

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-73861; File No. SR-ISEGemini-2014-24)

December 17, 2014

Self-Regulatory Organizations; ISE Gemini, LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to a Corporate Transaction Involving Its Indirect Parent

I. Introduction

On October 22, 2014, the ISE Gemini, LLC (the “Exchange” or the “ISE Gemini”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> a proposed rule change to make certain amendments to its corporate governance documents and those of certain of its upstream owners, in order to effectuate changes to its indirect, non-U.S. upstream ownership structure (the “Transactions”)<sup>4</sup> and to amend the Amended and Restated Limited Liability Company Agreement of ISE Gemini (“ISE Gemini LLC Agreement”) with respect to distributions of its assets. On October 31, 2014, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on November 12, 2014.<sup>5</sup> The Commission received no comments on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 1.

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

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

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

<sup>4</sup> The amendments also update certain of the corporate governance documents to reflect prior transactions.

<sup>5</sup> See Securities Exchange Act Release No. 73531 (November 5, 2014), 79 FR 67215 (“Notice”).

## II. Description of the Proposed Rule Change

The Exchange proposes to make certain changes to its indirect, non-U.S. upstream ownership structure.<sup>6</sup> Currently, the Exchange is a wholly owned subsidiary of International Securities Exchange Holdings, Inc. (“ISE Holdings”). ISE Holdings, in turn, is a wholly owned subsidiary of U.S. Exchange Holdings, Inc. (“U.S. Exchange Holdings”), which is wholly owned by Eurex Frankfurt AG (“Eurex Frankfurt”). Eurex Frankfurt is a wholly owned subsidiary of a Swiss stock corporation, Eurex Zürich AG (“Eurex Zürich”), which, in turn, is jointly owned by Deutsche Börse AG (“Deutsche Börse”) and Eurex Global Derivatives AG (“EGD,” and together with Eurex Zürich, the “Swiss companies”). EGD is a wholly-owned, direct subsidiary of Deutsche Börse.<sup>7</sup>

As a result of the Transactions, the Swiss companies will cease to be Non-U.S. Upstream Owners of the Exchange, as Deutsche Börse will become the sole, direct owner of Eurex Frankfurt, which will directly own 85% of U.S. Exchange Holdings. Deutsche Börse will directly own the remaining 15% of U.S. Exchange Holdings. Also in connection with the Transactions, the Series A Preferred Stock of ISE Holdings (“ISE Holdings Preferred”) will be converted to shares of ISE Holdings common stock (the “Conversion”).<sup>8</sup> Upon consummation of the Transactions, U.S. Exchange Holdings will remain the sole, direct owner of ISE Holdings,

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<sup>6</sup> For a more detailed description of the anticipated steps to effectuate the Transactions, see Notice, supra note 5, at 67216.

<sup>7</sup> Each of Deutsche Börse, Eurex Frankfurt, Eurex Zürich, and EGD is referred to as a “Non-U.S. Upstream Owner” and collectively as the “Non-U.S. Upstream Owners.”

<sup>8</sup> Upon consummation of the Transactions, all of the common stock of ISE Holdings will continue to be held by U.S. Exchange Holdings. See Notice, supra note 5, at 67216.

which, in turn, will also remain the sole, direct owner of the Exchange.<sup>9</sup> In order to consummate the Transactions, including the Conversion, the Exchange proposes to amend certain of its, and its upstream owners', corporate governance documents as described below.

A. Certificate of Designations of Series A Preferred Stock of ISE Holdings

The Exchange proposes to amend and restate the Certificate of Designations of Series A Preferred Stock of ISE Holdings (the "COD"). In particular, the Exchange proposes to amend Section 6(b) of the COD, which currently provides that the ISE Holdings Preferred is not convertible, to state that each share of ISE Holdings Preferred may, at the option of the holder thereof, be converted into one fully paid and non-assessable share of ISE Holdings common stock ("ISE Holdings Common") on the date on which such holder delivers a duly executed notice of conversion to ISE Holdings substantially in the form of a new Annex A attached to the COD.<sup>10</sup>

B. Amended and Restated Certificate of Incorporation of ISE Holding

The Exchange proposes to amend and restate the Amended and Restated Certificate of Incorporation of ISE Holdings (the "COI") by increasing the number of authorized shares of ISE Holdings Common from 1,000 shares to 101,000 shares in order to account for the increase in the authorized number of ISE Holdings Common that will result from the Conversion.<sup>11</sup> As

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<sup>9</sup> According to the Exchange, the Transactions will not result in any additional person or entity acquiring direct or indirect ownership in the Exchange. See Notice, supra note 5, at 67216.

<sup>10</sup> The Exchange also proposes to retitle the COD as the "Amended and Restated" Certificate of Designations of Series A Preferred Stock of ISE Holdings.

