SECURITIES AND EXCHANGE COMMISSION

Application of Topaz Exchange, LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission

July 26, 2013.

I. Introduction

On July 3, 2012, Topaz Exchange, LLC ("Topaz Exchange" or "Exchange") submitted to the Securities and Exchange Commission ("Commission") an Application for Registration as a National Securities Exchange ("Form 1 Application") 1 under Section 6 of the Securities Exchange Act of 1934 ("Act"). 2 On December 19, 2012, Topaz Exchange submitted Amendment No. 1 to its Form 1 Application. 3 On December 31, 2012, Topaz Exchange submitted Amendment No. 2 to its Form 1 Application. 4 Notice of the Form 1 Application, as modified by Amendment Nos. 1 and 2, was published for comment in the Federal Register on March 7, 2013. 5 The Commission received four comment letters regarding the Form 1 Application. 6 Topaz Exchange submitted a detailed response to comments on July 11, 2013. 7 On July 11, 2013, Topaz Exchange submitted Amendment No. 3 to the Form 1 Application. 8

II. Discussion

Under Sections 6(b) and 19(a) of the Act, the Commission shall by order grant an application for registration as a national securities exchange if the Commission finds, among other things, that the proposed 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 Topaz Exchange’s application for exchange registration meets the requirements of the Act and the rules and regulations thereunder. Further, the Commission finds that the proposed rules of Topaz Exchange are consistent with Section 6 of the Act in that, among other things, they assure a fair representation of the exchange’s members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer, 9 and that they are designed to 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, and remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, or broker-dealers. 10 Finally, the Commission finds that Topaz Exchange’s proposed rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. 11

A. Overview of Ownership of Topaz Exchange

Topaz Exchange is structured as a Delaware limited liability company information in the Form 1 Application. The changes proposed in Amendment No. 3 are not substantive, are consistent with the existing rules of other registered national securities exchanges, or are responsive to the concerns of the commenters and do not raise any new or novel regulatory issues.

1 Amendment No. 3, among other things, includes changes to proposed Topaz Exchange rules to respond to concerns raised by the commenters and to reflect changes to comparable ISE rules since the filing of Amendment No. 1. The changes are discussed below in Section II.D. Amendment No. 3 also provides further descriptions or updates.


3 Amendment No. 1, among other things, includes changes to the Limited Liability Company Agreement of Topaz Exchange, LLC ("Topaz Exchange LLC Agreement") and the Constitution of Topaz Exchange, LLC ("Topaz Exchange Constitution") concerning board composition and size, the initial director election process, and the use of regulatory funds. Amendment No. 1 also includes revisions to proposed rules of Topaz Exchange to remove rules relating to complex orders; to respond to comments on the Form 1 application from Commission staff; and to reflect recent changes to comparable rules of International Securities Exchange, LLC ("ISE"). Amendment No. 1 further provides additional descriptions in the Form 1 Application regarding proposed allocation procedures, auction mechanisms, execution of qualified contingent crosses, and the interim and initial director election processes, and removes references to complex orders.

4 Amendment No. 2, among other things, provides updated information regarding the board of directors of ISE and the Corporate Governance Committee of ISE and includes information regarding Longitude S.A., a newly incorporated affiliate of Topaz Exchange, which information includes the Articles of Incorporation and financial information for Longitude S.A. Finally, Amendment No. 2 provides an updated organizational chart that reflects the affiliates of Topaz Exchange.


6 See Letter from Angelo Evangelou, Associate General Counsel, Chicago Board Options Exchange, Incorporated, to Elizabeth M. Murphy, Secretary, Commission, dated April 23, 2013 ("CBOE Letter"); Letter from Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ OMX Group, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated April 25, 2013 ("NASDAQ Letter"); Letter from Janet McGinnis, EVP and Corporate Secretary, NYSE Euronext, General Counsel, NYSE Market, to Elizabeth M. Murphy, Secretary, Commission, dated May 10, 2013 ("NYSE Euronext Letter I"); and Letter from Janet McGinnis, EVP and Corporate Secretary, NYSE Euronext, General Counsel, NYSE Markets, to Elizabeth M. Murphy, Secretary, Commission, dated June 20, 2013 ("NYSE Euronext Letter II").

7 See Letter from Michael Simon, General Counsel and Secretary, Topaz Exchange, to Elizabeth M. Murphy, Secretary, Commission, dated July 10, 2013 ("Topaz Exchange Response Letter").


13 On March 1, 2013, the Commission issued an order granting Topaz Exchange exemptive relief, subject to certain conditions, in connection with the filing of its Form 1 Application. See Securities Exchange Act Release No. 69011, 78 FR 14844 (March 7, 2013). Because Topaz Exchange’s Form 1 Application was incomplete without the exemptive relief, the date of filing of such application is March 1, 2013. Id.
(“LLC”), and is a wholly-owned subsidiary of International Securities Exchange Holdings Inc. (“ISE Holdings”). 14 In December 2007, ISE Holdings became a direct, wholly-owned subsidiary of various German companies and Swiss companies 15 through an intermediary holding company, U.S. Exchange Holdings, Inc. ("U.S. Exchange Holdings"). 15 U.S. Exchange Holdings is wholly-owned by a German stock corporation, Eurex Frankfurt AG (“Eurex Frankfurt”). Eurex Frankfurt is a wholly-owned subsidiary of a Swiss stock corporation, Eurex Zurich AG (“Eurex Zurich”), which, in turn, was in 2007 jointly owned by Deutsche Börse and SWX Swiss Exchange AG (“SWX”) 16 ("Eurex Acquisition”). In 2012, SWX transferred its interest in Eurex Zurich to a Swiss subsidiary of Deutsche Börse ("Deutsche Börse Acquisition"), such that Eurex Zurich is now jointly owned by Deutsche Börse (together with Eurex Frankfurt, the "German companies") and EGD (together with Eurex Zurich, the "Swiss companies," and the Swiss companies and the German companies are referred to collectively as the "Non-U.S. Upstream Owners," and collectively with U.S. Exchange Holdings, the "Upstream Owners"). As Deutsche Börse holds a 100% direct ownership interest in EGD, it therefore holds a 100% indirect ownership interest in Eurex Zurich.

15 Following any Commission grant of registration to Topaz Exchange, ISE Holdings will be: (1) the sole holding company of two registered national securities exchanges, ISE and Topaz Exchange; and (2) the holder of a 31.54% ownership interest of a holding company, DE Holdings, that in turn owns two registered national securities exchanges, EDGX Exchange, Inc. ("EDGX") and EDGA Exchange, Inc. ("EDGA"). See Exhibit C to Topaz Exchange Form 1 Application, Section R ("Organizational Chart of Affiliates of Deutsche Börse AG").

16 See Organizational Chart of Affiliates of Deutsche Börse, Exhibit C. Section R. to Topaz Exchange Form 1 Application.


B. Governance of Topaz Exchange

1. Topaz Exchange Board of Directors

The board of directors of Topaz Exchange ("Topaz Exchange Board" or "Board") will be its governing body and will possess all of the powers necessary for the management of its business and affairs, including governance of Topaz Exchange as a self-regulatory organization ("SRO"). 17 Topaz Exchange will be governed by a board of directors comprised of no fewer than 8, but no more than 16, directors. 18 Specifically:

• At least 50% of Topaz Exchange Board must be comprised of Non-Industry Directors; 19
• At least one of the Non-Industry Directors must be a Public Director; 20
• Topaz Exchange Board will include the President/Chief Executive Officer as a director; 21 and
• At least 30% of Topaz Exchange Board must be officers, directors or partners of Topaz Exchange members, and must be elected by a plurality of holders of Exchange Rights ("Industry Directors"), of which at least one must be elected by a plurality of holders of Primary Market Maker ("PMM") Exchange Rights, one must be elected by a plurality of holders of Competitive Market Maker ("CMM") Exchange Rights, and one must be elected by a plurality of holders of Electronic Access Member ("EAM") Exchange Rights, provided that the number of each type of Industry Director shall always be equal to one another. 22

As part of the process to elect members of the Board, the Nominating Committee will nominate the proposed Industry Directors and the Corporate Governance Committee 23 or ISE Holdings will nominate the proposed Non-Industry Directors. 24 A petition process will allow Topaz Exchange members to nominate alternative candidates for consideration as Industry Directors. 25 At the first annual meeting and at each annual meeting thereafter, ISE Holdings will elect all of the members of the Topaz Exchange Board (except the Industry Directors which are elected by Topaz Exchange members 26), but it will be required to do so in compliance with the compositional requirements for the Board outlined in the Topaz Exchange Constitution.

The Commission believes that the requirement in the Topaz Exchange Constitution that at least 30% of the directors be Industry Directors and the means by which they will be chosen by Topaz Exchange members 27 provide for the fair representation of members in the selection of directors and the administration of Topaz Exchange and therefore is consistent with Section 6(b)(3) of the Act. 28 Section 6(b)(3) of the Act requires that "the rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the..."

24 See, e.g., Topaz Exchange Constitution, Article III, Section 3.10(a)–(b). ISE Holdings, as the Sole LLC Member of Topaz Exchange, is permitted to petition the Corporate Governance Committee to propose alternative Non-Industry Directors and Public Directors. See Topaz Exchange Constitution, Article III, Section 3.10(b)(ii).

25 See, e.g., Topaz Exchange Constitution, Article III, Section 3.10(a)(iii). Specifically, as proposed in Amendment No. 1, in addition to the Industry Director nominees named by the Nominating Committee, persons eligible to serve as such may be nominated for election to the Topaz Exchange Board by a petition, signed by the holders of not less than five percent (5%) of the outstanding Exchange Rights of the series entitled to elect such person if there are more than eighty (80) Exchange Rights in the series entitled to vote, ten percent (10%) of the outstanding rights of such series entitled to elect such person if there are between eighty (80) and forty (40) Exchange Rights in the series entitled to vote, and twenty-five percent (25%) of the outstanding Exchange Rights of such series entitled to elect such person if there are less than forty (40) Exchange Rights in the series entitled to vote. For purposes of determining whether a person has been nominated for election by petition by the requisite percentage, no Topaz Exchange member, alone or together with its affiliates, may account for more than 50% of the signatures of the holders of outstanding Exchange Rights of the series entitled to elect such person, and any such signatures by such Topaz Exchange Members, alone or together with its affiliates, in excess of such 50% limitation shall be disregarded. Id. This process is identical to the process in place at ISE. See ISE Constitution, Article III, Section 3.10(a)(ii).

26 See Topaz Exchange Constitution, Article III, Sections 3.2(b)(i) and (c).

27 Id.

exchange, broker, or dealer.” As the Commission previously has noted, this statutory requirement helps to ensure that members have a voice in the exchange’s use of self-regulatory authority, and that the exchange is administered in a way that is equitable to all those persons who trade on its market or through its facilities.29 In addition, with respect to the requirement that the number of Non-Industry Directors, including at least one Public Director, will at all times be at least 50% of the Board, the Commission believes that the proposed composition of the Topaz Exchange Board satisfies the requirements of Section 6(b)(3) of the Act.30

Interim Board

After Topaz Exchange is granted registration by the Commission, but prior to commencing operations, ISE Holdings, as the sole shareholder of Topaz Exchange, will serve only until the first annual meeting (“Interim Topaz Exchange Board”). The Interim Topaz Exchange Board will include the same individuals as the then-serving ISE Board and will consist of 15 directors: the President/Chief Executive Officer Director;31 6 Industry Directors; and 8 Non-Industry Directors.32 Topaz Exchange represents that it anticipates that there will be a significant overlap between its membership and the membership of ISE.34 Topaz Exchange further represents that it does not expect to receive a meaningful number of applications for membership from non-ISE members during the tenure of the Interim Topaz Exchange Board.35 Thus, the 6 interim Industry Directors to be appointed to the Topaz Exchange Board likely will have been elected by Topaz Exchange members in their capacity as ISE members.36

These interim Industry Directors will serve until the first interim Topaz Exchange Board is elected pursuant to the full nomination, petition, and voting process set forth in the Topaz Exchange Constitution and described above.37 Topaz Exchange will complete such process as promptly as possible and within 90 days after its application for registration as a national securities exchange is granted by the Commission.38

The Commission believes that the process for electing the interim Topaz Exchange Board, as proposed, is consistent with the requirements of the Act, including that the exchange assure fair representation of the exchange’s members in the selection of its directors and administration of its affairs.39 The Interim Topaz Exchange Board will be filled by current ISE Board members (which currently include Industry Directors who were elected by current ISE members) until the first annual meeting of Topaz Exchange. As noted above, Topaz Exchange represents that it anticipates that there will be significant overlap between the initial members of Topaz Exchange and the current members of ISE.40 Topaz Exchange further

industry directors on the ISE Board. See Exhibit J to Topaz Exchange Form 1 Application.

See Exhibit J to Topaz Exchange Form 1 Application.

See id.

See id.

See Exhibit J to Topaz Exchange Form 1 Application.

See Exhibit J to Topaz Exchange Form 1 Application.


31 See infra Section II.C.1. for a discussion of the ownership of Topaz Exchange.

32 See Exhibit J to Topaz Exchange Form 1 Application.

33 See Exhibit J to Topaz Exchange Form 1 Application. See also Amendment No. 3.

34 See Exhibit L to Topaz Exchange Form 1 Application. Based on discussions with ISE members, Topaz Exchange represented that it currently expects that Topaz Exchange’s membership will consist substantially of current ISE members, including, but not limited to, those ISE members that have representatives serving as


36 See Exhibit L to Topaz Exchange Form 1 Application. See Sections 3.2(c) and 3.10; see also Exhibit J to Topaz Exchange Form 1 Application.

