underwriters (or their affiliates) at a rate higher than that which they had received from the Existing Portfolios, their advisors or underwriters (or their affiliates), including without limitation 12b–1 Fees, shareholder service, administration or other service fees, revenue sharing or other arrangements in connection with such assets. Applicants represent that the Substitution and the selection of the Replacement Portfolios were not motivated by any financial consideration paid or to be paid by the Replacement Portfolios, their advisors or underwriters, or their respective affiliates.

14. Notice of the proposed Substitution will be mailed to all Contract owners at least 30 days prior to the Substitution. All Contract owners will have an opportunity at anytime after receipt of the notice of the Substitution and for 30 days after the Substitution to transfer Contract account value affected by the Substitution to other available subaccounts without the imposition of any transfer charge or limitation and without being counted as one of the Contract owner’s free transfers in a contract year.

15. Within five days after the Substitution, the Integrity Companies will send to its affected Contract owners a written confirmation that the Substitution has occurred.

16. The Substitution will in no way alter the insurance benefits to Contract owners or the contractual obligations of the Integrity Companies.

17. The Substitution will have no adverse tax consequences to Contract owners and will in no way alter the tax benefits to Contract owners.

Conclusion

For the reasons and upon the facts set forth above, the Applicants believe that the requested order meets the standards set forth in Section 26(c) and should, therefore, be granted.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon,
Deputy Secretary.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61698; File Nos. 10–194 and 10–196]

In the Matter of the Applications of EDGX Exchange, Inc., and EDGA Exchange, Inc., for Registration as National Securities Exchanges; Findings, Opinion, and Order of the Commission

March 12, 2010.

I. Introduction

On May 7, 2009, EDGX Exchange, Inc. (“EDGX”) and EDGA Exchange, Inc. (“EDGA”) (each, an “Exchange,” and, together, the “Exchanges”) each submitted to the Securities and Exchange Commission (“Commission”) a Form 1 application (each, a “Form 1 Application,” and, together, the “Form 1 Applications”) under the Securities Exchange Act of 1934 (“Act”) seeking registration as a national securities exchange pursuant to Section 6 of the Act. On July 30, 2009, each Exchange submitted Amendment No. 1 to its Form 1 Application. Notice of the Form 1 Applications, each as modified by Amendment No. 1, was published for comment in the Federal Register on September 17, 2009. The Commission received two comment letters regarding the Form 1 Applications, as modified by Amendment No. 1. On February 11, 2010, each Exchange submitted Amendment No. 2 to its Form 1 Application. 1

1 In the Notice (as defined below), EDGA Exchange, Inc. was assigned File No. 10–194 and EDGX Exchange, Inc. was assigned File No. 10–193. The EDGX Exchange, Inc. application was subsequently redesignated as File No. 10–196. The EDGA Exchange, Inc. file number remains unchanged.

II. Statutory Standards

Under sections 6(b) and 19(a) of the Act, 2 the Commission shall by order grant a registration as a national securities exchange if it finds, among

(B) revise the proposed rules of each Exchange to: (i) Indicate in Rules 1.5(p), 11.9(a), 14.2(g), 14.3(d) that the Post-Closing Session ends at 8:00 p.m.; (ii) add Rule 2.3(b)(f) (Member Eligibility & Registration) to require registration of Authorized Traders with the Exchange, and make conforming amendments to the interpretations and policies for Rule 2.3; (iii) reflect Direct Edge ECN LLC’s assumed name of DE Route in Rules 2.11 and 2.12, regarding its roles as an inbound and outbound router; (iv) add Rule 3.21 (Customer Disclosures) to require Exchange members that execute trades on behalf of customers during either Pre-Opening or Post-Closing Sessions offered by the Exchange to provide customers with notice regarding the risks of trading during extended hours, consistent with the rules of other self-regulatory organizations; (v) amend Rule 11.5(a) to clarify that market orders are eligible for the Pre-Opening and Post-Closing Sessions; (vi) add new Interpretation and Policy .01 to Rule 14.1 to explain the circumstances under which the Exchange will halt trading during the Pre-Opening and Post-Closing Sessions; (vii) amend Rule 11.11 to enable DTC/NSCC authorized clearing brokers to clear trades on the Exchange, even though they are not Exchange members; (viii) add section (d) to Rule 11.12 (Limitation of Liability) to establish a procedure to compensate Exchange members in relation to Exchange systems failures or a negligent act or omission of an Exchange employee, consistent with industry practice; (ix) revise the Exchange’s Clearly Erroneous Trading rules (Rule 11.13) to comport with the requirements of other national securities exchanges; and (x) add Rule 12.13 (Trading Ahead of Research Reports).

(b) Revises Exhibit C to clarify, in the description of Direct Edge ECN LLC, the cessation of its capacity as an electronic communications network following the Exchanges’ commencement of operations as national securities exchanges.

(c) Modifies Exhibit E to: (A) Provide a clarificatory paragraph with respect to the Exchange’s membership in various order and trade reporting organizations; (B) refer to the planned phase-in of securities to be traded on the Exchange; (C) update a reference to the provision of technical systems specifications and the addition of a copy of the Direct Edge Next Gen FIX Specifications (Version 1.0) (Users Manual).

(d) Revises Exhibit F to amend the Clearing Letter of Guarantee, User Agreement, Routing Agreement, and Exchange Data Vendor Agreement to reflect comments by potential Exchange members and industry practice.

(e) Modifies Exhibit I to state that, prior to the launch of the Exchange, DE Holdings will make a capital contribution into the Exchange’s capital account, and to represent that DE Holdings will enter into an explicit agreement with the Exchange to provide adequate funding for its operations. (f) Amends Exhibit J to state that all Directors, including Owner Directors and the Chief Executive Officer, will serve staggered three-year terms, subject to the Exchange’s Bylaws.

(g) Revises to Exhibit L to describe the Exchange’s execution of a regulatory services agreement with the ISE LLC and the Financial Industry Regulatory Authority (“FINRA”) to conduct various regulatory services on behalf of the Exchange.

The changes proposed in Amendment No. 2 are either not material, consistent with the existing rules of other registered national securities exchanges, or responsive to the concerns of the Commission.

4 In Amendment No. 1, each Exchange modified several Exhibits in its Form 1 Application. Specifically, each Exchange’s Amendment No. 2: (a) Modifies Exhibit B to: (i) Specify the dates when the non-U.S. Upstream Owners adopted the Supplemental Resolutions (as defined below); and

5 In Amendment No. 2, each Exchange modified several Exhibits in its Form 1 Application. Specifically, each Exchange’s Amendment No. 2: (a) Modifies Exhibit B to: (i) Specify the dates when the non-U.S. Upstream Owners adopted the Supplemental Resolutions (as defined below); and

6 15 U.S.C. 78f(b) and 78s(a).


7 See letters to Elizabeth M. Murphy, Secretary, Commission, from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq OMX Group, Inc., dated November 11, 2009 (“Nasdaq Letter”) and from Daniel Mathisson, Managing Director, and Vaishali Javeri, Director and Counsel, Credit Suisse Securities (USA) LLC, dated December 4, 2009 (“Credit Suisse Letter”). Direct Edge Holdings LLC responded to the Nasdaq Letter.

8 In Amendment No. 2, each Exchange modified several Exhibits in its Form 1 Application. Each Exchange’s Amendment No. 2: (a) Modifies Exhibit B to: (i) Specify the dates when the non-U.S. Upstream Owners adopted the Supplemental Resolutions (as defined below); and

9 In Amendment No. 2, each Exchange modified several Exhibits in its Form 1 Application. Specifically, each Exchange’s Amendment No. 2: (a) Modifies Exhibit B to: (i) Specify the dates when the non-U.S. Upstream Owners adopted the Supplemental Resolutions (as defined below); and

10 In Amendment No. 2, each Exchange modified several Exhibits in its Form 1 Application. Specifically, each Exchange’s Amendment No. 2: (a) Modifies Exhibit B to: (i) Specify the dates when the non-U.S. Upstream Owners adopted the Supplemental Resolutions (as defined below); and
other things, that the exchange is so organized and has the capacity to carry out the purposes of the Act and can comply, and can 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.

As discussed in greater detail below, the Commission finds that the Exchanges’ Form 1 Applications for exchange registration meet the requirements of the Act and the rules and regulations thereunder. Further, the Commission finds that the proposed rules of the Exchanges are consistent with Section 6 of the Act in that, among other things, they are designed to: (1) Assure fair representation of an exchange’s members in the selection of its directors and administration of its affairs and provide that, among other things, one or more directors shall be representative of investors and not be associated with the exchange, or with a broker or dealer; (2) prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanisms of a free and open market and a national market system; and (3) protect investors and the public interest. The Commission also believes that the rules of the Exchanges are consistent with section 11A of the Act. Finally, the Commission finds that the proposed rules of the Exchanges do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

III. Discussion

A. Corporate Structure

EDGX and EDGA each have applied to the Commission to register as a national securities exchange. EDGX and EDGA currently operate as separate trading platforms of Direct Edge ECN LLC (“DECN”), an electronic communications network (“ECN”) that is a registered broker-dealer. Direct Edge Holdings LLC (“DE Holdings”), a Delaware limited liability company, wholly owns EDGX, EDGA, and DECN. Following EDGX’s and EDGA’s commencement of operations as national securities exchanges, DECN will cease operations as an ECN and DECN (doing business as DE Route) will begin to operate as a facility of the Exchanges that provides outbound order routing for the Exchanges. DECN also will provide inbound routing services to EDGX from EDGA, and to EDGA from EDGX.9

As a limited liability company, DE Holdings is overseen by a Board of Managers (“DE Holdings Board”) and ownership in DE Holdings is represented by limited liability membership interests. The Fourth Amended and Restated Limited Liability Company Operating Agreement of DE Holdings (“DE Holdings Operating Agreement”) refers to the holders of such interests as “Members.”10 The Members of DE Holdings and their respective ownership interests are: International Securities Exchange Holdings, Inc. (“ISE Holdings”) (31.54%);11 Citadel Derivatives Group LLC (19.9%); The Goldman Sachs Group, Inc. (19.9%); Knight/Trimark, LLC (19.9%); and the ISE Stock Exchange Consortium Members (collectively 8.76%).12

1. Ownership of ISE Holdings

ISE Holdings, the owner of a 31.54% equity interest in DE Holdings, is also the parent company of International Securities Exchange, LLC (“ISE LLC”), a national securities exchange registered under section 6 of the Exchange Act. Following a corporate transaction in 2007 (the “2007 Transaction”),13 ISE Holdings became a wholly-owned subsidiary of U.S. Exchange Holdings, Inc. (“U.S. Exchange Holdings”), which is wholly owned by Eurex Frankfurt AG (“Eurex Frankfurt,” and, with Deutsche Börse AG, the “German Upstream Owners”). Eurex Frankfurt is a wholly-owned subsidiary of Eurex Zürich AG (“Eurex Zürich”), which, in turn, is jointly owned by Deutsche Börse AG and SIX Swiss Exchange AG (“SWX”), a wholly-owned subsidiary of SIX Group AG (SIX Group AG, SWX, and Eurex Zürich are referred to collectively as the “Swiss Upstream Owners,” and the Swiss Upstream Owners and the German Upstream Owners are referred to collectively as the “non-U.S. Upstream Owners”). As a result of ISE Holdings’ purchase of an equity interest in DE Holdings,14 the non-U.S. Upstream Owners, U.S. Exchange Holdings (together with the non-U.S. Upstream Owners, the “Upstream Owners”), and ISE Holdings acquired indirect ownership and voting interests in EDGX and EDGA.

