

*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**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>15</sup> and Rule 19b-4(f)(6) thereunder.<sup>16</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.<sup>17</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 shall institute proceedings under Section 19(b)(2)(B)<sup>18</sup> of the Act to determine 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2016-55 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-NYSEMKT-2016-55. This file number should be included on the subject line if email 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 Web site (<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 Web site 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-NYSEMKT-2016-55, and should be submitted on or before June 22, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Brent J. Fields,**

*Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-77901; File No. SR-NYSEMKT-2016-26]

**Self-Regulatory Organizations; NYSE MKT LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No.1 Thereto, To Amend the Eighth Amended and Restated Operating Agreement of the Exchange**

May 25, 2016.

**I. Introduction**

On March 29, 2016, NYSE MKT LLC ("Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the Eighth Amended and Restated Operating Agreement of the Exchange ("Operating Agreement"). The proposed rule change was published for comment in the **Federal Register** on April 12, 2016.<sup>3</sup> The Commission received no comments in response to the Notice. On May 19, 2016, the Exchange filed Amendment No. 1 to the proposal.<sup>4</sup> This order approves the proposed rule change, as modified by Amendment No. 1 thereto.

**II. Description of the Proposal**

The Exchange proposes to amend the Operating Agreement to (1) change the process for nominating non-affiliated directors; (2) remove a reference to an obsolete category of member; and (3) add references to Designated Market Makers ("DMMs").

*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 representation directors").<sup>5</sup> Pursuant to

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

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

<sup>3</sup> Securities Exchange Act Release No. 77536 (April 6, 2016), 81 FR 21636 ("Notice").

<sup>4</sup> Amendment No. 1 is a technical amendment to retain the initial reference to "DCRC Candidates" in Section 2.03(a)(iii) of the Operating Agreement rather than to delete it. Because Amendment No. 1 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 is not subject to notice and comment.

<sup>5</sup> 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"). 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, 15 U.S.C.

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

<sup>16</sup> 17 CFR 240.19b-4(f)(6).

<sup>17</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>18</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>19</sup> 17 CFR 200.30-3(a)(12).

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 played by the ICE NGC and to make a conforming change to Section 2.03(h)(i). In addition, if the Exchange’s Member Organizations endorse a Petition Candidate<sup>6</sup> for Non-Affiliated Director pursuant to Section 2.03(a)(iv) of the Operating Agreement, the ICE NGC makes the determination of whether the person is eligible.<sup>7</sup> The Exchange proposes to amend Section 2.03(a)(iv) to have the Exchange make such determination instead of the ICE NGC.

Currently, the nomination by the ICE NGC is the final step in the process for electing a Non-Affiliated Director. First, the DCRC recommends a candidate, whose name then is announced to the Member Organizations. The Member Organizations may propose alternate candidates by petition. If there are no Petition Candidates, the DCRC recommends its candidate to the ICE NGC. If Petition Candidates are proposed, the ICE NGC makes the determination of whether the candidates are eligible, and then all of the eligible candidates are submitted to the Member Organizations for a vote. The DCRC recommends to the ICE NGC the candidate receiving the highest number of votes. The ICE NGC is obligated to designate the DCRC-recommended candidate as the nominee, and NYSE Group is obligated to elect him or her as a Non-Affiliated Director.

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. Pursuant to Section 2.03(a)(iii), the ICE NGC is obligated to designate whomever the DCRC recommends or, if there is a Petition Candidate, whoever emerges from the petition process. According to the Exchange, the ICE NGC does not have any discretion. The Exchange

believes that removing this step would make the NYSE MKT process with respect to the nomination of Non-Affiliated Directors more efficient. Moreover, the Exchange believes that having the Exchange determine whether persons endorsed to be Petition Candidates are eligible to serve as Non-Affiliated Directors also 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. The Exchange further states that the proposed change would be consistent with the petition process of the Nasdaq Stock Market LLC in which that exchange determines the eligibility of proposed nominees.<sup>8</sup>

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. First, as is currently the 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. Second, if there were no Petition Candidates, the DCRC would nominate the candidate whom it had previously recommended. If there were Petition Candidates, the Exchange would make the eligibility determination regarding 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. Finally, NYSE Group would be obligated to elect the DCRC-nominated candidate as a Non-Affiliated Director.

