company (an “interval fund”) to make repurchase offers of between five and twenty-five percent of its outstanding shares at net asset value at periodic intervals pursuant to a fundamental policy of the interval fund. Rule 23c–3(b)(1) under the Act permits an interval fund to deduct from repurchase proceeds only a repurchase fee, not to exceed two percent of the proceeds, that is paid to the interval fund and is reasonably intended to compensate the fund for expenses directly related to the repurchase. A Fund will not impose a repurchase fee on investors who purchase and tender their shares.

3. Section 23(c)(3) provides that the Commission may issue an order that would permit a closed-end investment company to repurchase its shares in circumstances in which the repurchase is made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased.

4. Applicants request relief under section 6(c), discussed above, and section 23(c)(3) from rule 23c–3 to the extent necessary for the Funds to impose EWCs on shares of the Funds submitted for repurchase that have been held for less than a specified period.

5. Applicants state that the EWCs they intend to impose are functionally similar to CDSLs imposed by open-end investment companies under rule 6c–10 under the Act. Rule 6c–10 permits open-end investment companies to impose CDSLs, subject to certain conditions. Applicants note that rule 6c–10 is grounded in policy considerations supporting the employment of CDSLs where there are adequate safeguards for the investor and state that the same policy considerations support imposition of EWCs in the interval fund context. In addition, applicants state that EWCs may be necessary for the distributor to recover distribution costs. Applicants represent that any EWC imposed by the Funds will comply with rule 6c–10 under the Act as if the rule were applicable to closed-end investment companies. The Funds will disclose EWCs in accordance with the requirements of Form N–1A concerning CDSLs.

Asset-Based Service and Distribution Fees

1. Section 17(d) of the Act and rule 17d–1 under the Act prohibit an affiliated person of a registered investment company, or an affiliated person of such person, acting as principal, from participating in or effectuating in connection with any joint enterprise or joint arrangement in which the investment company participates unless the Commission issues an order permitting the transaction. In reviewing applications submitted under section 17(d) and rule 17d–1, the Commission considers whether the participation of the investment company in a joint enterprise or joint arrangement is consistent with the provisions, policies and purposes of the Act, and the extent to which the participation is on a basis different from or less advantageous than that of other participants.

2. Rule 17d–3 under the Act provides an exemption from section 17(d) and rule 17d–1 to permit open-end investment companies to enter into distribution arrangements pursuant to rule 12b–1 under the Act. Applicants request an order under section 17(d) and rule 17d–1 under the Act to the extent necessary to permit the Funds to impose asset-based service and distribution fees. Applicants have agreed to comply with rules 12b–1 and 17d–3 as if those rules applied to closed-end investment companies, which they believe will resolve any concerns that might arise in connection with a Fund financing the distribution of its shares through asset-based service and distribution fees.

3. For the reasons stated above, applicants submit that the exemptions requested under section 6(c) are necessary and appropriate in the public interest and are consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants further submit that the relief requested pursuant to section 23(c)(3) will be consistent with the protection of investors and will insure that applicants do not unfairly discriminate against any holders of the class of securities to be purchased. Finally, applicants state that the Funds’ imposition of asset-based service and distribution fees is consistent with the provisions, policies and purposes of the Act and does not involve participation on a basis different from or less advantageous than that of other participants.

Applicants’ Condition

Applicants agree that any order granting the requested relief will be subject to the following condition: Each Fund relying on the order will comply with the provisions of rules 6c–10, 12b–1, 17d–3, 18f–3, 22d–1, and, where applicable, 11a–3 under the Act, as amended from time to time, as if those rules applied to closed-end management investment companies, and will comply with the Sales Charge Rule, as amended from time to time, as if that rule applied to all closed-end management investment companies.
Commission is publishing this notice to solicit comment on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Background

On June 21, 2016, the Commission approved a proposed rule change relating to a corporate transaction in which Nasdaq, Inc. would become the ultimate parent of ISE (the “Nasdaq Acquisition Order,” supra note 6), and Nasdaq MRX, LLC (“MRX,” and together with ISE and GEMX, the “ISE Exchanges”).6 On June 30, 2016, pursuant to this transaction, Nasdaq, Inc. acquired all of the capital stock of U.S. Exchange Holdings, Inc. (“Exchange Holdings”), and thereby became the indirect, ultimate parent of the ISE Exchanges.7 Nasdaq, Inc. is also the ultimate parent of NASDAQ BX, Inc. (“BX”). The NASDAQ Stock Market LLC (“Nasdaq”), and NASDAQ PHILX LLC (“Phlx” and, together with Nasdaq and BX, the “Nasdaq Exchanges”).8 The

of other exchanges, including provisions concerning limitations on board committee powers, the confidentiality of books and records, the nomination of certain board directors by petition, and the confidentiality of board meetings pertaining to the Exchange’s self-regulatory functions; (2) revisions to the proposed amendments to ISE’s rules regarding ownership, voting, and transfer restrictions relating to certain market maker rights on the Exchange; (3) revisions to the related discussion of the purpose of the proposed changes; (4) clarification of certain aspects of the proposed rule changes (e.g., the nomination of Member Representative members to committees; and certain market maker rights and their related ownership, voting, and transfer restrictions); and (5) certain technical corrections (e.g., correcting incorrect cross references to Exhibits 5A, SB, SC, and SD, updating the proposed implementation date and the description of exchange’s most recent annual election of its board, and amending the proposed New LLC Agreement to reflect the current address of the Exchange and its Sole LLC Member). When the Exchange filed Amendment No. 1 the Commission, it also submitted Amendment No. 1 to the public comment file for SR–ISE–2017–32 (available at: https://www.sec.gov/comments/sr-ise-2017-32/ie201732.htm).
among other things, that the rules of a national securities 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, and 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.

A. Ownership of the Exchange

ISE is currently structured as a Delaware limited liability company ("Delaware LLC")23 and, as discussed above, is a wholly-owned subsidiary of ISE Holdings. ISE Holdings, in turn, is a wholly-owned subsidiary of Exchange, which is wholly-owned by Nasdaq, Inc. Pursuant to the Current LLC Agreement, ISE Holdings is defined as the Sole LLC Member.24 As the Sole LLC Member, ISE Holdings may assign all (but not less than all) of its interest in the Exchange, subject to prior approval by the Commission pursuant to the rule filing procedures under Section 19 of the Act.25

Pursuant to the proposed rule change, ISE will be merged with a newly formed Delaware LLC, whereby ISE will be the surviving entity, governed by the New Governing Documents. ISE Holdings will continue to be the direct owner of ISE and will be defined as the "Company Member" or "Sole LLC Member" in the New LLC Agreement and New By-Laws.26 Additionally, pursuant to the New LLC Agreement, ISE Holdings will not be permitted to assign, in whole or in part, its limited liability company interest in the Exchange, unless such transfer or assignment is filed with and approved by the Commission pursuant to the rule filing procedures under Section 19 of the Act.27

The Commission believes that the proposed restrictions on ISE Holdings' assignment of its ownership interest in ISE, taken together with restrictions on voting and ownership limitations in the governing documents of ISE's Upstream Owners that were previously approved by the Commission,28 are designed to minimize the potential that a person could improperly interfere with, or restrict the ability of, the Commission or ISE to effectively carry out its regulatory oversight responsibilities under the Act. The Commission also notes that the restrictions on transfer of ownership interest in the Exchange will be similar to those currently in place. In this regard, the Commission believes the proposed rule change is consistent with Section 6(b)(1) of the Act in particular, which requires that an exchange be organized and have the capacity to be able 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 regulations thereunder, and the rules of the exchange.

