchange.<sup>15</sup> Additionally, the Exchange proposes to incorporate the role of the Market Performance and Regulatory Advisory Committees into the proposed CFR.<sup>16</sup> 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.<sup>17</sup>

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

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account of their member organization but is not registered as a specialist. See Notice, supra note 4, at 79118 n.9. The Exchange represents that this category of NYSE MKT member no longer exists and, as a result, the Exchange does not propose to require the representation of such member on the proposed CFR. See id.

<sup>15</sup> 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's 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. See id. at 79118 n.11.

<sup>16</sup> Id. at 79118–19. The Exchange notes that the same profile of members who historically have served on these advisory committees would be represented on the proposed CFR. Id.

<sup>17</sup> See id. at 79118.

the Exchange, including rulemaking and the disciplinary process, consistent with Section 6(b)(3) of the Act.<sup>18</sup>

The Exchange proposes to make conforming amendments to Exchange Rules 475, 476, 476A and 308—Equities and Sections 1201, 1204, 1205, 1206, 1211, and 1212T of the Company Guide by generally replacing references to the current NYSE Regulation CFR with references to the “Committee for Review.”

The Exchange further proposes to amend Rule 476(f) to provide that the CFR may, but would not be required to, appoint an appeals panel to conduct a review thereunder and make a recommendation to the CFR regarding the disposition of the appeal. The Exchange represents that appeals panels would have no other role in the appellate process.<sup>19</sup> Any proposed appeals panel, as appointed by the CFR, would consist of at least three and no more than five individuals consistent with the composition of appeals panels constituted under the rules of the Exchange’s affiliate, NYSE Arca, Inc.<sup>20</sup> The Exchange represents that an appeals panel appointed by the CFR for equity matters would be composed of at least one director and one member or individual associated with an equities member organization. The Exchange further represents that an appeals panel appointed by the CFR for options matters would be composed of at least one director and one member or individual associated with an options member organization. The Exchange also proposes to describe the CFR as a subcommittee of the Exchange’s ROC in Sections 1205 and 1212T(g) of the Company Guide.

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<sup>18</sup> See id. at 79119 and 15 U.S.C. 78f(b)(3).

<sup>19</sup> See id. at 79119.

<sup>20</sup> See id.

## **B. Modifying Exchange Rules to Delete References to NYSE Regulation**

The Exchange proposes in connection with the Exchange's termination of the intercompany RSA to amend Section 4.05 of the Operating Agreement as well as Exchange Rules 0 (Regulation of the Exchange and its Member Organizations), 1—Equities (Definitions of Terms), 22—Equities (Disqualification Because of Personal Interest), 36 (Supplementary Material .30)—Equities (Communications Between Exchange and Members' Offices), 46 (Supplementary Material .10)—Equities (Floor Officials –Appointment), 48—Equities (Exemptive Relief — Extreme Market Volatility Condition), 49—Equities (Emergency Powers), 54—Equities (Dealings on Floor — Persons), 70 (Subparts (1) and (7) of Supplementary Material .40)—Equities (Execution of Floor Broker Interest), 103—Equities (Registration and Capital Requirements of DMMs and DMM Units), 103A—Equities (Member Education), 103B (Policy Note G and Supplementary Material .10)—Equities (Security Allocation and Reallocation), 422—Equities (Loans of and to Directors, etc.), 497—Equities (Additional Requirements for Listed Securities Issued by Intercontinental Exchange, Inc. or its Affiliates), and 902NY (Admission and Conduct on the Options Trading Floor) by deleting references to “NYSE Regulation, Inc.” and “NYSE Regulation” and where appropriate to replace such references with the “Exchange” or the “Exchange regulatory staff.”<sup>21</sup>

## **C. Modifying Exchange Rules to Reference the Exchange's Chief Regulatory Officer**

The Exchange proposes to amend Exchange Rules 48 – Equities (Exemptive Relief — Extreme Market Volatility Condition), 49 – Equities (Emergency Powers), and 86 – Equities (NYSE Bonds), to replace references to the Chief Executive Officer of NYSE Regulation with references to the Chief Regulatory Officer of the Exchange.

