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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87588; File No. SR-NYSE-2019-62)

November 22, 2019

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend Article II, Section 2.03 of the Twelfth Amended and Restated Operating Agreement of the Exchange to remove the independence requirement for the director elected by Exchange membership organizations

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 15, 2019, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Article II, Section 2.03 of the Twelfth Amended and Restated Operating Agreement of the Exchange (“Operating Agreement”), to remove the independence requirement for the director elected by Exchange membership organizations, and make additional conforming and non-substantive edits. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Article II, Section 2.03 (Board) of the Exchange’s Operating Agreement to remove the independence requirement for the director elected by Exchange membership organizations, and make additional conforming and non-substantive edits.

Proposed Amendments to Section 2.03

Pursuant to the Operating Agreement, at least twenty percent of the Board shall be persons who are not members of the board of directors of Intercontinental Exchange, Inc. (“ICE”), the Exchange’s ultimate parent company, but qualify as independent under the Exchange’s director independence policy (such policy, the “Independence Policy” and such directors, the “Non-Affiliated Directors”).³ The Non-Affiliated Directors are nominated by the

³ See Operating Agreement, Article II, Section 2.03(a)(iii). See also Securities Exchange Act Release Nos. 84635 (November 20, 2018), 83 FR 60924 (November 27, 2018) (SR–NYSE–2018-56) (notice of filing and immediate effectiveness of proposed rule change to amend Article II, Section 2.03(h)(ii) and Article VI of the Operating Agreement), and 85913 (May 22, 2019), 84 FR 24853 (May 29, 2019) (SR–NYSE–2019-27) (notice of filing and immediate effectiveness of proposed rule change to amend the Independence Policy of the Board of Directors of the Exchange).

member organizations of the Exchange (“Member Organizations”),⁴ through a process set forth in the Operating Agreement.⁵

Background

The requirement that Non-Affiliated Directors qualify as independent dates to the demutualization of the Exchange, when the Exchange filed with the Commission a proposed new organizational structure, including that all Board members would be required to be independent.⁶ Some commentators on that proposal questioned whether the independence requirement comported with the “fair representation” requirement of the Exchange Act,⁷ asking whether “such a structure is desirable from a policy perspective because it will exclude nearly all persons with significant and recent industry experience, which will result in inferior regulatory oversight.”⁸ The Commission approved the Exchange’s proposal, concluding that the fair representation requirement was met by the proposed structure. The Commission recognized that

⁴ “Member Organizations” includes “members, allied members and member organizations of the [Exchange].” Operating Agreement, Article II, Section 2.02 (Rules; Supervision of Member Organizations). As discussed below, the Exchange proposes to amend the definition to delete the obsolete reference to “allied members.”

⁵ See *id.*, Section 2.03(a)(iii)-(v). Other than to remove the independence requirement, the Exchange does not propose to amend the process for nominating the Non-Affiliated Directors.

⁶ See Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order granting approval of proposed rule change and Amendment Nos. 1, 3, and 5 thereto and notice of filing and order granting accelerated approval to Amendment Nos. 6 and 8 relating to the NYSE’s business combination with Archipelago Holdings, Inc.).

⁷ Section 6(b)(3) of the Exchange Act requires that the rules of a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs. 15 U.S.C. 78f(b)(3).

⁸ 71 FR 11251, *supra* note 6, at 11260 (citing letter from Marc E. Lackritz, President, Securities Industry Association and Micah S. Green, President and CEO, The Bond Market Association, to Nancy M. Morris, Secretary, Commission, dated February 2, 2006).

other demutualized self-regulatory organizations allowed for direct member representation on their boards of directors, and stated that there was not only one method to satisfy the fair representation requirement of the Exchange Act.⁹

The requirement that Non-Affiliated Directors qualify as independent precludes the Member Organizations from nominating a candidate from among their own numbers or who was recently employed by a Member or Member Organization. In this way, it limits members' ability to nominate the individual of their choice. Accordingly, the Exchange proposes to remove the requirement that Non-Affiliated Directors qualify as independent. After the proposed change, as required by the Operating Agreement¹⁰ and as is true now, (a) the majority of the members of the Board shall be U.S. persons that satisfy the requirements of the Independence Policy, and (b) at least twenty percent of the members of the Board shall be Non-Affiliated Directors.¹¹

Proposed Change

Pursuant to the Independence Policy,¹² a director is not independent—and therefore cannot be a Non-Affiliated Director—if, among other things, the director:

- Or one of his or her immediate family members is, or within the last year was, a Member¹³ of the Exchange;

⁹ Id. at note 104.