37 See Exhibit J to Topaz Exchange Form 1 Application.

38 See Exhibit J to Topaz Exchange Form 1 Application.


40 Topaz Exchange will have a streamlined waiver process in order for existing ISE members to apply for membership on Topaz Exchange. See Topaz Exchange Rule 302(a).

The Commission believes that the Interim Topaz Exchange Board process is designed to provide member representation sufficient to allow Topaz Exchange to commence operations for an interim period prior to going through the process to elect a new Board pursuant to the full nomination, petition, and voting process set forth in the Topaz Exchange Constitution.

2. Exchange Committees

Topaz Exchange will have a number of Board committees,41 including an Executive Committee (consisting of six directors, including three Non-Industry Directors),42 a Finance and Audit Committee (consisting of between three and five directors, all of whom must be Non-Industry Directors),43 a Compensation Committee (consisting of between three and five directors, all of whom must be Non-Industry Directors),44 and a Corporate Governance Committee (consisting of at least three directors, all of whom must be Non-Industry Directors),45 and such other additional committees as may be approved by the Topaz Exchange Board.46 Topaz Exchange also will have a Nominating Committee, which will be a
committee of Topaz Exchange and not a committee of the Board.50 The Nominating Committee will be composed of three industry representatives, and will be responsible for nominating candidates for Industry Director positions.51 As noted above, there will be a petition process by which members of Topaz Exchange can nominate their own nominees for the Industry Director positions.52 These nomination processes are consistent with processes that the Commission has approved for other exchanges.53 The Commission believes that Topaz Exchange’s proposed committees, which are similar to those committees maintained by other exchanges,54 are designed to help enable Topaz Exchange to carry out its responsibilities under the Act and are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.55

C. Regulation of Topaz Exchange

When Topaz Exchange commences operations as a national securities exchange, Topaz Exchange will have all the attendant regulatory obligations under the Act. In particular, Topaz Exchange will be responsible for the operation and regulation of its trading system and the regulation of its members. Certain provisions in the Topaz Exchange and ISE Holdings governance documents are designed to facilitate the ability of Topaz Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act. The discussion below summarizes some of these key provisions.

1. Ownership Structure: Ownership and Voting Limitations

As noted above in Section II.A, Topaz Exchange will be structured as a Delaware LLC and will be a wholly-owned subsidiary of ISE Holdings.56 following any Commission grant of registration to Topaz Exchange as a national securities exchange.57 ISE Holdings is owned by German companies and Swiss companies through an intermediary holding company, U.S. Exchange Holdings.58 ISE Holdings’ governing documents impose limits on any direct or indirect change in control of ISE Holdings, which are to be enforced through the creation of a statutory trust.59 First, ISE Holdings’ governing documents prohibit any Topaz Exchange member (alone or together with its Related Persons)60 from owning more than 20% of any class of Voting Shares of ISE Holdings.61 A second limit prohibits any other person (alone or together with its related persons) from owning more than 40% of any class of Voting Shares of ISE Holdings.62 A third limit prohibits any person (alone or together with its Related Persons) from owning or causing the voting of shares representing more than 20% of the voting power of the then outstanding Voting Shares of ISE Holdings.63 As described more fully below, if a person exceeds an ISE Holdings’ ownership or voting limit, 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 of directors (“ISE Holdings Board”) or on other matters (other than matters affecting the rights, preferences or privileges of the capital stock) automatically will be transferred to a Delaware statutory trust (“Trust”).64

Consistent with the governance structure of other exchanges, ISE Holdings’ Board may waive the 40% ownership limitation and the 20% voting restriction for persons other than Topaz Exchange members, subject to certain specified conditions,65 but such waiver will not be effective unless approved by the Commission.66

The Topaz Exchange LLC Agreement and Topaz Exchange Constitution do not include change of control provisions that are similar to those in the ISE Holdings Certificate and ISE Holdings Bylaws. However, the Topaz Exchange LLC Agreement and the Topaz Exchange Constitution explicitly provide that ISE Holdings is the Sole LLC Member of Topaz Exchange.67 ISE Holdings is permitted under the Topaz Exchange LLC Agreement to assign all but not less than its entire interest in Topaz Exchange (and therefore no longer would be its sole owner), but the assignment of all of ISE Holdings’ interest in Topaz Exchange will be subject to the rule filing procedures under Section 19 of the Act.68 As detailed above, ISE Holdings is owned by various Upstream Owners, none of which have similar ownership and voting limits pursuant to an amendment to the ISE Holdings Bylaws, provided that the ISE Holdings Board makes certain determinations. See ISE Holdings Certificate, Article FOURTH, Sections III.(a)(i)(A), III.(a)(ii)(B) and III.(b)(i). Article XI of the ISE Holdings Bylaws was adopted in connection with the Eurex Acquisition (see supra note 15 and accompanying text), when ISE LLC was the sole national securities exchange controlled by ISE Holdings. See Eurex Acquisition Order, supra note 15. Article XI, Section 11.1(b) was subsequently amended to apply to any Controlled National Securities Exchange, which will include Topaz Exchange.69

See also infra Sections III.(a)(i)(A) and III.(b)(i). Article XI of the ISE Holdings Bylaws, which originally was adopted in connection with the Eurex Acquisition (see supra note 15 and accompanying text for a description of the Eurex Acquisition), waives the ISE Holdings ownership and 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 and 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” (i.e., any national securities exchange or facility thereof controlled, directly or indirectly, by ISE Holdings, including ISE, EDGA, EDGX, and as a result of this Order, Topaz 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 a member of such Controlled National Securities Exchange.67

67 See Topaz Exchange LLC Agreement, Article II, Section 2.1 and Topaz Exchange Constitution, Article I, Section 1.1 (both of which define “Sole LLC Member” to mean ISE Holdings, as the sole member of Topaz Exchange).

68 See 15 U.S.C. 78c; see also Topaz Exchange LLC Agreement, Article VII, Section 7.1 and Topaz Exchange Constitution, Article I, Section 1.1.
and voting limits in their governing documents. To facilitate compliance with the ISE Holdings ownership and voting limits, the Upstream Owners have committed to take reasonable steps necessary to cause ISE Holdings to be in compliance with the ISE Holdings ownership and voting limits. These commitments are contained in the governing documents for U.S. Exchange Holdings and in corporate resolutions for the non-U.S. Upstream Owners.

Further, in connection with the Eurex Acquisition, ISE implemented the Trust pursuant to a Trust Agreement (“2007 Trust Agreement”) among ISE Holdings, U.S. Exchange Holdings, trustees (“Trustees”), and a Delaware trustee, which agreement has been subsequently amended to take into account subsequent acquisitions, including the current transaction.72 The current agreement (“2012 Trust Agreement”) serves, in part, to effectuate the ownership and voting limits for ISE Holdings in the event that a person obtains an ownership or voting interest in excess of the limits established in the ISE Holdings Certificate without prior Commission approval. To accomplish that purpose, for as long as ISE Holdings controls, directly or indirectly, a national securities exchange, including Topaz Exchange, the Trust would accept, hold and dispose of Trust Shares73 on the

terms and subject to the conditions set forth therein.74 Specifically, if any person’s ownership percentage exceeds the ownership limits or any person’s voting control percentage exceeds the voting limits without Commission approval, the Excess Shares will be transferred automatically to the Trust pursuant to the terms prescribed in the ISE Holdings Certificate.75 The Trust then would accept the Excess Shares and hold them for the benefit of the trust beneficiary, U.S. Exchange Holdings, who has the right to reacquire the Excess Shares either when a person no longer exceeds the ownership or voting limits or when such excess ownership percentage or voting control percentage is approved by the Commission in accordance with ISE Holdings Certificate.76

Although ISE Holdings is not independently responsible for regulation of Topaz Exchange, its activities with respect to the operation of Topaz Exchange must be consistent with, and must not interfere with, the self-regulatory obligations of Topaz Exchange.77 As described above, the provisions applicable to direct and indirect changes in control of ISE Holdings and Topaz Exchange, as well as the voting limitation, are designed to help prevent any owner of ISE Holdings from exercising undue influence or control over the operation of Topaz Exchange and to help assure that Topaz Exchange is able to effectively carry out its regulatory obligations under the Act. In addition, these limitations are designed to address the conflicts of interests that might result from a member of a national securities exchange owning interests in the

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66 For a U.S. Upstream Owner, the U.S. Exchange Holdings Certificate provides that, for so long as U.S. Exchange Holdings directly or indirectly controls a Controlled National Securities Exchange, U.S. Exchange Holdings will take reasonable steps necessary to cause ISE Holdings to be in compliance with the ISE Holdings ownership and voting limits. See U.S. Exchange Holdings Certificate, Article III.C.

77 The term “Depositary Shares” means shares that are transferred to the Trust pursuant to the Trust’s exercise of the Call Option. Under the Trust, the term “Call Option” means the option granted by the Trust beneficiary to the Trust to call the Voting Shares as set forth in Section 4.2.3 therein. See infra Section II.C.2.b for further discussion of the Call Option.
exchange. As the Commission has noted in the past, however, a member’s interest in an exchange, including an entity that controls an exchange, could become so large as to cast doubts on whether the exchange may fairly and objectively exercise its self-regulatory responsibilities with respect to such member.78 A member that is a controlling shareholder of an exchange could seek to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and conduct surveillance of the member’s conduct or diligently enforce the exchange’s rules and the federal securities laws with respect to conduct by the member that violates such provisions. As such, these requirements are designed to minimize the potential that a person or entity can improperly interfere with or restrict the ability of Topaz Exchange to effectively carry out its regulatory oversight responsibilities under the Act.

The Commission believes that Topaz Exchange’s and ISE Holdings’ proposed ownership and voting limitation provisions, coupled with the provisions in U.S. Exchange Holdings’ governing documents, the Topaz Exchange Resolutions and the 2012 Trust Agreement described above,79 are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.80 In particular, these requirements are designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or Topaz Exchange to effectively carry out their regulatory oversight responsibilities under the Act.81

2. Regulatory Independence and Oversight

a. ISE Holdings

Although ISE Holdings itself will not itself carry out regulatory functions, its activities with respect to the operation of Topaz Exchange must be consistent with, and not interfere with, the self-regulatory obligations of Topaz Exchange.82 In this regard, Topaz Exchange and ISE Holdings’ respective corporate documents include certain provisions that are designed to maintain the independence of the Topaz Exchange’s self-regulatory function.83 These provisions are substantially similar to those included in the governing documents of other exchanges that recently have been granted registration.84 Specifically:

• The directors, officers, and employees of ISE Holdings must give due regard to the preservation of the independence of the self-regulatory function of Topaz Exchange and must not take actions that would interfere with the effectuation of decisions by the Topaz Exchange Board relating to its regulatory functions (including disciplinary matters) or that would adversely affect the ability of Topaz Exchange to carry out its responsibilities under the Act.85

• ISE Holdings must comply with federal securities laws and the rules and regulations promulgated thereunder, and must cooperate with Topaz Exchange and the Commission pursuant to, and to the extent of, their respective regulatory authority. In addition, ISE Holdings’ officers, directors, and employees must comply with federal securities laws and the rules and regulations thereunder and agree to cooperate with Topaz Exchange and the Commission pursuant to their respective regulatory authority.86

82 See, e.g., BOX Order, supra note 39, and DirectEdge Exchanges Order, supra note 70.
83 See supra note 66, noting that the ISE Holdings Certificate and the ISE Holdings Bylaws were revised in 2010 to cover any Controlled National Securities Exchange, which would include Topaz Exchange.
84 See, e.g., BOX Order, supra note 39, and MIAX Order, supra note 30.
85 See ISE Holdings Bylaws, Article I, Section 1.5. Similarly, Article V, Section 5.1(b) of the Topaz Exchange LLC Agreement requires each Topaz Exchange Board director to take into consideration the effect that his or her actions would have on the ability of Topaz Exchange to carry out its responsibilities under the Act and on the ability of Topaz Exchange to engage in conduct that fosters and does not interfere with Topaz Exchange’s ability to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities, to assist in the enforcement of the provisions of this Act or the rules and regulations thereunder, or to otherwise protect investors and the public interest.
86 See ISE Holdings Certificate, Article TENTH. ISE Holdings also shall take reasonable steps necessary to cause its agents to cooperate with Topaz Exchange and the Commission pursuant to their respective regulatory authority. ISE Holdings Certificate, Article THIRTEENTH.

b. Other Exchanges

The Topaz Exchange LLC Agreement, Article VI, Section 4.1(b) and ISE Holdings Certificate, Article ELEVENTH, ISE Holdings LLC Agreement also provides that: all books and records of Topaz Exchange reflecting confidential information pertaining to the self-regulatory function of Topaz Exchange will be subject to confidentiality restrictions. See ISE Holdings Certificate, Article ELEVENTH. The requirement to keep such information confidential shall not limit or impede the Commission’s ability to access and examine such information or limit the ability of officers, directors, employees, or agents of ISE Holdings to disclose such information to the Commission.

87 See ISE Holdings Bylaws, Article I, Section 1.4.
88 See Topaz Exchange LLC Agreement, Article VI, Section 4.1(b) and ISE Holdings Certificate, Article ELEVENTH. ISE Holdings LLC Agreement also provides that: all books and records of Topaz Exchange reflecting confidential information pertaining to the self-regulatory function of Topaz Exchange will be subject to confidentiality restrictions. See ISE Holdings Certificate, Article ELEVENTH. The requirement to keep such information confidential shall not limit or impede the Commission’s ability to access and examine such information or limit the ability of officers, directors, employees, or agents of ISE Holdings to disclose such information to the Commission. See id.
89 See Topaz Exchange LLC Agreement, Article IV, Section 4.1 and ISE Holdings Bylaws, Article I, Section 1.3.
90 See ISE Holdings Certificate, Article TWELFTH.
91 See id.
must cooperate with the Commission and Topaz Exchange.

