

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-62377; File No. SR-NYSEArca-2010-55)

June 25, 2010

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Arca, Inc. to Amend the Bylaws of NYSE Euronext to Adopt a Majority Voting Standard in Uncontested Elections of Directors

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on June 14, 2010, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “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 is submitting this rule filing in connection with the proposal of its ultimate parent, NYSE Euronext (the “Corporation”),<sup>4</sup> to amend its bylaws (“Bylaws”) to replace the plurality vote standard for election of directors in uncontested elections that is currently in the Bylaws with a majority vote standard for such elections. The existing plurality vote standard will be retained in connection with contested elections for directors. The proposed rule change is identical to a rule change filed by the New York Stock Exchange LLC (“NYSE”) that was recently approved by the Commission.<sup>5</sup> The text of the proposed rule change is available at the

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> NYSE Arca, a Delaware corporation, is an indirect wholly-owned subsidiary of NYSE Euronext.

<sup>5</sup> Securities Exchange Act Release No. 61947 (April 20, 2010), 75 FR 22169 (April 27,

Exchange, the Commission's Web site at <http://www.sec.gov>, the Commission's Public Reference Room, and [www.nyse.com](http://www.nyse.com).

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is submitting this rule filing in connection with the Corporation's proposal to amend its Bylaws to replace the plurality vote standard for election of directors in uncontested elections that is currently in the Bylaws with a majority vote standard for such elections. Specifically, the Bylaws currently provide that "directors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors." Under the Corporation's corporate governance guidelines previously adopted by the Board of Directors of the Corporation ("Board"), however, any director nominee in an uncontested election (being an election in which the number of nominees equals the number of directors to be elected) who receives a greater number of "withheld" votes than "for" votes (including any "against" votes if that option were to be made available on the proxy card) must immediately tender his or her resignation from the Board. The Board will then

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2010) (SR-NYSE-2010-18).

decide, through a process managed by the Nominating and Governance Committee and excluding the nominee in question, whether to accept the resignation. In a contested election (being an election in which the number of nominees exceeds the number of directors to be elected), the unqualified plurality vote standard controls.

#### Uncontested Election

The Corporation is proposing to add an explicit majority voting provision for uncontested director elections to the Bylaws, thereby replacing the plurality vote standard for election of directors in such elections that is currently in the Bylaws. The existing plurality vote standard will be retained in connection with contested elections for directors. Under the proposed amendment to the Bylaws, the proxy card would change for an uncontested election, and the stockholders would be given the choice to vote “for,” “against” or “abstain” with respect to each director nominee individually.<sup>6</sup> In such an election, each director would be elected by the vote of the majority of the votes cast with respect to such director’s election, meaning that the number of votes cast “for” such director’s election exceeded the number of votes cast “against” that director’s election (with “abstentions” not counted as a vote cast either “for” or “against” such director’s election). In the event that any incumbent director fails to receive a majority of the votes cast, such director would be required to tender his or her resignation to the Nominating and Governance Committee of the Board (or another committee designated by the Board), and such committee would make a recommendation to the Board as to whether to accept or reject such resignation or whether other action should be taken. The Board would then act on the

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<sup>6</sup> Stockholders are currently given three choices when voting for a slate of director nominees: they can vote (1) “for” all nominees, (2) “withheld” for all nominees or (3) “withheld” for certain nominees and “for” the remaining nominees.

recommendation of such committee and publicly disclose its decision regarding the tendered resignation and the rationale behind the decision.

The proposed amendment to the Bylaws also provides that a director who tenders his or her resignation as described above will not participate in the recommendation by the Nominating and Governance Committee or the Board of Directors action regarding whether to accept the tendered resignation. In the event that each member of the Nominating and Governance Committee fails to receive a majority of the votes cast in the same uncontested election, then the independent directors who received a majority of the votes cast in such election must appoint a committee among themselves to consider the tendered resignation and recommend to the Board whether to accept it. However, if the only directors who received a majority of the votes cast in such election constitute three or fewer directors, all directors may participate in the action regarding whether to accept the tendered resignation.

Pursuant to the proposed amendment to the Bylaws, if the Board accepts a director's resignation as part of the process described above for uncontested elections, or if a nominee for director is not elected and the nominee is not an incumbent director, the Board may (i) fill the remaining vacancy as provided in Section 3.6 of the Bylaws and Article VI, Section 6 of the Certificate of Incorporation (involving a majority vote of the remaining directors then in office, though less than a quorum, or by the sole remaining director) or (ii) decrease the size of the Board as provided in Section 3.1 of the Bylaws and Article VI, Section 3 of the Certificate of Incorporation (involving adoption of a resolution by two-thirds of the directors then in office).

