

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62304; File No. SR-NYSEArca-2010-31)

June 16, 2010

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change to Amend NYSE Arca Rule 3.3(a) and Section 401(a) of the Exchange's Bylaws to Eliminate the Exchange's Audit Committee, Compensation Committee, and Regulatory Oversight Committee

On April 20, 2010, NYSE Arca, Inc. ("NYSE Arca" 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 NYSE Arca Rule 3.3(a) and Section 401(a) of the Exchange's Bylaws to eliminate the Exchange's Audit Committee, Compensation Committee, and Regulatory Oversight Committee. The proposed rule change was published for comment in the Federal Register on May 11, 2010.³ The Commission received no comments regarding the proposal. This order approves the proposed rule change.

I. Description of the Proposed Rule Change

Currently, the Board of Directors of the Exchange and its ultimate parent company, NYSE Euronext, each maintain its own Audit Committee and Compensation Committee. As more fully discussed in the Notice, the Exchange states that it has found that the work of these committees overlaps substantially.⁴ As a result, the Exchange has proposed to revise its Bylaws to allow for the elimination of its Audit and Compensation

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 62032 (May 4, 2010), 75 FR 26304 ("Notice").

⁴ See Notice, supra note 3.

Committees. In addition, the Exchange has proposed to eliminate its Regulatory Oversight Committee (“ROC”), and in lieu thereof, provide that the Board of NYSE Regulation, Inc. (“NYSER”)⁵ and the Board of the Exchange each will exercise a portion of the current responsibilities of the ROC, with the Board of the Exchange retaining ultimate legal responsibility for the regulation of its permit holders⁶ and its market.⁷

II. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁸ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,⁹ which requires a national securities exchange to 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 Commission also finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁰ in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and

⁵ NYSER is a not-for-profit indirect subsidiary of NYSE Euronext.

⁶ Permit holders at the Exchange are “members” of the Exchange as that term is defined in Section 3 of the Act.

⁷ These arrangements are set forth in various regulatory services agreements. See infra note 16 and accompanying text.

⁸ In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78f(b)(1).

¹⁰ 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. The Commission has previously approved a structure in which certain committees of the Board of NYSE Euronext, including its Audit and Compensation Committees, were authorized to perform functions for subsidiaries of NYSE Euronext, including the New York Stock Exchange, LLC (“NYSE”),¹¹ and NYSE Amex, Inc. (“NYSE Amex”).¹² The Commission has also previously approved a structure for NYSE Amex in which the Board of NYSE Amex and the Board of NYSE Euronext each exercise a portion of the Regulatory Oversight Committee responsibilities for NYSE Amex, with NYSE Amex retaining ultimate legal responsibility for the regulation of its permit holders and its market.¹³

The NYSE Arca Audit Committee. Under current Exchange Rule 3.3(a)(3)(B), the primary functions of the NYSE Arca Audit Committee are (i) to conduct an annual review with the independent auditors, to determine the scope of their examination and the cost thereof; (ii) to periodically review with the independent auditors and the internal auditor the Exchange’s internal controls and the adequacy of the internal audit program; (iii) to review the annual reports submitted both internally and externally, and take such action with respect thereto as it may deem appropriate, and (iv) to recommend to the Board of NYSE Arca independent public accountants as auditors of the Exchange and its subsidiaries.

¹¹ See Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120).

¹² See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-Amex-2008-62, SR-NYSE-2008-60) (“NYSE Amex Approval Order”).

¹³ See id.

The NYSE Euronext Audit Committee is responsible under its charter for assessing the effectiveness of the internal audit function and reviewing with management and the independent auditor any major issues as to the adequacy of NYSE Euronext's internal risk management and internal controls, as well as meeting to review and discuss with management and the independent auditor NYSE Euronext's annual audited financial statements, quarterly financial statements prior to the filing of Form 10-Q, and significant financial reporting issues and judgments made in connection with the preparation of the financial statements.

In connection with this proposal, the Exchange represents that: (i) the specific responsibilities of the NYSE Euronext Audit Committee, as well as numerous others in its charter relating to oversight of both the independent and internal auditors, financial statement and disclosure matters, and corporate oversight, result in the responsibilities of the NYSE Arca Audit Committee being fully duplicated by the responsibilities of the NYSE Euronext Audit Committee; (ii) the NYSE Euronext Audit Committee will continue to be composed at all times of independent directors and will continue to review the financial condition of the Exchange as part of its oversight of the financial processes of NYSE Euronext and of each of its consolidated subsidiaries; (iii) NYSER has broad authority to oversee the regulatory activities of the Exchange and the other self-regulatory organizations whose ultimate parent is NYSE Euronext, through delegated authority and regulatory services agreements; (iv) it is the practice of NYSE Euronext's Global Risk and Audit Services Department ("RAS"), which performs internal audit functions, to report to the NYSER Board on all internal audit matters relating to the Exchange's regulatory responsibilities, and to ensure that NYSER has the appropriate authority to

oversee RAS's activities with respect to the Exchange's regulatory responsibilities pursuant to the provisions of the RSA between the Exchange and NYSE; (v) RAS's written procedures will be amended to stipulate that the NYSE Board of Directors may, at any time, request that RAS conduct an audit of a matter of concern to it and report the results of the audit both to the NYSE Board of Directors and the NYSE Euronext Audit Committee; (vi) the chief regulatory officer of the Exchange would be in attendance at any meeting of the NYSE Board of Directors at which the results of any such audit would be reported by RAS; and (vii) the Exchange retains the authority to direct NYSE to request that RAS conduct such an audit of a matter of concern to it.