- In discharging his or her responsibilities as a board member of a Non-U.S. Upstream Owner, or of U.S. Exchange 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 U.S. Exchange Holdings, as applicable, will have on the ability of Topaz Exchange to carry out its responsibilities under the Act. In addition, each of the Non-U.S. Upstream Owners and U.S. Exchange Holdings, and their board members, officers, and employees, must give due regard to the preservation of the independence of the self-regulatory function of Topaz Exchange (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 Topaz Exchange to give due regard to preserving the independence of the self-regulatory functions of Topaz Exchange).

b. Upstream Owners

Although the Upstream Owners will not carry out any regulatory functions, the activities of each of the Upstream Owners with respect to the operation of Topaz Exchange must be consistent with, and not interfere with, the self-regulatory obligations of Topaz Exchange. The 2007 Resolutions, as supplemented by the supplemental Resolutions for Topaz Exchange, the U.S. Exchange Holdings Certificate, and the U.S. Exchange Exchange Holdings Bylaws include certain provisions that are designed to maintain the independence of the self-regulatory function of Topaz Exchange, enable Topaz Exchange 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, and facilitate the ability of Topaz Exchange, and the Commission to fulfill their regulatory and oversight obligations under the Act. Specifically:

- Each such Non-U.S. Upstream Owner and U.S. Exchange Holdings will comply with the U.S. federal securities laws and the rules and regulations thereunder and cooperate with the Commission and Topaz Exchange.

Also, each board member, officer, and employee of the Non-U.S. Upstream Owners, and of U.S. Exchange Holdings, in discharging his or her responsibilities, must comply with the U.S. federal securities laws and the rules and regulations thereunder, and cooperate with the Commission and Topaz Exchange.

The books and records of the Non-U.S. Upstream Owners related to the activities of Topaz Exchange must be subject at all times to, and the books and records of U.S. Exchange Holdings must be subject at all times to, inspection and copying by the Commission and Topaz Exchange.

- Books and records of U.S. Exchange Holdings related to the activities of Topaz Exchange will be maintained within the United States.

For so long as each of the Non-U.S. Upstream Owners or U.S. Exchange Holdings directly or indirectly controls Topaz Exchange, the books, records, officers, directors (or equivalent), and employees of each of the Non-U.S. Upstream Owners or of U.S. Exchange Holdings will be deemed to be the books, records, officers, directors, and employees of Topaz Exchange, as applicable. And, for so long as U.S. Exchange Holdings directly or indirectly controls Topaz Exchange, the premises of U.S. Exchange Holdings will be deemed to be the premises of Topaz Exchange.

- To the extent involved in the activities of Topaz Exchange, 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 suit, action or proceeding arising out of, or relating to, the activities of Topaz Exchange to the extent such board member, officer or employee are involved in the activities of Topaz Exchange. Likewise, U.S. Exchange Holdings, its officers, directors, and employees whose principal place of business and residence is outside of the United States, to the extent such director, officer, or employee is involved in the activities of Topaz Exchange, irrevocably submit to the jurisdiction of the Commission for all purposes.

- The books and records of the Non-U.S. Upstream Owners related to the activities of Topaz Exchange must at all times be made available for, and the books and records of U.S. Exchange Holdings must be subject at all times to, inspection and copying by the Commission and Topaz Exchange.

- See Form of German Parent Corporate Resolutions (2007 Resolution Section (3) and Topaz Exchange Resolution Section (2)(a)); and U.S. Exchange Holdings Certificate, Article FIFTEENTH.

- See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Section (7)(a) and (8)(a) and Topaz Exchange Resolution Sections (2)(b) and (2)(c)); U.S. Exchange 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, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Section (7) and Topaz Exchange Resolution Section (2)(b)).

- See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Section (7)(d) and Topaz Exchange Resolution Section (2)(b)); and U.S. Exchange Holdings Certificate, Article TENTH.

- See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Sections (5), (7)(d), and (8)(a) and Topaz Exchange Resolution Section (2)); and U.S. Exchange Holdings Certificate, Article TWELFTH.

- See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Sections (6), (7)(e) and (8)(e) and Topaz Exchange Resolution Section (2)); and U.S. Exchange Holdings Certificate, Article FOURTEENTH.

- See, e.g., Form of German Parent Corporate Resolutions (2007 Resolution Sections (6), (7)(e), and (8)(b) and Topaz Exchange Resolution Section (2)).
jurisdiction of the U.S. federal courts and the Commission for purposes of any suit, action or proceeding pursuant to the U.S. federal securities laws, and the rules or regulations thereunder, commended or initiated by the Commission arising out of, or relating to, the activities of Topaz Exchange.\(^{105}\)

- The 2007 Resolutions, as supplemented by the Topaz Exchange Resolutions, and the U.S. Exchange Holdings Certificate and the U.S. Exchange Holdings Bylaws each require that any change to the applicable document (including any action by the Non-U.S. Upstream Owners that would have the effect of amending or repealing the Topaz Exchange Resolutions or the 2007 Resolutions) must be submitted to the Topaz Exchange Board.\(^{106}\) If such change must be filed with, or filed with and approved by, the Commission under Section 19 of the Act,\(^{107}\) and the rules thereunder, then such change shall not be effective until filed with, or filed with and approved by, the Commission.\(^{108}\)

The 2012 Trust Agreement, in addition to enforcing the ownership and voting limits,\(^{109}\) also serves to effectuate compliance with the other commitments made under the Topaz Exchange Resolutions, which incorporate the 2007 Resolutions. To accomplish that purpose, the Trust would determine whether a Material Compliance Event\(^{110}\) has occurred or is continuing. The Trust would determine whether the occurrence and continuation of a Material Compliance Event requires the exercise of the Call Option.\(^{111}\) 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, and upon such exercise, the Trust Beneficiary\(^{112}\) and ISE Holdings, as applicable, will take such actions as are necessary to transfer, or cause the transfer to the Trust of a majority of the Voting Shares then outstanding.\(^{113}\) The Trust will transfer Deposited Shares from the Trust back to the Trust Beneficiary, as provided in Section 4.2(h) therein, only if no Material Compliance Event is continuing or, notwithstanding its continuation, the Trustees determine that the retention of the Deposited Shares could not reasonably be expected to address the continuing Material Compliance Event, provided that the determination is filed with, or filed with and approved by, the Commission.\(^{114}\)

The Commission believes that the provisions discussed above in Sections II.C.2.a and b., which are designed to help maintain the independence of Topaz Exchange’s regulatory function and help facilitate the ability of Topaz Exchange to carry out its regulatory responsibilities and operate in a manner consistent with the Act, are appropriate and consistent with the requirements of the Act, particularly with Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.\(^{115}\) Whether Topaz Exchange operates in compliance with the Act, however, depends on how it and ISE Holdings in practice implement the governance and other provisions that are the subject of this Order.\(^{116}\)

Further, Section 19(h)(1) of the Act\(^{117}\) provides the Commission with the authority “to suspend for a period not exceeding twelve months or revoke the registration of [an SRO], or to censure or impose limitations upon the activities, functions, and operations of [an SRO], if [the Commission] finds, on the record after notice and opportunity for hearing, that [the SRO] has violated or is unable to comply with any provision of [the Act], the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance” with any such provision by its members (including associated persons thereof).\(^{118}\) If Commission staff were to find, or become aware of, through staff review and inspection or otherwise, facts indicating any violations of the Act, including without limitation Sections 6(b)(1)\(^{119}\) and 19(g)(1),\(^{120}\) these matters could provide the basis for a disciplinary proceeding under Section 19(h)(1) of the Act.\(^{121}\)

Even in the absence of the provisions described above, under Section 20(a) of the Act,\(^{122}\) any person with a controlling interest in Topaz Exchange would jointly and severally liable with and to the same extent that Topaz Exchange 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\(^{123}\) 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.\(^{124}\) These provisions are applicable to all entities controlling Topaz Exchange, including the Trust, ISE Holdings, U.S. Exchange Holdings, and the Non-U.S. Upstream Owners.

c. Swiss Resolutions and Procedure With FINMA

As discussed more fully in the Eurex Acquisition Order,\(^{125}\) Swiss law is designed to protect Swiss sovereignty concerns and prohibits the direct delivery of information from the Swiss
owners of Topaz Exchange to the Commission or Topaz Exchange with respect to the activities of Topaz Exchange. In light of the Swiss penal code, the Swiss companies agreed to make their books and records relating to the activities of ISE, EDGA and EDGX immediately available for inspection and copying by the Commission through FINMA. The Swiss companies made the same agreement in connection with the Euronext Acquisition, and agreed to do so again with respect to the Topaz Exchange prior to the grant of registration to Topaz Exchange as a national securities exchange. In November 2009, the Commission and FINMA both approved and signed the Undertaking Relating to the Oversight of Affiliated Markets (“2009 Undertaking”) pursuant to which FINMA undertook to serve as a conduit for the delivery of information between the Commission and the Swiss owners of ISE Holdings (“Procedure”) for any national securities exchange registered under Section 6 of the Act that ISE Holdings controls or would, in the future, control, directly or indirectly.

Subject to the terms and conditions relating to the Procedure, coupled with the fact that under the Topaz Exchange LLC Agreement, all trading records of Topaz Exchange must be maintained in the United States, the Commission believes that the Procedure should not result in a level of access materially different from that agreed to by other entities that control U.S. national securities exchanges.

3. Regulation of Topaz Exchange

As a prerequisite to the Commission’s granting of an exchange’s application for registration, an exchange must be so organized and have the capacity to carry out the purposes of the Act. Specifically, an exchange must be able to enforce compliance by its members, and persons associated with its members, with the Act and the rules and regulations thereunder and the rules of the exchange. The discussion below summarizes how Topaz Exchange proposes to structure and conduct its regulatory operations.

The Commission directly to the Swiss Upstream Owners, and FINMA would be copied on any such requests; and (3) a FINMA staff member shall participate in any oral exchanges between the Commission and any of the Swiss Upstream Owners. As used in the 2009 Undertaking, “U.S. Markets” means ISE, EDGX, EDGA, and any national securities exchange registered under Section 6 of the Act that ISE Holdings may, in the future, control, directly or indirectly. See 2009 Undertaking, paragraph 6. Notwithstanding this Procedure, the Swiss Upstream Owners remain fully responsible for meeting all of their obligations as owners of a U.S. securities exchange, to be set forth in binding corporate resolutions.

FINMA serves as a conduit for the delivery of information and for participation in oral exchanges between the Commission and the Swiss companies, and would serve in that capacity for Topaz Exchange. The 2009 Undertaking explicitly states that it covers changes in Swiss companies that become future direct or indirect owners of the U.S. Markets. Specifically, when SIX Swiss Exchange AG’s transferred its interest to the newly formed Swiss corporation, EGD, EGD was covered by the 2009 Undertaking. See supra note 70. If a Non-U.S. Upstream Owner fails to make its books and records relating to the operation of Topaz Exchange available to the Commission, the Commission could bring an action under, among other provisions, Section 17 of the Act, 15 U.S.C. 78q, and Rule 17a-1(b) thereunder, 17 CFR 240.17a-1(b), against Topaz Exchange pursuant to Section 19(b) of the Act, 15 U.S.C. 78r(b).

FINMA serves as a conduit for the delivery of information and for participation in oral exchanges between the Commission and the Swiss companies, and would serve in that capacity for Topaz Exchange. The 2009 Undertaking explicitly states that it covers changes in Swiss companies that become future direct or indirect owners of the U.S. Markets. Specifically, when SIX Swiss Exchange AG’s transferred its interest to the newly formed Swiss corporation, EGD, EGD was covered by the 2009 Undertaking. See supra note 70. If a Non-U.S. Upstream Owner fails to make its books and records relating to the operation of Topaz Exchange available to the Commission, the Commission could bring an action under, among other provisions, Section 17 of the Act, 15 U.S.C. 78q, and Rule 17a-1(b) thereunder, 17 CFR 240.17a-1(b), against Topaz Exchange pursuant to Section 19(b) of the Act, 15 U.S.C. 78r(b).

