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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-72914; File No. SR-NSX-2014-16)

August 26, 2014

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 15.5 to Provide Additional Clarity and Precision, Correct Certain Citations, and Align the Rule with the Rules of Other Exchanges With Respect to the Original and Continued Listing Standards for Issuers' Compensation Committees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act" or "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 12, 2014, National Stock Exchange, Inc. ("NSX<sup>®</sup>" or the "Exchange") filed with the Securities and Exchange Commission ("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 comment on the proposed rule change from interested persons.

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

The Exchange is proposing to amend Rule 15.5 to conform with the provisions of Section 957 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"),<sup>3</sup> Section 10C of the Exchange Act,<sup>4</sup> and Rule 10C-1 promulgated pursuant thereto.<sup>5</sup>

The text of the proposed rule change is available on the Exchange's website at <http://www.nsx.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Pub. L. No. 111-203, 124 Stat. 1900 (2010).

<sup>4</sup> 15 U.S.C. 78j-3.

<sup>5</sup> 17 CFR 229.407 and 17 CFR 240.10C-1.

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 Exchange 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 these 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.<sup>6</sup>

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

1. Purpose

The Exchange is proposing to amend Chapter XV, “Listed Securities and Other Exchange Products,” and specifically Rule 15.5, entitled “Other Listing Standards” to conform with Section 10C of the Exchange Act, as added by Section 952 of the Dodd-Frank Act. Section 10C requires the Commission to direct national securities exchanges and national securities associations to prohibit, with certain exceptions, the listing of any equity security of an issuer that does not comply with the Compensation Committee and compensation adviser requirements of Section 10C.<sup>7</sup> Specifically, Section 10C(a)(1) of the Act requires the Commission to adopt rules directing exchanges to prohibit the listing of any equity security of an issuer, with certain

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<sup>6</sup> The Exchange notes that, as of the close of business on May 30, 2014, it ceased trading operations on its trading system. See Exchange Act Release No. 72107 (May 6, 2014), 79 FR 27017 (May 12, 2014)(SR-NSX-2014-14). The Exchange continues to be registered as a national securities exchange under Section 6 of the Exchange Act, and continues to retain its status as a self-regulatory organization. Prior to NSX ceasing trading operations, there were no NSX-listed securities and all securities traded on NSX on the basis of Unlisted Trading Privileges.

<sup>7</sup> See Exchange Act Sections 10C(a) and (f).

exceptions, that does not comply with the requirements of Section 10C with respect to Compensation Committees and compensation adviser requirements.<sup>8</sup>

The Exchange adopted rules to align with the requirements of Section 10C of the Act and Rule 10C-1 thereunder in October 2012.<sup>9</sup> The proposed amendments in the instant filing operate to provide further clarity and precision and correct certain citations, and align with the rules of other exchanges, with respect to the provisions of Rule 15.5(d)(5) that govern a listed issuer's Compensation Committee. The rule proposal also adds new text to the Interpretations and Policies of Rule 15.5(d)(5).

#### Listed Company Corporate Governance Requirements

The Exchange proposes to amend Rule 15.5(d)(5)(a) to clarify the Listed Company Corporate Governance Requirements for purposes of determining the independence of a member of the Compensation Committee. Specifically, the proposed amendment adds text stating that, in addition to determining whether the director meets the independence requirements of Rule 15.5(d)(2)(a) and (b),<sup>10</sup> the listed company must consider those factors contained in Rule

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<sup>8</sup> Five categories of issuers are excluded from this requirement: controlled companies, limited partnerships, companies in bankruptcy proceedings, open-end management investment companies registered under the Investment Company Act of 1940 (the "Investment Company Act"), and foreign private issuers that disclose in their annual reports the reasons why they do not have an independent compensation committee.

<sup>9</sup> See Exchange Act Release No. 68039 (October 11, 2012), 77 FR 63914 (October 17, 2012)(SR-NSX-2012-15).

<sup>10</sup> Paragraph (d)(2)(a) provides that no director may qualify as "independent" unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder, or officer of an organization that has a relationship with the company) and that companies must disclose these determinations. Paragraph (d)(2)(b) lists five additional bright line tests that a director must meet to be considered independent, including that a director who is an employee of the company, or whose immediate family member is an executive officer of the company, is not independent until three years after the end of such employment relationship.

15.5(d)(5)(a)(i) and (ii).<sup>11</sup> The Exchange submits that this amendment will reinforce the elements that must inform a listed company's determination of the independence of a member of the Compensation Committee.

#### Written Charter of the Compensation Committee

The amendments proposed by the Exchange to Rule 15.5(d)(5)(b)(i) with regard to the requirements for the written charter of the Compensation Committee are also primarily intended to conform the text of the rule with the provisions of Section 10C of the Act. First, the Exchange proposes in the introductory text of Paragraph (d)(5)(b)(i) to amplify the general requirements for the written charter by stating that the charter must address the Compensation Committee's purpose, responsibilities and authority, which at minimum must be to have direct responsibility and authority to engage in the tasks described in Rule 15.5(d)(5)(b)(i)(A) through (F). The proposed amendment will better define the scope of the Compensation Committee's authority to engage in the tasks described in the rule.

