

consisting of five members is sufficiently large to effectively perform the NYSE Regulation Board's oversight responsibilities.<sup>8</sup> In addition, with a Board size of five directors, the Exchange stated that it believes that retaining the requirement that at least two directors must be "fair representation candidates" is now unwarranted, because such directors would constitute 40% of the Board rather than 20% as was the case when the number of directors was fixed at ten members.<sup>9</sup>

The Exchange represented that the DCRC of NYSE Regulation is aware of and is in agreement with the proposed plan of implementation. The Exchange also represented that there is otherwise no change to the fair representation candidate selection and petition process.<sup>10</sup>

The Exchange stated that it believes that the elimination of the two-director minimum requirement for fair representation candidates is consistent with the governance structures of other national securities exchanges that have been approved by the Commission.<sup>11</sup> The Exchange pointed out that similar changes were approved subsequently to the Commission's approval of a structure for the board of NYSE Alternext US LLC (now NYSE MKT LLC), an affiliate of the Exchange, that included a requirement that at least 20% of that exchange's board constitute fair representation directors, but without the requirement that there be no less than two such directors.<sup>12</sup> The Exchange also noted that, more recently, the Commission approved a similar change when it considered a proposal to revise the Operating Agreement and Bylaws of the Exchange's wholly owned subsidiary, NYSE Market, Inc.<sup>13</sup>

### III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>14</sup> In particular, the Commission finds that the proposal is consistent with the requirements of Section 6(b)(3) of the Act, which provides that the rules of an exchange must 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.<sup>15</sup>

The fair representation requirement in Section 6(b)(3) of the Act is intended to give members a voice in the selection of the exchange's directors and the administration of its affairs. Moreover, the Section 6(b)(3) requirement helps to ensure that members are protected from unfair, unfettered actions by an exchange and that, in general, an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities. The Commission notes that the requirement that at least 20% of the directors on the NYSE Regulation Board be fair representation candidates is designed to ensure the fair representation of NYSE members on its Board. The Commission notes that, while the proposal eliminates the requirement regarding a specific minimum number of fair representation candidates on the Board, it does not alter the minimum 20% requirement for fair representation candidates or the process by which members can directly petition and vote for representatives on the NYSE Regulation Board. Moreover, the Commission notes that the proposal adds to the NYSE Regulation Bylaws a provision that whenever 20% of the Board would not result in a whole number, such number would in all cases be rounded up to the nearest whole number, thus ensuring that the fair representation candidates never constitute less than 20% of the Board. Furthermore, as the Exchange noted, the proposed change to the NYSE Regulation Bylaws is consistent with previous proposals approved by the Commission.<sup>16</sup> The Commission

therefore finds that the Exchange's proposal is consistent with Section 6(b)(3) of the Act.<sup>17</sup>

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>18</sup> that the proposed rule change (SR-NYSE-2013-32) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

[FR Doc. 2013-15916 Filed 7-2-13; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69871; File No. SR-EDGA-2013-13]

### Self-Regulatory Organizations; EDGA Exchange, Inc.; Order Approving a Proposed Rule Change Relating to the EDGA Exchange, Inc.'s Routing Broker Dealer, as Described in EDGA Rule 2.12(b)

June 27, 2013.

#### I. Introduction

On May 16, 2013, EDGA Exchange, Inc. ("EDGA" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to make permanent the existing pilot program that permits the Exchange's inbound router, as described in Rule 2.12(b), to receive inbound routes of equities orders through Direct Edge ECN LLC d/b/a DE Route ("DE Route"), the Exchange's routing broker dealer, from EDGX Exchange, Inc. ("EDGX"). The proposed rule change was published for comment in the **Federal Register** on May 28, 2013.<sup>3</sup> The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

#### II. Background

DE Route is a registered broker-dealer that is a member of the Exchange and is permitted to provide members of EDGX optional routing services to other

<sup>8</sup> See Notice, 78 FR at 30379.

<sup>9</sup> See *id.*

<sup>10</sup> See Notice, 78 FR at 30379 n.7.