The Commission will set compensation for the CRO. The Corporate Governance Committee, in its sole discretion, will make hiring and termination decisions with respect to the CRO, in each case taking into consideration any recommendations made by the President/Chief Executive Officer. The Corporate Governance Committee will be informed about the
compensation of the CRO, including factors affecting changes thereto.

b. Regulatory Funding

To help assure the Commission that it has and will continue to have adequate funding to be able to meet its responsibilities under the Act, Topaz Exchange represented that, prior to commencing operations as a national securities exchange, ISE Holdings will provide sufficient funding to Topaz Exchange for the exchange to carry out its responsibilities under the Act.138 Specifically, Topaz Exchange represented that ISE Holdings will make a cash contribution to Topaz Exchange of $5 million, in addition to previously provided “in-kind” contributions of legal, regulatory and infrastructure-related services to Topaz Exchange.139 Topaz Exchange represented in its Form 1 Application that the cash and in-kind contributions to Topaz Exchange will be adequate to operate Topaz Exchange, including its regulatory program.140 Further, Topaz Exchange, with ISE Holdings as its parent, will be affiliated with an existing exchange, ISE.141 Individuals currently employed by ISE have been providing, and will continue to provide, services to Topaz Exchange.142 Topaz Exchange represented in its Form 1 Application that there will be a written agreement between Topaz Exchange and ISE Holdings that requires ISE Holdings to provide adequate funding for Topaz Exchange’s operation, including the regulation of Topaz Exchange.143 This agreement further provides that ISE Holdings will reimburse Topaz Exchange for its costs and expenses to the extent Topaz Exchange’s assets are insufficient to meet its costs and expenses.144

138 See Exhibit 1 to Topaz Exchange Form 1 Application.
139 Other applicants for registration as a national securities exchange have noted in their Form 1 applications similar funding commitments and representations. BOX Exchange represented that, prior to launch, BOX Group LLC would allocate sufficient operational assets, including regulatory infrastructure and industry and regulatory memberships, to BOX Exchange in the amount of $1,000,000 loan to BOX Exchange. In MIAX, the exchange represented that Miami International Holdings, Inc. would allocate sufficient operational assets and make a capital contribution of not less than $2,000,000 into MIAX capital account prior to launching operations. See, e.g., MIAX Order, supra note 30.
140 See Exhibit 1 to Topaz Exchange Form 1 Application.
141 See id.
142 See Amendment No. 3. Both BOX and MIAX also represented in their Form 1 applications that there would be explicit agreements with their respective holding companies to provide adequate funding for the exchanges’ operations, including regulation.
143 See Exhibit 1 to Topaz Exchange Form 1 Application.
144 See id.
145 See id.
146 See id. See also Topaz Exchange LLC Agreement, Article III, Section 3.3. The Topaz Exchange LLC Agreement defines “Regulatory Funds” as fees, fines or penalties derived from the regulatory operations of the [Topaz Exchange], provided that such fees will not include revenues derived from listing fees, market data revenues, transaction revenues or any other aspect of the commercial operations of the Topaz Exchange, even if a portion of such revenues are used to pay any costs associated with the regulatory operations of the [Topaz Exchange]. Id. This definition is consistent with the rules of other SROs. See, e.g., MIAX LLC Agreement Section 16; and MIAX By-Laws Article IX, Section 9.4.
147 See Section 17(d)(1) of the Act and Rule 17d–2 thereunder, 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d–2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain regulatory responsibilities with respect to members of the SRO who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of certain regulatory responsibilities with respect to such members. See also Section 16(d) of the Act and Rule 16d–2 thereunder, 15 U.S.C. 78q(d)(1) and 17 CFR 240.16d–2. Section 16(d)(1) of the Act requires every SRO to submit to the Commission regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; and (iii) carry out other specified regulatory responsibilities with respect to such members. 15 U.S.C. 78q(d)(1) and 17 CFR 240.16d–2. Section 16(d)(1) of the Act requires every SRO to submit to the Commission regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; and (iii) carry out other specified regulatory responsibilities with respect to such members.
148 See id.
149 See id. See also 17d–2 Plans, including the two existing multiparty plans approved and declared effective by the Commission.
150 These agreements, which must be filed with and declared effective by the Commission, generally cover areas where each SRO’s rules substantively overlap, including such regulatory functions as personnel registration and sales practices. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO. Such regulatory duplication would add unnecessary expenses for common members and their SROs. A 17d–2 plan that is declared effective by the Commission relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.151 Many SROs have entered into Rule 17d–2 agreements.152 Topaz Exchange has represented to the Commission that it will enter into the following agreement of regulatory responsibilities pursuant to Rule 17d–2 of the Act (“17d–2 Plans”).

• MultiParty 17d–2 Plan for the Allocation of Regulatory Responsibility for Options Sales Practice Matters;154

• MultiParty 17d–2 Plan for the Allocation of Regulatory Responsibility for Options Related Market Surveillance Matters;155 and

144 See id.
145 See id.
146 See id. See also Topaz Exchange LLC Agreement, Article III, Section 3.3. The Topaz Exchange LLC Agreement defines “Regulatory Funds” as fees, fines or penalties derived from the regulatory operations of the [Topaz Exchange], provided that such fees will not include revenues derived from listing fees, market data revenues, transaction revenues or any other aspect of the commercial operations of the Topaz Exchange, even if a portion of such revenues are used to pay any costs associated with the regulatory operations of the [Topaz Exchange]. Id. This definition is consistent with the rules of other SROs. See, e.g., MIAX LLC Agreement Section 16; and MIAX By-Laws Article IX, Section 9.4.
147 See Section 17(d)(1) of the Act and Rule 17d–2 thereunder, 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d–2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain regulatory responsibilities with respect to members of the SRO who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of certain regulatory responsibilities with respect to such members. See also Section 16(d) of the Act and Rule 16d–2 thereunder, 15 U.S.C. 78q(d)(1) and 17 CFR 240.16d–2. Section 16(d)(1) of the Act requires every SRO to submit to the Commission regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; and (iii) carry out other specified regulatory responsibilities with respect to such members. 15 U.S.C. 78q(d)(1) and 17 CFR 240.16d–2. Section 16(d)(1) of the Act requires every SRO to submit to the Commission regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; and (iii) carry out other specified regulatory responsibilities with respect to such members.
148 See id.
149 See id. See also 17d–2 Plans, including the two existing multiparty plans approved and declared effective by the Commission.
150 These agreements, which must be filed with and declared effective by the Commission, generally cover areas where each SRO’s rules substantively overlap, including such regulatory functions as personnel registration and sales practices. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO. Such regulatory duplication would add unnecessary expenses for common members and their SROs. A 17d–2 plan that is declared effective by the Commission relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.151 Many SROs have entered into Rule 17d–2 agreements.152 Topaz Exchange has represented to the Commission that it will enter into the following agreement of regulatory responsibilities pursuant to Rule 17d–2 of the Act (“17d–2 Plans”).

• MultiParty 17d–2 Plan for the Allocation of Regulatory Responsibility for Options Sales Practice Matters;154

• MultiParty 17d–2 Plan for the Allocation of Regulatory Responsibility for Options Related Market Surveillance Matters;155 and

151 See id.
153 Rule 17d–2 under the Act permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members (i.e., 17d–2 plans).
155 See Exhibit L to Topaz Exchange Form 1 Application. See also Securities Exchange Act Release No. 68362 (December 5, 2012), 77 FR 73719 (December 11, 2012) [File No. 4–551] (notice of filing and order approving and declaring effective an amendment to the multiParty 17d–2 plan concerning options-related market surveillance).
• Bilateral 17d–2 Plan with FINRA that would cover, among other things, general inspection, examination, and enforcement activity.\(^{156}\)

If the Commission declares effective the amendments to the multilateral 17d–2 Plans and the new bilateral 17d–2 Plan, another SRO (often FINRA) would assume certain regulatory responsibility for members of Topaz Exchange that are also members of the SRO that assumes the regulatory responsibilities. This regulatory structure would be consistent with that of other exchanges, including ISE.\(^{157}\)

In addition, Topaz Exchange has entered into a third-party Regulatory Service Agreement ("RSA") with FINRA.\(^{158}\) Under the RSA, FINRA will carry out certain specified regulatory activities on behalf of Topaz Exchange. For example, FINRA, in its capacity as service provider to Topaz Exchange, will provide member operation services, including membership application review, conducting market surveillance, investigation services, conducting routine and cause examination services, assisting Topaz Exchange with disciplinary proceedings pursuant to Topaz Exchange’s rules including conducting hearings, and providing dispute resolution services to Topaz Exchange members on behalf of Topaz Exchange. Topaz Exchange, however, will retain ultimate legal responsibility for the regulation of its members and market.\(^{159}\) This regulatory structure would be consistent with that of other exchanges.\(^{160}\),\(^{161}\)

Topaz Exchange has also entered into a facilities management agreement ("FMA") with ISE.\(^{162}\) Pursuant to the proposed FMA, ISE intends to provide to Topaz Exchange certain services, including, for example, business management services, facilities management services, IT services, fiscal services, as well as Commission and other regulatory compliance services and other legal services, such as surveillance programs, legal programs, systems and other operational services.\(^{163}\) Topaz Exchange, however, will retain ultimate legal responsibility for the regulation of its members and market.

The Commission believes that it is consistent with the Act for Topaz Exchange to contract with other SROs to perform certain examination, enforcement, and disciplinary functions.\(^{164}\) These functions are fundamental elements of a regulatory program, and constitute core self-regulatory functions. The Commission believes that both FINRA, as a SRO that provides contractual services to other SROs, and ISE, as an SRO that currently operates an options exchange, should have the capacity to perform these functions for Topaz Exchange.\(^{165}\) However, Topaz Exchange, unless relieved by the Commission of its responsibility,\(^{166}\) bears the ultimate responsibility for self-regulatory responsibilities and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on Topaz Exchange’s behalf. In performing these regulatory functions, however, the SRO retained to perform specified regulatory functions may nonetheless bear liability for causing or aiding and abetting the failure of Topaz Exchange to perform its regulatory functions.\(^{167}\)

Accordingly, although FINRA and ISE will not act on their own behalves under their respective SRO responsibilities in carrying out these regulatory services for Topaz Exchange, as the SROs retained to perform regulatory functions, FINRA and ISE may have secondary liability if, for example, the Commission finds that the contracted functions are being performed so inadequately as to cause a violation of the federal securities laws by Topaz Exchange.

As part of its FMA with ISE, Topaz Exchange proposes to use dual employees to staff its regulatory services program. In other words, current ISE employees will also serve in a similar capacity for Topaz Exchange under the FMA. Topaz Exchange represents that the FMA will contain an obligation on the part of Topaz Exchange and ISE to preserve the other party’s information and materials which are confidential, proprietary and/or trade secrets and prevent unauthorized use or disclosure to third parties.\(^{168}\)

The Commission believes that the use of ISE employees by Topaz Exchange is appropriate, as the operations, rules, and management of ISE and Topaz Exchange will overlap to a considerable degree such that Topaz Exchange should benefit by leveraging the experience of current ISE staff. The Commission has approved such arrangements in a similar context.\(^{169}\) However, the Commission expects both ISE and Topaz Exchange to monitor the workload of their dual employees and supplement their staffs, if necessary, so that Topaz Exchange maintains sufficient personnel to allow it to carry out the purposes of the Act and enforce compliance with the rules of Topaz Exchange and the federal securities laws.

D. Trading System

1. Access to Topaz Exchange

Access to Topaz Exchange will be through the use of Exchange Rights.\(^{170}\) Through an application process, organizations will be approved to become members of Topaz Exchange.
and to exercise trading rights. Exchange Rights will not convey any ownership rights, but will provide for voting rights for representation on the Topaz Exchange Board and will confer the ability to transact on Topaz Exchange. Exchange Rights may not be leased and are not transferable except in the event of a change in control of a member or corporate reorganization involving a member. There is no limit on the number of Exchange Rights issued by Topaz Exchange. Membership in Topaz Exchange will be open to any non-member registered under Section 15(b) of the Act that meets the standards for membership set forth in the rules of Topaz Exchange. The Exchange’s denials from, and impositions of conditions upon, becoming or continuing to be a member may be appealed pursuant to rules governing hearing and review, described in Section II.E below. In addition to its regular membership application process, Topaz Exchange also will provide a process whereby a current member may be appointed to become a registered broker-dealer that is a member of ISE in good standing that is associated with a registered broker or dealer or natural person associated with a broker or dealer may become a member of such exchange or associated with a member thereof. Topaz Exchange proposes to allow firms that register as market makers to receive special privileges or rights over non-market maker members, such as participation entitlements for PMMs, if they satisfy certain affirmative and negative market making obligations on the exchange. This is similar to arrangements in place at other exchanges, such as ISE. The Commission finds that Topaz Exchange’s proposed membership rules are consistent with the Act, including Section 6(b)(2) of the Act, which requires the rules of an exchange to provide that any registered broker or dealer or natural person associated with a broker or dealer may become a member of such exchange or associated with a member thereof. Topaz Exchange’s proposed rules with respect to exchange membership are substantively similar to the rules of other exchanges.

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 a registered exchange, Topaz Exchange 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.

In addition, Topaz Exchange also will allow non-members to access Topaz Exchange as “sponsored customers” of a Topaz Exchange member, subject to certain rules. The sponsoring member will be responsible for implementing policies and procedures to supervise and monitor the trading of its sponsored users to ensure compliance with all applicable federal securities laws and rules and Topaz Exchange rules. Topaz Exchange’s proposed sponsored access rules are similar to the rules of other exchanges that provide for sponsored access and are consistent with Rule 15c3–5 under the Act.

2. Linkage

Topaz Exchange intends to become a participant in the Plan Relating to Options Order Protection and Locked/Crossed Markets or any successor plan (“Linkage Plan”). If admitted as a participant to the Linkage Plan, other plan participants will be able to send orders to Topaz Exchange in accordance with the terms of the plan as applied to Topaz Exchange.

Topaz Exchange rules include relevant definitions; establish the conditions pursuant to which members may enter orders in accordance with the Linkage Plan; impose obligations on Topaz Exchange regarding how it must process incoming orders; establish a general standard that members and Topaz Exchange should avoid trade-throughs; establish potential regulatory liability for members that engage in a pattern or practice of trading through other exchanges; and establish obligations with respect to locked and crossed markets.