B. Governance of the Exchange

With the replacement of the Current Governing Documents with the New Governing Documents, the Exchange proposes to replace certain provisions pertaining to governance of the Exchange with related provisions that are based on provisions currently in the Nasdaq LLC Agreement and Nasdaq By-Laws.29 These changes include, among others, provisions governing: the composition of the Exchange's board of directors ("Board" or "Board of Directors," and each member of the Board of Directors a "Director"); the process for nominating, electing, and removing Directors; the filling of vacancies on the Exchange's Board; its board committee structure; and regulatory independence of the Exchange.30 As noted above, the Exchange intends that the New Governing Documents would be implemented no later than by the end of the third quarter of 2017.31

1. Board of Directors: Powers and Composition

Under the New Governing Documents and consistent with the Current LLC Agreement,32 the business and affairs of the Exchange will be managed under the discretion of its Board, which will be vested with the power to do any and all acts necessary or for the furtherance of the purposes described in the New LLC Agreement, including fulfilling the Exchange's self-regulatory responsibilities as set forth in the Act.33 The new Board will also have the power to bind the Exchange and delegate powers,34 as it does today.35

ISE Holdings, as the Sole LLC Member, may determine at any time, in its sole and absolute discretion, the number of Directors to constitute the Board of Directors.36 At least 20% of the Directors shall be "Member Representative Directors."37 Additionally, the Board of Directors must include a number of "Non-Industry Directors," including at least one "Public Director" and at least one "issuer representative" (or if the Board consists of ten or more Directors, at least two issuer representatives), that equals or exceeds the sum of the number of Industry Directors and Member Representative Directors.38
Additionally, up to two Staff Directors may be elected to the Board. A Director may not be subject to a statutory disqualification. A Director will be removed upon a determination by the Board, by a majority vote of the remaining Directors, that the Director no longer satisfies the classification for which the Director was elected and that the Director’s continued service on the Board would violate the board composition requirements.

As discussed in more detail below, the current Board was elected at the Exchange’s 2017 annual election of its Board (the “2017 Annual Election,” and such Board the “2017 Board”), which was held on June 19, 2017, pursuant to the Current Governing Documents. When the New Governing Documents become operative, the 2017 Board will appoint a Nominating Committee and a Member Nominating Committee.

The Director with direct ties to the securities industry as a result of connections to a broker-dealer, the Exchange or its affiliates, FINRA, or certain service providers to such entities. See Notice, supra note 3, at 20516 n.69. See also New By-Laws, Article II, Section 2.2.

40 See New By-Laws, Article II(a); see also Notice, supra note 3, at 20516 n.72 and accompanying text.

41 See Current LLC Agreement, Article II, Section 2.2.

42 See New LLC Agreement, Section 9(a).

43 See New By-Laws, Article III, Section 2(b).

If the remaining term of office of a removed Director is not more than six months, the Board will not be deemed to be in violation of the Article III, Section 2(a) composition requirements during the vacancy by virtue of such vacancy. See id.

44 See infra notes 65–68, 70–71, and accompanying text.

45 See Notice, supra note 3, at 20517. The Nominating Committee will consist of no fewer than three and no more than six members. The number of Non-Industry members on the Nominating Committee shall equal or exceed the number of Industry members on the Nominating Committee. If the Nominating Committee consists of six members, two shall be Public members, and if the Nominating Committee consists of seven or more members, at least three shall be Public members. The Member Nominating Committee shall consist of no fewer than three and no more than six members. All members of the Member Nominating Committee shall be a current associated person of a current Exchange Member, and the Board will appoint such individuals after appropriate consultation with representatives of Exchange Members. See New By-Laws, Article III, Sections 6(b)(i) and (iii). See also Notice, supra note 3, at 20520–21, the compositional requirements for, and responsibilities of, the Nominating Committee and Member Nominating Committee.

An “industry member” will be a member of any committee appointed by the Board that is associated with a broker-dealer as defined in the New By-Laws, Article I(a). A “Non-industry member” will be defined as any committee appointed by the Board who is (i) a Public member; (ii) an officer or employee of an issuer of securities listed on the Exchange; or (iii) any other individual who would not be an Industry member. See New By-Laws, Article I(a). A “Public member” will be defined as a member of any committee appointed by the Board who has no material business relationship with a broker or dealer, the Company Member Nominating Committee will nominate candidates for each Member Representative Director position on the Board, as well as nominate candidates for appointment by the Board for each vacant or new position on a committee that is to be filled with a “Member Representative member” under the New By-Laws. If an Exchange Member submits a timely and duly executed written nomination to the Secretary of the Exchange, additional candidates may be added to the List of Candidates for the Member Representative Director positions. These candidates, together with candidates nominated by the Member Nominating Committee, will then be presented to Exchange Members for election. The Nominating Committee or its affiliates, or FINRA. See New By-Laws, Article I(aa).

Pursuant to the New By-Laws, Member Representative Directors shall be elected to the Board on an annual basis. See New By-Laws, Article II, Section 1(a).

1 Pursuant to the New By-Laws, a “Member Representative member” will be defined as a member of any committee appointed by the Board who has been elected or appointed after having been nominated by the Member Nominating Committee pursuant to the By-Laws, See New By-Laws, Article I(a). As discussed further below, the required inclusion of such representatives on certain committees, and the process by which they are to be selected, is tied with the fair representation requirements of Section 6(b)(3) of the Act. See infra note 102 and accompanying text. See also Amendment No. 1.

In Amendment No. 1, the Exchange clarifies the description of the functions of the Member Nominating Committee. Specifically, the Exchange clarifies that the new Member Nominating Committee is responsible for: (i) The nomination for election of Member Representative Directors to the Board and (ii) the nomination for appointment of Member Representative members to the committees requiring such inclusion. See New By-Laws, Article I(aa).

List of Candidates will be defined as the list of candidates for Member Representative Director positions to be elected on an Election Date. See New By-Laws, Article I(aa).

“Election Date” will be defined as a date selected by the Board on an annual basis, on which Exchange Members may vote with respect to Election of Member Representative Directors at the event of a Contested Election. See New By-Laws, Article I(k).

See also infra note 52, for the definition of “Contested Election.”

See New By-Laws, Article II, Section 1(b). See also Amendment No. 1.

If there is only one candidate for each Member Representative Director position to be elected on the annual election date, the Member Representative Director will be elected by ISE Holdings as the Sole LLC Member. If, as a result of the nomination and petition process, there are more Member Representative Directors candidates than the number of positions to be filled, each Exchange Member shall have the right to cast one vote for each Member Representative Director, and the candidates who receive the most votes shall be elected to the Member Representative Director positions. An Exchange Member, however, either alone or together with its affiliates, may not cast votes representing more than 20% of the votes cast for a candidate. See New By-Laws, Article II, Section 1(c) and Section 2. See also New By-Laws, Article I(g) defining “Contested Election” as an election for one or more Member Representative Directors for which the number of candidates on the List of Candidates exceeds the number of positions to be elected.