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

#### *B. Elimination of a Category of DCRC Membership*

The Operating Agreement requires that the DCRC include representatives from each of the four categories of Exchange members. The Exchange proposes to amend Section 2.03(h)(i) of the Operating Agreement to eliminate from the DCRC representatives of the fourth category, which relates to

individuals who are “associated with a Member Organization and spend a majority of their time on the trading floor of the [Exchange] and have as a substantial part of their business the execution of transactions on the trading floor of the [Exchange] for their own account or the account of their Member Organization, but are not registered as a specialist.”<sup>9</sup>

This fourth category describes a class of proprietary traders known as Registered Equity Market Makers (“REMMs”) on the former American Stock Exchange LLC, a predecessor of the Exchange. REMMs were floor traders who engaged in on-floor proprietary trading, subject to certain requirements intended to have these members effectively function like market makers, pursuant to the exemption for market makers in Section 11(a)(1)(A) of the Exchange Act.<sup>10</sup> The rules relating to this category of proprietary floor trader were eliminated shortly after the American Stock Exchange LLC was acquired by the NYSE.<sup>11</sup> In addition, NYSE MKT Rule 114, which governed REMMs, was deleted as obsolete in 2012.<sup>12</sup> As a result, there are no Exchange members or member organizations that fall under the fourth category specified in Section 2.03(h)(i) of the Operating Agreement. Thus, the Exchange proposes to delete references to this category as obsolete. This change would make Section 2.03(h)(i) consistent with the categories of members of the Committee for Review, as set forth in Section 2.03(h)(iii).<sup>13</sup>

#### *C. References to Designated Market Makers*

In 2008, the Exchange adopted rules, based on NYSE rules, that transformed specialists in the Exchange’s equity

<sup>9</sup> Representatives from the following three categories would continue to be included on the DCRC: (1) Member organizations that engage in a business involving substantial direct contact with securities customers (commonly referred to as “upstairs firms”); (2) specialists; and (3) floor brokers. The Exchange proposes to add DMMs to category (2), as discussed below. See note 15, *infra*, and accompanying text.

<sup>10</sup> This class of proprietary traders were known as Registered Competitive Market Makers (“RCMM”) on the New York Stock Exchange LLC (“NYSE”).

<sup>11</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995, 58996 (October 8, 2008) (SR-Amex–2008–63). The NYSE eliminated RCMMs shortly thereafter. See Securities Exchange Act Release No. 60356 (July 21, 2009), 74 FR 37281 (July 28, 2009) (SR-NYSE–2009–08).

<sup>12</sup> See Securities Exchange Act Release No. 68306 (November 28, 2012), 77 FR 71846 (December 4, 2012) (SR-NYSEMKT–2012–68).

<sup>13</sup> See Securities Exchange Act Release No. 77008 (February 1, 2016), 81 FR 6311 (February 5, 2016) (SR-NYSEMKT–2015–106).

78c(a)(39), Non-Affiliated Directors need not be independent.

<sup>6</sup> See Section 2.03(a)(iv) of the Operating Agreement.

<sup>7</sup> Pursuant to Section 2.02 of the Operating Agreement, “Member Organizations” refers to members and member organizations, as defined in NYSE MKT Rules 18 and 24, respectively.

<sup>8</sup> See 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.”).

market into DMMs.<sup>14</sup> As a result, market makers on the NYSE MKT equity market are called DMMs and on the NYSE Amex Options LLC (“NYSE Amex Options”) options market are called specialists.<sup>15</sup> However, several provisions of the Operating Agreement were not updated and refer only to specialists. Accordingly, the Exchange proposes to amend Sections 2.02 and 2.03(h)(i) to add references to DMMs.