The Commission believes that Topaz Exchange has proposed rules that are designed to comply with the requirements of the Linkage Plan. Further, as provided below, before Topaz Exchange can commence operations as an exchange, it must

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177 The term “Member” means an organization that has been approved to exercise trading rights associated with Exchange Rights, and the term “Membership” refers to the trading privileges associated with Exchange Rights. See Topaz Exchange Rules 100(a)(23) and 100(a)(24). Under Topaz Exchange Rules 300 and 302(c), Topaz Exchange shall confer on a current member the ability to transact on Topaz Exchange, although no rights shall be conferred upon a Member except those set forth in the Topaz Exchange LLC Agreement or Topaz Exchange Rules as amended from time to time. A Membership shall not convey any ownership interest in the Exchange. See Topaz Exchange Rules 300 and 302(c).

178 See Topaz Exchange Rules 300 and 302(c); see also Topaz Exchange LLC Agreement, Article VI, Sections 6.1 and 6.3.

179 See Topaz Exchange Rule 302(c). In such case, member status may be transferred to a qualified affiliate or successor upon written notice to Topaz Exchange.

180 See Topaz Exchange Rule 300(a); see also Topaz Exchange LLC Agreement, Article VI, Section 6.1.

181 See Topaz Exchange Rules 713, 802 and 803. See infra Section II.D.1.b. for further discussion of market maker privileges and obligations.

182 See, e.g., ISE Rules 713, 802 and 803 (containing similar rights and obligations for market makers on ISE). However, some of Topaz Exchange’s proposed access rules differ in some respects from the rules of ISE. For example, as a result of their differing membership structures, there is no limit on the number of PMMs that Topaz Exchange can approve for membership, whereas ISE can appoint only ten PPMs in total. There will still be only one PPM per options class on Topaz Exchange. There also will be no limit to the number of CMMs on Topaz Exchange, whereas ISE can appoint only 160 CMMs in total. EAM rights, however, will be unlimited on both ISE and Topaz Exchange. Topaz Exchange’s approach is consistent with the rules of exchanges that have no limit on the number of exchange rights, or their functional equivalent, that may be issued by the exchange. See, e.g., C2 Order, supra note 169.


184 See, e.g., MIAX Rule 200 Series (“Access”).


186 See, e.g., MIAX Order, supra note 30, at 77 FR 73074; BOX Order, supra note 39, at 77 FR 26337; BATS Order, supra note 29, at 73 FR 49502; and Nasdaq Order, supra note 29, at 71 FR 3555.

187 See Topaz Exchange Rule 706. Supplementary Material, 01.

188 See Topaz Exchange Rule 706. See also 17 CFR 240.15c3–5.

189 See, e.g., ISE Rule 706; see also MIAX Rule 210.

190 17 CFR 240.15c3–5.


192 See, e.g., Topaz Exchange Rules relating to Intermarket Linkage in Rule 1900 Series, which incorporates by reference ISE Rule 1900 Series. See also Amendment No. 3.
become a participant in the Linkage Plan.

3. Market Makers

Members of Topaz Exchange may apply to become one of two types of market maker: PMMs or CMMs (collectively, “Market Makers”). Market Makers are entitled to receive certain benefits and privileges in exchange for fulfilling certain affirmative and negative market-making obligations. Each class of Market Maker will receive a specific level of benefits and privileges in exchange for a specific level of obligation that such Market Maker assumes to the Topaz Exchange market.

To begin the process of registering as a Market Maker, a member will be required to file a written application with Topaz Exchange. In reviewing a member’s application for membership, Topaz Exchange will consider, among other things, the applicant’s market making ability. To qualify for registration as a Market Maker, a member of Topaz Exchange must meet the requirements established in Rule 15c3-1 under the Act and the general requirements set forth in Topaz Exchange Rule 800 series, including the minimum financial requirements of Topaz Exchange Rule 809.

All members who are approved to become Market Makers will be designated as specialists on Topaz Exchange for all purposes under the Act and rules thereunder. Topaz Exchange will not limit the number of qualifying entities that may become Market Makers.

In addition, all ISE market makers in good standing will be eligible for an Exchange Right in the same membership category in which they operate on ISE to trade on Topaz Exchange. For example, a CMM in good standing on ISE will be eligible to become a CMM on Topaz Exchange, through the submission and approval of a Topaz Exchange Waive-In Membership Application.

Once approved, a Market Maker may seek appointment to make markets in one or more options classes traded on the Topaz Exchange. Topaz Exchange will provide non-ISE Members with at least sixty days advance written notice of the date upon which the Exchange will allocate options classes and appoint market makers in order to ensure that non-ISE Members have a reasonable opportunity to participate in those processes. A market participant must have completed a membership application to be eligible to participate in the appointment and allocation processes.

Either the Topaz Exchange Board or a committee thereof will appoint classes of options contracts traded on Topaz Exchange to Market Makers taking into consideration: (1) The financial resources available to the Market Maker; (2) the Market Maker’s experience and expertise in market making and trading; and (3) the maintenance and enhancement of competition among Market Makers in each option class to which they are appointed.

No appointment of a Market Maker will be without the Market Maker’s consent to such appointment, provided that refusal to accept an appointment may be deemed sufficient cause for termination or suspension of a market maker’s registration. Topaz Exchange will appoint a PMM to each options class traded on Topaz Exchange. Once appointed, Topaz Exchange will surveil a Market Maker’s activity for continued compliance with all applicable rules and requirements, which are discussed in more detail below.

The Commission finds that Topaz Exchange’s proposed rules for the registration and appointment of Market Makers are consistent with the Act. In particular, Topaz Exchange’s rules provide an objective process by which a member could become a Market Maker on Topaz Exchange and provide for oversight by Topaz Exchange to monitor for continued compliance by Market Makers with the terms of their application for such status. The Commission notes that Topaz Exchange’s proposed Market Maker registration and appointment requirements are similar to those of other options exchanges.

b. Market Maker Obligations

Pursuant to Topaz Exchange rules, Market Makers will be subject to a number of general obligations. In particular, the transactions of a Market Maker should constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market and a Marker Maker should not make bids or offers or enter into transactions that are inconsistent with such a course of dealings. A Market Maker has a continuous obligation to engage, to a reasonable degree under the existing circumstances, in dealings for his own account when there exists, or it reasonably anticipated that there will exist, a lack of price continuity, a temporary disparity between the supply of and demand for a particular options contract, or a temporary distortion of the price relationships between options contracts of the same class. For all series of option classes which the Market Maker is appointed, the Market Maker is expected to: (1) Compete with other Market Makers to improve the market; (2) make markets that, absent changed market conditions, will be honored for the number of contracts entered into the Topaz Exchange’s system; (3) update market quotations in response to changed market conditions; (4) price options contracts fairly by, among other things, bidding and offering so as to create the prescribed bid/ask differentials. These provisions are similar to arrangements in place at other options exchanges.
Further, Market Makers must maintain minimum net capital in accordance with Topaz Exchange rules, including the minimum financial requirement of Topaz Exchange Rule 809, in addition to the Act and rules and regulations thereunder.215 Market Makers also must maintain information barriers between their market making activity and Other Business Activities216 that are reasonably designed to prevent the misuse of material, non-public corporate or market information in the possession of persons on one side of the barrier from influencing the conduct of persons on the other side of the barrier.217

Topaz Exchange’s rules governing Market Maker quoting obligations are tailored to the specific class of Market Maker (that is, PMM or CMM).218 Specifically, a PMM will be subject to the highest standard applicable on Topaz Exchange, as a PMM must enter continuous two-sided quotations and enter into any resulting transactions in all of the series listed on the Topaz Exchange of the options classes to which it is appointed on a daily basis.219 PMMs are also required to participate in the opening rotation.220 Although a CMM is not required to enter quotations in the options classes to which it is appointed, whenever a CMM does enter a quote in an options class to which it is appointed, the CMM must then provide continuous quotations in that class for 60% of the time the options class is open for trading on the Topaz Exchange.221

ISE). However, some of Topaz Exchange’s access rules differ in some respect from the rules of ISE. See also supra note 182.

215 See Topaz Exchange Rule 1300 Series, which incorporates by reference ISE Rule 1300 Series; see also Topaz Exchange Rule 809.

216 “Other Business Activities” means: (1) Conducting an investment or banking or public securities business; (2) making markets in the stocks underlying the options in which it makes markets; or (3) handling listed options orders as agent on behalf of Public Customers or broker-dealers; (4) conducting non-market making proprietary listed options trading activities. See Topaz Exchange Rule 810(c).

217 See Topaz Exchange Rule 810.

218 See Topaz Exchange Rule 804.

219 See Topaz Exchange Rule 804(e)(1); see also Topaz Exchange Rule 804(c). A PMM shall be deemed to have provided continuous quotes pursuant to paragraph (e)(1) of Rule 804 if it provides two-sided quotes for 90% of the time that an options class is open for trading on the Topaz Exchange. See Topaz Exchange Rule 804, Supplementary Material .01; see also Amendment No. 3.

220 See Topaz Exchange Rule 701(b)(1). See also Amendment No. 3.

221 See Topaz Exchange Rule 804(e)(2). A CMM must maintain continuous quotations for at least 90% of the time the options class for which it receives Preferred Orders is open for trading on the Topaz Exchange. See Topaz Exchange Rule 804(e)(2)(iii); see also Topaz Exchange Rule 713, Supplementary Material .03 regarding Preferred Orders.

Further, CMMs may be called upon by a Topaz Exchange official to submit a single quote or maintain continuous quotes in one or more series of options to which the CMM is appointed whenever, in the judgment of such official, it is necessary to do so in the interest of fair and orderly markets.222 For purposes of meeting the continuous quoting obligations discussed herein, a Market Maker’s quote must meet the bid/ask differential requirements of Topaz Exchange Rule 803(b)(4).223 In options classes other than to which it is appointed, a Market Maker should not engage in transactions in an account in which it has an interest that are disproportionate in relation to, or in derogation of, the performance of its market making obligations as specified in the Topaz Exchange rules.224 Further, the total number of contracts executed during a quarter by a CMM in options classes to which it is not appointed may not exceed 25% of the total number of contracts traded by such CMMs in classes to which it is appointed and with respect to which it was quoting pursuant to Topaz Exchange Rule 804(e)(2).225 Similarly, the total number of contracts executed during a quarter by a PMM in options classes to which it is not appointed may not exceed 10% of the total number of contracts traded per each PMM membership.226

If Topaz Exchange finds any failure by a Market Maker to properly perform as a market maker, such Market Maker may be subject to suspension or termination.227 Topaz Exchange may suspend or terminate any appointment of a Market Maker under Topaz Exchange Rule 802 and may make additional appointments whenever, in Topaz Exchange’s judgment, the interests of a fair and orderly market are best served by such action.228 Market Makers receive certain benefits for carrying out their responsibilities.229 For example, a broker-dealer or other lender may extend “good faith” credit to a member of a national securities exchange or registered broker-dealer to finance its activities as a market maker or specialist.230 PMMs are also entitled to certain participation entitlements.231 In addition, market makers are excepted from the prohibition in Section 11(a) of the Act.232

The Commission believes that a market maker must be subject to sufficient and commensurate affirmative obligations, including the obligation to hold itself out as willing to buy and sell options for its own account on a regular or continuous basis, to justify favorable treatment.233 The Commission further believes that the rules of all U.S. options markets need not provide the same standards for market maker participation, so long as they impose affirmative obligations that are consistent with the Act.234

The Commission believes that Topaz Exchange’s Market Maker participation requirements impose appropriate affirmative obligations on Topaz Exchange’s Market Makers that are commensurate with the benefits afforded to such participants, as discussed above, and, accordingly, are consistent with the Act. The Commission believes that the specific levels of benefits conferred on the different classes of Market Makers (PMMs and CMMs) are appropriately balanced by the obligations imposed by Topaz Exchange’s rules. The Commission further believes that Topaz Exchange’s market maker requirements, which are identical to ISE’s rules236 and similar to other options exchanges’ rules,237 impose sufficient appropriate obligations that are consistent with the Act.

Finally, the Commission believes that the Act does not mandate a particular market model for exchanges, and while Market Makers may become an important source of liquidity on Topaz Exchange, they will likely not be the only source as Topaz Exchange is designed to match buying and selling interest of all Topaz Exchange participants.

222 See also supra note 261–268 See also infra notes 261–268 and accompanying text (describing the PMM participation entitlements).


224 See MIAX Order, supra note 30, at 77 FR 73076; and BOX Order supra note 39; see also, e.g., C2 Order, supra note 169.