<sup>11</sup> The Exchange also proposes to retitle the COI as the "Second" Amended and Restated Certificate of Incorporation of ISE Holdings and update the date thereof.

such, the total number of authorized ISE Holdings Common and ISE Holdings Preferred will increase from 101,000 shares to 201,000 shares.<sup>12</sup>

C. Trust Agreement

The Exchange proposes to amend and restate the Second Amended and Restated Trust Agreement (the “Trust Agreement”) that exists among ISE Holdings, U.S. Exchange Holdings, and the Trustees (as defined therein) in connection with the Transactions. Specifically, the Exchange proposes to: (i) update the recitals of the Trust Agreement with respect to the Transactions; (ii) remove references to the Swiss companies from the definition of “Affected Affiliate” in Section 1.1 of the Trust Agreement; (iii) remove outdated references to EDGA Exchange, Inc. (“EDGA”) and EDGX Exchange, Inc. (“EDGX”) from the definition of “Controlled National Securities Exchange” in Section 1.1 and update the recitals of the Trust Agreement accordingly;<sup>13</sup> and (iv) remove EGD’s address from the notices provision in Section 8.8 of the Trust Agreement.<sup>14</sup>

D. Certain Resolutions and Agreements

The Exchange proposes to delete certain corporate resolutions and agreements that were previously adopted by the Swiss companies that will cease to be indirect, upstream owners of ISE Gemini after the Transactions. In particular, each of the Non-U.S. Upstream Owners previously adopted resolutions, which were approved by the Commission, to incorporate

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<sup>12</sup> The Exchange will maintain the total number of authorized ISE Holdings Preferred Stock at 100,000 shares.

<sup>13</sup> EDGA and EDGX previously were Controlled National Securities Exchanges, but ceased to be so as a result of a business combination whereby BATS Global Markets, Inc. became the ultimate parent company for each. See Securities Exchange Act Release No. 71449 (January 30, 2014), 79 FR 6961 (February 5, 2014) (SR-EDGA-2014-34; SR-EDGX-2014-43). See also Notice, supra note 5, at 67217 n.22.

<sup>14</sup> The Exchange also proposes to retitle the Trust Agreement as the “Third” Amended and Restated Trust Agreement and update the date thereof.

measures regarding ownership, jurisdiction, books and records, and other issues related to their control of the Exchange, with respect to the Non-U.S. Upstream Owners, as well as its board members, officers, employees, and agents (as applicable), to the extent that they are involved in the activities of the Exchange.<sup>15</sup> In addition to these resolutions, the Swiss companies previously entered into an “Agreement and Consent,” in which EGD agreed to provide certain information related to the activities of the Exchange, including books and records of EGD related to the activities of the Exchange, to the Commission, through Eurex Zürich. As the Swiss companies will cease to be Non-U.S. Upstream Owners of the Exchange following the consummation of the Transactions, the Exchange proposes to delete the resolutions of these entities, as referenced above, along with the Agreement and Consent, such that they will no longer be rules of the Exchange as of a date in December 2014 that corresponds to the effective closing date of the applicable step in the Transactions.

E. ISE Gemini LLC Agreement

In addition to the changes described above, the Exchange proposes to amend and restate the ISE Gemini LLC Agreement by deleting the first sentence of Section 3.3 which provides that distributions may not be made to ISE Holdings except: (i) pursuant to Section 3.4 (Tax Characterization; Returns; Distributions in Respect of Taxes) of the ISE Gemini LLC

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<sup>15</sup> In this regard, the Exchange also proposes to delete the form of agreement and consent to be entered into by relevant officers and employees of the Swiss companies. See SR-ISEGemini-2014-24, Exhibit 5G, proposing to delete in its entirety the “Form of Agreement and Consent (Swiss Entities).”

Agreement; or (ii) upon liquidation of the Exchange.<sup>16</sup> The Exchange also proposes to clarify in Section 3.3 that Regulatory Funds shall not be used for non-regulatory purposes.<sup>17</sup>

#### U.S. Exchange Holdings Certificate of Incorporation

Lastly, the Exchange proposes to make several administrative amendments to the Second Amended and Restated Certificate of Incorporation of U.S. Exchange Holdings (“U.S. Exchange Holdings COI”) to update references therein to the Trust Agreement. Specifically, Article THIRTEENTH of the U.S. Exchange Holdings COI contains outdated references to (i) the “Amended and Restated” Trust Agreement, which is currently the “Second Amended and Restated” Trust Agreement and will become the “Third Amended and Restated” Trust Agreement; and (ii) the effective date of the Trust Agreement, which will be changed to a date in December 2014 that corresponds to the effective closing date of the applicable step in the Transactions. The Exchange also proposes to add language in Article THIRTEENTH specifying that the Trust Agreement may be amended, restated, or replaced from time to time and remove references to EDGA Exchange and EDGX Exchange from the definition of “Controlled National Securities Exchange” in Article TENTH.<sup>18</sup>

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<sup>16</sup> The Exchange states that this deletion would not impact the current practice of distributions from the Exchange to ISE Holdings. See Notice, supra note 5, at 67218.