The Exchange is next proposing amendments to Rule 15.5(d)(5)(b)(i)(A) through (F) to remove the word "independent" contained in the pre-amendment rule text in reference to legal counsel. The proposed changes to paragraph (b)(i)(A) through (F) recognize that, while Section 10C(d)(1) of the Act provides that the Compensation Committees of listed issuers shall have the express authority to hire "independent legal counsel," it does not require that they do so, nor does it preclude a Compensation Committee from retaining non-independent legal counsel or

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<sup>11</sup> Paragraph (d)(5)(a) requires that, when determining the independence of directors the listed company must consider (i) the source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the listed company to the director; and (ii) whether the director is affiliated with the listed company, a subsidiary of the listed company, or an affiliate of a subsidiary of the listed company.

obtaining advice from in-house counsel or outside counsel retained by the issuer or management. The proposed deletion will operate to remove any ambiguity in that regard.

Consistent with Section 10C of the Act, the proposed change to the rule text will enhance the pre-amendment requirements for the written charter of the Compensation Committee by expressly stating that the Compensation Committee, at a minimum, has the authority to retain or obtain the advice of compensation consultants, legal counsel and other compensation advisers as determined in the sole discretion of the Compensation Committee and to appoint, compensate and oversee the work of any such compensation consultants, legal counsel or other adviser. The amended rule text will also list the factors that the Compensation Committee must use in selecting a compensation consultant, legal counsel or other adviser.<sup>12</sup>

#### Compensation Committee Funding

The Exchange proposes to amend Rule 15.5(d)(5)(c) regarding the funding that a listed company must provide for the Compensation Committee to discharge its functions. As amended, subparagraph (5)(c) will provide that listed companies must provide for appropriate funding, as determined by the Compensation Committee, for payment of reasonable compensation to a compensation consultant, legal counsel or any other adviser retained by the Compensation Committee. As amended, the text of such subparagraph will delete the word “independent” with reference to legal counsel, a change which mirrors the similar change to the requirement for the written charter of the Compensation Committee, and specifies that the funding must be sufficient to pay reasonable compensation to any other adviser “...retained by the Compensation Committee.”

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<sup>12</sup> See proposed Rule 15.5(d)(5)(b)(i)(D).

The Exchange submits that the proposed change will align subparagraph (5)(c) with Section 10C of the Act and Rule 10C-1(b)(3) pursuant thereto<sup>13</sup> with regard to listing standards that must be adopted by exchanges regarding requirements for compensation committees and any compensation consultant, legal counsel or other adviser used by such committees.<sup>14</sup> The proposed amendments are intended to enhance the clarity and precision of the Rule by providing that a listed issuer must provide for appropriate funding for reasonable compensation for compensation consultants, legal counsel, or any other adviser retained by the Compensation Committee.

#### Requirements for A Smaller Reporting Company

The Exchange is further proposing clarifying amendments to Rule 15.5(d)(5)(e) with respect to the requirements for a Smaller Reporting Company as defined in Rule 12b-2 under the Act.<sup>15</sup> Specifically, the amendments provide that a Smaller Reporting Company with a public float of \$75 million or more as of the last business day of its second fiscal quarter will cease to be a Smaller Reporting Company as of the beginning of the fiscal year following the Smaller Reporting Company Determination Date. In that instance, the company shall be required to comply with Rule 15.5(d)(5)(b)(i)(F) with respect to the criteria for selecting a compensation consultant, legal counsel, or other adviser to the Compensation Committee, as of six months from the date it ceases to be a Smaller Reporting Company.

Additionally, the amended rule specifies that the company must: (i) provide for one member of its Compensation Committee meeting the independence standard of Rule 15.5(d)(5)(a)(i)-(ii) within six months of the date that it ceases to be a Smaller Reporting

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<sup>13</sup> 17 CFR 240.10C-1(b)(3).

<sup>14</sup> Id.

<sup>15</sup> 17 CFR 240.12b-2.

Company; (ii) provide for a majority of directors on its Compensation Committee meeting those requirements within nine months of that date; and (iii) provide that a Compensation Committee comprised solely of members that meet those requirements is in place within twelve months of that date.

These amendments are intended to provide a degree of flexibility to companies that cease to be Smaller Reporting Companies to fully implement the provisions of Rule 15.5(d) on a workable basis, giving due regard to the steps necessary for a company to fully implement the provisions of the Rule.

Revised Interpretations and Policies of Rule 15.5(d)(5): Compensation Committee Assessment of Adviser Independence and Adoption of Adviser's Recommendations

The Exchange is also proposing amendments to the Interpretations and Policies of Rule 15.5(a)(1)(d) that will serve to: (i) provide additional clarity as to the responsibility of a listed issuer's Compensation Committee to conduct an independence assessment before retaining or obtaining the advice of a compensation consultant, legal counsel, or any other adviser; and (ii) provide guidance as to the implementation of a consultant's or adviser's recommendations and the exercise of the Compensation Committee's judgment in that regard.