<sup>11</sup> See Notice, 78 FR at 30379. The Exchange noted that, for example, Article III, Section 5(e) of the By-Laws of the of the NASDAQ Stock Market LLC ("NASDAQ") requires that the Regulatory Oversight Committee of the NASDAQ Board of Directors ("NASDAQ ROC"), which has an oversight role comparable to that of the NYSE Regulation Board, must consist of three members, each of whom must be a "Public Director" (*i.e.*, "a Director who has no material business relationship with a broker or dealer, [NASDAQ] or its affiliates, or FINRA") and an "independent director" as defined by NASDAQ Marketplace Rule 4200. The Exchange also noted that there is no requirement that the NASDAQ ROC have any members who would be the equivalent of a fair representation candidate on the NYSE Regulation Board.

<sup>12</sup> See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707, 57711-12 (October 3, 2008) (SR-Amex-2008-62).

<sup>13</sup> Securities Exchange Act Release No. 59683 (April 1, 2009), 74 FR 15799 (April 7, 2009) (SR-NYSE-2009-12).

<sup>14</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>15</sup> 15 U.S.C. 78f(b)(3).

<sup>16</sup> See *supra* notes 12 and 13 and accompanying text.

<sup>17</sup> 15 U.S.C. 78f(b)(3).

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 69613 (May 21, 2013), 78 FR 31996 ("Notice").

trading centers.<sup>4</sup> DE Route is owned by Direct Edge Holdings LLC (“DE Holdings”). DE Holdings also owns two registered securities exchanges—the Exchange and EDGX.<sup>5</sup> Thus, DE Route is an affiliate of the Exchange and EDGX.<sup>6</sup>

On May 12, 2010, the Commission approved the Exchange’s application for registration as a national securities exchange.<sup>7</sup> As part of the approval, the Exchange was approved to receive inbound routes of orders that DE Route routes in its capacity as a facility of EDGX on a pilot basis for 12 months.<sup>8</sup> The pilot was originally set to expire on July 1, 2011, but was subsequently extended and is currently set to expire on June 30, 2013.<sup>9</sup> The Exchange now seeks permanent approval of this inbound routing pilot.<sup>10</sup>

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>11</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>12</sup> 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, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulation thereunder, and the rules of the Exchange. Further, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>13</sup> which requires, 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. Section 6(b)(5) also requires that the rules of an exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers.

Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange previously implemented limitations and conditions to DE Route’s affiliation with the Exchange to permit the Exchange to accept inbound orders that DE Route routes in its capacity as a facility of EDGX, on a pilot basis.<sup>14</sup> The Exchange now seeks to make this pilot permanent, subject to the same limitation and conditions. Specifically, the Exchange committed to the following limitations and conditions:<sup>15</sup>

- The Exchange shall enter into a plan pursuant to Rule 17d-2 under the Exchange Act with a non-affiliated self-regulatory organization (“SRO”) to relieve the Exchange of regulatory responsibilities for DE Route with respect to rules that are common rules between the Exchange and the non-affiliated SRO, and enter into a regulatory contract (“Regulatory Contract”) with a non-affiliated SRO to perform regulatory responsibilities for DE Route for unique Exchange rules.

- The Regulatory Contract shall require the Exchange to provide the non-affiliated SRO with information, in an easily accessible manner, regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively “Exceptions”) in which DE Route is identified as a participant that has potentially violated Exchange or Commission Rules, and shall require that the non-affiliated SRO provide a report, at least quarterly, to the Exchange quantifying all Exceptions in which DE Route is identified as a participant that has potentially violated Exchange or Commission Rules.

- The Exchange, on behalf of DE Holdings, shall establish and maintain procedures and internal controls reasonably designed to ensure that DE Route does not develop or implement changes to its system on the basis of non-public information regarding planned changes to Exchange systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated members of the Exchange in connection with the provision of inbound order routing to the Exchange.<sup>16</sup>

The Exchange states that it has complied with the above-listed conditions during the pilot.<sup>17</sup> The Exchange believes that by meeting such conditions it has set up mechanisms that protect the independence of the Exchange’s regulatory responsibility with respect to DE Route, and has demonstrated that DE Route cannot use any information that it may have because of its affiliation with the Exchange to its advantage.<sup>18</sup>

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.<sup>19</sup> Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange’s self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, for the reasons discussed below, the Commission believes that it is consistent with the Act to permit DE

<sup>16</sup> The Commission notes that this condition is set forth in EDGA Rule 2.12(a)(3).

