

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79114; File No. SR-NYSEMKT-2016-93)

October 18, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Article IV, Section 4.05 of the Ninth Amended and Restated Operating Agreement of the Exchange

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on October 6, 2016, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III 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 Ninth Amended and Restated Operating Agreement of the Exchange (“Operating Agreement”) regarding use of regulatory assets, fees, fines and penalties, and make additional, 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.

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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Article IV, Section 4.05 (Limitation on Distributions) of the Operating Agreement (“Section 4.05”), regarding use of regulatory assets, fees, fines and penalties (“Regulatory Funds”), and make additional, non-substantive edits.

Proposed Amendment to Section 4.05

Section 4.05 provides that:

[t]he Company shall not use any regulatory assets or any regulatory fees, fines or penalties collected by Exchange regulatory staff for commercial purposes or distribute such assets, fees, fines or penalties to the Member or any other entity.⁴

Although it prohibits the use of Regulatory Funds for “commercial purposes,” that term is not defined in Section 4.05 or elsewhere in the Operating Agreement. Accordingly, to add greater clarity to the limits on the use of Regulatory Funds, the Exchange proposes to replace the prohibition against using Regulatory Funds for “commercial purposes” with a statement that Regulatory Funds “will be applied to fund the legal, regulatory and surveillance operations” of the Exchange. The prohibition on using Regulatory Funds for distributions to the Member or any other entity would remain.

In addition, “Exchange” is not a defined term in the Operating Agreement, which defines

⁴ See Ninth Amended and Restated Operating Agreement of NYSE MKT LLC, Art. IV, Sec. 4.05; see also Securities Exchange Act Release No. 77901 (May 25, 2016), 81 FR 35092 (June 1, 2016) (SR-NYSEMKT-2016-26).

the Exchange as the “Company.” Accordingly, the Exchange proposes to replace “Exchange regulatory staff” with “Company regulatory staff.”

The amended Section 4.05 would read as follows:

Any regulatory assets or any regulatory fees, fines or penalties collected by Company 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.

The Exchange believes that the increased clarity in the scope of the limits on use of Regulatory Funds will enhance the protections provided by Section 4.05 against the possibility that Regulatory Funds may be assessed to respond to the Exchange’s budgetary needs rather than to serve a disciplinary purpose.⁵

The proposed amendments would have the benefit of bringing Section 4.05 into greater conformity with the bylaws of the Exchange’s affiliate NYSE Arca, Inc., which provide that regulatory fees and penalties “will be applied to fund the legal, regulatory and surveillance operations of the Exchange.”⁶

The proposed amendments would make Section 4.05 more consistent with the limitations on the use of regulatory income of other self-regulatory organizations (“SROs”). Most such limitations are substantially similar to the proposed revised Section 4.05. For example, similar to

⁵ See Securities Exchange Act Release No. 77899 (May 24, 2016), 81 FR 34393 (May 31, 2016) (SR-NYSE-2016-37).

⁶ See Bylaws of NYSE Arca, Inc., Art. II, Sec. 2.06 (“Any revenues received by the Exchange from regulatory fees or regulatory penalties will be applied to fund the legal, regulatory and surveillance operations of the Exchange and will not be used to pay dividends. For purposes of this Section, regulatory penalties shall include restitution and disgorgement of funds intended for customers.”). The Exchange’s affiliate New York Stock Exchange LLC has submitted substantially the same proposed amendment to its operating agreement. See SR-NYSE-2016-66.

the proposed Section 4.05, the limited liability company agreements of the BOX Options Exchange (“BOX”), International Securities Exchange, LLC (“ISE”), and its affiliates ISE Gemini, LLC and ISE Mercury, LLC, provide that regulatory funds shall be used to fund the relevant SRO’s legal, regulatory and surveillance operations.⁷ Consistent with the proposed revised Section 4.05, their definition of “regulatory funds” includes fees, fines or penalties derived from its regulatory operations.⁸