2. Amendments to the Corporate Resolutions of the Non-U.S. Upstream Owners and Corporate Governing Documents of ISE Holdings and U.S. Exchange Holdings

In connection with the 2007 Transaction, each of the non-U.S. Upstream Owners adopted corporate resolutions (collectively, the “2007 Resolutions”) designed to maintain the independence of the regulatory functions of ISE LLC.15 In addition, the Amended and Restated Certificate of Incorporation of U.S. Exchange Holdings (“U.S. Exchange Holdings Certificate”) and the Amended and Restated Bylaws of U.S. Exchange Holdings (“U.S. Exchange Holdings Bylaws”), as well as the Certificate of Incorporation of ISE Holdings (“ISE Holdings Certificate”) and the Amended and Restated Bylaws of ISE Holdings (“ISE Holdings Bylaws”) included provisions designed to maintain the independence of the regulatory functions of ISE LLC.16

9 See EDGX and EDGA Rules 2.11 and 2.12. See also Section III.G, infra.

10 Specifically, the DE Holdings Operating Agreement defines a “Member” to include any Person (i) executing the DE Holdings Operating Agreement as a Member of DE Holdings as of April 13, 2009; or (ii) subsequently admitted as an additional or substitute Member of DE Holdings. References to “Members,” as defined in the DE Holdings Operating Agreement and used in connection with DE Holdings, should be distinguished from references to “members,” the latter refers to “members,” as defined in section 3(a)(3) of the Exchange Act, supra note 13.


12 The ISE Stock Exchange Consortium members are: Bear Resi, Inc.; DB US Financial Markets Holding Corporation; Canopy Acquisition Corporation; IB Exchange Corp.; LabMorgan Corporation; Merrill Lynch L.P., Holdings, Inc.; Nordea Securities International, Inc.; Sun Partners LLC; and VCM Capital Markets, LLC.


14 See DE Holdings Order, supra note 11.

15 See Eures Order, supra note 13. In 2007, the non-U.S. Upstream Owners were Eurex Frankfurt, Deutsche Börse AG, Eurex Zürich, SWX, SWX Group, and Verein SWX Swiss Exchange.

16 In this regard, through the 2007 Resolutions and the corporate governing documents of ISE Holdings and U.S. Exchange Holdings, the non-U.S. Upstream Owners and ISE Holdings committed, among other things: That they, and each of their directors, officers, and employees, would comply with the federal securities laws and with the Commission and ISE LLC; that their directors, officers, and employees would give due regard to preserving the independence of the self-regulatory functions of ISE LLC; and that they, and each of their directors, officers, and employees, would give due regard to preserving the independence of the self-regulatory functions of ISE LLC; (ii) subsequently admitted as an additional or substitute Member of DE Holdings; (i) executing the DE Holdings Operating Agreement as a Member of DE Holdings as of April 13, 2009; or (ii) subsequently admitted as an additional or substitute Member of DE Holdings.
The 2007 Resolutions and the corporate governing documents of U.S. Exchange Holdings and ISE Holdings related to ISE LLC and, by their terms, did not apply to additional national securities exchanges, such as EDGX and EDGA, that the Upstream Owners and ISE Holdings might control, directly or indirectly, as a result of a subsequent transaction. To maintain the independence of the regulatory function of EDGX and EDGA, each of the non-U.S. Upstream Owners has adopted supplemental resolutions (the “Supplemental Resolutions”) that apply the 2007 Resolutions to EDGX and EDGA in the same manner and to the same extent as the 2007 Resolutions apply to ISE LLC. According, the Supplemental Resolutions, which are included in the Form 1 Applications, extend to EDGX and EDGA the commitments that the non-U.S. Upstream Owners made in the 2007 Resolutions with respect to ISE LLC.

In addition, the Commission has approved changes to the U.S. Exchange Holdings Certificate and U.S. Exchange Holdings Bylaws, and to the ISE Holdings Certificate and ISE Holdings Bylaws, that apply these governing documents to any national securities exchange, or facility thereof, that U.S. Exchange Holdings or ISE Holdings, as applicable, controls, directly or indirectly, including EDGX and EDGA.

The Commission believes that the Supplemental Resolutions, the U.S. Exchange Holdings Certificate and U.S. Exchange Holdings Bylaws, as amended, and the ISE Holdings Certificate and ISE Holdings Bylaws, as amended, will assist EDGX and EDGA in fulfilling their self-regulatory obligations and in administering and complying with the requirements of the Act, as discussed in greater detail below. 3. Swiss Resolutions and the 2009 Procedure

As discussed more fully in the Eurex Order, the Swiss law designed to protect Swiss sovereignty raised concerns about the ability of the Swiss Upstream Owners to provide the Commission with direct access to information, including books and records, related to the activities of ISE LLC. To avoid conflict with Swiss law and to facilitate the 2007 Transaction, the Commission and the Swiss Federal Banking Commission (“SFBC”) developed a procedure (the “2007 Procedure”) under which the SFBC undertook to serve as a conduit for unfiltered delivery of books and records of the Swiss Upstream Owners related to the activities of ISE LLC. Accordingly, each 2007 Resolution adopted by the Swiss Upstream Owners (the “2007 Swiss Resolutions”) provided that, where necessitated by Swiss law, a Swiss Upstream Owner would provide information related to the activities of ISE LLC, including the books and records of such owner related to the activities of ISE LLC, to the Commission promptly through the SFBC. Moreover, oral exchanges between each Swiss Upstream Owner and the Commission related to the activities of ISE LLC would include the participation of SFBC.

By its terms, the 2007 Procedure applied solely to information of the Swiss Upstream Owners related to the activities of ISE LLC, including books and records related to the activities of ISE LLC. To accommodate the Swiss Upstream Owners’ indirect ownership and voting interest in EDGX and EDGA, the Commission and FINMA (the successor to the SFBC) have developed a procedure (the “2009 Procedure”) that is substantially similar to the 2007 Procedure, except that it will apply to any U.S. securities exchange, or facility thereof, that ISE Holdings controls, directly or indirectly, including EDGX and EDGA. The 2009 Procedure, which will become effective upon the Commission’s approval of the Exchanges’ Form 1 applications, will supersede the 2007 Procedure.

Under the 2009 Procedure, FINMA would serve as a conduit for the delivery of information of the Swiss Upstream Owners related to the activities of any registered national securities exchange controlled, directly or indirectly, by ISE Holdings, including EDGX and EDGA. The Commission’s usual practice is to have direct access to books and records related to the activities of a U.S. securities exchange. However, subject to the condition that the Swiss Upstream Owners will promptly deliver such information to the Commission, coupled with the fact that under Bylaws of the Exchanges, all trading records of the Exchanges must be maintained in the United States, the Commission believes that the provisions of the 2007 Resolutions adopted by the Swiss Upstream Owners, as supplemented by the Supplemental Resolutions adopted by the Swiss Upstream Owners, related to the Commission’s access to the books and records of the Swiss Upstream Owners through FINMA, should not result in a level of access materially different from that agreed to by other entities that control U.S. securities exchanges.

would be deemed to be the books and records of ISE LLC for purposes of and subject to oversight pursuant to the U.S. securities laws; and, that, for so long as they controlled ISE LLC, any change to their governing documents would be submitted to the board of directors of ISE LLC and, if ISE LLC determined that such change was required to be filed with the Commission, such change would not be effective until filed with, or filed with and approved by the Commission, in accordance with Section 19(b) of the Act.

The enumeration in each of the 2007 Resolutions is identical. The enumeration in each of the Supplemental Resolutions also is identical. Therefore, unless otherwise specified, reference herein to certain enumerated resolutions applies to all of the 2007 Resolutions or to all of the Supplemental Resolutions, as applicable.


15 See also Eurex Order, supra note 13, at text accompanying note 60.

16 See 2007 Swiss Resolutions 1, 3(b), 6, 7(a), 7(e), 8(a), 8(e), and 9, and Swiss Supplemental Resolution 2.

17 See Bylaws of EDGX (“EDGX Bylaws”) and Bylaws of EDGA (“EDGA Bylaws”) and, together with the EDGX Bylaws, the “Exchange Bylaws”.

18 Article XI, Section 4. The enumeration in the Exchange Bylaws is identical.

20 See Eurex Order, supra note 13, at text accompanying note 60.

22 See 2007 Swiss Resolutions 1, 3(b), 6, 7(a), 7(e), 8(a), 8(e), and 9, and Swiss Supplemental Resolution 2.
4. Trust Agreement

In connection with the 2007 Transaction, ISE implemented a Delaware statutory Trust (the “Trust”) pursuant to a Trust Agreement ("2007 Trust Agreement") among ISE Holdings, U.S. Exchange Holdings, trustees (the "Trustees"), and a Delaware trustee.\(^{29}\) By its terms, the 2007 Trust Agreement related solely to ISE Holdings’ ownership of ISE LLC, but not to any other national securities exchange that ISE Holdings might control, directly or indirectly. The Commission has approved a proposal\(^{30}\) that revises the 2007 Trust Agreement to replace references to ISE LLC with references to any national securities exchange or facility thereof controlled, directly or indirectly, by ISE Holdings, including EDGX and EDGA.\(^{31}\) The 2007 Trust Agreement, as amended, is referred to herein as the "2007 Trust Agreement").\(^{32}\) Except for the expanded scope of the 2007 Trust Agreement, the 2009 Trust Agreement is substantially similar to the 2007 Trust Agreement.

The Trust serves two general purposes. First, for as long as ISE Holdings controls, directly or indirectly, a national securities exchange, including EDGX or EDGA, the Trust would hold capital stock of ISE Holdings in the event that a person obtains an ownership or voting interest in ISE Holdings in excess of the ownership and voting limits established in the ISE Holdings Certificate of Incorporation.\(^{33}\) Second, the Trust would hold capital stock of ISE Holdings in the event of a Material Compliance Event.\(^{33}\) Under the 2009 Trust Agreement, a "Material Compliance Event" is any state of facts, development, event, circumstance, condition, occurrence, or effect that results in the failure of any of the non-U.S. Upstream Owners to adhere to its respective commitments under the 2007 Resolutions, as supplemented by the Supplemental Resolutions, in any material respect.\(^{34}\) The Trust holds a call option over the capital stock of ISE Holdings that may be exercised if a Material Compliance Event has occurred and continues to be in effect.\(^{35}\) For the reasons discussed in the Eurex Order in connection with the 2007 Trust Agreement,\(^{36}\) the Commission finds that the 2009 Trust Agreement is designed to enable EDGX and EDGA to operate in a manner that complies with the federal securities laws, including the objectives of Sections 6(b) and 19(g) of the Act,\(^{37}\) and to facilitate the ability of EDGX and EDGA and the Commission to fulfill their regulatory and oversight obligations under the Act.\(^{38}\) In addition, the Commission notes that the 2009 Trust Agreement, like the 2007 Trust Agreement, is consistent with the provisions that other entities that directly or indirectly own or control a self-regulatory organization have instituted and that have been approved by the Commission.\(^{39}\)

B. Self-Regulatory Function of the Exchanges; Relationship Between DE Holdings, the Upstream Owners, ISE Holdings, and the Exchanges; Jurisdiction Over DE Holdings, ISE Holdings, and the Upstream Owners

1. DE Holdings

Although DE Holdings itself will not itself carry out regulatory functions, its activities with respect to the operation of EDGX and EDGA must be consistent with, and not interfere with, the self-regulatory obligations of EDGX and EDGA. The DE Holdings corporate documents include certain provisions that are designed to maintain the independence of the Exchanges’ self-regulatory function from DE Holdings, enable EDGX and EDGA to operate in a manner that complies with the federal securities laws, including the objectives of Sections 6(b) and 19(g) of the Act, and facilitate the ability of the Exchanges and the Commission to fulfill their regulatory and oversight obligations under the Act.\(^{40}\) For example, DE Holdings submits to the Commission’s jurisdiction with respect to activities relating to EDGX and EDGA,\(^{41}\) and agrees to provide the Commission and the Exchanges with access to its books and records that are related to the operation or administration of the Exchanges.\(^{42}\) In addition, to the extent they are related to the operation or administration of EDGX or EDGA, the books, records, premises, officers, Managers, agents, and employees of DE Holdings shall be deemed the books, records, premises, officers, Managers, agents, and employees of EDGX or EDGA, as applicable, for purposes of, and subject to oversight pursuant to, the Act.\(^{43}\) DE Holdings also agrees to keep confidential non-public information relating to the self-regulatory function of the Exchanges and not to use such information for any non-regulatory purpose.\(^{45}\) In addition, the Board of Managers of DE Holdings, as well as its officers, employees, and agents, are required to give due regard to the preservation of the independence of the self-regulatory function of EDGX and EDGA.\(^{46}\) Further, the DE Holdings Operating Agreement requires that any changes to the DE Holdings Operating Agreement be submitted to the Boards of Directors of EDGX and EDGA, and, if such amendment is required to be filed with the Commission pursuant to Section 19(b) of the Act, such change shall not be effective until filed with, or filed with and approved by, the

\(^{29}\) See Eurex Order, supra note 13, at Section II.C, for a more detailed description of the Trust.