Section 2.02 of the Operating Agreement provides that the Board has general supervision over Member Organizations and over approved persons in connection with their conduct with or affecting Member Organizations. Section 2.02 further provides that the Board “may disapprove of any member acting as a specialist or odd lot dealer.” The Exchange proposes to add “designated market maker (as defined in Rule 2 of the Company Rules) (‘DMM’)” after “specialist” in Section 2.02.

Section 2.03(h)(i) sets out the categories of individuals that shall be represented on the DCRC. The Exchange proposes to add “or DMM” to the references to “specialist” in categories (ii) and (iii), so that they reference both types of market makers. The changes would be consistent with the categories of members of the Committee for Review set forth in Section 2.03(h)(iii), which refers to both DMMs and specialists.<sup>16</sup>

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

### III. Discussion and Commission’s Findings

The Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of Section 6 of the Act<sup>17</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>18</sup>

<sup>14</sup> See Securities Exchange Act Release Nos. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex-2008-63) (approval order) and 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR-NYSEALTR-2008-10) (amending equity rules to conform to NYSE New Market Model Pilot rules). See also Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46) (approving rule change to create NYSE New Market Model Pilot).

<sup>15</sup> The Exchange operates a marketplace for trading options through NYSE Amex Options, a facility of the Exchange. See Rule 2—Equities (i) & (j) (defining DMM) and Rule 927NY (defining specialist).

<sup>16</sup> See note 13, *supra*, and accompanying text.

<sup>17</sup> 15 U.S.C. 78f.

<sup>18</sup> The Commission has also considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

The Commission finds that the proposed rule change is consistent with Section 6(b)(1),<sup>19</sup> 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,<sup>20</sup> 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.<sup>21</sup> 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.

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 another exchange that similarly provide for that exchange to determine the eligibility of proposed Petition Candidates.<sup>22</sup>

Further, eliminating the requirement that the DCRC include representatives from the fourth category of members

<sup>19</sup> 15 U.S.C. 78f(b)(1).

<sup>20</sup> 15 U.S.C. 78f(b)(3).

<sup>21</sup> The Commission notes that the DCRC is appointed by the Board. See Section 2.03(h)(i) of the Operating Agreement.

<sup>22</sup> See *supra* note 8. See generally Securities Exchange Act Release Nos. 56876 (November 30, 2007), 72 FR 70357 (December 11, 2007) (SR-NASDAQ-2007-068) (approving process for electing Member Representative Directors).

described above (formerly REMMs) would remove a reference to an obsolete category of member from the Operating Agreement. The Commission finds that eliminating such an obsolete reference would add clarity to the Exchange’s rules and be consistent with the public interest and the protection of investors.

Finally, the proposed addition of references to DMMs in Section 2.02 and 2.03(h)(i) of the Operating Agreement would more accurately reflect that specialists in the Exchange’s equity market are now referred to as DMMs and also would make these sections consistent with Section 2.03(h)(iii) (categories of members of the Committee for Review), which refers to both DMMs and specialists. The proposed addition of a reference to DMMs in Section 2.02 would clarify that the Board has general supervision over all Member Organizations, including the ability to disapprove of any member acting as a DMM, as well as a specialist or odd lot dealer. The proposed addition of references to DMMs in Section 2.03(h)(i) would clarify that DMMs, as well as specialists, are categories of individuals that would be represented on the DCRC.

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

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>23</sup> that the proposed rule change (SR-NYSEMKT-2016-26), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

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

**Brent J. Fields,**

*Secretary.*

[FR Doc. 2016-12787 Filed 5-31-16; 8:45 am]

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77908; File No. SR-Phlx-2016-59]

### Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to PIXL Pricing

May 25, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

<sup>23</sup> 15 U.S.C. 78s(b)(2).

<sup>24</sup> 17 CFR 200.30-3(a)(12).