Some SROs have provisions that are less restrictive than the proposed Section 4.05. More specifically, the governing documents of affiliates Bats BZX Exchange, Inc., Bats BYX Exchange, Inc., Bats EDGX Exchange, Inc., and Bats EDGA Exchange, Inc. permit such SROs to use regulatory funds to fund legal and regulatory operations, including surveillance and enforcement activities, but also provide that revenues received from fees derived from the regulatory function or regulatory penalties may be used to pay restitution and disgorgement of

⁷ Such provisions also limit the relevant SRO from making any distribution to its member using regulatory funds. See Box Options Exchange Limited Liability Company Agreement, Art. 1, Sec. 1.1 and Art. 8, Sec. 8.1; Third Amended and Restated Limited Liability Company Agreement of International Securities Exchange, LLC, Art. III, Sec. 3.3(ii); Second Amended and Restated Limited Liability Company Agreement of ISE Gemini, LLC, Art. III, Sec. 3.3(ii); and Limited Liability Company Agreement of ISE Mercury, LLC, Art. III, Sec. 3.3(ii).

⁸ The BOX definition of regulatory funds also states that such funds “shall not include revenues derived from listing fees, market data revenues, transaction revenues or any other aspect of the commercial operations of the Exchange or a facility of the Exchange, even if a portion of such revenues are used to pay costs associated with the regulatory operations of the Exchange.” Box Options Exchange Limited Liability Company Agreement, Art. 1, Sec. 1.1. The agreements of ISE and its affiliates have substantially similar language. See Third Amended and Restated Limited Liability Company Agreement of International Securities Exchange, LLC, Art. III, Sec. 3.3(ii); Second Amended and Restated Limited Liability Company Agreement of ISE Gemini, LLC, Art. III, Sec. 3.3(ii); and Limited Liability Company Agreement of ISE Mercury, LLC, Art. III, Sec. 3.3(ii).

funds intended for customers.⁹ The limited liability company agreement of Miami International Securities Exchange, LLC, and bylaws of National Stock Exchange, Inc., have similar provisions.¹⁰ By contrast, the operating agreement of the NASDAQ Stock Market LLC (“Nasdaq”) simply limits Nasdaq from making a distribution to its member using regulatory funds, and does not impose other restrictions.¹¹

Additional Proposed Amendments

The Exchange proposes to make a non-substantive amendment to the second sentence of Article II, Section 2.03(h)(iii) (Board). Currently, the sentence provides that the Committee for Review (“CFR”) will be responsible for, among other things, “reviewing determinations to limit

⁹ The described revenues may not be used for non-regulatory purposes or distributed to the stockholder. See Fourth Amended and Restated Bylaws of Bats BZX Exchange, Inc., Art. X, Sec. 4; Fourth Amended and Restated Bylaws of Bats BYX Exchange, Inc., Art. X, Sec. 4; Fifth Amended and Restated Bylaws of Bats EDGX Exchange, Inc., Art. X, Sec. 4; and Fifth Amended and Restated Bylaws of Bats EDGA Exchange, Inc., Art. X, Sec. 4.

¹⁰ See Second Amended and Restated Limited Liability Company Agreement of Miami International Securities Exchange, LLC, Art. IX, Sec. 9.4 (“Any Regulatory Funds will not be used for non-regulatory purposes or distributed to the LLC Member, but rather, shall be applied to fund the legal and regulatory operations of the Company (including surveillance and enforcement activities), or, as the case may be, shall be used to pay restitution and disgorgement of funds intended for customers.”); Third Amended and Restated By-laws of National Stock Exchange, Inc., Art. X, Sec. 10.4 (“Any revenues received by the Exchange from fees derived from its regulatory function or regulatory penalties will not be used to pay dividends and shall be applied to fund the legal and regulatory operations of the Exchange (including surveillance and enforcement activities), or, as the case may be, shall be used to pay restitution and disgorgement of funds intended for customers.”); see also Amended and Restated By-Laws of Miami International Securities Exchange, LLC, Art. IX, Sec. 9.4.