<sup>17</sup> See Notice, 78 FR at 31997.

<sup>18</sup> See *id.*

<sup>19</sup> See, e.g., Securities Exchange Act Release Nos. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq’s proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.); 58673 (September 29, 2008), 73 FR 57707 (October 8, 2008) (SR-Amex-2008-62) (order approving the combination of NYSE Euronext and the American Stock Exchange LLC); 59135 (December 22, 2008), 73 FR 79954 (December 30, 2008) (SR-ISE-2009-85) (order approving the purchase by ISE Holdings of an ownership interest in DirectEdge Holdings LLC); and 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (SR-NYSE-2008-120) (order approving a joint venture between NYSE and BIDS Holdings L.P.); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182) (order granting the exchange registration of BATS Exchange, Inc.); 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10-194 and 10-196) (order granting the exchange registration of EDGX Exchange, Inc. and EDGA Exchange, Inc.); and 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10-198) (order granting the exchange registration of BATS-Y Exchange, Inc.).

<sup>4</sup> DE operates as a facility of EDGX that provides outbound routing from EDGX to other trading centers, subject to certain conditions. See Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File No. 10-194 and 10-196) (order granting the exchange registration of EDGA and EDGX.) (“Exchange Registration Approval Order”).

<sup>5</sup> See *id.*

<sup>6</sup> See Exchange Registration Approval Order, 75 FR at 13165 n.219 and accompanying text.

<sup>7</sup> See Exchange Registration Approval Order, 75 FR 13151.

<sup>8</sup> See *id.*

<sup>9</sup> See Securities Exchange Act Release Nos. 64362 (April 28, 2011), 76 FR 25386 (May 4, 2011) (SR-EDGA-2011-13); and 66643 (March 22, 2012), 77 FR 18876 (March 28, 2012) (SR-EDGA-2012-10).

<sup>10</sup> See Notice, 78 FR 31996.

<sup>11</sup> In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78f(b)(1).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> See Exchange Registration Approval Order, 75 FR at 13165-13166.

<sup>15</sup> See Notice, 78 FR at 31996-31997.

Route, in its capacity as a facility of EDGX, to provide inbound routing to the Exchange on a permanent basis instead of a pilot basis, subject to the other conditions described above.<sup>20</sup>

The Exchange has proposed ongoing conditions applicable to DE Route's inbound routing activities in its capacity as a facility of EDGX, which are enumerated above. The Commission believes that these conditions mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that a non-affiliated SRO's oversight of DE Route,<sup>21</sup> combined with a non-affiliated SRO's monitoring of DE Route's compliance with the Exchange's rules and quarterly reporting to the Exchange, will help to protect the independence of the Exchange's regulatory responsibilities with respect to DE Route. The Commission also believes that the Exchange's Rule 2.12(a)(3) is designed to ensure that DE Route cannot use any information advantage it may have because of its affiliation with the Exchange.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>22</sup> that the proposed rule change (SR-EDGA-2013-13) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69884; File No. SR-BYX-2013-013]

### Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Order Granting Approval to Proposed Rule Change Amending and Restating the Amended and Restated By-Laws of BATS Y-Exchange, Inc.

June 27, 2013.

#### I. Introduction

On April 29, 2013, BATS Y-Exchange, Inc. (the "Exchange" or "BYX") filed with the Securities and Exchange Commission ("Commission") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend and restate the Amended and Restated By-Laws of BATS Y-Exchange. The proposed rule change was published for comment in the **Federal Register** on May 15, 2013.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

The Exchange has proposed to amend and restate its Amended and Restated By-Laws (the "Current By-Laws") and adopt these changes as its Second Amended and Restated By-Laws (the "New By-Laws"). The Exchange's proposed amendments to the Current By-Laws include: (i) Providing that the Board of Directors will consist of four (4) or more directors, with the board fixing the actual number of directors from time to time by resolution of the Board of Directors rather than fixing the number of directors in the by-laws; (ii) clarifying that the existing procedures for filling vacancies on the Board of Directors apply only for non-Member Representative Director positions; (iii) clarifying separate procedures for filling vacancies on the Board of Directors for Member Representative Director positions; and (iv) adding a new requirement that the processes for filling any director vacancies apply to vacancies created as a result of an increase in the size of the board.