Under the Exchange’s Current Governing Documents, six directors on the Board are officers, directors, or partners of Exchange members, and are elected by a plurality of the Exchange’s “Exchange Directors” (“Exchange Directors”), of which two must be elected by holders of MRM Rights, two must be elected by holders of CMM Rights, and two must be elected by holders of EAM Rights. See Notice, supra note 3, at 20510. See also Current Constitution, Article III, Section 3.2. The Exchange states that this current structure was adopted to comply with the fair representation requirements of Section 6(b) of the Act. See Notice, supra note 3, at 20510. Because they give members a voice in the Exchange’s use of its self-regulatory authority, the Exchange believes that Exchange Directors serve the same function as Member Representative Directors on the boards of the Nasdaq Exchanges. See id.

The Exchange notes that the Commission has previously found the Nasdaq LLC Agreement’s (1) 20% Member Representative Director requirement, and (2) election process, provide fair representation of Nasdaq members, consistent with the requirements of Section 6(b) of the Act. See Notice, supra note 3, at 20510 n.18 (citing Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550, 3553 (January 23, 2006) (“Nasdaq Exchange Order”) (granting the exchange registration of Nasdaq Stock Market, Inc.). The Commission notes that the Board compositional requirements and the process for electing Member Representative Directors in the New Governing Documents are based on the parallel requirements in the Nasdaq LLC Agreement.

See also New By-Laws, Article III, Section 6(b).


The Commission also noted that it previously found the compositional requirements for the board of directors of Nasdaq, upon which ISE’s proposed requirements are based, to be consistent with Act. See Nasdaq Exchange Order, supra note 52, at 3553. See, e.g., Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (“Regulation ATS Release”).
process.\textsuperscript{57} As it has previously stated, the Commission believes that public directors can provide unbiased perspectives, which may enhance the ability of the Board to address issues in a non-discriminatory fashion and foster the integrity of the Exchange.\textsuperscript{58}

The Commission also believes that the proposed requirement that at least 20% of the Directors be Member Representative Directors, and the means by which they will be chosen by Exchange Members, is consistent with Section 6(b)(2) of the Act,\textsuperscript{59} because it provides for fair representation of members in the selection of directors and the administration of ISE. Section 6(b)(3) of the Act requires that “the rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.”\textsuperscript{60} As the Commission previously has noted, this statutory requirement helps to ensure that members have a voice in the Exchange’s use of its self-regulatory authority, and that the Exchange is administered in a way that is equitable to all those persons who trade on its markets or through its facilities.\textsuperscript{61} In addition, the Commission believes that the requirement that at least one director be a Public Director and one an issuer representative satisfies the requirements of Section 6(b)(3) of the Act.\textsuperscript{62}

2. Transition From Current Board Election Process to the New Election Process

In its filing, the Exchange states that, when it was acquired by Nasdaq, Inc., there were a number of harmonizing changes to its Board that resulted in a complete overlap of directors on the ISE Boards and the Nasdaq Exchanges (the “Post-Acquisition Board”).\textsuperscript{63} ISE also states its belief that the Post-Acquisition Board satisfied the composition requirements contained in both the Current Constitution and the New By-Laws.\textsuperscript{64} The Exchange states that the terms of the Directors on the Post-Acquisition Board ended at the 2017 Annual Election,\textsuperscript{65} and that all of the Directors on the 2017 Board are Directors that served on the Post-Acquisition Board. The Exchange believes that the 2017 Board satisfies both the board composition requirements in the Current Governing Documents, as well as in the New Governing Documents,\textsuperscript{66} and that once the New Governing Documents become operative, no additional actions with respect to the 2017 Board will be required under the Delaware Limited Liability Company Act.\textsuperscript{67} Pursuant to the proposal, the 2017 Board will serve until the Exchange’s first annual election of Directors in accordance with the processes under the New Governing Documents in 2018 (“2018 Board”).\textsuperscript{68} The Commission believes the Exchange’s proposal to allow the 2017 Board to continue serving until the 2018 Board would be elected pursuant to the process in the New Governing Documents is consistent with the Act, and in particular Section 6(b)(3) of the Act.\textsuperscript{69} The Exchange states that, although the 2017 Board was not nominated or voted upon in accordance with the New Governing Documents, it believes that the composition of the 2017 Board is consistent with the Act, as it still provides for the fair representation of members and has one or more directors that are representative of issuers and investors and not associated with a member of the exchange, broker, or dealer. Specifically, the Exchange states that six Directors are officers, directors, or partners of Exchange members, as required by Section 3.2(b) of the Current Constitution, and were elected by a plurality of the holders of “Exchange Rights.”\textsuperscript{70} These Exchange Directors were subject to the full petition and voting process by membership in accordance with Articles II and III of the Current Constitution, which process the Commission previously found to satisfy the requirements of the Act.\textsuperscript{71} The Exchange believes that the Exchange Directors serve the same function as the Member Representative Directors under the proposed board structure, as both directorships give Exchange members a voice in the Exchange’s use of its self-regulatory authority.\textsuperscript{72} The Exchange also notes that only its corporate governance structure would change under the proposed rule change, and that its membership has remained substantially the same both before and after the 2017 Annual Election.\textsuperscript{73}

Additionally, the Commission notes that, under the Current Governing Documents, the 2017 Board will be required to include two Directors that are “Public Directors.”\textsuperscript{74}


\textsuperscript{60} Id.

\textsuperscript{61} See, e.g., Nasdaq Exchange Order, supra note 52; and Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (order granting the exchange registration of BATS Exchange, Inc.).


\textsuperscript{63} See Notice, supra note 3, at 20516.

\textsuperscript{64} See Amendment No. 1.

\textsuperscript{65} The Exchange states that it held its 2017 Annual Election on June 19, 2017, in accordance with the nomination, petition, and voting processes set forth in the Current Governing Documents. See id.

\textsuperscript{66} The Commission notes that if the Board of Directors in place at the time the New Governing Documents become effective does not satisfy the requirements in the New Governing Documents, the Exchange would need to comply with the procedures for removing Directors and filling vacancies pursuant to the New Governing Documents. See, e.g., supra notes 43, 46, and 51–53 and accompanying text.

\textsuperscript{67} See Amendment No. 1. As discussed above, the Exchange proposes that, if approved, the New Governing Documents would be made effective no later than by the end of the third quarter of 2017. See Amendment No. 1; see also supra note 18 and accompanying text.

\textsuperscript{68} See Notice, supra note 3, at 20517. See also Amendment No. 1.

\textsuperscript{69} See supra notes 54–62 and accompanying text (discussing the requirements of Section 6(b)(3) and the Commission’s belief that the composition requirements for the Board of Directors, and the process for electing such Directors under the New Governing Documents, are consistent with those requirements).

\textsuperscript{70} See Amendment No. 1. See also Notice, supra note 3, at 20510 and 20513–14 (discussing the Exchange’s current process for the nomination and election of Directors, including the Exchange Directors).

“Exchange Rights” currently means, collectively, PMM Rights, CMM Rights, and EAM Rights, which are the trading and other rights associated with the Exchange’s three classes of membership. See Rule 100(a)(17); Current LLC Agreement, Article VI; and Current Constitution, Section 13.1(q). See also Rules 100(a)(11), 100(a)(14), and 100(a)(30); and Current Constitution, Sections 13.1(g), 13.1(f), and 13.1(bb). Under the New Rules, “Exchange Rights” will be defined in New Rule 100(a)(19) as the PMM Rights, CMM Rights, and EAM Rights, which will be defined in New Rules 100(a)(39), 100(a)(11), and 100(a)(15), respectively, and as discussed further below. See infra Section III.C. (discussing amendments to the Exchange’s Rules).