¹⁰ See Operating Agreement, Article II, Section 2.03(a)(i).

¹¹ The balance of the Board membership is not required to be independent or a Non-Affiliated Director. Presently, a senior officer of ICE is a member of the Board.

¹² The Independence Policy can be found at https://www.nyse.com/publicdocs/nyse/regulation/nyse/Director_Independence_Policy_of_New_York_Stock_Exchange_LLC.pdf. See also 84 FR 24853, supra note 3.

¹³ The term “Member” is used in the Independence Policy as defined in Section 3(a)(3)(A)(i) of the Exchange Act. See 15 U.S.C. 78c(a)(3)(A)(i).

- Is, or within the last year was, employed by a Member Organization¹⁴;
- Has within the last year received from any Member Organization more than \$100,000 per year in direct compensation, or received from Member Organizations in the aggregate an amount of direct compensation which in any one year is more than 10 percent of the director's annual gross income for such year¹⁵; or
- Is affiliated, directly or indirectly, with a Member Organization.

The proposed amendments would remove these limitations by:

- Amending Section 2.03(a)(i) to delete the requirement that Non-Affiliated Directors qualify as independent under the Independence Policy and adding a sentence stating that “[t]he Non-Affiliated Directors need not be independent, and must meet any status or constituent affiliation qualifications prescribed by the Company and filed with and approved by the U.S. Securities and Exchange Commission (the ‘SEC’).”
- Amending the third sentence of the second paragraph of Section 2.03(a)(iv) and fourth sentence of Section 2.03(l) to remove the references to potential petition candidates and current directors qualifying as independent under the Independence Policy.

In addition to allowing Member Organizations to nominate the Non-Affiliated Directors of their choice, the proposed amendments would have the benefit of bringing Section 2.03 into greater conformity with Section 2.03 of the operating agreement of the Exchange's affiliate NYSE American LLC (“NYSE American”), which does not require that the NYSE American

¹⁴ The term “Member Organization” is used in the Independence Policy as defined in Section 3(a)(3)(A)(ii), 3(a)(3)(A)(iii) and 3(a)(3)(A)(iv) of the Exchange Act. See 15 U.S.C. 78c(a)(3)(A)(ii)-(iv).

¹⁵ Such limitations exclude director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service).

Non-Affiliated Directors qualify as independent under the NYSE American Director Independence Policy.¹⁶ The proposed additional sentence in Section 2.03(a)(i) would be the same as the second sentence in Section 2.03(a)(i) of the NYSE American Operating Agreement.

In addition, the proposed amendments would bring the Operating Agreement into greater conformity with the bylaws of the Exchange's affiliates NYSE Arca, Inc., NYSE Chicago, Inc. and NYSE National, Inc., none of which require that the directors nominated by their trading permit holders be qualified as independent.¹⁷

The Exchange notes that the proposed changes also would be consistent with the governing documents of other self-regulatory organizations, such as the Nasdaq Stock Market LLC¹⁸ and CBOE BYX Exchange, Inc.,¹⁹ which do not require that the directors nominated by the membership of the exchange be independent.

¹⁶ See Twelfth Amended and Restated Operating Agreement of NYSE American LLC ("NYSE American Operating Agreement"), Section 2.03(a) and (l). The NYSE American Director Independence Policy is the same as the Exchange's Independence Policy. See Securities Exchange Act Release No. 85919 (May 22, 2019), 84 FR 24842 (May 29, 2019) (SR-NYSEAMER-2019-20) (notice of filing and immediate effectiveness of proposed rule change to amend the Independence Policy of the Board of Directors of NYSE American).

¹⁷ See Bylaws of NYSE Arca, Inc., Article III, Section 3.02(a) and NYSE Arca Rule 3.2(b)(3)(C)(ii) (Directors Nominated by the Trading Permit Holders); Second Amended and Restated Bylaws of NYSE Chicago, Inc., Article II, Section 2 (General Composition and Term of Office); and Sixth Amended and Restated By-Laws of NYSE National, Inc., Article III, Sections 3.2(a) (General Composition).