<sup>17</sup> As amended, Section 3.3 of the ISE Gemini LLC Agreement will provide that, notwithstanding any provision to the contrary in the ISE Gemini LLC Agreement, (i) the Exchange would not be required to make a distribution to ISE Holdings if such distribution would violate the Delaware Limited Liability Company Act, any other applicable law, or is otherwise required to fulfill the regulatory functions or responsibilities of the Exchange, and (ii) Regulatory Funds will not be used for non-regulatory purposes, but rather shall be used to fund the legal. The Exchange also proposes to retitle the ISE Gemini LLC Agreement as the “Second” Amended and Restated Limited Liability Company Agreement, update the date thereof, and update the table of contents.

<sup>18</sup> The Exchange also proposes to retitle the U.S. Exchange Holdings COI as the “Third” Amended and Restated Certificate of Incorporation of U.S. Exchange Holdings, and update the effective date thereof.

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to a national securities exchange.<sup>19</sup> Specifically, the Commission finds that the proposal is consistent with Section 6(b)(1) of the Act,<sup>20</sup> which requires that an exchange be organized and have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange.

The Exchange represents that it will continue to operate and regulate its market and members in the same manner following the Transactions as it operates today.<sup>21</sup> The Exchange further states that the proposed rule change will facilitate an ownership structure that will continue to provide the Commission with appropriate oversight tools to allow the Commission to enforce the provisions of the Act with respect to the Exchange and its direct and indirect Non-U.S. Upstream Owners, including each of their directors, officers, employees, and agents, to the extent they are involved in the activities of the Exchange.<sup>22</sup> The Commission notes that as a result of the Transactions, the Swiss companies will no longer be indirect, upstream owners of the Exchange, but that the upstream ownership of the Exchange otherwise remains substantially the same.<sup>23</sup> The Commission also notes that the Exchange has represented that it is not

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<sup>19</sup> In approving the proposed rule changes, the Commission has considered their impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>20</sup> 15 U.S.C. 78s(b)(1).

<sup>21</sup> See Notice, supra note 5 at 67227.

<sup>22</sup> See id. at 67228.

<sup>23</sup> Although prior to the Transactions Deutsche Börse's interest in U.S. Exchange Holdings was held solely through its 100% indirect ownership in Eurex Frankfurt, upon consummation of the transactions it will instead directly own Eurex Frankfurt and will

proposing any changes to the Exchange's operational or trading structure in connection with the Transactions.<sup>24</sup> The Exchange further stated that no changes will be made to other aspects of the Exchange's corporate governance documents that were previously approved by the Commission.<sup>25</sup>

The Commission believes that the proposed changes related to the Transactions will not impact provisions of the Exchange's, or its upstream owners, corporate governance documents that were designed to enable the ISE Gemini to operate in a manner that complies with the federal securities laws, and were intended to assist the ISE Gemini in fulfilling its self-regulatory obligations and administering and complying with the requirements of the Act.<sup>26</sup> The Commission also believes that the proposed rule change will allow the Commission to continue to exercise its plenary regulatory authority over the Exchange and continue to provide the Commission and the Exchange with access to necessary information that will allow the Exchange to comply, and enforce compliance, with the Act. As the Exchange notes, the proposed administrative amendments will continue to preserve the independence of the Exchange's self-regulatory functions and ensure that it will be able to obtain any information it needs in order to address fraudulent and manipulative acts in its marketplace and carry out its regulatory responsibilities under the Act.<sup>27</sup>

The Commission also believes that the proposed amendments to the ISE Gemini LLC

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hold a direct 15% interest in U.S. Exchange Holdings. The remaining 85% interest in U.S. Exchange Holdings will continue to be directly held by Eurex Frankfurt.

<sup>24</sup> See id.

<sup>25</sup> See id.

<sup>26</sup> See e.g., Securities Exchange Act Release No. 70050 (July 26, 2013), 78 FR 46622 (August 1, 2013) (approving the application for registration as a national securities exchange of Topaz Exchange, LLC).

<sup>27</sup> See id.



Agreement related to distributions are consistent with the Act. The Commission notes, as discussed above, that the Exchange states that the proposed changes will not impact the current practice of distributions from the Exchange to ISE Holdings, and would continue to ensure that any distributions by the Exchange to ISE Holdings, and subsequently to its indirect upstream owners, would not be made in violation of the Exchange's legal and regulatory responsibilities or with Regulatory Funds.<sup>28</sup> The Commission believes that the proposed rule change is designed to facilitate the ability of ISE Gemini to fulfill its regulatory obligations under the Act and will help ensure the independence of its regulatory function from its market operations and other commercial interests.<sup>29</sup>

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<sup>28</sup> See Notice, *supra* note 5, at 67218.

<sup>29</sup> The Commission notes that, as amended, the provision in ISE Gemini's LLC Agreement governing distributions will be consistent with similar provisions the Commission has previously approved for other self-regulatory organizations. See, e.g., Securities Exchange Act Release No. 68341 (December 3, 2012), 77 FR 73065 (December 7, 2012) (approving the application for registration as a national securities exchange of Miami International Securities Exchange, LLC).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>30</sup> that the proposed rule change (SR-ISEGemini-2014-24), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>31</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>30</sup> 15 U.S.C. 78f(b)(2).

<sup>31</sup> 17 CFR 200.30-3(a)(12).