

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89615; File No. SR-NYSE-2020-67)

August 19, 2020

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend Article IV, Section 4.05 of the Thirteenth Amended and Restated Operating Agreement of the Exchange

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 August 7, 2020, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 IV, Section 4.05 of the Thirteenth Amended and Restated Operating Agreement of the Exchange (“Operating Agreement”), to allow the use of regulatory fines for charitable donations, and to 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 IV, Section 4.05 (Limitation on Distributions) of the Exchange's Operating Agreement to allow the use of regulatory fines for charitable donations, and to make additional conforming and non-substantive edits.

Currently, regulatory fines and other regulatory income may only be used to fund the Exchange's legal, regulatory and surveillance operations, and may not be distributed.³ However, the size of a regulatory fine is not related to the regulatory or legal budget of the Exchange. Rather, it is tailored to address the misconduct at issue in the matter for which it is levied. As a result, there may be times when the amount of the regulatory fines collected by the Exchange regulatory staff, when combined with regulatory fees and other regulatory income, is greater than the amount needed to fund the legal, regulatory and surveillance operations. The Exchange

³ See Thirteenth Amended and Restated Operating Agreement of New York Stock Exchange LLC, Art. IV, Sec. 4.05; see also Securities Exchange Act Release No. 79115 (October 18, 2016), 81 FR 73187 (October 24, 2016) (SR-NYSE-2016-66) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Article IV, Section 4.05 of the Tenth Amended and Restated Operating Agreement of the Exchange).

proposes that on such occasions it be able to distribute money obtained from regulatory fines to charity.

The Exchange proposes that any such charitable donations be subject to approval by the Regulatory Oversight Committee (“ROC”). All ROC members are members of the Board of Directors that meet the requirements of the independence policy of the Exchange, and the ROC is charged with reviewing the regulatory budget of the Exchange and inquiring into the adequacy of resources available in the budget for regulatory activities.⁴

Accordingly, the Exchange proposes to amend Section 4.05 as follows (proposed additions italicized):

Any regulatory assets or any regulatory fees, fines or penalties collected by the Company’s regulatory staff will be applied to fund the legal, regulatory and surveillance operations of the Company, and the Company shall not distribute such assets, fees, fines or penalties to the Member or any other entity, with the exception that regulatory fines may be used to make charitable donations, subject to approval by the ROC.

The Exchange believes that the proposed change would be consistent with previous rules

⁴ See Operating Agreement, Article II, Section 2.03(h)(ii) and Securities Exchange Act Release No. 75288 (June 24, 2015), 80 FR 37316 (June 30, 2015) (SR– NYSE–2015–27) (Notice of Filing of Proposed Rule Change Amending the Eighth Amended and Restated Operating Agreement of the Exchange To Establish a Regulatory Oversight Committee as a Committee of the Board of Directors of the Exchange and Make Certain Conforming Amendments to Exchange Rules). The independence policy is subject to Commission review. See Securities Exchange Act Release No. 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).

of the Exchange regarding fine income. Specifically, between 2007 and 2016 the Exchange was subject to certain internal procedures regarding the use of fine income (the “Fine Income Procedures”).⁵ The Fine Income Procedures provided that the NYSE Regulation, Inc. Board of Directors could determine to use unused fine income that had accumulated beyond a level reasonably necessary for future contingencies for a charitable purpose.⁶ The ROC assumed that responsibility from the Board of Directors of NYSE Regulation, Inc.⁷

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

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act⁸ in general, and Section 6(b)(1)⁹ in particular, in that it enables 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. The Exchange believes that the proposed rule change

⁵ See Securities Exchange Act Release No. 78326 (July 14, 2016), 81 FR 47184 (July 20, 2016) (SR-NYSE-2016-37) (Order Approving Proposed Rule Change Removing From Its Rules Certain Internal Procedures Regarding the Use of Fine Income).

⁶ See Securities Exchange Act Release No. 77899 (May 24, 2016), 81 FR 34393 (May 31, 2016) (SR-NYSE-2016-37) (Notice of Filing of Proposed Rule Change Removing From Its Rules Certain Internal Procedures Regarding the Use of Fine Income).

⁷ See 80 FR 37316, supra note 4, at note 25.

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(1).

also is consistent with Section 6(b)(4),¹⁰ which requires that the rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among the exchange's members and issuers and other persons using its facilities, and Section 6(b)(5),¹¹ which requires that the rules of the exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 believes that the proposed change would allow the Exchange to be so organized as 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 proposed change would recognize that the size of a regulatory fine is not related to the regulatory or legal budget of the Exchange, and as a result there may be times when the amount of the regulatory fines collected by the Exchange regulatory staff, when combined with regulatory fees and other regulatory income, is greater than the amount needed to fund the legal, regulatory and surveillance operations. In such a case, the proposed change would give the Exchange the option to make charitable donations using regulatory fines.

¹⁰ 15 U.S.C. 78f(b)(4).

¹¹ 15 U.S.C. 78f(b)(5).

The Exchange believes that it would be appropriate to permit charitable donations because such donations would not be commercial in nature. Indeed, by keeping them unavailable for commercial distributions or other commercial purposes, the proposed amended Section 4.05 would continue to “guard against the possibility that fines may be assessed to respond to budgetary needs rather than to serve a disciplinary purpose.”¹² It would “continue to help ensure that the Exchange does not inappropriately use its regulatory assets, fees, fines or penalties for commercial purposes or to distribute such assets, fees, fines or penalties to its direct parent, NYSE Group, Inc., or to any other entity.”¹³

For the same reasons, the Exchange believes that the proposed change would provide for the equitable allocation of reasonable dues, fees, and other charges among the Exchange's members.

The Exchange believes that the proposed change would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest because requiring ROC approval would facilitate an independent assessment of proposed charitable donations using regulatory fines. The Exchange believes that it is appropriate to have the ROC evaluate proposed charitable donations not only because its members are independent, but also because the ROC is responsible for overseeing the Exchange's regulatory and self-regulatory organization responsibilities and assessing its regulatory performance, including reviewing the regulatory budget of the Exchange and inquiring into the adequacy of resources available in the

¹² 81 FR 34393, supra note 6, at 34395, citing Securities Exchange Act Release No. 55216 (January 31, 2007), 72 FR 5779 (February 7, 2007) (NYSE-2006-109), at 5780.

¹³ 81 FR 47184, supra note 5, at 47187.

budget for regulatory activities.¹⁴ As a result, the ROC would be able to evaluate a proposed charitable donation within the context of the Exchange’s regulatory responsibilities and resources. Indeed, as it has previously noted, the Exchange “believes that the responsibility to assure the proper exercise by Exchange regulatory staff of the Exchange’s power to fine member organizations . . . properly lies with the ROC”¹⁵ That responsibility extends to the proposed use of regulatory fines.

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 such longer period 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

¹⁴ See Operating Agreement, Article II, Section 2.03(h)(ii).

¹⁵ 81 FR 34393, supra note 6, at 34397.

- (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-2020-67 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-2020-67. 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 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-2020-67, 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.¹⁶

J. Matthew DeLesDernier
Assistant Secretary

¹⁶ 17 CFR 200.30-3(a)(12).