225 See id.

226 See Topaz Exchange Rule 801.236 See, e.g., ISE Rule 800 Series.

227 See, e.g., MIAX Order, supra note 30, and BOX Order, supra note 39.
4. Order Display, Execution, and Priority

Topaz Exchange proposes to operate a fully automated electronic options trading platform to buy or sell securities with a continuous, automated matching function.238 Liquidity will be derived from Topaz Exchange members acting as principal or as agent electronically, submitting quotes as well as market and various types of limit orders to buy or to sell.239 Non-members also may access Topaz Exchange pursuant to Topaz Exchange rules governing “sponsored access.”240 All of these electronic submissions to Topaz Exchange will be from remote locations, as there will be no trading floor.241 Topaz Exchange’s Optimist system generally will automatically execute incoming orders.242 Non-opening trades will occur when a buy order/quote and a sell order/quote on the Topaz Exchange’s order book.243 All options will be traded in decimals on Topaz Exchange and will be consistent with the Penny Pilot.244

All orders submitted to Topaz Exchange’s trading platform must have a designated price and size (limit orders)245 or must be orders to buy or sell a stated amount of a security at the national best bid or offer when the order reaches Topaz Exchange (market orders).246 Members may submit the following orders to Topaz Exchange:

- Market Orders: Limit Orders (including Marketable Limit, Fill-or-Kill, Immediate or Cancel, Non-Displayed Penny Order, Intermarket Sweep, and Stopped Orders); 247 or Contingency Orders (including All-Or-None, Stop, Stop Limit, Customer Participation, Reserve, Attributable, Customer Cross, Qualified Contingent Cross, Minimum Quantity,248 Do-Not-Route, Add Liquidity, Opening Only, and Good-Till-Date Orders).249 Like ISE, Topaz Exchange also will permit flash mechanisms, which thereby permit certain orders to first be exposed at the NBBO to all Topaz Exchange members for execution at the National Best Bid or Offer (“NBBO”) before an unaffiliated broker will, under contract with Topaz Exchange, route the order to another market for execution.250

Quotes entered by PMMs and CMMs must, like Limit Orders, be priced and have a designated size.251 Orders will be accepted for any security traded on Topaz Exchange, whether submitted by a member on a particular basis or any basis in any size,252 whereas quotes for any security traded on Topaz Exchange may only be submitted by PMMs and CMMs and only in the options classes to which the market makers are appointed.253 Topaz Exchange will be required to maintain a full audit trail of every incoming and outgoing message (including all orders and quotes) submitted to the Topaz Exchange’s system.254 Members may receive status reports regarding orders submitted to Topaz Exchange or change or cancel an order to buy or sell at least 1000 contracts that is identified as being part of a qualified contingent trade (as defined in Topaz Exchange Rule 715, Supplementary Material .02) coupled with a contra-side order to buy or sell an equal number of contracts. A Minimum Quantity Order is an order that is initially available for partial execution only for a specified number of contracts or greater. A Do-Not-Route Order is a market or limit order that is to be executed in whole or in part on Topaz Exchange (i) only after being displayed on Topaz Exchange’s limit order book; and (ii) without routing any portion of the order to another market center. An Opening Only Order is a limit order that can be entered for the opening rotation only. A Good-Till-Date Order is a limit order to buy or sell which, if not executed, will be cancelled at the close of the end of the expiration date assigned to the order, or the expiration of the series. These order types are the same order types that are available on ISE, except that ISE also includes several complex order types that are not proposed for Topaz Exchange. See Topaz Exchange Rule 715; ISE Rules 715 and 722: see also Exhibit B to Topaz Exchange Form 1 Application.

238 See Exhibit E to Topaz Exchange Form 1 Application.
239 See id.
240 See id.
241 See id.
242 See Topaz Exchange Rule 714.
243 See Exhibit E to Topaz Exchange Form 1 Application.
244 See Topaz Exchange Rule 710 and Supplementary Material .01. The Commission has approved exchange rules on a pilot basis that permit the exchange to operate orders with premiums under $3 in pennies and series with premiums of $3 and over in nickels in approximately 360 options series ("Penny Pilot"). In addition, these rules allow all series in QQQQs, IWM, and SPY to be listed for trading.245 All options will be traded in decimals on Topaz Exchange and will be consistent with the Penny Pilot.
246 A market order is an order to buy or sell a stated number of options contracts that is to be executed at the best price obtainable when the order reaches Topaz Exchange. Topaz Exchange Rule 715(a).
247 See Topaz Exchange Rule 715. A Marketable Limit Order is a limit order to buy (sell) at or above (below) the best offer (bid) on the Topaz Exchange. A Fill-or-Kill Order is a limit order that is to be executed in its entirety as soon as it is received and, if not so executed, treated as cancelled. An Immediate-or-Cancel Order is a limit order that is to be executed in whole or in part upon receipt and any portion not executed is to be treated as cancelled. A Non-Displayed Penny Order is a limit order that specifies a one-cent price increment in a security that has a minimum trading increment pursuant to Topaz Exchange Rule 710 that is larger than one-cent. An Intermarket Sweep Order is a limit order that meets the requirements of Topaz Exchange Rule 1900(b), which incorporates by reference ISE Rule 1901(b)(8). To execute Stopped Orders, members must enter them into the Facilitation Mechanism or Solicited Order Mechanism pursuant to Topaz Exchange Rule 716.
248 The NASDAQ Letter noted that both Topaz Exchange Rules 715(1) and 715(6) appear to be identical and urged that Topaz Exchange clarify the difference between these two types of Minimum Quantity Orders. See NASDAQ Letter, supra note 7, and Amendment No. 6. The Commission believes that Topaz Exchange Rule 715(1) appropriately addresses the commenter’s concern.
249 See Topaz Exchange Rule 715. An All-or-None Order is a limit order that is to be executed in its entirety or not at all. A Stop Order is an order that becomes a market order when the stop price is elected. A Stop Limit Order is an order that becomes a limit order when the stop price is elected. A Customer Participation Order is a limit order on behalf of a Public Customer (as defined in Topaz Exchange Rule 100(a)(30)) that, in addition to the limit order price increments according to Topaz Exchange Rule 710, includes a price stated in one-cent increments at which the Public Customer wishes to participate in trades executed in the same options series in penny increments through the Price Improvement Mechanism pursuant to Topaz Exchange Rule 723. A Reserve Order is a limit order that contains both a displayed posted limit order portion and an Attributable Order portion. An Attributable Order is a market or limit order which displays the user firm ID for purposes of electronic trading on Topaz Exchange. A Customer Cross Order is a limit order that becomes a limit order when the stop price is elected. A Priority Customer Order (as defined in Topaz Exchange Rule 100(a)(37b) to buy a Priority Customer Order to sell at the same price and for the same quantity. A Qualified Contingent Cross order is comprised of

See Topaz Exchange Rule 713(a).
250 See Topaz Exchange Rule 713(a).
251 See Topaz Exchange Rule 804(a).
252 See 17 CFR 240.17a–5. See also Exhibit E to Topaz Exchange Form 1 Application, Section C.

253 See Topaz Exchange Rule 804(a).
254 See 17 CFR 240.17a–5. See also Exhibit E to Topaz Exchange Form 1 Application, Section C.

255 See Topaz Exchange Rule 804(b). The NASDAQ Letter noted that proposed Topaz Exchange Rule 804(g) and Supplementary Material .01 appear to be identical and urged that Topaz Exchange clarify this provision. See NASDAQ Letter, supra note 6. Topaz Exchange stated that it will correct the duplicative provision. See Topaz Exchange Response Letter, supra note 7, and Amendment No. 3. The Commission believes that Topaz Exchange’s revision to Topaz Exchange Rule 804(g) is appropriate as it addresses the commenter’s concern.
order at any time before that order is executed on Topaz Exchange, except as otherwise specified in Topaz Exchange Rule 723 (Price Improvement Mechanism for Crossing Transactions).255

All orders and quotes submitted to Topaz Exchange will be displayed unless designated otherwise by the member submitting the order.256

Displayed orders and quotes will be displayed on an anonymous basis (except for Attributable Orders,257 which will allow voluntary disclosure of firm identification information) at a member’s specified price. Non-Displayed Orders (the non-displayed portion of a Reserve Order or a Non-Displayed Penny Order) will not be displayed to anyone and will not have time priority over displayed orders at the same price.258

Topaz Exchange will utilize a pro-rata priority scheme with a Priority Customer preference.259 This scheme is the same as what the Commission has approved for ISE.

In addition, under Topaz Exchange rules, PMMs are granted certain participation entitlements. For example, PMMs will be entitled to a participation entitlement with respect to each incoming order if they have a quote at the NBBO.260 The PMM participation entitlement will apply only to any remaining balance after any Priority Customer261 orders have first been satisfied.262 The PMM will not be allocated a total quantity greater than the quantity it is quoting at the execution price, and it will not receive any further allocation of an order if it receives a participation entitlement.263 Another such entitlement provides that small size orders (i.e., five or fewer contracts) will be allocated in full to the PMM if it has a quote at the NBBO.264

These participation entitlements for PMMs are consistent with provisions that the Commission has approved for other exchanges.265 The Commission believes that these entitlements are appropriately balanced by the obligations imposed on these classes of market makers, as discussed in detail above.266 In particular, PMMs are subject to higher quoting obligations than other Market Makers who are not eligible to receive the aforementioned participation entitlements.267 Therefore, the Commission believes that the proposed rules regarding participation entitlements are consistent with the Act.

Topaz Exchange proposes to make available certain additional order processing and matching features, largely based on features available on ISE.268 Mechanisms that will be utilized by Topaz Exchange include: A Price Improvement Mechanism (which affords the opportunity for price improvement after an auction for eligible orders above the NBBO);270 a Facilitation Mechanism (which affords members an opportunity to cross orders after an auction and provides the facilitating member the opportunity to receive 40% of the agency order);271 and a Solicited Order Mechanism (which allows members representing agency orders the opportunity to cross large size solicited orders after an auction).272 These mechanisms are consistent with substantially similar mechanisms currently existing on other options exchanges, including identical mechanisms on ISE with respect to non-complex orders.273

Members will be able to access Topaz Exchange through a variety of electronic

255 See Exhibit E to Topaz Exchange Form 1 Application, Section C.
256 See Topaz Exchange Rule 704.
257 An Attributable Order is a market or limit order which displays the user firm’s ID for purposes of trading on the Topaz Exchange. Use of Attributable Orders would be voluntary. This order type is consistent with similar order types on other exchanges. See, e.g., CBOE Rule 6.53(c) (attributable order type).
258 See Topaz Exchange Rules 710(b)(4) and 715(g).
259 See Topaz Exchange Rule 713, Supplementary Material 01. Under this priority methodology, the highest bid or offer will have priority except that Priority Customer Orders will have priority over professional interest and all market maker interest at the same price. Subject to certain limits, Professional Orders and market maker quotes at the best price receive allocations based upon the percentage of the total number of contracts available at the best price that is represented by the size of the Professional Order or quote. If there were two or more Priority Customer Orders for the same options series at the same price, priority will be afforded based on the sequence in which such orders were received. Topaz Exchange rules will define “Priority Customer” as a person or entity that is not a broker or dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial accounts. “Professional Orders,” i.e., orders for the account of a person or entity that is not a Priority Customer, will be subordinate to Priority Customer orders for priority and fee purposes. Professional Orders will include orders of broker-dealers and orders of those Public Customers that are not Priority Customers. See Topaz Exchange Rules 100(a)(37A)–(37C) for definitions of Priority Customer, Priority Customer Order and Professional Order, respectively.
260 See, e.g., ISE Rule 713, Priority of Quotes and Orders.
261 See Topaz Exchange Rule 713, Supplementary Material 01. Specifically, the PMM’s participation entitlement will be equal to the greater of: (i) The proportion of the total size at the best price represented by the size of its quote, or (ii) 60% of the contracts to be allocated if there is only one other Market Maker quote at the NBBO or 40% if there are two or more other Market Maker quotes at the NBBO. See Topaz Exchange Rule 713, Supplementary Material 01(b).
262 See supra note 259 for the definition of Priority Customer.
263 See Topaz Exchange Rule 713, Supplementary Material 01.
264 See id.
265 See Topaz Exchange Rule 713, Supplementary Material 01(c). The rule provides that Topaz Exchange will review the functioning of this provision quarterly to make sure that small size orders do not account for more than 40% of the volume executed on Topaz Exchange. Id.
266 See, e.g., ISE Rule 713, Supplementary Materials 01 and 03; see also MIAX Order, supra note 30.
267 See supra Section II.D.3.b (discussing market maker obligations).
268 For example, as discussed above, supra Section II.D.3.b., PMMs must provide continuous two-sided quotes in each appointed option class.
269 The primary difference between Topaz Exchange’s order processing and matching features and those of ISE previously approved by the Commission will be that Topaz Exchange will not accept complex orders.

260 See Topaz Exchange Rule 723. Topaz Exchange will operate a pilot program whereby there will be no minimum size requirements for orders to be eligible for the PMM. See Exhibit E to Topaz Exchange Form 1 Application; see also Topaz Exchange Rule 723, Supplementary Material .03.
261 See Topaz Exchange Rule 716(d). The NASDAQ Letter stated that it appears that the rule concerning the Facilitation Mechanism was internally inconsistent in part. Specifically, the NASDAQ Letter noted that proposed Topaz Exchange Rule 716(d)(3)(i) stated that Priority Customer bids (offers) that are priced higher (lower) than the facilitation price will be executed at the facilitation price, and further noted that the same section of the rule also stated that a facilitation order would be cancelled at the end of the exposure period if an execution would take place at a price that is inferior to the best bid (offer) on Topaz. See NASDAQ Letter, supra note 6. The NASDAQ Letter suggested that this means that a Priority Customer bidding higher than the facilitation price would cause the facilitation order to be cancelled. See id.

270 See Topaz Exchange Rule 716(d). The NASDAQ Letter clarified this point by explaining that, because Topaz Exchange is a price priority exchange, Topaz Exchange will not execute a facilitation order at a price inferior to the Topaz Exchange best bid or offer (“Topaz BB”) at the time of execution. Topaz Exchange noted that, since interest on the opposite side of a facilitation order participates in the execution of the facilitation order, the only instance where a better priced Priority Customer Order might be outside of the Topaz BB is when the order is on the same side of the market as the facilitation order. In other words, the text of Rule 716(d) means that better-priced Priority Customer Orders on the opposite side of the market from the order being facilitated will be given the benefit of executing at the facilitation price, whereas better-priced Priority Customer Orders on the same side of the market as the order being facilitated will cause the facilitation order to be cancelled. See Exchange Response Letter, supra note 7.