\textsuperscript{71} See Amendment No. 1; Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11401 (March 2, 2000) (“ISE Exchange Approval”) (granting ISE’s application for registration as a national securities exchange); and ISE HoldCo Order, supra note 9, at 25265.

\textsuperscript{72} See Notice, supra note 3 at 20517. See also Amendment No. 1.

\textsuperscript{73} See Amendment No. 1.

\textsuperscript{74} See Current Constitution, Section 3.2(b).

Pursuant to the Exchange’s Current Constitution, a “Public Director” means a non-industry representative who has no material relationship with a broker or dealer or any affiliate of a broker or dealer or the Exchange or any affiliate of the Exchange. See Current Constitution, Sections 3.2(b) and 13.1(cc).
The term “non-industry representative” means any person who would not be considered an “industry representative,” as well as (i) a person affiliated with a broker or dealer that operates solely in the business of non-member affiliates, or (ii) an employee of an entity that is affiliated with a broker or dealer that does not account for a material portion of the revenues of the consolidated entity, and who is primarily engaged in the business of the non-member entity. See Current Constitution, Section 13.1(l). The term “industry representative” means a person who is an officer, director, or employee of a broker or dealer or who has been employed in any such capacity at any time within the prior three (3) years, as well as a person who has a consulting or employment relationship with or has provided professional services to the Exchange and a person who had any such relationship or provided any such services to the Exchange at any time within the prior three (3) years. See Current Constitution, Section 13.1(l).

The Exchange proposes that the Executive Committee be an optional committee, to be appointed only if deemed necessary by the Board. Because the Executive Committee will have the powers and authority of the Board in the management of the business and affairs of the Exchange between meetings of the Board, its composition must reflect that of the Board. Accordingly, if established, the number of Non-Industry Directors on the Executive Committee must equal or exceed the number of Industry Directors and the percentages of Public Directors and Member Representative Directors must be at least as great as the corresponding percentages on the Board as a whole.

The Board would retain oversight of the financial operations of the Exchange instead of delegating these functions to a standing committee, but would have the option to appoint a Finance Committee at the Board’s discretion. The Finance Committee would advise the Board with respect to the oversight of the financial operations and conditions of the Exchange, including recommendations for the Exchange’s annual operating and capital budgets and proposed changes to the rates and fees charged by the Exchange.

The Exchange proposes to eliminate its current Finance and Audit Committee and to have the committee’s functions performed by Nasdaq, Inc.’s Audit Committee (“Nasdaq Audit Committee”), which is composed of at least three directors of Nasdaq, Inc., all of whom must satisfy the standards for independence set forth in Section 10A(m) of the Act and Nasdaq’s rules. The Exchange notes that the Nasdaq Audit Committee has broad authority to review the financial information that will be provided to shareholders of Nasdaq, Inc. and others; systems of internal controls; and audit, financial reporting, and legal and compliance processes. The Exchange states that, to the extent the current Finance and Audit Committee oversees the Exchange’s financial reporting process, its activities are duplicative of the activities of the Nasdaq Audit Committee, which is also charged with providing oversight over financial reporting and independent auditor selection for Nasdaq, Inc. and all of its subsidiaries. The Exchange also notes that the consolidated financial statements of the Exchange will still be prepared for each fiscal year.

The Exchange will also have a Regulatory Oversight Committee (“ROC”) under the New Governing Documents, which will have broad authority to oversee the adequacy and effectiveness of the Exchange’s regulatory and self-regulatory responsibilities. The ROC will consist of three members, each of whom must be a Public Director and an “independent director,” as defined in Nasdaq Rule 5605. Pursuant to the New By-Laws, the Exchange will also have a Chief Regulatory Officer (“CRO”), as it does currently. The new CRO will have general responsibility for the supervision of the regulatory operations based on substantially similar language in Section 5.2(i) of MRX’s Constitution and is intended to assure the fair administration and governance of the Exchange. The Exchange does not have this limitation in Section 5.2 of its Current Constitution with respect to any Board committees set up by Board resolution, and is therefore proposing to follow the more current MRX standard. The current Finance and Audit Committee must be composed of at least three (3) and not more than five (5) directors, all of whom must be non-industry representatives and must be “financially literate” as determined by the Board. See Current Constitution, Article V, Section 5.5.
of the Exchange and will meet with the ROC in executive session at regularly scheduled meetings of the ROC, and at any time upon request of the CRO or any member of the ROC.91

The ROC will assess the Exchange’s regulatory performance, assist the Board in reviewing the regulatory plan and the overall effectiveness of the Exchange’s regulatory functions, review the Exchange’s regulatory budget and inquire into the adequacy of resources available in the budget for regulatory activities, and be informed about the compensation and promotion or termination of the CRO.92

The Exchange also proposes that the Internal Audit Department of Nasdaq, Inc. (“Nasdaq Internal Audit Department”) would report to the Board on all Exchange-related internal audit matters and direct such reports to the new ROC.93 In addition, to ensure that the Board retains authority to direct the Nasdaq Internal Audit Department’s activities with respect to the Exchange, the Nasdaq Internal Audit Department’s written procedures will stipulate that the ROC may, at any time, direct the Nasdaq Internal Audit Department to conduct an audit of a matter of concern and report the results of the audit both to the ROC and the Nasdaq Audit Committee.94

The Exchange also proposes to eliminate its current Compensation Committee and its Corporate Governance Committee.95 The Compensation Committee is primarily charged with reviewing and approving compensation policies and plans for the Chief Executive Officer and other senior executive officers of the Exchange.96

Under the new governance structure, the functions of the Compensation Committee will be performed by Nasdaq, Inc.’s management compensation committee or, to the extent that policies, programs, and practices must be established for any Exchange officers or employees who are not also officers or employees of Nasdaq Inc., the full Board.97

The Corporate Governance Committee is primarily charged with: (i) Nominating candidates for all vacant or new non-

industry representative positions on the Board, (ii) overseeing the Exchange’s regulatory activities and program, and (iii) overseeing and evaluating the governance of the Exchange.98 Under the new governance structure, the functions of the Corporate Governance Committee will be performed by the new Nominating Committee, the new ROC, or, if required, the full Board.99

As discussed above, the Nominating Committee and Member Nominating Committee will have responsibility for, among other things, nominating candidates for election to the Board. On an annual basis, the members of these committees will nominate candidates for the succeeding year’s respective committees to be elected by ISE Holdings.100

Finally, the Quality of Markets Committee (“QMC”) will have the following functions: (i) To provide advice and guidance to the Board on issues relating to the fairness, integrity, efficiency, and competitiveness of the information, order handling, and execution mechanisms of the Exchange from the perspective of investors, both individual and institutional, retail firms, market making firms, and other market participants; and (ii) to advise the Board with respect to national market system plans and linkages between the facilities of the Exchange and other markets.101

At least 20% of the QMC must be composed of Member Representative members, and the Non-Industry members on the QMC must equal or exceed the sum of Industry members and Member Representative members.102

The Commission believes that the Exchange’s proposed committees, which are similar to the committees maintained by other exchanges,103 are designed to help enable the Exchange to carry out its responsibilities under the Act and are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.104 The Commission further believes that the Exchange’s proposed committees, including their composition and the means by which committee members will be chosen, are consistent with Section 6(b)(3) of the Act because relevant committees provide for the fair representation of members in the administration of the Exchange’s affairs.105