¹⁸ See Bylaws of the Nasdaq Stock Market LLC, Article I (noting that a "Member Representative Director may, but is not required to be, an officer, director, employee, or agent of a Nasdaq Member").

¹⁹ See Ninth Amended and Restated Bylaws of CBOE BYX Exchange, Inc., Article III, Sections 3.1 and 3.2.

Additional Proposed Amendments

The Exchange proposes to delete the reference to “allied members” from the definition of “Member Organizations” in Section 2.02 because the Exchange no longer has allied members and therefore the reference is obsolete.²⁰

The Exchange proposes to make a non-substantive amendment to the first sentence of Article III, Section 3.03 (No Transfers) to replace the definition of the Commission with “SEC.” Because proposed Section 2.03(a)(i) would include a definition of the Commission, a definition would no longer be required in Section 3.03.

Finally, the Exchange proposes to make non-substantive conforming changes to the title, recitals and signature page of the Operating Agreement, which would become the Thirteenth Amended and Restated Operating Agreement of the Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act²¹ in general, and Section 6(b)(3)²² in particular, in that it is intended to give members a voice in the selection of an exchange’s directors and the administration of its affairs. The Exchange believes that the proposed rule change is consistent with Section 6(b)(1)²³ of the Act, in that it would enable the Exchange to be so organized as to have the capacity to be able to

²⁰ See Securities Exchange Act Release Nos. 43720 (August 21, 2018), 83 FR 43720 (August 27, 2018) (SR-NYSE-2018-38) (notice of filing and immediate effectiveness of proposed rule change to amend the Independence Policy of the Board of Directors of the Exchange); and 58549 (September 15, 2008), 73 FR 54444 (September 19, 2008) (SR-NYSE-2008-80) (notice of filing and immediate effectiveness of proposed rule change and Amendment No. 1 thereto conforming certain NYSE Rules to changes to NYSE incorporated rules recently filed by the Financial Industry Regulatory Authority, Inc.).

²¹ 15 U.S.C. 78f(b).

²² See 15 U.S.C. 78f(b)(3).

²³ 15 U.S.C. 78f(b)(1).

carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

As noted above, the requirement that Non-Affiliated Directors qualify as independent under the Independence Policy precludes the Member Organizations from nominating a candidate from among their own numbers or who was recently employed by a Member or Member Organization. Yet those are the very persons who, by virtue of their work as, with, or in affiliation with a Member Organization, are the most informed about the Member Organizations, their operations, and their concerns. Accordingly, the Exchange believes that the proposed rule change would be consistent with Section 6(b)(3) because it would give the Member Organizations more flexibility and greater options in selecting their preferred nominees for the Non-Affiliated Directors and, therefore, the administration of the Exchange's affairs. In so doing, the proposed rule change would enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act. At the same time, the Exchange would continue to have a majority of the members of the Board qualify as independent under the Independence Policy.

The Exchange notes that the proposed changes to Section 2.03 would have the additional benefit of bringing the Operating Agreement into greater conformity with the NYSE American Operating Agreement, which does not require that the NYSE American Non-Affiliated Directors qualify as independent under the NYSE American Director Independence Policy, and the bylaws of the Exchange's affiliates NYSE Arca, Inc., NYSE Chicago, Inc. and NYSE National, Inc., none of which require that the directors nominated by their trading permit holders be qualified as independent. In addition, the proposed amendments would make Section 2.03 more consistent

with the governing documents of other self-regulatory organizations that do not require that the directors nominated by the membership of the exchange be independent.

The Exchange believes that the proposed amendment to Section 2.02 of the Operating Agreement would enable the Exchange to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply with the provisions of the Exchange Act by its members and persons associated with members because it would remove an obsolete reference to allied members, thereby adding clarity and transparency to the Operating Agreement by removing any confusion that may result if it retained such obsolete reference. The Exchange further believes that market participants would benefit from the increased clarity, reducing potential confusion.

The proposed amendments to effect non-substantive technical and conforming changes would enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange because the changes would ensure that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the Operating Agreement.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with the administration and functioning of the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2019-62 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2019-62. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, D.C. 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2019-62, and should be submitted on or before [INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Eduardo A. Aleman
Deputy Secretary

²⁴ 17 CFR 200.30-3(a)(12).