271 See Topaz Exchange Rule 716(e). With respect to the Block Order, Facilitation and Solicited Order Mechanisms described in Topaz Exchange Rule 716(b), (d) and (e), the NYSE Euronext Letter II recommended clarifying language to describe what terms, if any, should be contained within a “broadcast message.” See NYSE Euronext Letter II, supra note 6. Topaz Exchange stated that it would amend the various sections of the rule to clarify the terms of the broadcast message. See Topaz Exchange Response Letter, supra note 7, and Amendment No. 3. The Commission believes that Topaz Exchange’s revisions to Topaz Exchange Rule 716(b), (d) and (e) appropriately address the commenter’s concerns.
272 See ISE Rules 716 and 723.
systems, and non-members will be able to access Topaz Exchange pursuant to sponsored access arrangements with Topaz Exchange members, pursuant to Topaz Exchange rules.274 As noted above, Topaz Exchange also intends to become a participant in the Linkage Plan.275 The manner in which Topaz Exchange proposes to comply with the Linkage Plan is identical to the manner in which ISE complies with the Linkage Plan.276 To comply with the Linkage Plan, Topaz Exchange, among other things, will prohibit its members from effecting a transaction at a price that is inferior to the NBBO, unless an exception applies.277 Topaz Exchange will provide a centralized process for sending intermarket sweep orders to other exchanges on behalf of Public Customer Orders.278 Topaz Exchange will contract with one or more unaffiliated brokers to route orders to other exchanges when necessary to comply with the Linkage Plan. In circumstances where marketable Public Customer Orders are received when Topaz Exchange is not at the NBBO or orders are received that would lock or cross another market, they will be exposed to Topaz Exchange members for up to one second.279 If, after a Public Customer Order is exposed, such order cannot be executed in full on Topaz Exchange at the then-current NBBO or better and is marketable, the lesser of the full displayed size of the protected bid(s) or protected offer(s) that are priced better than the Topaz Exchange’s quote or the balance of the order will be sent to a contracted unaffiliated broker, and any additional balance of the order that is not marketable against the then-current NBBO will be placed on the Topaz Exchange book.280 The Commission believes that Topaz Exchange’s proposed display, execution, and priority rules are consistent with the Act. In particular, the Commission finds that the proposed rules are consistent with Section 6(b)(5) of the Act,281 which, among other things, requires that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and to not permit unfair discrimination between customers, issuers, or dealers. The Commission also finds that the proposed rules are consistent with Section 6(b)(8) of the Act,282 which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The trading rules of Topaz Exchange are substantially similar to the current ISE trading rules, which were approved at the time ISE’s registration as a national securities exchange was granted283 or filed with and approved by the Commission (or otherwise became effective) pursuant to Section 19(b) of the Act.284 The Commission believes that Topaz Exchange’s trading rules, in general, do not raise any novel or controversial issues.285

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274 See, e.g., Topaz Exchange Rule 706, Supplementary Material .01. 275 See Topaz Exchange Rule 1900 Series, which incorporates by reference ISE Rule 1900 Series. 276 The Commission recently approved a change in the way in which ISE complies with the Linkage Plan by now contracting with one or more unaffiliated brokers to route intermarket sweep orders of Public Customers to other exchanges when necessary. See Securities Exchange Act Release No. 60369 (April 18, 2013), 78 FR 24273 (April 24, 2013) (File No. SR–ISE–2013–18). PMMs no longer have the responsibility of either executing the Public Customer Order at a price that at least matches the NBBO or obtaining better prices from the away market(s) by sending one or more intermarket sweep orders on the Public Customer’s behalf. See also Amendment No. 3 (removing exposure and routing obligations from PMMs under Topaz Exchange’s Rule 800 Series). 277 See Topaz Exchange Rule 714; see also ISE Rule 714. 278 See Topaz Exchange Rule 1001, which incorporates by reference ISE Rule 1001. 279 See Topaz Exchange Rule 1001, Supplementary Material .02, which incorporates by reference ISE Rule 1901, Supplementary Material .02. 280 See id. Any additional balance of the order will be executed on Topaz Exchange if it is marketable. 281 15 U.S.C. 78f(b)(5). 282 15 U.S.C. 78f(b)(8). 283 See ISE Order, supra note 167. 284 The Commission notes, however, that some of Topaz Exchange’s rules differ in some respects from the rules of ISE. For example, Topaz Exchange is not proposing to incorporate ISE’s rules relating to the trading of equity securities or to incorporate any rules concerning the trading of complex or multi-legged orders at this time. 285 With respect to clearing rules, the three commenters recommended clarifying language with respect to Topaz Exchange Rule 712(b), specifically “... or other guarantee given by such Clearing Member to such Member, ...”. The commenters noted that this language lacks clarity whether Topaz Exchange exercises discretion (collectively, “covered accounts”), unless an exception applies. The Exchange has represented that it has analyzed its rules proposed hereunder, and believes that they are consistent with Section 11(a) of the Act and rules thereunder. For the reasons set forth below, based on Topaz Exchange’s representations, the Commission believes that Topaz Exchange’s order execution algorithm, including the Facilitation, Solicitation and Customer Cross processes (but excluding the Price Improvement Mechanism), will allow members to meet the requirements of Rule 11a2–2(T) for executions on Topaz Exchange. Additionally, the Commission believes that Topaz Exchange members’ executions that occur through the Price Improvement Mechanism will be consistent with the requirements in Section 11(a)(1)(G) of the Act and rule 11a1–1(T) thereunder. a. Rule 11a2–2(T) Rule 11a2–2(T) under the Act,287 as 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) May not be affiliated with the executing member; (ii) must transmit the order from off the exchange floor; (iii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution; and (iv) authorization were also not clearly defined and that Topaz Exchange should have a rule text that governs the terms and revocation of letters of authorization. Topaz Exchange clarified this point by noting that ISE has interpreted and applied its identical rule to require the submission of written authorization in order for an ISE member to give up a particular clearing member’s name. Topaz Exchange further noted that it would amend the rule to make clear that written authorization is required. See Topaz Exchange Response Letter, supra note 7, and Amendment No. 3. The Commission believes that Topaz Exchange’s revision to Topaz Exchange Rule 712(b) appropriately addresses the commenters’ concerns. 286 15 U.S.C. 78k(a)(1). 287 17 CFR 240.11a2–2(T). 288 The member may, however, participate in clearing and settling the transaction. See Securities Exchange Act Release No. 60369 (April 18, 2013), 78 FR 24273 (April 24, 2013) (File No. SR–ISE–2013–18).
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 a letter to the Commission, Topaz Exchange requested that the Commission concur with its conclusion that Topaz Exchange members that enter orders through the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes, (but excluding those transactions effected through the PIM process), satisfy the requirements of Rule 11a2–2(T). For the reasons set forth below, the Commission believes that Topaz Exchange members that enter orders through the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes, but excluding those transactions effected through the PIM process, will satisfy the conditions of Rule 11a2–2(T).

Rule 11a2–2(T)’s first condition is that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that the requirement is satisfied when automated exchange facilities, such as the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages over non-members in handling their orders after transmitting them to the Exchange. Topaz Exchange has represented that the design of the trading platform ensures that no member has any special or unique trading advantage in the handling of its orders after transmitting its orders to Topaz Exchange. Based on the Exchange’s representation, the Commission believes that the Topaz Exchange trading system, including the Facilitation, Solicitation and Customer Cross processes, will satisfy this requirement.

Second, Rule 11a2–2(T) requires orders for covered accounts to be transmitted from off the exchange floor. Topaz Exchange will not have a physical trading floor, and like other automated systems, will receive 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. Orders sent to Topaz Exchange, regardless of where it executes within the Topaz Exchange system, including as a Facilitation, will be transmitted from remote terminals directly to Topaz Exchange by electronic means. Since the Topaz Exchange trading system receives all orders electronically through remote terminals or computer-to-computer interfaces, the Commission believes that the trading system, including the Facilitation, Solicitation and Customer Cross processes, will satisfy the off-floor transmission requirement.

Third, Rule 11a2–2(T) requires that the member participate in the execution of its order once it has been transmitted to the member performing the execution. Topaz Exchange

Communications and Execution System (“1979 Release”).

See Exchange 11(a) Request Letter, supra note 289.


See also 1979 Release, supra note 290.

The member may cancel or modify the order, or modify the instructions for executing the order, but only from off the Exchange floor. See 1979 Release, supra note 288, at 41 FR 11547. The Commission has stated that the non-participation requirement is satisfied under such circumstances so long as such modifications or cancellations are represented 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 Topaz Exchange, orders submitted through the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes, also meet the non-participation requirement. The execution of a member’s order depends not on the member entering the order, but rather on what orders, bids, or offers are present in the system at the time the member submits the order and on the priority of those orders, bids or offers. Topaz Exchange represents that orders sent to Topaz Exchange and through the Facilitation, Solicitation and Customer Cross processes will be centrally processed and executed automatically by Topaz Exchange. Topaz Exchange further represents that orders sent to Topaz Exchange will be transmitted from remote terminals directly to the system by electronic means. Once an order is submitted to Topaz Exchange, the order is executed against another order based on the established matching algorithms for the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes. Trades will execute when orders or quotations on Topaz Exchange match one another based on their priority. As Topaz Exchange stated in its Exchange 11(a) Request Letter, the execution does not depend on the participant but rather upon what other orders are entered into the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes, at the same time as the subject order; while orders are on Topaz Exchange; or submitted as Responses; and where the order is ranked based on the priority ranking algorithm. Therefore, at no time following the submission of an order to the Topaz Exchange system, including through the Facilitation, Solicitation or Customer Cross processes, a participant able to acquire control or influence the result or timing of orders also transmitted from off the floor. See id. (stating that the “non-participation requirement does not prevent initiating members from canceling or modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor”).
submitted to the Topaz Exchange system, including through the Facilitation, Solicitation or Customer Cross processes. Accordingly, the Commission believes that the non-participation requirement will be met when orders are executed automatically through use of the Topaz Exchange system, including the Facilitation, Solicitation and Customer Cross processes.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof 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). Topaz 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.

b. Section 11(a)(1)(G) and Rule 11a1–1(T)

Section 11(a)(1)(G) of the Act provides an additional exemption from the general prohibition set forth in Section 11(a)(1) for any transaction for a member’s own account, provided that: (i) Such member is primarily engaged in certain underwriting, distribution, and other activities generally associated with broker-dealers and whose gross income is derived principally from such business and related activities; and (ii) the transaction is effected in compliance with the rules of the Commission, which, as a minimum, assure that the transaction is not inconsistent with the maintenance of fair and orderly markets and yields priority, parity, and precedence in execution to orders for the account of persons who are not members or associated with members of the exchange. In addition, Rule 11a1–1(T) under the Act specifies that a transaction effected on a national securities exchange for the account of a member which meets the requirements of Section 11(a)(1)(G)(i) of the Act is deemed, in accordance with the requirements of Section 11(a)(1)(G)(ii), to be not inconsistent with the maintenance of fair and orderly markets and to yield priority, parity, and precedence in execution to orders for the account of non-Priority or persons associated with non-members of the exchange, if such transaction is effected in compliance with certain requirements.

Topaz Exchange represented that its Price Improvement Mechanism, or PIM, is a process set forth in Topaz Exchange Rule 723 whereby an EAM can provide price improvement opportunities for a transaction. As Topaz Exchange stated in its Exchange 11(a) Request Letter, Topaz Exchange’s proposed PIM rules will require Priority Customer interest, at any given price, be executed in full before Professional Orders and market maker quotes. Additionally, Topaz Exchange’s proposed PIM rules will require non-member Professional Orders to be executed in full before any proprietary interest of members (i.e., proprietary interest from EAMs and market makers). Because Topaz Exchange Rule 723(d) will require Topaz Exchange members to yield priority to Priority Customers and non-member Professional Orders in the PIM process, the Commission believes that the proposal with respect to transactions effected through the PIM process will be consistent with Section 11(a)(1)(G) and Rule 11a1–1(T) thereunder. The Commission also reminds exchanges and their members, however, that, in addition to yielding priority to non-member orders at the same price, members must also meet the other requirements under Section 11(a)(1)(G) of the Act and Rule 11a1–1(T) thereunder (or satisfy the requirements of another exemption) to effect transactions for their own accounts.

E. Discipline and Oversight of Members

As noted above, one prerequisite for the Commission’s grant of an exchange’s application for registration is that a proposed exchange must be so organized and have the capacity to be able to carry out the purposes of the Act. Specifically, an exchange must be able to enforce compliance by its members and persons associated with its members with the Act and the rules and regulations thereunder and the rules of the exchange.

Topaz Exchange rules codify Topaz Exchange’s disciplinary jurisdiction over its members, thereby facilitating its ability to enforce its members’ compliance with its rules and the federal securities laws. Topaz Exchange’s rules permit it to sanction members for violations of the Act and the rules and regulation thereunder and Topaz Exchange’s rules by, among other things, expelling or suspending members; limiting members’ activities, functions, or operations; fining or censuring members; suspending or barring a person from being associated with a member; or any other fitting sanction in accordance with Topaz Exchange rules.

Topaz Exchange’s disciplinary and oversight functions will be administered in accordance with Chapter 16 of the Topaz Exchange rules, which...
incorporates by reference Chapter 16 of ISE rules, governing disciplinary jurisdiction. Unless delegated to another SRO pursuant to the terms of an effective 17d–2 Plan, Topaz Exchange regulatory staff (including regulatory staff of another SRO that may be acting on Topaz Exchange’s behalf pursuant to a regulatory services agreement) will, among other things, investigate potential securities laws violations and initiate charges pursuant to Topaz Exchange rules. Upon a finding of probable cause of a violation within the disciplinary jurisdiction of Topaz Exchange and where further proceedings are warranted, Topaz Exchange will conduct a hearing on disciplinary matters before a professional hearing officer and two members of the Business Conduct Committee ("Panel"). The Topaz Exchange member (or its associated person) or the Topaz Exchange regulatory staff may petition for review of the Panel’s decision by the Topaz Exchange Board. Any review will be conducted by the Topaz Exchange Board or a committee thereof composed of at least three of its directors, at least one of which shall be an Industry Director (whose decision must be ratified by the Topaz Exchange Board). In addition, the Topaz Exchange Board on its own motion may order review of a disciplinary decision. The Topaz Exchange Board may affirm, reverse, or modify, in whole or in part, the Panel’s decision. The decision of the Topaz Exchange Board will be in writing and will be final.