##### A. Number of Directors

Article III, Section 2(a) of the Exchange's Current By-Laws fixes the number of directors of the Exchange at

ten (10) directors. Article III, Section 2(a) of the New By-Laws would amend Article III, Section 2(a) to state that the Board of Directors of the Exchange shall consist of four (4) or more members, the number thereof to be determined from time to time by resolution of the Board of Directors, subject to the compositional requirements of the board set forth in Article III, Section 2(b).

The Current By-Laws and the New By-Laws require that the Board of Directors consist of the following: (i) one (1) director who is the Chief Executive Officer of the Company; (ii) representation by Member Representative Directors of at least twenty percent (20%) of the board;<sup>4</sup> and (iii) representation by Non-Industry Directors (including at least one (1) Independent Director) that equals or exceeds the sum of the number of Industry Directors and Member Representative Directors.<sup>5</sup> Under the Current By-Laws and the New By-Laws, the Chief Executive Officer is considered to be an Industry Director.<sup>6</sup> Additionally, under the Current By-Laws and New By-Laws, the Member Representative Director requirement of twenty percent (20%) would require the board to include at least one (1) Member Representative Director.<sup>7</sup> Thus, under the proposal, the minimum requisite sum of the number of Industry Directors and Member Representative Directors would equal two (2) directors. As such, under the composition requirements, the board would also have to include at least two (2) Non-Industry Directors, bringing the total minimum size of the board to four (4) directors.

##### B. Member Representative Director Vacancies

A Member Representative Director is defined in relevant part in Article I of the Current By-Laws as a Director "elected by the stockholders after having been nominated by the Member Nominating Committee<sup>8</sup> or by an Exchange Member pursuant to these By-Laws." Article III, Section 4 of the Current By-Laws in turn specifies the precise process the Member Nominating

<sup>4</sup> The Exchange noted that because the number of Member Representative Directors must be at least twenty percent (20%) of the board, it is required under the Current By-Laws and the New By-Laws that if twenty percent (20%) of the directors then serving on the board is not a whole number, such number of Member Representative Directors must be rounded up to the next whole number.

<sup>5</sup> See Article III, Section 2(b) of the Current By-Laws.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> See Article VI, Section 3 of the Current By-Laws for a detailed description of the Member Nominating Committee and its responsibilities.

<sup>20</sup> The Commission notes that these limitations and conditions are consistent with those previously approved by the Commission for other exchanges. See, e.g., Securities Exchange Act Release Nos. 64090 (March 17, 2011), 76 FR 16462 (March 23, 2011) (SR-BX-2011-007); 66808 (April 13, 2012), 77 FR 23294 (April 18, 2012) (SR-BATS-2012-013); 66807 (April 13, 2012), 77 FR 23300 (April 18, 2012) (SR-BYX-2012-006); 67256 (June 26, 2012), 77 FR 39277 (July 2, 2012) (SR-BX-2012-030); 69233 (March 25, 2013), 78 FR 19352 (March 29, 2013) (SR-NASDAQ-2013-028); 69232 (March 25, 2013), 78 FR 19342 (March 29, 2013) (SR-BX-2013-013); and 69229 (March 25, 2013), 78 FR 19337 (March 29, 2013) (SR-Phlx-2013-15).

<sup>21</sup> This oversight will be accomplished through a 17d-2 Agreement. See Approval Order, 75 FR at 13165; and Notice, 78 FR at 31996.

<sup>22</sup> 15 U.S.C. 78s(b)(2).

<sup>23</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 69541 (May 8, 2013), 78 FR 28695 (May 15, 2013) ("Notice").