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<sup>21</sup> See id. at 79119–20.

#### **D. Certain Technical and Non-Substantive Changes**

The Exchange proposes to make certain technical and non-substantive changes to amend Exchange Rules 1 – Equities (Definitions of Terms), 48 – Equities (Exemptive Relief — Extreme Market Volatility Condition), and 103B – Equities (Security Allocation and Reallocation). The Exchange also proposes to make certain technical and non-substantive changes to amend the Exchange’s Company Guide Sections 350 (Cancellation Notice), 1204 (The Listing Qualifications Panel), 1205 (Review by the Exchange Committee on Securities), 1206 (Discretionary Review by Board of Directors), 1212T (Temporary Provisions Regarding Legacy Applications for Initial Listing), and the Listing Forms Appendix.

Exchange Rule 1– Equities, which defines the term the “Exchange,” would be amended to replace single quotation marks with double quotation marks in the heading and in the first paragraph.

Exchange Rule 48 – Equities, which sets forth the procedures for invoking an extreme market volatility condition, would be amended to replace single quotation marks with double quotation marks around the term “qualified Exchange officer.”

Exchange Rule 103B – Equities, which governs the security allocation and reallocation process, would be amended to replace single quotation marks with double quotation marks around the term “Allocation Prohibition” and to remove the comma from “New York Stock Exchange, LLC.”

The Exchange proposes to update the sample letter set forth in Section 350 of the Exchange’s Company Guide. Section 350 provides that a company no longer intending to issue all or some securities for listing should cancel the listing authority by notifying the Exchange by letter, and provides a sample letter for use by listed companies. The Exchange proposes to

amend the sample letter in Section 350 by changing the addressee from “Office of General Counsel” to “Legal Department,” updating the address to “11 Wall Street,” and the salutation from “Dear Sirs” to “Ladies and Gentlemen.” Similarly, the Exchange proposes to make conforming changes in the Exchange’s Company Guide Sections 1204, 1205, 1206 and 1212T to replace references to the “Office of General Counsel” with “Legal Department.”

The Exchange also proposes to amend Section 1212T(c) to replace the outdated reference to “American Stock Exchange” with “Exchange.”

Finally, the Exchange proposes to update the Listing Forms Appendix to update the address from “30 Broad” to “11 Wall” Street.

### 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 exchange.<sup>22</sup> 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.<sup>23</sup> 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

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<sup>22</sup> 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).

<sup>23</sup> 15 U.S.C. 78f(b)(1).

and not be associated with a member of the exchange, broker, or dealer.<sup>24</sup> 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.<sup>25</sup> Finally, the Commission finds that the proposal is consistent with Section 6(b)(7) of the Act, which requires that the rules of the exchange provide a fair procedure for the disciplining of its 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 with respect to access to services offered by the exchange or a member thereof.<sup>26</sup>

The Exchange represents that the proposed CFR would be a successor to the current CFR, which is a committee of the NYSE Regulation's Board of Directors that reviews appeals of Exchange disciplinary actions, and the Committee on Securities, which is a committee of the Exchange's Board that reviews determinations to limit or prohibit the continued listing of an issuer's securities on the Exchange.<sup>27</sup> The Exchange also proposes to incorporate the responsibilities of the Market Performance Committee and the Regulatory Advisory Committee into the proposed CFR.<sup>28</sup> According to the Exchange, the Market Performance Committee acts

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<sup>24</sup> 15 U.S.C. 78f(b)(3).

<sup>25</sup> 15 U.S.C. 78f(b)(5).

<sup>26</sup> 15 U.S.C. 78f(b)(7).

<sup>27</sup> See Notice, supra note 4, at 79118.