Appeals from any determination that impacts access to Topaz Exchange, such as termination or suspension of membership, will be instituted under, and governed by, the provisions in the Chapter 17 of the Topaz Exchange rules, which incorporates the provisions in Chapter 17 of ISE rules. Topaz Exchange’s Chapter 17 applies to persons economically aggrieved by any of the following actions of Topaz Exchange including, but not limited to: (a) Denial of an application to become a Member; (b) barring a person from becoming associated with a Member; and (c) limiting or prohibiting services provided by the Topaz Exchange or services of any exchange member.

Any person aggrieved by an action of Topaz Exchange within the scope of the Chapter 17 may file a written application to be heard within thirty days. After such action has been taken, Applications for hearing and review will be referred to the Business Conduct Committee, which will appoint a hearing panel of no less than three members of such Committee. The decision of the hearing panel made pursuant to Chapter 17 of the Topaz Exchange rules is subject to review by the Topaz Exchange Board, either on its own motion, or upon written request submitted by the applicant or the President of Topaz Exchange. The review will be conducted by the Topaz Exchange Board or a committee of the Topaz Exchange Board composed of at least three directors.

The Commission finds that Topaz Exchange’s proposed disciplinary and oversight rules and structure, as well as its proposed process for persons economically aggrieved by certain Topaz Exchange actions, 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 proposed Topaz Exchange rules, which incorporate by reference ISE rules, are designed to provide Topaz Exchange with the ability to comply, and with the authority to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of Topaz Exchange. The Commission notes that Topaz Exchange’s proposed disciplinary and oversight rules and

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312 See supra notes 154–156 and accompanying text (concerning the multiparty 17d–2 Plans to modify, in whole or in part, the Panel’s decision by the Topaz Exchange Board on its own motion may order review of a disciplinary decision. See also Topaz Exchange Rule 1704 (which incorporates by reference ISE Rule 1702).)
313 Pursuant to a Resolution of the Topaz Exchange Board, the President and CEO shall establish Topaz Exchange’s Business Conduct Committee, pursuant to a charter. The Committee shall consist of no more than 21 persons, all of whom are employees of members of Topaz Exchange, representing members as follows: at least three persons shall represent PMMs; at least three persons shall represent CMMs that are not also PMMs; and at least six persons shall represent EAMs that neither are, nor are affiliated with, a PMM or CMM. See Amendment No. 3.
314 See also Topaz Exchange Rule 1609 (which incorporates by reference ISE Rule 1606). The proposed process for persons found to be in violation. The CRO must approve the statement of charges.
315 See Topaz Exchange Rule 1606 (which incorporates by reference ISE Rule 1606); see also Topaz Exchange Rule 1615, Supplemental Material .01 (which incorporates by reference ISE Rule 1615, Supplemental Material .01).
316 Pursuant to a Resolution of the Topaz Exchange Board, the President and CEO shall establish Topaz Exchange’s Business Conduct Committee, pursuant to a charter. The Committee shall consist of no more than 21 persons, all of whom are employees of members of Topaz Exchange, representing members as follows: at least three persons shall represent PMMs; at least three persons shall represent CMMs that are not also PMMs; and at least six persons shall represent EAMs that neither are, nor are affiliated with, a PMM or CMM. See Amendment No. 3.
317 See Topaz Exchange Rule 1606 (which incorporates by reference ISE Rule 1606); see also Topaz Exchange Rule 1615, Supplemental Material .01 (which incorporates by reference ISE Rule 1615, Supplemental Material .01).
318 See supra notes 154–156 and accompanying text (concerning the multiparty 17d–2 Plans to modify, in whole or in part, the Panel’s decision by the Topaz Exchange Board on its own motion may order review of a disciplinary decision. See also Topaz Exchange Rule 1704 (which incorporates by reference ISE Rule 1702).)
320 Topaz Exchange’s proposed rules, which incorporate by reference ISE rules, are designed to provide Topaz Exchange with the ability to comply, and with the authority to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of Topaz Exchange. The Commission notes that Topaz Exchange’s proposed disciplinary and oversight rules and
structures are similar to the rules of other exchanges.333

F. Listing Requirements

Topaz Exchange does not intend to offer original listings when it commences operations. Instead, Topaz Exchange will list and trade only standardized option contracts that are listed on other national securities exchanges and cleared by the Options Clearing Corporation.334 Topaz Exchange’s listing rules, including the criteria for the underlying securities of the options to be traded, incorporate by reference all of the listing rules of ISE.335 The Commission finds that Topaz Exchange’s proposed initial and continued listing rules are consistent with the Act, including Section 6(b)(5),336 in that they are designed to protect investors and the public interest and to promote just and equitable principles of trade. Before beginning operation, Topaz Exchange will need to become a participant in the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Act (“OLPP”).337 In addition, before beginning operation, Topaz Exchange will need to become a participant in the Options Clearing Corporation.

III. Exemption From Section 19(b) of the Act With Regard to ISE, CBOE, NYSE, and FINRA Rules Incorporated by Reference

Topaz Exchange proposes to incorporate by reference certain ISE, CBOE, NYSE and FINRA rules.338 Thus, for certain Topaz Exchange rules, Topaz Exchange members will comply with a Topaz Exchange rule by complying with the referenced ISE, CBOE, NYSE or FINRA rule.

In connection with the proposal to incorporate the ISE, CBOE, NYSE and FINRA rules by reference, Topaz Exchange requested, pursuant to Rule 240.0–12 under the Act, an exemption under Section 36 of the Act from the rule filing requirements of Section 19(b) of the Act for changes to the Topaz Exchange rules that are effected solely by virtue of a change to a cross-referenced ISE, CBOE, NYSE or FINRA rule.340 Topaz Exchange proposes to incorporate by reference categories of rules, rather than individual rules within a category, that are not trading rules. In addition, Topaz Exchange agrees to provide written notice to its members whenever FINRA, ISE, CBOE or NYSE proposes a change to a cross-referenced rule341 and whenever any such proposed changes are approved by the Commission or otherwise become effective.342

Using the 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.343 The Commission is hereby granting Topaz 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 Topaz Exchange proposes to incorporate by reference. The exemption is conditioned upon Topaz Exchange providing written notice to Topaz Exchange members whenever FINRA, ISE, CBOE or NYSE proposes to change an incorporated by reference rule and when the Commission approves any such changes. The Commission believes that the exemption is appropriate in the public interest and consistent, with the protection of investors because it will promote more efficient use of Commission’s and SROs’ resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought to be implemented by more than one SRO.

IV. Conclusion

It is ordered that the application of Topaz Exchange for registration as a national securities exchange be, and it hereby is, granted.

It is furthered ordered that operation of Topaz Exchange is conditioned on the satisfaction of the requirements below:

A. Participation in National Market System Plans Relating to Options Trading. Topaz Exchange must join: (1) The Plan for the Reporting of Consolidated Options Last Sale Reports and Quotation Information (Options Price Reporting Authority); (2) the OLPP; (3) the Linkage Plan; and (4) the Plan of the Options Regulatory Surveillance Authority.

B. Participation in Multiparty Rule 17d–2 Plans. Topaz Exchange must become a party to the multicity Rule 17d–2 agreements concerning options sales practice regulation and market surveillance.

C. Participation in the Options Clearing Corporation. Topaz Exchange must become an Options Clearing Corporation participant exchange.


E. Effective Regulation. Topaz 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 Topaz Exchange.

F. Trade Processing and Exchange Systems. Topaz Exchange must have, and represent in a letter to the staff in the Commission’s Division of Trading and Markets that it has, adequate procedures and programs in place, as detailed in Commission Automation Policy Review guidelines, to effectively process trades and maintain the confidentiality, integrity, and availability of Topaz Exchange’s systems.344

338 See, e.g., MIAX Order, supra note 30, and BOX Order, supra note 39.
339 See Exhibit H to Topaz Exchange Form 1 Application.
340 See Topaz Exchange Rule 500 Series (which incorporates by reference ISE Rule 500 Series) (Securities Traded on the Exchange). See also MIAX Rule 400 Series and BOX Rule 5000 Series.
343 Specifically, Topaz Exchange proposes to incorporate by reference the following ISE Rules: Chapter 4 (Business Conduct), Chapter 5 (Securities Traded on the Exchange), Chapter 6 (Doing Business with the Public), Chapter 10 (Closing Transactions), Chapter 11 (Exercises and Deliveries), Chapter 12 (Margins), Chapter 13 (Net Capital Requirements), Chapter 14 (Records, Reports and Audits), Chapter 15 (Summary Suspension), Chapter 16 (Discipline), Chapter 17 (Hearings and Review), Chapter 18 (Arbitration), Chapter 19 (Order Protection; Locked and Crossed Market), Chapter 20 (Index Rules), Chapter 22 (Rate-Modified Foreign Currency Options Rules). The following rules are cross-referenced in the ISE rules: ISE Rule 1202 (Margin Requirements) cross-references the same CBOE and NYSE rules that may be in effect from time to time; ISE Rule 1615 (Disciplinary Functions) cross-references the FINRA Code of Procedure and ISE Rule 1800 cross-references the 12000 and 13000 Series of the FINRA Manual and FINRA Rule 2268.
344 On November 16, 1989, the Commission published its first Automation Review Policy (“ARP I”), in which the Commission created a voluntary framework for SROs to establish comprehensive planning and assessment programs to determine systems capacity and vulnerability. On May 9, 1991, the Commission published its second Automation Review Policy (“ARP II”) to clarify the
It is further ordered, pursuant to Section 36 of the Act, \(^3\) that Topaz Exchange shall be exempted from the rule filing requirements of Section 19(b) of the Act with respect to the FINRA, ISE, CBOE and NYSE rules that Topaz Exchange proposes to incorporate by reference, subject to the conditions specified in this Order that Topaz Exchange provide written notice to Topaz Exchange members whenever FINRA, ISE, CBOE or NYSE propose to change an incorporated by reference rule and when the Commission approves any such changes.

By the Commission.

Kevin M. O’Neill,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; NYSE Arca, Inc.: Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Options Fee Schedule With Respect to Cap on Fees for Firm and Broker Dealer Open Outcry Executions

July 26, 2013.

Pursuant to Section 19(b)(1) \(^1\) of the Securities Exchange Act of 1934 (the "Act") \(^2\) and Rule 19b–4 thereunder, \(^3\) notice is hereby given that, on July 18, 2013, NYSE Arca, Inc. (the "Exchange") or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule ("Fee Schedule") \(^4\) with respect to cap on fees for Firm and Broker Dealer open outcry executions. The text of the proposed rule change is available on the Exchange’s Web site at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule with respect to the cap on fees for Firm and Broker Dealer open outcry executions. Currently, there is a $100,000 cap per month on Proprietary fees and Broker Dealer fees for transactions in standard option contracts cleared in the customer range for open outcry executions, exclusive of strategy executions, royalty fees, and Firm trades executed via a Joint Back Office ("JBO") agreement. \(^4\)

The Exchange proposes to amend the text of the Fee Schedule to make more explicit that the $100,000 cap applies to the fees on a combined basis. For example, if in a given month a Firm incurred $55,000 in Proprietary fees and $55,000 in Broker Dealer fees for standard option contract transactions cleared in the customer range for open outcry executions, exclusive of strategy executions, royalty fees, and Firm trades executed via a JBO agreement, then the Firm would only have to pay a total of $100,000 in such fees. \(^5\) If a Firm or Broker Dealer only had one of the two types of fees that met those qualifications, then it could still qualify if such fees exceeded $100,000 per month.

The proposed change is not intended to address any other issues, and the Exchange is not aware of any problems that Firms or Broker Dealers would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(5) of the Act, \(^6\) in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act, \(^7\) in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed change is reasonable because it will provide better notice about how to qualify for the fee cap. The Exchange further believes that the fee cap is equitable and not unfairly discriminatory because it is designed to encourage Firms and Broker Dealers to engage in a high level of open outcry executions, which will increase liquidity on the Exchange and benefit all market participants. The Exchange believes that it is equitable and not unfairly discriminatory to offer the fee cap to Firms and Broker Dealers, and not other market participants, because its purpose is to attract large block order flow to the floor of the Exchange, where such orders can be better handled in comparison with electronic orders that are not negotiable.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange’s statement regarding the burden on competition.

Types of review and reports expected from SROs.


\(^9\) Since the fee cap was amended in July 2012 to include Broker Dealer fees, the Exchange has provided a monthly report to its member firms that may have incorrectly suggested that fees for each of the two types of volume had to each separately reach $100,000 before the fee cap applied. While the Exchange believes that the current text of the Fee Schedule is clear that both types of fees count toward the $100,000 cap, the Exchange wishes to avoid any potential misunderstanding on the qualifications for the fee cap. The report text also will be updated accordingly to avoid any such misunderstanding. The Exchange notes that, since the $75,000 fee cap and, later, the $100,000 fee cap were implemented, no Firm or Broker Dealer has qualified for the fee cap, whether applied on a combined or separate basis.