\(^{30}\) See U.S. Exchange Holdings Order, supra note 19.

\(^{31}\) See U.S. Exchange Holdings Order, supra note 19, Section II.C

\(^{32}\) See Eurex Order, supra note 13, at Section II.C.

\(^{33}\) The term of the Trust is perpetual, provided that ISE Holdings directly or indirectly controls a national securities exchange or a facility thereof, that ISE Holdings directly or indirectly controls a national securities exchange or a facility thereof, or that ISE Holdings directly or indirectly controls a national securities exchange or a facility thereof.

\(^{34}\) See 2009 Trust Agreement, Article I, Section 1.1.

\(^{35}\) See 2009 Trust Agreement, Article IV, Section 4.2. More specifically, if a Material Compliance Event occurs and continues to be in effect, the Trustees must take certain actions, including, after a Cure Period, the exercise of a Call Option for a transfer of the majority of capital stock of ISE Holdings that has the right by its terms to vote in the election of the ISE Holdings Board or on other matters. See 2009 Trust Agreement, Article IV, Section 4.2. See also Eurex Order, supra note 13, at note 62 and accompanying text.

\(^{36}\) See Eurex Order, supra note 13, at Section II.C. See also U.S. Exchange Holdings Order, supra note 19.

\(^{37}\) If a person exceeds an ownership or voting limit, then a Majority of the capital stock of ISE Holdings that has the right by its terms to vote in the election of the ISE Holdings Board or on other matters (other than matters affecting the rights, preferences, or privileges of the capital stock) would automatically be transferred to the Trust. See ISE Holdings Certificate, Article FOURTH, Section III(c). See also Eurex Order, supra note 13, at note 37 and accompanying text.

\(^{38}\) See Eurex Order, supra note 13, at Section II.C.
Commission.\(^{47}\) The Commission finds that these provisions are consistent with the Act, and that they will assist EDGX and EDGA in fulfilling their self-regulatory obligations and in administering and complying with the requirements of the Act.

2. Upstream Owners and ISE Holdings

Although the Upstream Owners and ISE Holdings will not carry out any regulatory functions, the activities of each of the Upstream Owners and of ISE Holdings with respect to the operation of EDGX and EDGA must be consistent with, and not interfere with, the self-regulatory obligations of EDGX and EDGA. The 2007 Resolutions, as supplemented by the Supplemental Resolutions, the ISE Holdings Bylaws, the ISE Holdings Certificate, the U.S. Exchange Holdings Certificate, and the U.S. Exchange Holdings Bylaws include certain provisions designed to maintain the independence of the self-regulatory function of EDGX and EDGA, enable EDGX and EDGA to operate in a manner that complies with the U.S. federal securities laws, including the objectives and requirements of Sections 6(b) and 19(g) of the Act,\(^ {48}\) and facilitate the ability of EDGX, EDGA, and the Commission to fulfill their regulatory and oversight obligations under the Act.

For example, the Upstream Owners and ISE Holdings provide that each such Upstream Owner, and ISE Holdings, will comply with the U.S. federal securities laws and the rules and regulations thereunder and cooperate with the Commission and EDGX and EDGA.\(^ {49}\) Also, each board member, officer, and employee of the Upstream Owners, and ISE Holdings, in discharging his or her responsibilities, will comply with the U.S. federal securities laws and the rules and regulations thereunder, cooperate with the Commission, and cooperate with EDGX and EDGA.\(^ {50}\) In discharging his or her responsibilities as a board member of an Upstream Owner, or of ISE Holdings, each such member must, to the fullest extent permitted by applicable law, take into consideration the effect that the actions of the Upstream Owner or ISE Holdings, as applicable, would have on the ability of EDGX and EDGA to carry out their responsibilities under the Act.\(^ {51}\) In addition, each of the Upstream Owners and ISE Holdings, and their board members, officers, and employees, must give due regard to the preservation of the independence of the self-regulatory functions of EDGX and EDGA (or in the case of the non-U.S. Upstream Owners, that they will take reasonable steps necessary to cause their officers and employees involved in the activities of EDGX and EDGA to give due regard to preserving the independence of the self-regulatory functions of EDGX and EDGA).\(^ {52}\)

Further, the non-U.S. Upstream Owners (along with their respective board members, officers, and employees), U.S. Exchange Holdings, and ISE Holdings agree to keep confidential, to the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of EDGX and EDGA, including, but not limited to, confidential information regarding disciplinary matters, trading data, trading practices, and audit information, contained in the books and records of EDGX or EDGA and not use such information for any commercial purposes.\(^ {53}\) In addition, books and records of the non-U.S. Upstream Owners related to the activities of EDGX and EDGA will at all times be made available for, and books and records of U.S. Exchange Holdings and ISE Holdings will be subject at all times to, inspection and copying by the Commission, EDGX, and EDGA.\(^ {54}\) Books and records of U.S. Exchange Holdings related to the activities of EDGX and EDGA, and the books and records of ISE Holdings, will be maintained within the United States.\(^ {55}\) Moreover, for so long as each of the Upstream Owners or ISE Holdings directly or indirectly controls EDGX or EDGA, the books, records, officers, directors (or equivalent), and employees of each of the Upstream Owners or of ISE Holdings will be deemed to be the books, records, officers, directors, and employees of EDGX or EDGA, as applicable.\(^ {56}\) Finally, for so long as U.S. Exchange Holdings or ISE Holdings directly or indirectly control EDGX or EDGA, the premises of U.S. Exchange Holdings and ISE Holdings will be deemed to be the premises of EDGX or EDGA.\(^ {57}\)

To the extent involved in the activities of EDGX or EDGA, each of the non-U.S. Upstream Owners, its board members, officers, and employees, irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for purposes of any action arising out of, or relating to, the activities of EDGX or EDGA.\(^ {58}\) Likewise, U.S. Exchange Holdings, its officers and directors, and employees whose principal place of business and residence is outside of the United States, to the extent such directors, officers, or employees are involved in the activities of EDGX or EDGA, irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for purposes of any action arising out of, or relating to, EDGX or EDGA.\(^ {59}\)

Finally, the 2007 Resolutions, as supplemented by the Supplemental Resolutions, the U.S. Exchange Holdings Certificate, the U.S. Exchange Holdings Bylaws, the ISE Holdings Certificate, and the ISE Holdings Bylaws each require that any change to the applicable document (including any action by the non-U.S. Upstream Owners) are subject to the jurisdiction of the U.S. federal courts and the Commission for purposes of any action arising out of, or relating to, EDGX or EDGA.\(^ {60}\)

47 See DE Holdings Operating Agreement, Article XV, Section 15.2(b). The requirement to submit changes to the Exchange may be foreclosed as long as DE Holdings directly or indirectly controls the Exchange. Id.
49 See Resolution 1 and Supplemental Resolution 2(a); U.S. Exchange Holdings Certificate, Article ELEVENTH; and ISE Holdings Certificate, Article THIRTEENTH.
50 See Resolutions 7(a) and 8(a) and Supplemental Resolutions 2(b) and (c); U.S. Exchange Holdings Certificate, Article TENTH; and ISE Holdings Certificate, Article TENTH. The Resolutions also provide that each non-U.S. Upstream Owner will take reasonable steps necessary to cause each person who subsequently becomes a board member of the non-U.S. Upstream Owner to agree in writing to certain matters included in the Resolutions. See Resolution 7 and Supplemental Resolution 2(b).
51 See Resolutions 5, 7(d), and 8(d) and Supplemental Resolutions 1 and 2(a); U.S. Exchange Holdings Certificate, Article TWELFTH; and ISE Holdings Bylaws, Article I, Section 1.5.
52 The Commission believes that any non-regulatory use of such information would be for a commercial purpose.
53 See Resolutions 6, 7(e), and 8(e), and Supplemental Resolution 2; U.S. Exchange Holdings Certificate, Article FOURTEENTH; and ISE Holdings Certificate, Article ELEVENTH.
54 See Resolution 3 and Supplemental Resolution 2(a); U.S. Exchange Holdings Certificate, Article FIFTEENTH; and ISE Holdings Certificate, Article TWELFTH. See Section I.A.3, supra, for a discussion of the 2009 Procedure through which the Swiss Upstream Owners would make available their books and records relating to the activities of the Exchanges.
55 See U.S. Exchange Holdings Certificate, Article FIFTEENTH; and ISE Holdings Bylaws, Article I, Section 1.3.
56 See Resolutions 3 and 8(c) and Supplemental Resolutions 2(a) and (c); U.S. Exchange Holdings Certificate, Article FIFTEENTH; and ISE Holdings Certificate, Article TWELFTH.
57 See U.S. Exchange Holdings Certificate, Article FIFTEENTH; and ISE Holdings Certificate, Article TWELFTH.
58 See Resolutions 2, 7(b), and 8(b) and Supplemental Resolution 2.
59 See U.S. Exchange Holdings Bylaws, Article VI, Section 16.
60 See ISE Holdings Bylaws, Article I, Section 1.4.
Owners that would have the effect of changing the Supplemental Resolutions or the 2007 Resolutions) be submitted to the Boards of EDGX and EDGA.\(^{62}\) If such change must be filed with, or filed with and approved by, the Commission under Section 19 of the Act,\(^{63}\) and the rules thereunder, then such change shall not be effective until filed with, or filed with and approved by, the Commission.\(^{64}\) The Commission finds that these provisions are consistent with the Act, and that they will assist EDGX and EDGA in fulfilling their self-regulatory obligations and in administering and complying with the requirements of the Act.

3. Controlling Persons

Under Section 20(a) of the Act, any person with a controlling interest in EDGX or EDGA would be jointly and severally liable with and to the same extent that EDGX or EDGA is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, section 21C of the Act authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation. These provisions are applicable to all entities controlling the Exchanges, including the Trust, DE Holdings, ISE Holdings, and the Upstream Owners.