<sup>28</sup> See id. at 79118–19.

in an advisory capacity regarding trading rules and other matters within its charter, and the Regulatory Advisory Committee acts in an advisory capacity regarding disciplinary matters and regulatory rules other than trading rules.<sup>29</sup> Therefore, the Exchange proposes to expand the proposed CFR's responsibilities to include 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.<sup>30</sup> The Commission notes that the proposed CFR incorporates the salient features of the current CFR, including the requirement that the CFR be comprised of both Exchange directors who satisfy the Exchange's independence requirements,<sup>31</sup> as well as persons who are not directors, and that a majority of the members of the CFR voting on a matter subject to a vote of the CFR must be directors of the Exchange.<sup>32</sup> As such, the Commission finds that the Exchange's proposed revisions to its appellate procedure for disciplinary matters and for determinations to limit or prohibit the continued listing of an issuer's securities on the Exchange ensures sufficient independence of the appellate function of the Exchange, and therefore helps to ensure that the exchange is organized and has the capacity to carry out the purposes of the Act, as required by Section 6(b)(1) of the Act.<sup>33</sup>

The Commission also finds that the composition of the proposed CFR ensures the fair representation of members in the administration of the Exchange's affairs.<sup>34</sup> Proposed

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<sup>29</sup> See id. The Exchange notes that the same categories of NYSE MKT members that were represented on the Market Performance Committee and the Regulatory Advisory Committee would be represented on the proposed CFR. See id.

<sup>30</sup> See id.

<sup>31</sup> See note 11, supra.

<sup>32</sup> See Notice, supra note 4, at 79118.

<sup>33</sup> 15 U.S.C. 78f(b)(1).

<sup>34</sup> 15 U.S.C. 78f(b)(3).

Section 2.03(h)(iii) of the Exchange’s Operating Agreement provides that, among the persons on the proposed CFR, who are not directors, at least one individual from each of the following categories must be on the CFR: (i) individuals who are associated with a Member Organization that engages in a business involving substantial direct contact with securities customers, (ii) individuals who are associated with a Member Organization and registered as a DMM or specialist,<sup>35</sup> and (iii) individuals who are associated with a Member Organization and have 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 are not registered as a DMM or specialist.<sup>36</sup> Because NYSE MKT members will serve on the proposed CFR, which will 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 Commission finds that the proposed rule change is consistent with Section 6(b)(3) of the Act.<sup>37</sup>

The Exchange also proposes to amend Exchange Rule 476(f) to permit the CFR to appoint an appeals panel, consisting of at least three and no more than five individuals, which would conduct a review of any disciplinary determination on behalf of the CFR, and make a recommendation to the CFR regarding the disposition of such appeal.<sup>38</sup> According to the Exchange, an appeals panel appointed by the CFR for equity matters would be composed of at

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<sup>35</sup> The Exchange notes that market makers on the Exchange’s equity market are called DMMs and on NYSE Amex Options are called specialists. See Notice, supra note 4, at 79118 n.9.

<sup>36</sup> See id.

<sup>37</sup> 15 U.S.C. 78f(b)(3).

<sup>38</sup> See Notice, supra note 4, at 79119. According to the Exchange, any such appeals panel would have no other role in the appellate process. See id.

least one director and one member or individual associated with an equities member organization, and an appeals panel appointed for options matters would be composed of at least one director and one member or individual associated with an options member organization.<sup>39</sup>

The Commission finds that the Exchange's proposal with respect to the proposed composition and the role of an appeals panel is consistent with Sections 6(b)(3) and 6(b)(7) of the Act.<sup>40</sup>

Finally, the Commission finds that it is consistent with Section 6(b)(5) of the Act for the Exchange to make various technical and conforming revisions to its Rules.<sup>41</sup>

#### IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NYSEMKT-2015-106) is approved.

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

Robert W. Errett  
Deputy Secretary

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<sup>39</sup> See id.

<sup>40</sup> 15 U.S.C. 78f(b)(3) and 15 U.S.C. 78f(b)(7).

<sup>41</sup> 15 U.S.C. 78f(b)(5).

<sup>42</sup> 17 CFR 200.30-3(a)(12).