First, the revised text of the Interpretations and Policies reinforces that the Compensation Committee is required to conduct the independence assessment outlined in Rule 15.5(5)(b)(i)(F)<sup>16</sup> with respect to any compensation consultant, legal counsel or other adviser,

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<sup>16</sup> Under Rule 15.5(b)(i)(F)(1)-(6), the independence determination must take into account the following required factors: other services provided to the issuer by the person that employs the compensation consultant, legal counsel or adviser; the amount of fees received by the adviser's employer from the issuer, as expressed by a percentage of total revenue of that employer; the conflicts of interests policies and procedures of the adviser's employer; any business or personal relationship between the compensation consultant, legal counsel or adviser with a member of the Compensation Committee; any stock of the issuer owned by the compensation consultant, legal counsel or adviser; and

other than in-house legal counsel and any other in-house adviser whose role is limited to certain identified activities, for which no disclosure would be required under Item 407(e)(3)(iii) of Regulation S-K.<sup>17</sup> Such activities are consulting on any broad-based plan that does not discriminate in scope, terms or operation, in favor of executive officers or directors of the listed company, and that is available generally to all salaried employees; or providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice. The revised text in the Interpretations and Policies incorporates in the Exchange's guidance to issuers the amendments to Item 407 that were adopted by the Commission along with Section 10C of the Act.<sup>18</sup>

In addition, the revised Interpretations and Policies makes clear that Rule 15.5(d)(5) does not, in fact, require that a compensation consultant, legal counsel or other compensation adviser be independent, but only that the Compensation Committee consider the enumerated independence factors before selecting or receiving advice from a compensation adviser. The Compensation Committee may select or receive advice from any compensation adviser they prefer including ones that are not independent, after considering the six independence factors outlined in Rule 15.5(d)(5)(b)(i)(F)(1)-(6).

Finally, the Exchange proposes to include a new provision that nothing in Rule 15.5(d)(5)(b) shall be construed to require the Compensation Committee to implement or act consistently with the advice or recommendations of the compensation consultant, legal counsel

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any business or personal relationship between the compensation consultant, legal counsel or adviser and any executive officers of the issuer.

<sup>17</sup> 17 CFR 229.407.

<sup>18</sup> 17 CFR 229.407(e)(iv).

or other adviser to the Compensation Committee; or to affect the ability or obligation of the Compensation Committee to exercise its own judgment in fulfillment of the duties of the Compensation Committee. The proposed new text tracks the provisions of Rule 10C-1.<sup>19</sup>

## 2. Statutory Basis

The Exchange believes the proposed rule amendments are consistent with the Exchange Act and the rules and regulations thereunder applicable to national securities exchanges. Specifically, the Exchange believes that the proposed amendments are consistent with Section 6 of the Exchange Act<sup>20</sup> in general, and Section 6(b)(5) in particular. Section 6(b)(5) requires that the rules of an exchange be designed to, among other things, 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.

The Exchange submits that the proposed amendments are consistent with Section 6(b)(5) in that they are designed to protect investors and the public interest by providing additional clarity and precision and correct citations with regard to the Exchange's requirements for Compensation Committees under the listed issuer corporate governance requirements. The proposed revisions will also align the Exchange's rules with the rules of other national securities exchanges. The Exchange further believes that the proposed rule changes will further the implementation of the requirements of Section 10C of the Act and Rule 10C-1 pursuant thereto and are therefore consistent with the Exchange Act.

### 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 Act. The

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<sup>19</sup> See CFR 240.10C-1(b)(2)(iii)(A) and (B).

<sup>20</sup> 15 U.S.C. §78f(b)(5).

Exchange submits that these changes will have no competitive impact, in that they are intended to better align the Exchange's corporate governance rules for listed companies with the statutory requirements. Similar rules have been enacted by other national securities exchanges with rules governing the initial or continued listing of the equity securities of listed companies and the proposed changes work to align Exchange Rule 15.5(d)(5) with the rules of other exchanges.

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

The Exchange has not solicited, and does not intend to solicit, written comments on the proposed rule change.

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

Because the foregoing proposed rule change does not:

- A. significantly affect the protection of investors or the public interest;
- B. impose any significant burden on competition; and
- C. become operative for 30 days from the date on which it was filed, or such shorter

time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)<sup>21</sup> of the Exchange Act and Rule 19b-4(f)(6) thereunder.<sup>22</sup> At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine

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<sup>21</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>22</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description of the text of the proposed rule change, at least five business days prior to the date of the filing of the proposed rule change, or such other time as designated by the Commission. This requirement has been met.

whether the proposed rule change should be approved or 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](mailto:rule-comments@sec.gov). Please include File Number SR-NSX-2014-16 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-NSX-2014-16. 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, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the

principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NSX-2014-16, 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.<sup>23</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>23</sup> 17 CFR 200.30-3(a)(12).