C. Ownership and Voting Limitations; Changes in Control of the Exchanges

The DE Holdings Certificate includes restrictions on the ability to own and vote shares of the capital stock of DE Holdings.\(^{65}\) These limitations are designed to prevent any Member of DE Holdings from exercising undue control over the operation of the Exchanges and to assure that the Exchanges and the Commission are able to carry out their regulatory obligations under the Act. Similarly, the corporate governing documents of ISE Holdings include ownership and voting limitations (respectively, the “ISE Holdings Ownership Limit” and the “ISE Holdings Voting Limit”) that apply for so long as ISE Holdings controls, directly or indirectly, a national securities exchange, including EDGX or EDGA. The Resolutions and Supplemental Resolutions of the non-U.S. Upstream Owners, and the U.S. Exchange Holdings Certificate of Incorporation, include provisions requiring these entities to take reasonable steps necessary to cause ISE Holdings to be in compliance with the ISE Holdings Ownership Limit and the ISE Holdings Voting Limit.

1. DE Holdings

Generally, no person, other than ISE Holdings, either alone or together with its related persons, may own, directly or indirectly, of record or beneficially, more than 20% of the voting power (respectively, the “ISE Holdings Ownership Limit” and the “ISE Holdings Voting Limit”) that would violate the voting limitations, and any Units that would violate the voting limitation will not be entitled to vote to the extent of the violation.\(^{67}\)

The DE Holdings Board may waive the 40% ownership limitation applicable to persons who are not Exchange members and the 20% voting limitation pursuant to an amendment to the DE Holdings Operating Agreement adopted by the DE Holdings Board if the DE Holdings Board finds that the amendment would not be effective unless it is filed with and approved by the Commission.\(^{68}\) However, as long as DE Holdings directly or indirectly controls an Exchange, the DE Holdings Board may not waive the ownership and voting limitations above 20% for Exchange members or their related persons.\(^{70}\)

Exchange members that trade on an exchange traditionally have ownership interests in such exchange. As the Commission has noted in the past, however, a member’s interest in an exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.\(^{71}\) A member that is a controlling shareholder of an exchange...
might be tempted to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and surveil the member’s conduct or diligently enforce its rules and the federal securities laws with respect to conduct by the member that violates such provisions.

In addition, as proposed, the Exchanges will be wholly-owned subsidiaries of DE Holdings. The Amended and Restated Bylaws of EDGX and EDGA (together, the “Exchanges Amended and Restated Bylaws”) identify this ownership structure.76 Any changes to the Exchanges Amended and Restated Bylaws, including any change in the provision that identifies DE Holdings as the initial owner of the Exchanges, must be filed with and approved by the Commission pursuant to Section 19 of the Act.77

The Commission believes that these provisions are consistent with the Act. These requirements should minimize the possibility that a person could improperly interfere with or restrict the ability of the Commission or the Exchanges to effectively carry out their regulatory oversight responsibilities under the Act. In its comment letter, Nasdaq raises questions relating to the ownership and control of EDGX and EDGA, in particular, and of national securities exchanges in general. In this regard, Nasdaq notes that that it will review proposed rule changes by EDGX and EDGA for possible bias in favor of the Exchanges’ Member/owners, the Commission believes that it will review proposed rule changes by the Exchanges, as it reviews the proposed rule changes of all other national securities exchanges, to evaluate whether the proposed rules are consistent with Act, in general, and, in particular, with the requirements of Section 6(b)(5) of the Act.84

Nasdaq also expresses concern regarding potential unfair advantages resulting from exchanges of information between the Exchanges and their Member/owners.85 In particular, Nasdaq questions how the Exchanges will implement the provisions of Exchange Rules 2.10 and 2.1186 and Exchange Amended and Restated Bylaws Article XI which, among other things, restrict the flow of confidential information between the Exchanges and other

76 See Exchanges Amended and Restated Bylaws Article I(jj). The enumeration in the Amended and Restated Bylaws of EDGX and EDGA is identical.
78 See Nasdaq Letter, supra note 4, at 3. Credit Suisse, however, believes that Commission rules governing the ownership structure of alternative trading systems are unnecessary and would be inconsistent with the goals of Regulation ATS. See Credit Suisse Letter, supra note 4. The Commission does not believe that the consideration of the Exchanges’ applications for exchange registration are the appropriate forum for considering this issue.
79 Id. at 4. In this regard, Nasdaq notes that three broker-dealers each hold a 19.9% ownership interest in DE Holdings. See Nasdaq Letter, supra note 4, at 2.
80 See Nasdaq Letter, supra note 4, at 4.
81 See notes 65–77, supra, and accompanying text.
82 See note 65, supra.
83 See Exchanges Amended and Restated Bylaws, Article III, Section 2(b). The composition of the Exchanges’ Boards is discussed in greater detail in Section II.D.1., infra.
85 Exchange Rule 2.10, “Affiliation between Exchange and a Member,” generally prohibits an Exchange from acquiring an ownership interest in a Member, and a Member from becoming an affiliate of the Exchange, without prior Commission approval. Exchange Rule 2.10 allows an Exchange Member to be a Director of the Exchange or of DE Holdings. In addition, Exchange Rule 2.10 allows each Exchange to be an affiliate of DECN. Exchange Rule 2.11, “Direct Edge ECN LLC as Outbound Router,” addresses DECN’s function as the outbound router for the Exchanges. Exchange Rules 2.10 and 2.11 are discussed in greater detail in Section III.G., infra.
86 See, e.g., Article XI, Section 3 of the Amended and Restated Bylaws of BATS Exchange, Inc.
privileges of the capital stock) (“ISE Holdings Ownership Limit”). In addition, for so long as ISE Holdings controls, directly or indirectly, a Controlled National Securities Exchange, no person, either alone or together with its related persons, may, directly or indirectly, vote or cause the voting of more than 20% of the ISE Holdings capital stock that has the right by its terms to vote in the election of the ISE Holdings Board or on other matters (other than matters affecting the rights, preferences, or privileges of the capital stock) (“ISE Holdings Voting Limit”).

Article XI of the ISE Holdings Bylaws, which originally was adopted in connection with the Eurex Transaction, waives the ISE Holdings Ownership Limits and the ISE Holdings Voting Limits to allow the Upstream Owners to own and vote all of the common stock of ISE Holdings. Article XI, Section 11.1(b) states that, in waiving the ISE Holdings Ownership Limits and the ISE Holdings Voting Limits to permit the Upstream Owners to own and vote the capital stock of ISE Holdings, the ISE Holdings Board has determined, with respect to each Upstream Owner, that:

(i) Such waiver will not impair the ability of ISE Holdings and each Controlled National Securities Exchange to carry out their respective functions and responsibilities under the Act; (ii) such waiver is in the best interests of ISE Holdings, its stockholders, and each Controlled National Securities Exchange; (iii) such waiver will not impair the ability of the Commission to enforce the Act; (iv) neither the Upstream Owner nor any of its related persons is subject to a statutory disqualification (within the meaning of Section 3(a)(9) of the Act); and (v) neither the Upstream Owner nor any of its related persons is a member of such Controlled National Securities Exchange.

Because Article XI, Section 11.1(b) requires the ISE Holdings Board, in waiving the ISE Holdings Ownership Limit and the ISE Holdings Voting Limit, to have determined, with respect to each Upstream Owner, that, among other things, such waiver will not impair the ability of EDGX and EDGA to carry out their functions and responsibilities under the Act, or impair the Commission’s ability to enforce the Act, the Commission believes that the Upstream Owners’ exercise of ownership and voting control of ISE Holdings will not impair the ability of the Commission or of EDGX and EDGA to discharge their respective responsibilities under the Act.

(b) Upstream Owners

To facilitate compliance with the ISE Holdings Ownership Limit and the ISE Holdings Voting Limit, the Resolutions of the non-U.S. Upstream Owners, as supplemented by the Supplemental Resolutions, provide that each such owner will take reasonable steps necessary to cause ISE Holdings to be in compliance with the ISE Holdings Ownership Limit and the ISE Holdings Voting Limit. Likewise, the U.S. Exchange Holdings Certificate provides that, for so long as U.S. Exchange Holdings directly or indirectly controls a national securities exchange, including EDGX or EDGA, U.S. Exchange Holdings will take reasonable steps necessary to cause ISE Holdings to be in compliance with the ISE Holdings Ownership Limit and the ISE Holdings Voting Limit. The Commission believes that these provisions in the Resolutions, as supplemented by the Supplemental Resolutions, and in the U.S. Exchange Holdings Certificate should minimize the potential that a person could improperly interfere with, or restrict the ability of, the Commission or EDGX or EDGA to effectively carry out their regulatory responsibilities under the Act.

D. EDGX and EDGA

EDGX and EDGA each have applied to the Commission to register as a national securities exchange. As part of their exchange applications, EDGX and EDGA have filed their Certificates of Incorporation (together, the “Exchange Certificates”) and the Exchanges Amended and Restated Bylaws. In these documents, among other things, the Exchanges establish the composition of their respective Boards of Directors (each, an “Exchange Board,” and, together, the “Exchange Boards”) and the committees of the Exchanges.

1. Exchange Boards

Each Exchange Board will be the governing body of its Exchange and will possess all of the powers necessary for the management of the business and affairs of the Exchange to effect the execution of the Exchange’s responsibilities as a self-regulatory organization (“SRO”). Under the Exchanges Amended and Restated Bylaws, each Exchange Board initially will be composed of 19 Directors, including:

- The Chief Executive Officer (“CEO”) of EDGX or EDGA, as applicable;
- Four Owner Directors;
- Ten Independent Directors; and
- Four Exchange Member Directors.

In addition, at all times, at least 20% of the Directors of each Exchange Board will be Exchange Member Directors and the majority of the Directors of each Exchange Board will be Independent Directors.

The enumeration in the EDGX Certificate and the EDGA Certificate and the EDGX Amended and Restated Bylaws are the same as the enumeration in the EDGX Certificate and the EDGA Certificate and the EDGX Amended and Restated Bylaws, respectively.

The Designating Owners of DE Holdings (i.e., Members of DE Holdings that hold at least a 15% Percentage Interest in DE Holdings) select the Owner Directors. See Exchanges Amended and Restated Bylaws, Articles 1(k) and III, Section 2(b).

An Independent Director is a Director who has no material relationship with (i) the Exchange or any Affiliate of the Exchange, or (ii) any Exchange Member or Affiliate of any Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director will not be disqualified from serving in such capacity solely because such Director is a Director of the Exchange, DE Holdings, or, the case of EDGA, a Director of EDGX and, in the case of EDGX, a Director of EDGA. See Exchanges Amended and Restated Bylaws, Article 1(l).