¹¹ See Second Amended Limited Liability Company Agreement of The NASDAQ Stock Market LLC, Sec. 15. See also by-laws of NASDAQ BX, Inc., Art. IX, Sec. 9.8, and Second Amended Limited Liability Company Agreement of NASDAQ PHLX LLC, Sec. 14. When the NASDAQ OMX Group, Inc. acquired the Boston Stock Exchange (“BSE”), the BSE by-laws were amended to include a similar provision that dividends could not be paid to the stockholders using regulatory funds. See Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR–BSE– 2008– 02; SR–BSE–2008–23; SR–BSE–2008– 25; SR–BSECC–2008–01), at 46942.

or prohibit the continued listing of an issuer’s securities on the Exchange.” The Exchange proposes to replace “Exchange” with “exchange operated by the Company.” The Exchange proposes to make the change because, as noted above, “Exchange” is not a defined term in the Operating Agreement.

Finally, 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 Act¹² in general, and Section 6(b)(1)¹³ 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 replacing the current prohibition against using Regulatory Funds for undefined “commercial purposes” with a requirement that Regulatory Funds “be applied to fund the legal, regulatory and surveillance operations” of the Exchange 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 with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange, because it would add greater clarity to the limits on the use of Regulatory Funds, enhancing the protections provided by Section 4.05 against the possibility that Regulatory Funds may be assessed to respond to the Exchange’s

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(1).

budgetary needs rather than to serve a disciplinary purpose.¹⁴ The proposed changes to Section 4.05 would make it more transparent to market participants.

Similarly, the Exchange believes that replacing “Exchange regulatory staff” with “Company regulatory staff” in Section 4.05 and replacing “Exchange” with “exchange operated by the Company” in Article II, Section 2.03(h)(iii) 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 with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange, because it would add greater clarity to the Operating Agreement by using the defined term “Company” instead of “Exchange,” which is not defined in the Operating Agreement

For the same reasons, the Exchange believes that the proposed rule changes are consistent with Section 6(b)(4),¹⁵ 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),¹⁶ 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 proposed changes would add greater clarity to the limits on the use of

¹⁴ See Securities Exchange Act Release No. 77899 (May 24, 2016), 81 FR 34393 (May 31, 2016) (SR-NYSE-2016-37).

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ 15 U.S.C. 78f(b)(5).

Regulatory Funds, enhancing the protections provided by Section 4.05, and ensure the use of defined terms, thereby making Section 4.05 and Article II, Section 2.03(h)(iii) more transparent to market participants.

The Exchange notes that the proposed change to Section 4.05 would have the additional benefit of bringing the Exchange's restrictions on the use of regulatory assets and income into greater conformity with those of its affiliate NYSE Arca, Inc. In addition, the proposed amendments would make Section 4.05 more consistent with the limitations on the use of regulatory income of other SROs. Most such limitations are substantially similar to the proposed revised Section 4.05. In fact, the proposed Section 4.05 is more restrictive than the provisions of some other SROs, whose rules allow the use of regulatory funds for restitution and disgorgement of funds intended for customers, or simply limit the SRO from making a distribution to its member using regulatory funds.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁷ and Rule 19b-4(f)(6) thereunder.¹⁸ Because the proposed rule change does not: (i)

¹⁷ 15 U.S.C. 78s(b)(3)(A)(iii).

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)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)¹⁹ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²⁰ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

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)²¹ 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:

¹⁸ 17 CFR 240.19b-4(f)(6).

¹⁹ 17 CFR 240.19b-4(f)(6).

²⁰ 17 CFR 240.19b-4(f)(6)(iii).

²¹ 15 U.S.C. 78s(b)(2)(B).

- 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-NYSEMKT-2016-93 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSEMKT-2016-93. 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; 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-2016-93 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.²²

Robert W. Errett
Deputy Secretary

²² 17 CFR 200.30-3(a)(12).