The Commission notes that the proposed elimination of the NYSE Arca Audit Committee is comparable to a structure for NYSE and NYSE Amex that the Commission has previously considered and approved.¹⁴ The Commission finds that the proposed elimination of the NYSE Arca Audit and Compensation committees is consistent with the Act.

NYSE Arca Compensation Committee. The Exchange also proposes to eliminate its Compensation Committee, and to prescribe that the functions of that committee be performed by the NYSE Euronext Human Resources and Compensation Committee. Pursuant to current Exchange Rule 3.3(a)(4)(B), the NYSE Arca Compensation Committee is required to (i) review and approve corporate goals and objectives relevant to the Exchange CEO's compensation; (ii) evaluate the CEO's performance in light of those goals and objectives; (iii) set the CEO's compensation level based on this evaluation; and (iv) make recommendations to the Exchange's Board of Directors with

¹⁴ See supra notes 11 and 12.

respect to the design of incentive compensation and equity-based plans. As more fully set forth in the Notice, the Exchange represents that the NYSE Arca Compensation Committee's assigned responsibilities with respect to compensation and personnel matters overlap with the broader mandate of the NYSE Euronext Human Resources and Compensation Committee. The Commission notes that the proposed elimination of the NYSE Arca Compensation Committee is comparable to a structure for NYSE and NYSE Amex that the Commission has previously considered and approved.¹⁵ The Commission finds that the proposed elimination of the NYSE Arca Compensation Committees is consistent with the Act.

Elimination of NYSE Arca Regulatory Oversight Committee

The Exchange also proposes to eliminate its ROC, and in lieu thereof, provide for the exercise of the current formal responsibilities of the ROC to be divided between the NYSE Board and the Exchange's Board. Currently, the ROC is responsible for ensuring (i) the independence of Exchange regulation; (ii) adequate resources for the Exchange to properly fulfill its self-regulatory obligations; and (iii) that Exchange management fully supports the execution of the regulatory process.

In support of its proposal to eliminate the ROC, the Exchange represents that it has previously entered into an RSA with NYSE to perform all of the Exchange's regulatory functions on the Exchange's behalf; that the Financial Industry Regulatory Authority ("FINRA") performs some of the regulatory functions contracted out to NYSE pursuant to a separate multi-party regulatory services agreement with FINRA;¹⁶

¹⁵ See supra note 12.

¹⁶ The Commission notes that on June 14, 2010, NYSE, NYSE, NYSE Amex, and NYSE Arca ("NYSE Parties") entered into a new multi-party regulatory services

and that these regulatory contractual arrangements closely parallel the regulatory arrangements for NYSE Amex that the Commission reviewed and approved in the NYSE Amex Approval Order.¹⁷ The Exchange states that the proposed elimination of its ROC will result in regulatory arrangements similar to those approved for NYSE Amex. In addition to the foregoing, the Exchange specifically represents that (i) NYSER will provide a comparable level of independence as that of a ROC; (ii) NYSE Euronext has agreed to provide adequate funding to NYSE Regulation to conduct its regulatory activities with respect to the Exchange; and (iii) notwithstanding its regulatory agreements, the Exchange retains ultimate legal responsibility for the regulation of its permit holders and its market and has full authority to take action to assure that its regulatory responsibilities are met. Acknowledging that it retains ultimate legal responsibility, the Exchange has further stated that its Board of Directors will directly assume the ROC's current formal responsibility to ensure that Exchange management fully supports the execution of the regulatory process and that it retains the authority to direct NYSER and FINRA to take any action necessary to fulfill the Exchange's statutory and self-regulatory obligations.

The Commission notes that the proposed elimination of the NYSE Arca ROC is comparable to the structure that the Commission approved in the NYSE Amex Approval

agreement with FINRA, pursuant to which FINRA will perform additional regulatory functions on behalf of the NYSE Parties, including market surveillance and enforcement activities. See <http://www.nyse.com/press/1276509404802.html>. See also June 16, 2010 email correspondence from William Love, Chief Counsel, NYSE Euronext, to Heidi Pilpel, Special Counsel, Commission.

¹⁷ See supra note 12.

Order.¹⁸ The Commission finds that the proposed elimination of the NYSE Arca ROC is consistent with the Act.

III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule change (SR-NYSEArca-2010-31) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Florence E. Harmon
Deputy Secretary

¹⁸ See supra note 12.

¹⁹ 15 U.S.C. 78s(b)(2).

²⁰ 17 CFR 200.30-3(a)(12).