An Independent Director is an officer, director, employee or agent of an Exchange Member who is elected in an Exchange Director position. See Exchanges Amended and Restated Bylaws, Article 1(q).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(b).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(a)(ii). An Exchange Member Director is an Exchange Director who is elected in an Exchange Director position by a person other than a Director, with no material relationship to the Exchange or any Affiliate of the Exchange, or (ii) any Exchange Member or Affiliate of any Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director will not be disqualified from serving in such capacity solely because such Director is a Director of the Exchange, DE Holdings, or, the case of EDGA, a Director of EDGX and, in the case of EDGX, a Director of EDGA. See Exchanges Amended and Restated Bylaws, Article 1(l).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(a)(ii). An Exchange Member Director is a Director who has no material relationship with (i) the Exchange or any Affiliate of the Exchange, or (ii) any Exchange Member or Affiliate of any Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director will not be disqualified from serving in such capacity solely because such Director is a Director of the Exchange, DE Holdings, or, the case of EDGA, a Director of EDGX and, in the case of EDGX, a Director of EDGA. See Exchanges Amended and Restated Bylaws, Article 1(q).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(b).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(a)(ii). An Exchange Member Director is a Director who has no material relationship with (i) the Exchange or any Affiliate of the Exchange, or (ii) any Exchange Member or Affiliate of any Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director will not be disqualified from serving in such capacity solely because such Director is a Director of the Exchange, DE Holdings, or, the case of EDGA, a Director of EDGX and, in the case of EDGX, a Director of EDGA. See Exchanges Amended and Restated Bylaws, Article 1(q).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(b).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(a)(ii). An Exchange Member Director is a Director who has no material relationship with (i) the Exchange or any Affiliate of the Exchange, or (ii) any Exchange Member or Affiliate of any Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director will not be disqualified from serving in such capacity solely because such Director is a Director of the Exchange, DE Holdings, or, the case of EDGA, a Director of EDGX and, in the case of EDGX, a Director of EDGA. See Exchanges Amended and Restated Bylaws, Article 1(q).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(b).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(a)(ii). An Exchange Member Director is a Director who has no material relationship with (i) the Exchange or any Affiliate of the Exchange, or (ii) any Exchange Member or Affiliate of any Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director will not be disqualified from serving in such capacity solely because such Director is a Director of the Exchange, DE Holdings, or, the case of EDGA, a Director of EDGX and, in the case of EDGX, a Director of EDGA. See Exchanges Amended and Restated Bylaws, Article 1(q).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(b).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(a)(ii). An Exchange Member Director is a Director who has no material relationship with (i) the Exchange or any Affiliate of the Exchange, or (ii) any Exchange Member or Affiliate of any Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director will not be disqualified from serving in such capacity solely because such Director is a Director of the Exchange, DE Holdings, or, the case of EDGA, a Director of EDGX and, in the case of EDGX, a Director of EDGA. See Exchanges Amended and Restated Bylaws, Article 1(q).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(b).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(a)(ii). An Exchange Member Director is a Director who has no material relationship with (i) the Exchange or any Affiliate of the Exchange, or (ii) any Exchange Member or Affiliate of any Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director will not be disqualified from serving in such capacity solely because such Director is a Director of the Exchange, DE Holdings, or, the case of EDGA, a Director of EDGX and, in the case of EDGX, a Director of EDGA. See Exchanges Amended and Restated Bylaws, Article 1(q).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(b).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(a)(ii). An Exchange Member Director is a Director who has no material relationship with (i) the Exchange or any Affiliate of the Exchange, or (ii) any Exchange Member or Affiliate of any Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director will not be disqualified from serving in such capacity solely because such Director is a Director of the Exchange, DE Holdings, or, the case of EDGA, a Director of EDGX and, in the case of EDGX, a Director of EDGA. See Exchanges Amended and Restated Bylaws, Article 1(q).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(b).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(a)(ii). An Exchange Member Director is a Director who has no material relationship with (i) the Exchange or any Affiliate of the Exchange, or (ii) any Exchange Member or Affiliate of any Exchange Member; provided, however, that an individual who otherwise qualifies as an Independent Director will not be disqualified from serving in such capacity solely because such Director is a Director of the Exchange, DE Holdings, or, the case of EDGA, a Director of EDGX and, in the case of EDGX, a Director of EDGA. See Exchanges Amended and Restated Bylaws, Article 1(q).

See Exchanges Amended and Restated Bylaws, Article III, Section 2(b).
Each Exchange’s Nominating Committee will nominate candidates for each director position (other than Owner Directors, Exchange Member Directors, and the director position filled by the CEO), and DE Holdings, as the sole shareholder, will elect those directors. Each Exchange’s Member Nominating Committee will nominate candidates for each Exchange Member Director on the Exchange Board.109 Members of EDGX and EDGA may nominate additional candidates for the Exchange Member Director positions pursuant to a petition process.110 If no candidates are nominated pursuant to a petition process, then each Exchange’s Nominating Committee will nominate the initial nominees of the Member Nominating Committee as Exchange Member Directors.111 If a petition process produces additional candidates, then the candidates nominated pursuant to the petition process, together with those nominated by each Exchange’s Member Nominating Committee, will be presented to Exchange Members for election to determine the final nomination of Exchange Member Directors.112 Each Exchange’s Nominating Committee will nominate the candidates who receive the most votes as Exchange Member Directors.113 DE Holdings, as the sole shareholder, will elect those candidates nominated by each Exchange’s Nominating Committee as Exchange Member Directors.114 The Commission believes that the requirement in the Exchanges Amended and Restated By-Laws that 20% of the directors be Exchange Member Directors and the means by which they are chosen by Members provides for the fair representation of members in the selection of directors and the administration of the Exchanges consistent with the requirement in Section 6(b)(3) of the Act.115 As the Commission has previously noted, this requirement helps to ensure that members have a voice in the use of self-regulatory authority, and that an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities.116

The Commission has previously stated its belief that the inclusion of public, non-industry representatives on exchange oversight bodies is critical to an exchange’s ability to protect the public interest.117 Further, public, non-industry representatives help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. The Commission believes that public directors can provide unique, unbiased perspectives, which should enhance the ability of the Exchange Boards to address issues in a non-discriminatory fashion and foster the integrity of the Exchanges.118 The Commission believes that the composition of the Exchange Boards satisfy the requirements in Section 6(b)(3) of the Act,119 which requires that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer.120

2. Exchange Committees

In the Exchanges Amended and Restated Bylaws, the Exchanges have proposed to establish several committees. Specifically, each Exchange has proposed to establish the following committees whose members the Exchange Boards, after consultation with the Chairman, may designate: a Compensation Committee;121 an Audit Committee;120 a Governance Committee;120 a Market Quality Committee;120 a By-Laws and Rules Committee;120 and a Business Conduct Committee.120

103 See Form 1 Applications, Exhibit J, Response 2.
104 The Nominating Committee will consist solely of three independent Directors. See Exchanges Amended and Restated Bylaws, Article IV, Section 1(b).
105 See Exchanges Amended and Restated Bylaws, Article III, Sections 2 and 4.
106 The Nominating Committee will consist solely of three independent Directors. See Exchanges Amended and Restated Bylaws, Article IV, Section 1(b).
107 Additional candidates for the Member Nominating Committee may be nominated and elected by each Exchange’s Members pursuant to a petition process.
108 The Exchange Member Nominating Committee will solicit comments from Exchange members for the purpose of approving and submitting names of candidates for election to the position of Exchange Member Director. See Exchanges Amended and Restated Bylaws, Article III, Section 4.
109 See Exchanges Amended and Restated Bylaws, Article III, Section 4(c). The petition must be signed by Exchange Member Representatives representing 10% or more of the Exchange members. No Exchange member, together with its Affiliates, may account for more than 50% of the signatures endorsing a particular candidate. Id. See Exchanges Amended and Restated Bylaws, Article III, Section 4(d).
110 See Exchanges Amended and Restated Bylaws, Article III, Section 4(e) and (f). Each Exchange Member will have the right to cast one vote for each available Exchange Director nomination, provided that any such vote must be cast for a person on the List of Candidates, and no Exchange Member, together with its Affiliates, may account for more than 20% of the votes cast for a candidate. See Exchanges Amended and Restated Bylaws, Article III, Section 4(f).
111 See Exchanges Amended and Restated Bylaws, Article III, Section 4(f).
112 See Exchanges Amended and Restated Bylaws, Article III, Section 4(e).
113 The Exchange Member Nominating Committee will solicit comments from Exchange members for the purpose of approving and submitting names of candidates for election to the position of Exchange Member Director. See Exchanges Amended and Restated Bylaws, Article III, Section 4.
114 The Exchange Member Nominating Committee will solicit comments from Exchange members for the purpose of approving and submitting names of candidates for election to the position of Exchange Member Director. See Exchanges Amended and Restated Bylaws, Article III, Section 4(c). The petition must be signed by Exchange Member Representatives representing 10% or more of the Exchange members. No Exchange member, together with its Affiliates, may account for more than 50% of the signatures endorsing a particular candidate. Id. See Exchanges Amended and Restated Bylaws, Article III, Section 4(d).
116 See, e.g., Nasdaq Exchange Registration Order and NYSE/Archipelago Merger Approval Order, supra note 75, and BATS Exchange Order, supra note 65.
118 See Nasdaq Exchange Registration Order and NYSE/Archipelago Merger Approval Order, supra note 75, and BATS Exchange Order, supra note 65.
120 See Form 1 Applications, Exhibit J, Response 2 (stating that at least one Independent Director will be a public non-industry representative not associated with a member of the Exchange or with a broker or dealer, as required by Section 6(b)(3) of the Act).
121 The Compensation Committee will consist of three Independent Directors. See Exchanges Amended and Restated Bylaws.
Committee; an Executive Committee; a Regulatory Oversight Committee; and an Appeals Committee. In addition, each Exchange has proposed to establish a Nominating Committee and a Member Nominating Committee, which will be elected on an annual basis by a vote of the stockholders. For the reasons discussed above, the Commission believes that the Exchanges’ proposed committees should enable the Exchanges to carry out their responsibilities under the Act and are consistent with the Act.

E. Regulation of EDGX and EDGA

As a prerequisite for the Commission’s approval of an exchange’s application for registration, an exchange must be organized and have the capacity to carry out the purposes of the Act. Among other requirements, an exchange must be able to enforce compliance by its members, and persons associated with its members, with the federal securities laws and the rules of the exchange.

1. Membership

Membership on the Exchanges will be open to any registered broker or dealer that is a member of another registered national securities exchange or association, or any natural person associated with such a registered broker or dealer. To be eligible for membership in the Exchanges, a person must be, and remain, a member of another registered national securities exchange or association.

For a temporary 90-day period after approval of the Exchanges’ Form 1 Applications, an applicant that is an active member of another registered national securities exchange or the Financial Industry Regulatory Authority, Inc. (“FINRA”) and is a current or former subscriber to DECN will be able to apply through an expedited process to become a member of one or both Exchanges, and to register with the Exchange(s) all of its associated persons whose registrations are active at the time the Exchanges are approved as national securities exchanges, by submitting waive-in application forms, including membership agreements. EDGX or EDGA may request additional documentation in addition to the waive-in application form in order to determine whether a waive-in applicant meets the Exchange’s qualification standards. All of the firm’s associated persons who are registered in categories recognized by Exchange rules would become registered persons of an Exchange member firm.

All other applicants (and after the 90-day period has ended, those that could have waived in through the expedited process) may apply for membership in one or both Exchanges by submitting a full membership application to the Exchange(s). Applications for association with an Exchange Member shall be submitted to the Exchange(s) on Form U-4 and such other forms as the Exchanges may prescribe.

Each Exchange will receive and review all applications for membership in the Exchange. If an Exchange is satisfied that the applicant is qualified for membership, the Exchange will promptly notify the applicant, in writing, of such determination, and the applicant will be a member of the Exchange. If an Exchange is not satisfied that the applicant is qualified for membership, the Exchange shall promptly notify the applicant of the grounds for denial. Once an applicant is a member of an Exchange, it must continue to possess all the qualifications set forth in the Exchange’s rules. When an Exchange has reason to believe that an Exchange member or associated person of a member fails to meet such qualifications, the Exchange may suspend or revoke such person’s membership or association.

Amended and Restated Bylaws, Article V, Sections 2(a) and 5(b).

The Audit Committee will have at least three members and will consist solely of Directors, including a majority of Independent Directors, and an Independent Director will serve as Chairman of the Audit Committee. See Exchanges Amended and Restated Bylaws, Article V, Sections 2(a) and 5(b).

The Regulatory Oversight Committee will have at least three members and will consist solely of Independent Directors. See Exchanges Amended and Restated Bylaws, Article V, Sections 2(a) and 5(c).

The Appeals Committee will consist of two Independent Directors and one Exchange Member Director. See Exchanges Amended and Restated Bylaws, Article V, Section 5(d).

See Exchanges Amended and Restated Bylaws, Article VI, Sections 1 and 2, and Section 1D.1., supra.