4. Regulatory Independence

Certain provisions in ISE’s Current Governing Documents, and those of its Upstream Owners, are designed to help maintain the independence of the regulatory functions of the Exchange.106 The New Governing Documents similarly include provisions designed to help maintain the independence of the regulatory functions of ISE,107 which provisions are substantially similar to those included in the governing documents of other exchanges.108

Specifically:

• The Exchange Board will be required, when evaluating any proposal, to take into account all factors that the Board deems relevant, including, without limitation, (1) the potential impact on: The integrity, continuity, and stability of the national securities exchange operated by the Exchange and the other operations of the Exchange; the ability to prevent fraudulent and manipulative acts and practices; and

input on matters that are important to them, the Exchange states that at least 20% of the persons serving on any such committees will be individuals who will have been appointed by the Member Nominating Committee and will be representative of the Exchange’s membership. See id.109


109 See Notice, supra note 3, at 20524. The Commission notes that the Exchange did not propose any amendments to the governing documents of its Upstream Owners.

110 See, e.g., Nasdaq Exchange Order, supra note 52; MIAX Exchange Order, supra note 57; Mercury Exchange Approval, supra note 28.
investors and the public, and (2) whether such proposal would promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and assisting in the removal of impediments to or the perfection of the mechanisms for a free and open market and a national market system.\[^{109}\]  
- All books and records of ISE reflecting confidential information pertaining to the self-regulatory function of the Exchange (including but not limited to disciplinary matters, trading data, trading practices, and audit information) shall be retained in confidence by ISE and its officers, directors, employees and agents; shall not be made available to persons other than to those officers, directors, employees, and agents of ISE that have a reasonable need to know; and will not be used for any non-regulatory purpose.\[^{110}\]

**The Exchange proposes that, as is currently the case, the books and records of ISE must be maintained in the United States and are subject at all times to examination by the Commission pursuant to the federal securities laws and the rules and regulations thereunder.**

Under the New LLC Agreement and New By-Laws, any amendments to those documents will not become effective until filed with, or filed with and approved by, the Commission, as required under Section 19 of the Act and the recommendations thereunder.\[^{111}\]

The Exchange also states that it is retaining in the New LLC Agreement certain provisions from its current LLC Agreement that are not in the Nasdaq Exchanges' by-laws, regulations, or other governing documents of other exchanges. These provisions are substantially similar to those the Commission has previously found to be consistent with the Act in the context of the corporate governance structures of other exchanges. See, e.g., MIAX Exchange Order, supra note 57; Mercury Exchange Approval, supra note 28.

The Commission notes that, as is currently the case, the Exchange's books and records requirements are subject to the filing requirements of Section 6(b)(1) of the Act, because they reflect the obligation of the Board to ensure compliance with the rule filing requirements under the Act. Additionally, the Commission finds these changes to be consistent with Section 19(b)(1) of the Act and Rule 19b-4 thereunder,\[^{112}\] which require that a self-regulatory organization file with the Commission all proposed rules, as well as all proposed changes in, additions to, and deletions of its existing rules. These provisions clarify that amendments to the New Governing Documents constitute proposed rule changes within the meaning of Section 19(b)(2) of the Act and Rule 19b-4 thereunder, and are subject to the filing requirements of Section 19 of the Act.\[^{113}\]

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\[^{109}\] See New By-Laws, Article III, Section 3. See also Amendment No. 1. In Amendment No. 1, the Exchange proposes to clarify in Article III, Section 3 of the New By-Laws the factors to be considered by the Exchange in amending any proposal. See id. Further, the Exchange states that Article III, Section 3 of the New By-Laws recognizes the Exchange's status as a self-regulatory organization, and the provisions of Section 19 of the Act taken together, are designed to reinforce the notion that the Exchange is not solely a commercial enterprise, but rather a self-regulatory organization registered pursuant to, and subject to the obligations imposed by, the Act. See Notice, supra note 3, at 20517; Amendment No. 1.

\[^{110}\] The corresponding provision in ISE's Current LLC Agreement prohibits the use of confidential information for any commercial purpose. See Current LLC Agreement, Article IV, Section 4.1(b). The Exchange proposes to modify the standard to prohibit the use of such information for any non-regulatory purpose. See Notice, supra note 3, at 20512; New LLC Agreement, Section 16. The Exchange states that this change is intended to replicate Section 4.1(b)(iii) of MRX's LLC Agreement, to emphasize the independence of the Exchange's regulatory function from its commercial interests. See Amendment No. 1.

Pursuant to Amendment No. 1, the Exchange is not proposing that ISE, and the Board on behalf of ISE, shall not have the right to keep confidential from ISE Holdings, as the Sole LLC Member, any information that the Board would otherwise be permitted to keep confidential from the Sole LLC Member pursuant to Section 16-305(c) of the Delaware Limited Liability Company Act. 6 Del. C. § 16-101. Additionally, the Exchange is not proposing that ISE Holdings, as the Sole LLC Member and the Exchange's authorized representative, shall have an explicit right to examine the Exchange's books, records, and documents during business hours. See Amendment No. 1. Although such provisions are in the Nasdaq LLC Agreement (see Nasdaq LLC Agreement, Section 16), they are not in the Current Governing Documents of ISE.

The Commission believes that the proposed provisions relating to the books and records of the Exchange are designed to maintain the independence of ISE's self-regulatory function, and are consistent with the Act. The Commission notes that these provisions are substantially similar to those the Commission has previously found to be consistent with the Act in the context of the corporate governance structures of other exchanges. See, e.g., MIAX Exchange Order, supra note 57; Mercury Exchange Approval, supra note 28.

The Commission also notes that the governing documents of ISE's Upstream Owners provide that all books and records of ISE reflecting confidential information pertaining to the self-regulatory function of the Exchange will be subject to confidentiality restrictions. See Certificate of Incorporation of ISE Holdings, Article Eleventh; Certificate of Incorporation of U.S. Exchange Holdings, Article Fourteenth; By-Laws of Nasdaq, Inc., Article XII, Section 12(b).

\[^{111}\] See New LLC Agreement, Section 16; see also Current LLC Agreement, Article IV, Section 4.1.

\[^{112}\] See New LLC Agreement, Section 16. The Commission notes that, as is currently the case, the Commission's ability to access and examine such information or limit the ability of officers, directors, employees, or agents of ISE to disclose such information to the Commission. See id. See also Current LLC Agreement, Article IV, Section 4.1(b).

\[^{113}\] The Exchange states that certain provisions in Section 16 of the New LLC Agreement are substantially similar to provisions in Section 16 of the Nasdaq LLC Agreement. See Amendment No. 1. The Exchange also states that it is retaining in its New LLC Agreement certain provisions from its Current LLC Agreement that are not in the governing documents of the Nasdaq Exchanges, such as those relating to where the Exchange's books and records are maintained, and who may access the books and records, in particular those books and records that contain confidential information pertaining to the self-regulatory function of the Exchange. See Notice, supra note 3, at 20512 & n.38.