### General Election Requirements

The following applies to elections of directors and is not being amended. Section 2.7 of the Bylaws provides that, unless otherwise provided in the Certificate of Incorporation of the Corporation, each stockholder entitled to vote at any meeting of stockholders shall be entitled to one vote for each share of stock held by such stockholder that has voting power upon the matter in question. This entitlement, however, is subject to the voting limitation in the Certificate of Incorporation that generally prohibits a beneficial owner, either alone or together with related parties, from voting or causing the voting of shares of stock of the corporation, in person or by proxy or through any voting agreement or other arrangement, to the extent that such shares represent in the aggregate more than 10% of the then outstanding votes entitled to be cast on such matter. Any votes purported to be cast in excess of this limitation will be disregarded.<sup>7</sup>

Relative to the foregoing, if any beneficial owner of the Corporation's stock, either alone or together with related parties, is party to any agreement, plan or other arrangement with any other person or entity relating to shares of stock of the Corporation entitled to vote on any matter under circumstances in which (i) the result would be that shares of stock of the Corporation that would be subject to such agreement, plan or other arrangement would not be voted on any matter, or any proxy relating thereto would be withheld and (ii) the effect of the agreement, plan or arrangement would be to enable a beneficial owner (but for these provisions), either alone or together with related parties, to vote, possess the right to vote or cause the voting of shares of the Corporation's stock to exceed 10% of the then outstanding votes entitled to be cast (assuming that all shares of stock of the Corporation that are subject to the agreement, plan or other arrangement are not outstanding votes entitled to be cast on such matter), then this recalculated

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<sup>7</sup> See NYSE Euronext Amended and Restated Certificate of Incorporation at Article V, Section 1(A).

10% voting limitation will be applicable. Any votes purported to be cast in excess of this recalculated voting limitation will be disregarded.<sup>8</sup>

At each meeting of stockholders of the Corporation, except as otherwise provided by law or the Certificate of Incorporation of the Corporation, the holders of a majority of the voting power of the outstanding shares of stock of the Corporation entitled to vote on a matter at the meeting, present in person or represented by proxy, will constitute a quorum (it being understood that any shares in excess of the applicable voting limitation discussed above will not be counted as present at the meeting and will not be counted as outstanding shares of stock of the Corporation for purposes of determining whether there is a quorum, unless and only to the extent that such voting limitation shall have been duly waived as provided in the Certificate of Incorporation).<sup>9</sup>

As noted above, the proposed rule change is identical to a rule change filed by the NYSE (the “NYSE Rule Change”) that was recently approved by the Commission.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>10</sup> of the Act, in general, and furthers the objectives of Section 6(b)(1)<sup>11</sup> of the Act, 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 proposed rule change is also consistent with, and furthers the

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<sup>8</sup> See id.

<sup>9</sup> See NYSE Euronext Amended and Restated Certificate of Incorporation at Article VIII, Section 2.

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(1).

objectives of, Section 6(b)(5)<sup>12</sup> of the Act, in that it is 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 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. Specifically, the Exchange believes that the proposed rule change will protect investors and the public interest by codifying in the Bylaws the existing policy of the Corporation aimed at ensuring better corporate governance and accountability to stockholders by means of a voting procedure leading to election results that more accurately reflect the views of stockholders on the qualifications and suitability of individual director nominees, even if there are no alternative director nominees to vote for on the ballot.

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 Act.

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

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 for 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,

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<sup>12</sup> 15 U.S.C. 78f(b)(5).

the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>13</sup> and Rule 19b-4(f)(6)<sup>14</sup> thereunder.

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative on the date of its approval by the Euronext College of Regulators, which approval the Exchange believes is imminent. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will enable the Exchange to implement the proposed rule change immediately upon receiving the approval of the Euronext College of Regulators. In addition, as noted by the Exchange, the proposal is identical to the recently approved NYSE Rule Change.<sup>15</sup> For these reasons, the Commission designates the proposed rule change as operative upon filing.<sup>16</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</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>15</sup> See Securities Exchange Act Release No. 61947 (April 20, 2010), 75 FR 22169 (April 27, 2010) (SR-NYSE-2010-18) (order approving identical proposal submitted by NYSE).

<sup>16</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).



necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2010-55 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2010-55. 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 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, 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-NYSEArca-2010-55 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.<sup>17</sup>

Florence E. Harmon  
Deputy Secretary

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