See Exchanges Amended and Restated Bylaws, Article VI, Sections 1 and 3, and Section 1D.1., supra.


Id. See also Section 19(g) of the Act, 15 U.S.C. 78s(g).

See Exchange Rules 2.3(a) and 2.5(a)(4).

See Exchange Rule 2.4. The BATS Exchange also provided a waive-in application process. See BATS Rule 2.4.

Id.

Id.

See Exchange Rule 2.6.

See Exchange Rule 2.6(b).

See Exchange Rule 2.6(c).

See Exchange Rule 2.6(d).

See Exchange Rule 2.7; see also Exchange Rules Chapters VII and VIII.

Appeal of a staff denial, suspension, or termination of membership will be heard by the Appeals Committee of EDGX or EDGA, as applicable. Decisions of the Appeals Committee will be made in writing and will be sent to the parties to the proceeding. The decisions of the Appeals Committee will be subject to review by the applicable Exchange Board, on its own motion, or upon written request by the aggrieved party or by the Chief Regulatory Officer (“CRO”). The Exchange Board will have sole discretion to grant or deny the request. The Exchange Board will conduct the review of the Appeals Committee’s decision and may affirm, reverse, or modify the Appeals Committee’s decision. An Exchange Board’s decision is final.

The Commission finds that the membership rules of EDGX and EDGA are consistent with section 6 of the Act, specifically section 6(b)(2) of the Act, which requires that a national securities exchange have rules that provide that any registered broker or dealer or natural person associated with such broker or dealer may become a member and any person may become associated with an exchange member. The Commission notes that pursuant to section 6(c) of the Act, an exchange must deny membership to any person, other than a natural person, that is not a registered broker or dealer, any natural person that is not, or is not associated with, a registered broker or dealer, and registered broker-dealers that do not satisfy certain standards, such as financial responsibility or operational capacity. As registered exchanges, the Exchanges must independently determine if an applicant satisfies the standards set forth in the Act, regardless of whether an applicant is a member of another SRO.

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123 See Exchange Rule 10.3: see also Exchanges Amended and Restated Bylaws Article V, Section 5(d).
140 See Exchange Rule 10.4(d).
141 See Exchange Rule 10.5(a).
142 Id.
143 See Exchange Rule 10.5(b).
144 Id. Membership decisions are subject to review by the Commission. See Exchange Rule 10.7 and Section 19(d) of the Act, 15 U.S.C. 78s(d).
148 See Nasdaq Exchange Registration Order, supra note 75.

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2. Regulatory Independence

Each Exchange has proposed several measures to help ensure the independence of its regulatory function from its market operations and other commercial interests. The regulatory operations of each Exchange will be supervised by the Exchange’s CRO and monitored by its Regulatory Oversight Committee.\(^{149}\) The Regulatory Oversight Committees of each Exchange will consist of three members, each of whom must be an Independent Director.\(^ {150}\) Each Exchange’s Regulatory Oversight Committee will be responsible for monitoring the adequacy and effectiveness of the Exchange’s regulatory program, assessing the Exchange’s regulatory performance, and assisting the Exchange Board in reviewing the Exchange’s regulatory plan and the overall effectiveness of the Exchange’s regulatory functions.\(^ {151}\) Each Exchange’s Regulatory Oversight Committee also will meet with the Exchange’s CRO in executive session at regularly scheduled meetings and at any time upon request of the CRO or any member of the Regulatory Oversight Committee.\(^ {152}\)

Each Exchange proposes that its CRO have general supervision of the regulatory operations of the Exchange, including overseeing surveillance, examination, and enforcement functions.\(^ {153}\) The CRO also will administer any regulatory services agreement with another SRO to which the Exchange is a party.\(^ {154}\) The CRO of each Exchange will be an Executive Vice President or Senior Vice President of the Exchange, and also may serve as the Exchange’s General Counsel.\(^ {155}\)

In addition, each Exchange has taken steps designed to provide sufficient funding for the Exchange to carry out its responsibilities under the Act. Specifically, each Exchange has represented that: (1) DE Holdings will allocate sufficient operational assets and make a capital contribution to the Exchange’s capital account prior to the launch of the Exchange; (2) such an allocation and contribution will be adequate to operate the Exchange, including the regulation of the Exchange; and (3) there will be an explicit agreement between the Exchange and DE Holdings that requires DE Holdings to provide adequate funding for each Exchange’s operations, including the regulation of the Exchange.\(^ {156}\) In addition, the Amended and Restated Bylaws of each Exchange provides that revenues received by the Exchange from fees derived from its regulatory function or regulatory penalties will not be used for non-regulatory purposes or distributed to the stockholders, but rather, will be applied to fund the legal and regulatory operations of the Exchange (including surveillance and enforcement activities), or will be used to pay restitution and disgorgement of funds intended for customers.\(^ {157}\)

3. Regulatory Contracts

Although the Exchanges will be SROs with all of the attendant regulatory obligations under the Act, EDGX and EDGA each have stated that they entered into a regulatory contract with FINRA and a regulatory contract with ISE LLC (each, a “Regulatory Contract,” and, together, the “Regulatory Contracts”), under which FINRA and ISE will perform certain regulatory functions on behalf of EDGX and EDGA.\(^ {158}\) Specifically, each Exchange states that FINRA will assist Exchange staff on registration issues on an as-needed basis, investigate potential violations of each Exchange’s rules or federal securities laws related to activity on the Exchange, conduct examinations related to market conduct on the Exchange by Members, assist the Exchanges with disciplinary proceedings pursuant to each Exchange’s rules, including issuing charges, presiding over disciplinary hearings, and provide dispute resolution services to Exchange Members on behalf of the Exchanges, including operation of each Exchange’s arbitration program. Each Exchange also represents that FINRA will provide the Exchange with access to FINRA’s WebCRD system, and will assist with programming Exchange-specific functionality relating to such system.\(^ {159}\) With respect to the Regulatory Contracts with ISE, each Exchange states that ISE will perform surveillance including, but not limited to, reviews respecting trading through protected quotes, locked and crossed markets, manipulation, wash trades, marking the close, customer complaints, frontrunning, trading ahead of customer orders, and anti-spoofing.\(^ {160}\)

Notwithstanding the Regulatory Contracts, each Exchange acknowledges it will retain ultimate legal responsibility for the regulation of its members and its market.\(^ {161}\)

The Commission believes that it is consistent with the Act to allow the Exchanges to contract with FINRA and ISE to perform examination, enforcement, and disciplinary functions.\(^ {162}\) These functions are fundamental elements to a regulatory program, and constitute core self-regulatory functions. The Commission believes that FINRA and ISE have the expertise and experience to perform these functions on behalf of the Exchanges.\(^ {163}\)

At the same time, each Exchange, unless relieved by the Commission of its responsibility,\(^ {164}\) bears the ultimate responsibility for self-regulatory responsibilities and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on the Exchange’s behalf. In performing these regulatory functions, however, the SROs retained to perform regulatory functions may nonetheless bear liability for causing or aiding and abetting the failure of EDGX or EDGA to perform its

\(^{149}\) See Exchanges Amended and Restated Bylaws, Article V, Section 5(c).

\(^{150}\) See Exchanges Amended and Restated Bylaws Articles I(u) and V, Sections 2(a) and 5(c).

\(^{151}\) See Exchanges Amended and Restated Bylaws Article V, Section 5(c).

\(^{152}\) See Exchanges Amended and Restated Bylaws Article VII, Section 9.

\(^{153}\) Id.

\(^{154}\) Id.

\(^{155}\) Id. See Nasdaq Exchange Registration Order, supra note 75.

\(^{156}\) See Amendment No. 2, supra note 5.

\(^{157}\) See Exchanges Amended and Restated Bylaws Article X, Section 4.

\(^{158}\) See Exchange Rule 11.7; see also Amendment No. 2, Pursuant to the applicable provisions of the Freedom of Information Act, 5 U.S.C. 552, and Commission regulations thereunder, 17 CFR 200.83, the Exchanges have requested confidential treatment for the Regulatory Contracts.

\(^{159}\) See Amendment No. 2, supra note 5.
4. 17d–2 Agreement

Section 19(g)(1) of the Act requires every SRO to examine its members and persons associated with its members and to enforce compliance with the federal securities laws and the SRO’s own rules, unless the SRO is relieved of this responsibility pursuant to section 17(d) of the Act. Section 17(d) was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication with respect to members of more than one SRO (“common members”). Rule 17d–2 of the Act permits SROs to propose joint plans allocating regulatory responsibilities concerning common members. These agreements, which must be filed with and approved by the Commission, generally cover such regulatory functions as personnel registration, branch office examinations, and sales practices. Commission approval of a Rule 17d–2 plan relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO. Many existing SROs have entered into such agreements.

EDGX and EDGA each have represented to the Commission that each Exchange and FINRA intend to file Rule 17d–2 agreements with the Commission covering common members of EDGX or EDGA, as applicable, and FINRA. These agreements would allocate to FINRA regulatory responsibility, with respect to common members, for the following:

- FINRA will examine common members of EDGX or EDGA, as applicable, and FINRA for compliance with federal securities laws, rules and regulations, and rules of the Exchange that the Exchange has certified as identical or substantially similar to FINRA rules.
- FINRA will investigate common members of EDGX or EDGA, as applicable, and FINRA for violations of federal securities laws, rules or regulations, or Exchange rules that the Exchange has certified as identical or substantially similar to FINRA rules.
- FINRA will enforce compliance by common members with the federal securities laws, rules and regulations, and the rules of EDGX or EDGA, as applicable, that the Exchange has certified as identical or substantially similar to FINRA rules.

Because EDGX and EDGA anticipate entering into this Rule 17d–2 agreement, they have not made provision to fulfill the regulatory obligations that would be undertaken by FINRA under these agreements with respect to common members of EDGX or EDGA, as applicable, and FINRA. Accordingly, the Commission is conditioning the operation of the Exchanges on approval of the Commission of the Rule 17d–2 agreements between each Exchange and FINRA that allocate the above specified matters to FINRA.

5. Discipline and Oversight of Members

As noted above, as a prerequisite for Commission approval of an exchange’s application for registration, an exchange must be organized and have the capacity to carry out the purposes of the Act. Among other requirements, an exchange must be able to enforce compliance by its members and persons associated with its members with federal securities laws and the rules of the exchange. As noted above, pursuant to the Regulatory Contracts, FINRA will perform many of the initial disciplinary processes on behalf of the Exchanges. For example, FINRA will investigate potential securities laws violations, issue complaints, and conduct hearings pursuant to the rules of the Exchanges. Appeals from disciplinary decisions will be heard by each Exchange’s Appeals Committee, and the Appeals Committee’s decision shall be final. In addition, each Exchange Board may on its own initiative order review of a disciplinary decision.

The Exchanges Amended and Restated Bylaws and the Exchanges’ rules provide that each Exchange has disciplinary jurisdiction over its members so that it can enforce its members’ compliance with its rules and the federal securities laws. Each Exchange’s rules also permit it to sanction members for violations of its rules and violations of the federal securities laws and rules by, among other things, expelling or suspending members, limiting members’ activities, functions, or operations, fining or censuring members, or suspending or barring a person from being associated with a member, or any other fitting sanction. Each Exchange’s rules also provide for the imposition of fines for certain minor rule violations in lieu of commencing disciplinary proceedings. Accordingly, as a condition to the operation of the Exchanges, a Minor Rule Violation Plan (“MRVP”) filed by each Exchange under

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165 For example, if failings by the SRO retained to perform regulatory functions have the effect of leaving an Exchange in violation of any aspect of the exchange’s self-regulatory obligations, the Exchange would bear direct liability for the violation, whereas the SRO retained to perform the necessary functions may bear liability for causing or aiding and abetting the violation. See, e.g., Nasdaq Exchange Registration Order, supra note 75; BATS Exchange Order, supra note 63; and Securities Exchange Exchange Order Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10–127) (order approving the International Securities Exchange LLC’s application for registration as a national securities exchange).