ISE also states that the Nasdaq Exchanges will separately file proposed rule changes to harmonize the books and records provisions in their respective governing documents with the language in Section 16 of the New LLC Agreement. See Notice, supra note 3, at 20512 n.38.

\[^{114}\] See Current LLC Agreement, Article III, Section 3.3.

\[^{115}\] Specifically, pursuant to Section 15 of the New LLC Agreement, Regulatory Funds shall not be used non-regulatory purposes, but rather shall be used to fund the legal, regulatory, and surveillance operations of the Exchange, and the Exchange shall not make a distribution to the Sole LLC Member (ISE Holdings) using Regulatory Funds. See New LLC Agreement, Section 15.

Consistent with Section 3.3 of the Current LLC Agreement, Schedule A of the New LLC Agreement defines "Regulatory Funds" as fees, fines, or penalties derived from the regulatory operations of the Exchange. However, Regulatory Funds do 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 portion of such revenues are used to pay costs associated with the regulatory operations of the Exchange. See New LLC Agreement, Schedule A.

ISE states that the Nasdaq Exchanges will separately file proposed rule changes to harmonize the books and records provisions in their respective governing documents with the language in Section 15 of the New LLC Agreement. See Amendment No. 1.


that these rights reflect ISE’s original membership structure, where the original Market Maker Rights provided the holders thereof with an equity ownership interest in ISE, as well as trading rights on the Exchange. The Exchange states, however, that today the Market Maker Rights do not confer any equity ownership in the Exchange and are, for all practical purposes, rights to trade on the Exchange. As such, the Exchange believes that the provisions governing the trading privileges of PMMs, CMMs, and EAMs are more appropriately located in its Rules rather than its governance documents. Accordingly, the Exchange proposes to import into its Rules certain provisions relating to Market Maker Rights, as well as Exchange Rights, currently found in the Current Governing Documents. The Exchange states that it is amending its Rules to: (i) Clarify any Rules that cross-reference the Current Governing Documents in the rule text, since those documents are being replaced by the New Governing Documents; or (ii) relocate or memorialize in the Rules certain rights and protections afforded to the Market Maker Rights holders, which today are primarily found in the Current Governing Documents. The Exchange represents that the holders of Exchange Rights will continue to have the same trading privileges they currently hold as PMMs, CMMs, and EAMs under its Rules, and the new Board structure of the Exchange will not change any trading privileges. Specifically, the Exchange proposed changes to its Rules to, among other things:

- Relocate the concept of CMM Rights from the Current LLC Agreement to New Rule 100(a)(11), which will state that the term “CMM Rights” means the transferable rights held by a Competitive Market Maker or a “non-member owner” (as that term is defined in Rule 300(a)), and provide in New Rule 100(a)(11) that there are 160 authorized CMM Rights, as is currently set forth in Section 6.1(a) of the Current LLC Agreement.

- Relocate to New Rule 100(a)(12) the definition of “Competitive Market Maker,” which is currently only defined in Section 13.1(g) of the Current Constitution.

- Relocate the concept of EAM Rights to New Rule 100(a)(15), which will state that the term “EAM Rights” means the non-transferable rights held by an Electronic Access Member.

118 See, e.g., Securities Exchange Act Release No. 51029 (January 12, 2005), 70 FR 3233, 3241 (January 21, 2005) (SR–ISE–2004–29) (approving an ISE rule interpretation that requires that revenues received from regulatory fees or regulatory penalties be segregated and applied to fund the legal, regulatory, and surveillance operations of the Exchange and not used to pay dividends to the holders of Class A Common Stock (AKA “Market Maker Rights”), namely: (i) the right to vote on any change in, amendment to, or modification of the Core Rights or the definition of “Core Rights”; and (ii) the right to transfer or lease Market Maker Rights upon approval of the Exchange.

120 The Commission notes, however, that in the case of a Contested Election for Member Directors, the term “Member” means an organization that is approved to exercise trading privileges on the Exchange (currently held by PMMs, CMMs, and EAMs), and is designed to ensure that the Exchange’s ability to effectively carry out its role as a guardian of the Exchange’s assets and to promote the interests of investors, including the holders of Market Maker Rights (PMMs, CMMs, and EAMs), is not adversely affected.

121 See supra note 3, at 20512.

122 See Current LLC Agreement, Section 6.3(b) and Current Constitution, Section 10.1. “Core Rights” represent the voting rights with respect to any increase in the number of authorized Market Maker Rights and CMM Rights (PMM Rights and CMM Rights, each as defined below, and, together, “Market Maker Rights”), namely: (i) the right to vote on any change in, amendment to, or modification of the Core Rights or the definition of “Core Rights”; and (ii) the right to transfer or lease Market Maker Rights upon approval of the Exchange.

123 The Exchange represents that the holders of Exchange Rights also currently have the right to vote on amendments to the Current LLC Agreement or Current By-Laws, if the amendment would alter or change the powers, preferences, or special rights of one or more series of Exchange Rights so as to affect them adversely. See Current LLC Agreement, Article VIII, Section 8.1 and Current Constitution, Article X, Section 10.1.

124 See Notice, supra note 3, at 20510 & n.27 (citing ISE Exchange Approval, supra note 71). The Exchange notes that all of the initial Market Maker Rights provided the rights holders with an equity ownership interest in ISE as well as trading rights on the Exchange. As such, those rights were transferable or leaseable to approved persons or entities (i.e., Exchange members or non-member owners as provided in Rule 300(a)). Additionally, in the past, holders of Market Maker Rights had the right to vote on corporate actions, such as increasing the number of memberships in a class (akin to the voting rights related to “Core Rights” today). The Exchange notes that at the beginning, the holders of EAM Rights had no equity interest in the Exchange and only had rights to trade on the Exchange, and that those rights were not transferable, but the holders of EAM Rights could only be held by Exchange members. The Exchange has since demutualized and reorganized into a holding company structure, all of which resulted in the separation of the equity ownership rights in the Exchange (currently all held by ISE Holdings as the Sole LLC Member) from the trading privileges on the Exchange (currently held by PMMs, CMMs, and EAMs). The holders of Market Maker Rights and CMM Rights still retain, however, the ability to transfer those rights. See, e.g., Rule 307(a); Current LLC Agreement, Section 6.4; and Current Constitution, Sections 12.1(c), 12.2(c), and 12.3(b). See also Notice, supra note 3, at 20510 & n.27, 20511.

125 See Notice, supra note 3, at 20511.

126 See infra note 140 for the definition of the term, “PMM.”

127 See infra note 136 for the definition of the term, “CMM.”

128 See infra note 138 for the definition of the term, “EAM.”

129 See supra note 70 for the definition of the term “Exchange Rights.”

130 The Exchange provides that all the provisions relating to Market Maker Rights, as well as Exchange Rights, currently found in the Current Governing Documents. The Exchange states that it is amending its Rules to: (i) Clarify any Rules that cross-reference the Current Governing Documents in the rule text, since those documents are being replaced by the New Governing Documents; or (ii) relocate or memorialize in the Rules certain rights and protections afforded to the Market Maker Rights holders, which today are primarily found in the Current Governing Documents. The Exchange represents that the holders of Exchange Rights will continue to have the same trading privileges they currently hold as PMMs, CMMs, and EAMs under its Rules, and the new Board structure of the Exchange will not change any trading privileges. Specifically, the Exchange proposed changes to its Rules to, among other things: 

- Relocate the concept of CMM Rights from the Current LLC Agreement to New Rule 100(a)(11), which will state that the term “CMM Rights” means the transferable rights held by a Competitive Market Maker or a “non-member owner” (as that term is defined in Rule 300(a)), and provide in New Rule 100(a)(11) that there are 160 authorized CMM Rights, as is currently set forth in Section 6.1(a) of the Current LLC Agreement.

