



8011-01P

SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-87914; File No. SR-NYSE-2019-62]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving 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
January 8, 2020.

I. Introduction

On November 15, 2019, the New York Stock Exchange LLC (“NYSE” or “Exchange”) 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 Article II, Section 2.03 of the Twelfth Amended and Restated Operating Agreement (“Operating Agreement”) of the Exchange 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 was published for comment in the Federal Register on November 29, 2019.³ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend Article II, Section 2.03 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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 87588 (November 22, 2019), 84 FR 65875 (November 29, 2019) (“Notice”).

Currently, pursuant to the Operating Agreement, at least twenty percent of the Exchange’s board of directors (“Board”) must be composed of persons who are not members of the board of directors of Intercontinental Exchange, Inc. (“ICE”), the Exchange’s ultimate parent company, but who qualify as independent under the Exchange’s director independence policy (such policy, the “Independence Policy”, and such directors, the “Non-Affiliated Directors”).⁴ The Non-Affiliated Directors are nominated by the member organizations of the Exchange (“Member Organizations”),⁵ through a process set forth in the Operating Agreement.⁶

Under the Independence Policy,⁷ 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 Member⁸ of the Exchange;
- is, or within the last year was, employed by a Member Organization⁹;

⁴ See Operating Agreement, Article II, Section 2.03(a)(iii).

⁵ “Member Organizations” includes “members, allied members and member organizations of the [Exchange].” See Operating Agreement, Article II, Section 2.02 (Rules; Supervision of Member Organizations). As discussed below, the Exchange proposes to amend the definition to delete as obsolete the reference to “allied members.”

⁶ 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.

⁷ The Independence Policy is available at: https://www.nyse.com/publicdocs/nyse/regulation/nyse/Director_Independence_Policy_of_New_York_Stock_Exchange_LLC.pdf.

⁸ 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).

⁹ 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).

- 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 year¹⁰; or
- is affiliated, directly or indirectly, with a Member Organization.

As the Exchange states, 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. Because of this, the Exchange believes, the current requirement limits members' ability to nominate the individual of their choice. Moreover, the Exchange notes that individuals who are precluded by the independence requirement from serving as Non-Affiliated Directors 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.

The Exchange therefore proposes to remove this limitation in its current rules by:

- amending Section 2.03(a)(i) to delete the requirement that Non-Affiliated Directors qualify as independent under the Independence Policy;
- adding a sentence stating that "[t]he Non-Affiliated Directors need not be independent, and must meet any status or constituent affiliation qualifications

¹⁰ 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).

prescribed by the Company and filed with and approved by the Commission;¹¹
and

- 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.

The Exchange states that the proposed rule change would bring the Operating Agreement into greater conformity with the operating agreement of its affiliate, NYSE American LLC (“NYSE American”), which does not require that the NYSE American Non-Affiliated Directors qualify as independent under the NYSE American Director Independence Policy,¹² and with the bylaws of its affiliates, NYSE Arca, Inc., NYSE Chicago, Inc. and NYSE National, Inc., none of which, according to the Exchange, require that the directors nominated by their trading permit holders be qualified as independent.¹³ The Exchange further notes that the governing documents

¹¹ In tandem with this change, the Exchange also proposes to make a non-substantive amendment to the first sentence of Article III, Section 3.03 to delete the language in that sentence defining the term “SEC”. Proposed Section 2.03(a)(i), which would appear earlier in the text, would already include such reference.

¹² See Notice, supra note 3, at 65876 n.16. See Twelfth Amended and Restated Operating Agreement of NYSE American LLC (“NYSE American Operating Agreement”), Section 2.03(a) and (l). According to the Exchange, 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).

¹³ See Notice, supra note 3, at 65876 n.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).

of other self-regulatory organizations, such as the Nasdaq Stock Market LLC¹⁴ and Cboe BYX Exchange, Inc.,¹⁵ do not require that the directors nominated by the membership of the exchange be independent.

The Exchange also proposes to delete the reference to “allied members” from the definition of “Member Organizations” in Section 2.02. The Exchange states that it no longer has allied members and that therefore the reference is obsolete.¹⁶ 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.

III. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act¹⁷ and the rules and regulations thereunder applicable to a national securities exchange.¹⁸ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁹ which requires, among other things, that rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and

¹⁴ See Notice, supra note 3, at 65876 n.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”).

¹⁵ See Notice, supra note 3, at 65876 n.19. See Ninth Amended and Restated Bylaws of Cboe BYX Exchange, Inc., Article III, Sections 3.1 and 3.2.

¹⁶ See Notice, supra note 3, at 65876.

¹⁷ 15 U.S.C. 78f.

¹⁸ 15 U.S.C. 78f(b). In approving this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁹ 15 U.S.C. 78f(b)(5).

perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and that those rules are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission further finds that the proposed rule change is consistent with Section 6(b)(3) of the Act,²⁰ which, among other things, requires the rules of a national securities exchange to assure the fair representation of its members in the selection of its directors and administration of its affairs.

As the Exchange notes, 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 that included a requirement that all Board members of the Exchange be independent.²¹ Moreover, as the Exchange also notes, the Commission has approved governing documents of other exchanges that do not require the member representatives on their boards to be independent.²²

Therefore, the Commission believes that it is reasonable for NYSE to eliminate the independence requirement for Non-Affiliated Directors and thereby afford its Member Organizations the same flexibility in selecting directors that need not be independent as exists at other national securities exchanges. The Commission notes that the proposed rule change will enable the Exchange to conform its governing documents with those of its affiliated exchanges, which do not require that directors nominated by the membership be independent.

²⁰ 15 U.S.C. 78f(b)(3).

²¹ See Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (Commission order granting approval of NYSE's business combination with Archipelago Holdings, Inc.).

²² See supra notes 12-15.

Based on the foregoing, the Commission finds that the proposed rule change is consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²³ that the proposed rule change (SR-NYSE-2019-62) be, and hereby is, approved.

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

Jill M. Peterson,
Assistant Secretary.

²³ 15 U.S.C. 78s(b)(2).

²⁴ 17 CFR 200.30-3(a)(12).