166 Id.


168 See Rule 17d–2 Adopting Release, supra note 170.


170 The Commission notes that regulation that is substantially identical to a FINRA rule.

171 The Exchanges Note 65; and

172 The Commission notes that regulation that is substantially identical to a FINRA rule.

173 See generally Exchanges Amended and Restated Bylaws Article X and Exchange Rules Chapters II and VIII.

174 See Exchange Rules 2.2 and 8.1(a).

175 See Exchange Rule 8.10(c).

176 See generally Exchanges Amended and Restated Bylaws Article X and Exchange Rules Chapters II and VIII.

177 See Section III.E.S., supra.

178 See Exchange Rules 8.10(b).
Act Rule 19d–1(c)(2) must be declared effective by the Commission. The Commission finds that the Exchanges Amended and Restated By-Laws and the rules of each Exchange concerning the Exchange’s disciplinary and oversight programs are consistent with the requirements of sections 6(b)(6) and 6(b)(7) of the Act in that they provide fair procedures for the disciplining of members and persons associated with members. The Commission further finds that the rules of EDGX and EDGA are designed to provide the Exchanges with the ability to comply, and with the authority to enforce compliance by their members and persons associated with their members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchanges.

F. Trading Systems of EDGX and EDGA

1. Trading Rules

Each Exchange will operate a fully automated electronic order book. Members of EDGX and EDGA and entities that enter into sponsorship arrangements with such members (collectively, “Users”) will have access to the systems of EDGX and EDGA (each, an “EDGX System,” an “EDGA System,” or an “Exchange System,” and, together, the “Exchange Systems”). Users will be able to electronically submit market and various types of limit orders to EDGX or EDGA from remote locations. All orders submitted to the Exchanges will be displayed unless designated otherwise by the Exchange member submitting the order. Displayed orders will be displayed on an anonymous basis at a specified price. Non-displayed orders will not be displayed but will be ranked in an Exchange System at a specified price. The Exchanges’ Systems will continuously and automatically match orders pursuant to price/time priority, except that displayed orders will have priority over non-displayed orders at the same price.

Each Exchange System is designed to comply with Rule 611 of Regulation NMS by requiring that, for any execution to occur on the Exchange during regular trading hours, the price must be equal to, or better than, any “protected quotation” within the meaning of Regulation NMS (“Protected Quotation”), unless an exception to Rule 611 of Regulation NMS applies. Each Exchange will direct any orders or portion of orders that cannot be executed in their entirety to away markets for execution, unless the terms of the orders direct the Exchange not to route such orders away.

Each Exchange intends to operate as an automated trading center in compliance with Rule 600(b)(4) of Regulation NMS. Each Exchange will display automated quotations at all times except in the event that a systems malfunction renders the Exchange’s System incapable of displaying automated quotations. Each Exchange has designed its rules relating to orders, modifiers, and order execution to comply with the requirements of Regulation NMS, including an immediate-or-cancel functionality. These rules include accepting orders marked as market order, which will allow orders so designated to be automatically matched and executed without reference to Protected Quotations at other trading centers, and routing orders marked as limit order, which will allow for direct routing to the Exchange.

2. Section 11 of the Act

Section 11(a)(1) of the Act prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion (collectively, “covered accounts”), unless an exception applies. Rule 11a2–2(T) under the Act, known as the “effect versus execute” rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2–2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute the transactions on the exchange. To comply with Rule 11a2–2(T)’s conditions, a member: (i) Must transmit the order from off the exchange floor; (ii) May not participate in the execution of the transaction once it has been transmitted to the member performing the execution; and (iii) May not be affiliated with the executing exchange.

Officer, DE Holdings, DECN, EDGX, and EDGA, to James Brigagliano, Co-Acting Director, Division of Trading and Markets, Commission, dated August 10, 2009.

The rules of EDGX and EDGA do not provide for specialists or market makers.

See Exchange Rule 11.8.

See Exchange Rule 11.9(a).

See Exchange Rule 11.9(b)(2).

See Exchange Rule 11.9(b)(4).

See Exchange Rule 11.9(d); see also 17 CFR 242.600(b)(3).

See Exchange Rules 11.5(d) and 11.9; see also 17 CFR 242.605(b)(3).

See Exchange Rule 11.5(d)(1).
member; and (iv) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule.

In letters to the Commission, each Exchange requested that the Commission concur with its conclusion that Exchange members entering orders into each respective Exchange System satisfy the requirements of Rule 11a2–2(T). For the reasons set forth below, the Commission believes that EDGA members entering orders into the EDGX System and EDGX members entering orders into the EDGX System would satisfy the conditions of the Rule.

The rule’s first condition is that orders for covered accounts be transmitted from off the exchange floor. Each Exchange System receives orders electronically through remote terminals or computer-to-computer interfaces. In the context of other automated trading systems, the Commission has found that the off-floor transmission requirement is met if a covered account order is transmitted from a remote location directly to an exchange’s floor by electronic means. Because each Exchange System receives orders electronically through remote terminals or computer-to-computer interfaces, the Commission believes that each System satisfies the off-floor transmission requirement.

Second, the rule requires that the member not participate in the execution of its order. Each Exchange represents that at no time following the submission of an order is a member able to acquire control or influence over the result or timing of an order’s execution. According to each Exchange, the execution of a member’s order is determined solely by what orders, bids, or offers are present in each system at the time the member submits the order and on the priority of those orders, bids, and offers. Accordingly, the Commission believes that Exchange members do not participate in the execution of orders submitted into the Exchange Systems.

Third, Rule 11a2–2(T) requires that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that this requirement is satisfied when automated exchange facilities, such as the Exchange Systems, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange. Each Exchange represents that the design of its Exchange System ensures that no member has any special or unique trading advantage in the handling of its orders after transmitting its orders to the Exchange. Based on the Exchanges’ representations, the Commission believes that the Exchange Systems satisfy this requirement.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2–2(T). Each Exchange represents that Exchange members trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule’s exemption.

G. Section 11A of the Act

Section 11A of the Act and the rules thereunder form the basis of our national market system and impose requirements on exchanges to implement its objectives. Specifically, national securities exchanges are required, under Rule 601 of Regulation NMS, to file transaction reporting plans regarding transactions in listed equity and Nasdaq securities that are executed on their facilities. Currently registered exchanges satisfy this requirement by participating in the Consolidated Transaction Association Plan (“CTA Plan”) for listed equities and the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (“Nasdaq UTP Plan”) for Nasdaq securities. Before the Exchanges can begin operating as exchanges, each must join these plans as a participant.

National securities exchanges are required, under Rule 602 of Regulation
NMS,215 to collect bids, offers, quotation sizes and aggregate quotation sizes from those members who are responsible broker or dealers. National securities exchanges must then make this information available to vendors at all times when the exchange is open for trading. The current exchanges satisfy this requirement by participating in the Consolidated Quotation System Plan ("CQ Plan") for listed equity securities and the Nasdaq UTP Plan for Nasdaq securities. Before EDGX and EDGA can begin operating as exchanges, each must join the CQ Plan as a participant, in addition to the CTA Plan and the Nasdaq UTP Plan.

Finally, national securities exchanges must make available certain order execution information pursuant to Rule 605 of Regulation NMS.216 Current exchanges have standardized the required disclosure mechanisms by participating in the Order Execution Quality Disclosure Plan.217 Each Exchange must join this plan before it begins operations as an exchange.

H. Order Routing

As discussed above, DE Holdings wholly owns EDGA, EDGX, and DECN.218 As such, each Exchange is affiliated with DECN,219 which is a registered broker-dealer and member of FINRA. The Exchanges also anticipate that DECN will be a member of each Exchange.

Each Exchange’s Rule 2.10 provides generally that, without prior Commission approval, the Exchange may not, directly or indirectly, acquire or maintain an ownership interest in a member organization of such Exchange. In addition, each Exchange’s Rule 2.10 provides that, without prior Commission approval, none of the Exchange’s members may be or become an affiliate of the Exchange or an affiliate of an affiliate of the Exchange. However, each Exchange proposes that its affiliate, DECN, become a member of the Exchange to provide certain routing services on behalf of the Exchange. Specifically, each Exchange proposes to (1) operate DECN as a facility of such Exchange to provide outbound routing services to other securities exchanges,220 automated trading systems, electronic communications networks, or other broker-dealers (collectively, “Trading Centers”), and (2) receive through DECN orders routed inbound to such Exchange from its affiliated exchange (i.e., EDGX in the case of EDGA, and EDGA in the case of EDGX).221 Accordingly, each Exchange seeks Commission approval of an exception in the Exchange’s Rule 2.10 that will permit the affiliation between the Exchange and its member, DECN.

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, particularly where a member is routing orders to such affiliated exchange,222 each Exchange has proposed limitations and conditions on DECN’s affiliation with the Exchange. Specifically, each Exchange proposes that DECN operate as an affiliated outbound router on behalf of the Exchange, subject to certain conditions set forth in the Exchange’s Rule 2.11; and that DECN operate as an affiliated inbound router on behalf of the Exchange subject to certain conditions set forth in the Exchange’s Rule 2.12.223

1. DECN as Outbound Router

Each Exchange proposes that DECN would operate as a facility of the Exchange providing outbound routing services from the Exchange to other Trading Centers.224 DECN’s operation as a facility providing outbound routing services for each Exchange is subject to the conditions that:

- The Exchange regulates DECN as a facility of the Exchange;
- FINRA, a self-regulatory organization unaffiliated with the Exchange, is DECN’s designated examining authority;
- DECN only provides routing services unless otherwise approved by the Commission;
- The use of DECN for outbound routing by Exchange members is optional; and
- The Exchange will establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and its facilities (including DECN) and any other entity.225

As a facility of each Exchange, DECN will be subject to each Exchange’s and the Commission’s regulatory oversight; and each Exchange will be responsible for ensuring that DECN’s outbound routing function is operated consistent with section 6 of the Act and the Exchange’s rules. In addition, each Exchange will be required to file with the Commission rule changes and fees relating to DECN’s outbound routing function. Any such fees relating to DECN’s outbound router function will be subject to exchange non-discrimination requirements. Further, the Commission believes that the proposed conditions on which DECN will operate as a facility providing outbound routing services for each Exchange should minimize the potential for conflicts of interest and informational advantages involved where a member firm is affiliated with an exchange to which it is routing orders. The Commission notes that the proposed conditions for the operation of DECN as affiliated outbound router on behalf of each Exchange are consistent with conditions the Commission has approved for other exchanges.226 The Commission therefore finds the proposed operation of DECN as an affiliated outbound router of each Exchange to be consistent with the Act.

2. DECN as Inbound Router

Each Exchange also proposes that DECN, operating as a facility of the Exchange, provide routing services from EDGX to EDGA, in the case of EDGA, and from EDGA to EDGX, in the case of EDGX (i.e., “inbound routing”), subject to the following conditions and limitations:

- The Exchange enters into (1) a 17d–2 agreement with FINRA, a non-affiliated SRO,227 to relieve the Exchange of regulatory responsibilities for DECN with respect to rules that are common rules between the Exchange and the non-affiliated SRO, and (2) a regulatory services agreement with FINRA, a non-affiliated SRO, to perform regulatory responsibilities for DECN for unique Exchange rules.
- The regulatory service agreement requires 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.