- Relocate to New Rule 100(a)(12) the definition of “Competitive Market Maker,” which is currently only defined in Section 13.1(g) of the Current Constitution.

- Relocate the concept of EAM Rights to New Rule 100(a)(15), which will state that the term “EAM Rights” means the non-transferable rights held by an Electronic Access Member.

131 See Notice, supra note 3, at 20511. The Exchange also proposes certain technical, non-substantive changes, such as changing the term “Constitution” to “By-Laws.”

132 See id.

133 See Current LLC Agreement, Article VI, Section 6.2(b).

134 CMM Rights are transferable rights. The holders of CMM Rights may lease or sell these rights in accordance with the Exchange’s rules and the Current Governing Documents. As discussed above, all Exchange Rights (i.e., PMM, CMM, and EAM Rights) convey voting rights and trading privileges on the Exchange. From ISE’s inception, however, only the holders of the PMM Rights and CMM Rights could transfer the voting rights and trading privileges associated with such Market Maker Rights, while the voting rights and trading privileges associated with the EAM Rights have never been transferable. See supra note 124.

The term “non-member owners” is defined as individuals and organizations that are not Members of the Exchange, or that are otherwise Members, but do not seek to exercise trading privileges associated with the Market Maker Rights that they own. See Rule 300(a).

The term “Member” means an organization that has been approved to exercise trading rights associated with Exchange Rights. See current Rule 100(a)(23); New Rule 100(a)(26).

See Current LLC Agreement, Article VI, Section 6.2(a).

136 The term “Competitive Market Maker” (referred to herein as “CMM”) will be defined to mean a Member that is approved to exercise trading privileges associated with CMM Rights. See New Rule 100(a)(12).

137 EAM Rights are non-transferable. Accordingly, the holders of EAM Rights may not lease or sell these rights (unlike PMM and CMM Rights, which...
Relocate to New Rule 100(a)(16) the definition of “Electronic Access Member,” which is currently only defined in Section 13.11(l) of the Current Constitution.
Relocate the definitions for “Exchange Transaction,” “good standing,” and “System” from the Current Constitution to the Rules, and delete Rule 100(a)(22), defining “LLC Agreement,” as that term would no longer be used in the Rules, as amended by the proposed rule change.
Relocate the concept of PMM Rights from Article VI of the Current LLC Agreement to New Rule 100(a)(20), which will state that the term “PMM Rights” means the transferable rights held by a Primary Market Maker or a “non-member owner” (as that term is defined in Rule 300(a)), and will state that there are 10 authorized PMM Rights, as is currently set forth in Section 6.1(a) of the Current LLC Agreement.
Relocate to New Rule 100(a)(40) the definition of “Primary Market Maker” from Section 13.1(bb) of the Current Constitution.

The Exchange also proposed to add as new paragraphs (d) and (e) in New Rule 300 certain protections in the Current Governing Documents that relate to the Market Maker Rights. First, new paragraph (d) preserves the concept of Core Rights from the Current Governing Documents, and states that any increase in the number of authorized PMM or CMM Rights must be approved by the affirmative vote of the holders of at least a majority of the then outstanding PMM Rights, voting as a class, and the affirmative vote of the holders of at least a majority of the then outstanding CMM Rights, voting as a class, respectively. Second, new paragraph (e) states that any amendments to the New Governing Documents that would alter or change the powers, preferences, or special rights of one or more series of PMM Rights or CMM Rights must also be approved by the holders of a majority of such PMM or CMM Rights, as applicable. As such, to the extent they relate to the Market Maker Rights holders, paragraph (e) preserves the existing amendment rights from the Current Governing Documents.

The Exchange also proposes to explicitly set forth in its Rules the ownership and voting limitations for the holders of Market Maker Rights. Today, a holder or lessee of Exchange Rights, together with any affiliate, is restricted from owning (or exercising any of the non-trading rights associated with) more than 20% of the PMM Rights or CMM Rights. Consistent with the current limitation, the Exchange proposes to replace the current Supplementary Material .02 to Rule 303 with New Supplementary Material .02, to state that, “[i]n addition to the trading concentration limits contained in [Rule 303], no holder or lessee of Market Maker Rights, together with any affiliate, may gain ownership or voting rights in excess of 20% of the outstanding PMM Rights or CMM Rights, as applicable.” The Exchange also states that the New Governing Documents will not have any provisions related to the Market Maker Rights.

The Commission notes that, because the only remaining voting rights associated with PMM Rights and CMM Rights will be the Core Rights and the right to vote on certain amendments to the New Governing Documents, as described above, the voting limitation in Supplementary Material .02 to New Rule 303 will only apply to voting on those matters. Voting on the election of Member Representative members will be governed by Article II of the New By-Laws, as described above.

In the context of a lease of Market Maker Rights, the Exchange proposes to add a requirement in New Rule 308 that the holder of Market Maker Rights must, as is currently required by Section 12.4(b) of the Current Constitution, retain the Core Rights associated with such Market Maker Rights and not transfer such voting rights to the lessee.

Section 12.4(b) of the Current Constitution also states that, under a lease agreement, the lessor may retain the voting rights with respect to the PMM Rights and CMM Rights or may transfer such voting rights, other than the Core Rights, to the lessee. Currently, the voting rights associated with the PMM Rights and CMM Rights that may be retained or transferred are the right to vote in the election of Exchange Directors and the right to vote on amendments to the Current Governing Documents that may adversely affect Market Maker Rights. Pursuant to the New Governing Documents, a holder of Market Maker Rights will continue to have the option of retaining or transferring the right to vote on certain amendments to the New Governing Documents that are transferable. See Current Constitution Article XII, Section 12.3. See also Notice, supra note 3, at 20522 n.111.

The current definition of EAM Rights in Rule 100(a)(14) refers to Article VI of the Current LLC Agreement.

The term “Electronic Access Member” (referred to herein as “EAM”) will be defined to mean a Member that is approved to exercise trading privileges associated with EAM Rights. See New Rule 100(a)(16).

“Exchange Transaction” would be relocated from Section 13.1(c) of the Current Constitution to New Rule 100(a)(20), “good standing” from Section 13.1(e) of the Current Constitution to New Rule 100(a)(20), and “System” from Subsection 13.1(g) of the Current Constitution to New Rule 100(a)(53).

The term “Primary Market Maker” (referred to herein as “PMM”) will be defined to mean a Member that is approved to exercise trading privileges associated with PMM Rights. See New Rule 100(a)(40).

See New Rule 300(d). See also supra note 122 and accompanying text (discussing the current Core Rights).
Documents. With respect to the right to vote in the case of a Contested Election, the Exchange provides that those voting rights will be transferable under a lease agreement for the holders of Market Maker Rights who are also members of the Exchange. Non-member owners, who are required to lease out their Market Maker Rights pursuant to Rule 300(b) will no longer have voting rights with respect to Directors that represent Exchange Members. The Commission notes that the 20% concentration limitation on voting described above will continue to apply in the case of any transfer of the right to vote in Contested Elections.