216 17 CFR 242.605.
218 See Section III.A, supra.
219 The Exchanges state that DECN will do business under the name of “DE Route.”
220 Securities exchanges to which each Exchange proposes to route orders include its affiliated exchange (i.e., EDGX in the case of EDGA, and EDGA in the case of EDGX).
221 See Notice, supra note 3.
223 See Exchange Rules 2.11 and 2.12.
224 See Exchange Rule 2.11. See also Notice, supra note 3.
225 Id.
227 The Rule 17d–2 agreement is discussed at Section III.E.4, supra.
The Exchange, until such information is available generally to similarly situated members of the Exchange, is reasonable designed to ensure that DECN cannot use any information advantage it may have because of its affiliation with the Exchange. Furthermore, the Commission believes that each Exchange's proposal to allow DECN to route orders inbound to its affiliated exchange (i.e., from EDGX, in the case of EDG, and EDGA, in the case of EDG), on a pilot basis, will provide each Exchange and the Commission an opportunity to assess the impact of any conflicts of interest of allowing an affiliated member of an Exchange to route orders inbound to the Exchange and whether such affiliation provides an unfair competitive advantage.

Further, the Commission notes that the proposed conditions for the operation of DECN as affiliated inbound router on behalf of each Exchange are similar to conditions the Commission has approved for other exchanges. The Commission therefore finds the proposed operation of DECN as an affiliated inbound router of each Exchange is consistent with the Act.

I. Listing Requirements/Unlisted Trading Privileges

The Exchanges initially do not intend to list any securities. Accordingly, the Exchanges have not proposed rules that would allow them to list any securities at this time. Instead, the Exchanges have proposed to trade securities pursuant to unlisted trading privileges, consistent with section 12(f) of the Act and Rule 12f-5 thereunder. Rule 12f-5 requires an exchange that extends unlisted trading privileges to securities to have in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends unlisted trading privileges. Each Exchange's rules allow it to extend unlisted trading privileges to any security listed on another national securities exchange or with respect to which unlisted trading privileges may otherwise be extended in accordance with section 12(f) of the Act. Each Exchange's rules provide for transactions in the class or type of security to which the exchange intends to extend unlisted trading privileges. In addition, pursuant to its rules, each Exchange will cease trading any equity security admitted to unlisted trading privileges that is no longer listed on another national securities exchange or to which unlisted trading privileges may no longer be extended, consistent with section 12(f). The Commission finds that these rules are consistent with the Act.

J. Exchange Fees

In the Form 1 Applications, the Exchanges generally describe their proposed fees and note that they may, in the future, prescribe such reasonable fees, and assessments or other charges as they may deem appropriate. Nasdaq, however, argues that the Form 1 Applications are deficient because the Exchanges have not included their fee schedules in the Form 1 Applications. The Commission notes that it previously approved Form 1 applications that did not include fee schedules. For example, the Commission approved the Form 1 application of BATS Exchange, Inc. ("BATS") on August 18, 2008, and BATS subsequently filed its fee schedule on October 21, 2008, pursuant to Exchange Act Section 19(b). The

228 See Exchange Rule 2.12.

229 This oversight will be accomplished through the Rule 17d–2 agreement and the RSA.
Commission also notes that any fees to be charged by the Exchanges would need to be filed with the Commission pursuant to section 19(b)(1) of the Act and would not be effective until filed with, or filed with and approved by, the Commission.

IV. Exemption From Section 19(b) of the Act With Regard to FINRA Rules Incorporated by Reference

Each Exchange proposes to incorporate by reference certain rules of FINRA.240 Thus, for certain EDGA rules, EDGA members will comply with an EDGA rule by complying with the referenced FINRA rule. Similarly, for certain EDGX rules, EDGX members will comply with an EDGX rule by complying with the referenced FINRA rule.

In connection with its proposal to incorporate FINRA rules by reference, each Exchange requested, pursuant to Rule 240.0–12,241 an exemption under Section 19(b) of the rule filing requirements of Section 19(b) of the Act for changes to those Exchange rules that are effected solely by virtue of a change to a cross-referenced FINRA rule.242 Each Exchange proposes to incorporate by reference categories of rules (rather than individual rules within a category) that are not trading rules. Each Exchange agrees to provide written notice to its members whenever FINRA proposes a change to a cross-referenced rule243 and whenever any such proposed changes are approved by the Commission.244

Using its authority under Section 36 of the Act, the Commission previously exempted certain SROs from the requirement to file proposed rule changes under Section 19(b) of the Act.245 Each such exempt SRO agreed to be governed by the incorporated rules, as amended from time to time, but is not required to file a separate proposed rule change with the Commission each time the SRO whose rules are incorporated by reference seeks to modify its rules. In addition, each SRO incorporated by reference only regulatory rules (e.g., margin, suitability, arbitration), not trading rules, and incorporated by reference whole categories of rules (i.e., did not “cherry-pick” certain individual rules within a category). Each exempt SRO had reasonable procedures in place to provide written notice to its members each time a change is proposed to the incorporated rules of another SRO in order to provide its members with notice of a proposed rule change that affects their interests, so that they would have an opportunity to comment on it.

The Commission is granting each Exchange’s request for exemption, pursuant to Section 36 of the Act, from the rule filing requirements of Section 19(b) of the Act with respect to the rules that each Exchange proposes to incorporate by reference into their respective rules. This exemption is conditioned upon each Exchange providing written notice to its members whenever FINRA proposes to change a rule that each Exchange has incorporated by reference. The Commission believes that this exemption is appropriate in the public interest and consistent with the protection of investors because it will promote more efficient use of Commission and SRO resources by avoiding duplicative rule filings based on substantially identical rule text sought by more than one SRO. Consequently, the Commission grants each Exchange’s exemption request.

V. Conclusion

It is ordered that the applications of each of EDGX and EDGA for registration as a national securities exchange be, and hereby is, granted.

It is further ordered that operation of each of EDGX and EDGA is conditioned on the satisfaction of the requirements below:

A. Participation in National Market System Plans. Each Exchange must join the CTA Plan, the CQ Plan, the Nasdaq UTP Plan, and the Order Execution Quality Disclosure Plan.


C. Minor Rule Violation Plan. A MRVP filed by each Exchange under Rule 19d–1(c)(2) must be declared effective by the Commission.246

D. 17d–2 Agreement. An agreement pursuant to Rule 17d–2247 between FINRA and each Exchange that allocates to FINRA regulatory responsibility for those matters specified above248 must be approved by the Commission, or each Exchange must demonstrate that it independently has the ability to fulfill all of its regulatory obligations.

E. Regulatory Contracts. Each Exchange and FINRA, and each Exchange and ISE LLC, must finalize the provisions in the Regulatory Contracts, as described above,249 that will specify the Exchange and Commission rules for which FINRA and ISE will provide certain regulatory functions, or each Exchange must demonstrate that it independently has the ability to fulfill all of its regulatory obligations.

F. Examination by the Commission. Each Exchange must have, and represent in a letter to the staff in the Commission’s Office of Compliance Inspections and Examinations that it has, adequate procedures and programs in place to effectively regulate the Exchange.

G. Trade Processing and Exchange Systems. Each Exchange must have, and represent in letters to the staff in the Commission’s Division of Trading and Markets that it has, adequate procedures and programs in place, as noted in Commission Automation Policy Review guidelines,250 to effectively process trades and maintain the confidentiality, integrity, and availability of the Exchange’s systems.

It is further ordered, pursuant to section 36 of the Act,251 that each Exchange shall be exempt from the rule filing requirements of section 19(b) of:

240 17 CFR 240.0–12.
241 17 CFR 240.9–12.
242 See letter from Eric W. Hess, General Counsel and Secretary, EDGA, to Elizabeth M. Murphy, Secretary, Commission, dated February 11, 2010; and letter from Eric W. Hess, General Counsel and Secretary, EDGX, to Elizabeth M. Murphy, Secretary, Commission, dated February 11, 2010 (together, the “Exchange 19(b) Exemption Request Letters”).
243 See Exchange 19(b) Exemption Request Letters, supra note 242.
244 Each Exchange will provide such notice through a posting on the same Web site location where each Exchange will post its own rule filings pursuant to Rule 19b–4 under Act, within the time frame required by that Rule. The Web site posting will include a link to the location on the FINRA Web site where FINRA’s proposed rule change is posted. Id.
246 17 CFR 240.19d–1(c)(2).
the Act with respect to the FINRA rules the Exchange proposes to incorporate by reference into the Exchange’s rules, subject to the conditions specified in this Order.

By the Commission.

Florence E. Harmon, Deputy Secretary.

[FR Doc. 2010–5868 Filed 3–17–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 29174; File No. 811–21873]

American Vantage Companies; Notice of Application

March 11, 2010.

AGENCY: Securities and Exchange Commission (“Commission”).

ACTION: Notice of application for deregistration under section 8(f) of the Investment Company Act of 1940 (the “Act”).

SUMMARY OF APPLICATION: American Vantage Companies requests an order declaring that it has ceased to be an investment company.

APPLICANT: American Vantage Companies (the “Company”).

FILING DATES: The application was filed on November 25, 2008 and amended on April 30, 2009, November 12, 2009, February 4, 2010 and March 10, 2010.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission’s Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on April 5, 2010 and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer’s interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission’s Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicant, F.O. Box 81920, Las Vegas, Nevada 89180.

FOR FURTHER INFORMATION CONTACT: Jaea F. Hahn, Senior Counsel, at (202) 551–

Brownstone, LLC, which focuses on Native American tribal gaming and commercial/jurisdictional gaming, and COD. Despite its registration under the Act, the Company has never represented or stated that it is involved in any business other than gaming, media, restaurants and entertainment and has always emphasized its operating results rather than investment income as a material factor in its business. The Company has never employed an investment advisor nor is there an employee who is specifically assigned to manage the Company’s investments.

As described more fully in the application, the Company’s assets primarily consist of interests in its wholly-owned and majority-owned subsidiaries and a 49% interest in the Border Grill and the Company derives substantially all of its revenues from operations. The Company currently has investment securities that equal approximately 16.4% of its total assets on an unconsolidated basis. For the six months ended June 30, 2009, the Company derived 98.8% of its revenues from its operating subsidiaries. The Company derived only 1.2% of its income from investment assets for the six months ended June 30, 2009.

Applicant’s Legal Analysis

1. Section 8(f) of the Act provides that whenever the Commission, upon application or its own motion, finds that a registered investment company has ceased to be an investment company, the Commission shall so declare by order and upon the taking effect of such order, the registration of such company shall cease to be in effect.

2. Section 3(a)(1)(A) of the Act defines an investment company as any issuer which is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities. Section 3(a)(1)(C) of the Act defines an investment company as any issuer which is engaged or proposes to engage primarily, in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer’s total assets (exclusive of Government securities and cash items) on an unconsolidated basis. Section 3(a)(2) of the Act defines investment securities as all securities except (a) Government securities, (B) securities issued by employees’

\footnote{1}{These investment securities principally consisted of 7,000,000 shares of common stock, and warrants to purchase 1,400,000 shares of common stock, of Genius Products, Inc. (“Genius”) acquired when the Company sold its subsidiary American Vantage Media Corporation to Genius, together with a 49% interest in the Border Grill Restaurant (“Border Grill”). The Company privately placed most of its shares of Genius stock and used the net proceeds for working capital and to fund its purchase in September 2007 of Candidates on Demand Group, Inc. (“COD”), a temporary placement agency and recruitment firm which operates as a wholly-owned subsidiary of the Company.

\footnote{2}{The Company’s investment assets consist of its 49% interest in Border Grill, auction-rate securities, and its remaining Genius common stock and warrants.}