The Exchange also proposes to amend New Rule 308 to memorialize the manner in which Market Maker Rights may be subleased. Specifically, the Exchange proposes that a lessee of a Market Maker membership in good standing may sublease such membership to a Member with the permission of the owner. The Exchange states that this is consistent with the Exchange’s current practice and will not change the manner in which Market Maker Rights are subleased, but will clarify that such rights may be subleased to an Exchange Member only. Additionally, the Exchange proposes to relocate to the New Rules the requirement from the Current Constitution that a lessor of Market Maker Rights must retain the Core Rights.

The Exchange also proposes to clarify that, for the holders of Market Maker Rights who are also members of the Exchange, the right to vote on Directors representing Exchange Members will continue to be transferable under a lease agreement. Non-member owners, who are required to lease out their Market Maker Rights pursuant to Rule 300(b), will not have voting rights with respect to electing Member Representative Directors. The Exchange states that all voting rights other than Core Rights will remain transferable under a lease agreement, and that New Rule 308(b)(4) requires a lease agreement of Market Maker Rights to include provisions for which party will exercise the voting rights associated with the Market Maker Rights being leased. Accordingly, apart from being relocated from the Current Constitution to the Rules, the Exchange represents that the proposed amendment to New Rule 308 will not change the current transfer rights associated with Market Maker Rights, other than as described above with respect to non-member owners.

The Exchange also proposes to amend New Rule 802(b) to provide that, if a Primary Market Maker fulfills its obligations as a Primary Market Maker under the Rules, the Exchange will not reallocate the options classes to which such Primary Market Maker is appointed, unless otherwise requested by the Primary Market Maker; and would provide that the foregoing will not limit or affect the Exchange’s responsibility under Rule 802(d) to reallocate any options classes in the interests of a fair and orderly market. The Exchange states that this proposal is consistent with the manner in which products are allocated to PMMs on the Exchange today. According to the Exchange, today, when ISE lists new options classes, it allocates them to one of its PMMs under Rule 802, and that pursuant to delegated authority by the Board, an Allocation Committee, which consists of employees of the Exchange (“Allocation Committee”), makes allocation decisions according to the guidelines contained in Rule 802. The Exchange also states that the Allocation Committee has not reallocated the products appointed to a PMM since the Exchange’s inception for reasons other than as provided in the proposed rule, and as such, the proposed changes are simply to memorialize a longstanding practice on the Exchange.

The Commission believes that the proposed changes to ISE’s Rules are consistent with the Act and, in particular Section 6(b)(1) of the Act, 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. The Commission notes that many of the proposed changes to ISE’s Rules are technical in nature, such as renumbering of Rules or conforming terminology to reflect the replacement of the Current Governing Documents with the New Governing Documents.

The Commission also notes that, as described above, the Exchange proposes to relocate definitions and provisions related to Market Maker Rights from the Current Governing Documents into the Rules. The Commission believes that the proposed changes to ISE’s Rules that would prohibit a holder or lessee of Market Maker Rights, together with any affiliate, from gaining ownership or voting rights in excess of 20% of the outstanding PMM Rights or CMM Rights, as applicable, are consistent with the Act. The Commission has previously stated that a regulatory concern can arise if a member’s interest in an exchange becomes so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member. The Commission has stated, for example, that a member that directly or indirectly controls an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from diligently monitoring and surveilling the member’s conduct or diligently enforcing its rules and the federal securities laws with respect to conduct by the member that violates such provisions. The Commission believes that the proposal would not give rise to concerns about the Exchange’s ability to effectively carry out its regulatory responsibilities under the Act because the proposed rules change preserves existing ownership and voting limitations.

IV. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act, to approve the proposal, as modified by Amendment No. 1, prior to the 30th day after publication of Amendment No. 1 in the Federal Register. In Amendment No. 1, ISE revises the original proposal to make certain changes discussed in greater detail above. Notably, in Amendment No. 1, ISE revises its proposal to (1) make changes to the Exchange’s New LLC Agreement and New By-Laws to better align these proposed documents with certain provisions in ISE’s existing governing documents and the governing documents of other exchanges, including those concerning limitations on board committee powers, the confidentiality of books and records, the nomination of certain board directors by petition, and the confidentiality of board meetings; (2) revise the proposed

150 See Amendment No. 1.
151 See id.
152 See id.
153 See Notice, supra note 3, at 20523, See also Amendment No. 1; and New Rule 308.
154 See Amendment No. 1.
155 As described above, under the New By-Laws, in the case of a Contested Election, each Exchange Member shall have the right to cast one vote for each Member Representative Director. See New By-Laws, Article II, Section 2. See also supra note 52; Amendment No. 1.
156 See Amendment No. 1.
157 See id.
158 See New Rule 802(b)(2).
159 See Notice, supra note 3, at 20523.
160 See id.
161 See id.
163 See, e.g., ISE HoldCo Order, supra note 9, at 25262 n.38 and accompanying text.
164 See, e.g., id. at 25262.
amendments to ISE’s rules regarding ownership, voting, and transfer restrictions relating to certain market maker rights on the Exchange; (3) revise the related discussion of the purpose of the proposed changes; (4) add clarification to the description of the proposal regarding the operation of certain provisions; and (5) make certain technical corrections. The Commission believes that Amendment No. 1 does not raise any novel regulatory issues and instead better aligns ISE’s proposed New Governing Documents with certain provisions in its Current Governing Documents and the governing documents of other exchanges that were previously approved by the Commission. As discussed more fully above, certain provisions of ISE’s New Governing Documents, as modified by Amendment No. 1, are designed to facilitate the ability of ISE to maintain the independence of its self-regulatory function, enable it to operate in a manner that complies with the federal securities laws, and facilitate the ability of ISE and the Commission to fulfill their regulatory and oversight obligations under the Act. The Commission further believes that Amendment No. 1 provides additional clarity in the rule text and the description of the proposal, which is consistent with ISE’s original proposal and supports ISE’s analysis of how its proposal is consistent with the Act, thus facilitating the Commission’s ability to make the findings set forth above to approve the proposal. Accordingly, the Commission finds that good cause exists to approve the proposal, as modified by Amendment No. 1, on an accelerated basis.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether Amendment No. 1 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. Please include File Number SR–ISE–2017–32 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 be included on File Number SR–ISE–2017–32. 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 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–ISE–2017–32 and should be submitted on or before August 25, 2017.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–ISE–2017–32), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority,169 Eduardo A. Aleman, Assistant Secretary.

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166 See, e.g., Securities Exchange Act Release Nos. 70650 (July 26, 2013), 78 FR 46622 (August 1, 2013) (granting CEMX’s (f/k/a Topaz Exchange, LLC) application for registration as a national securities exchange); and Mercury Exchange Approval, supra note 29.

167 See supra Section III.B.4 (discussing, for example, certain provisions in ISE’s New Governing Documents that are designed to help maintain the independence of the regulatory functions of the Exchange).

SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 11.26 To Modify the Date of Appendix B Web site Data Publication Pursuant to the Regulation NMS Plan To Implement a Tick Size Pilot Program

July 31, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”) and Rule 19b–4 thereunder, notice is hereby given that on July 18, 2017, NYSE National, Inc. (the “Exchange” or “NYSE NAT”) 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 proposes to amend Rule 11.26 to modify the date of Appendix B Web site data publication pursuant to the Regulation NMS Plan to Implement a Tick Size Pilot Program (“Plan”). The proposed rule change is available on the Exchange’s Web site 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 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.

