

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77386; File No. SR-NYSEMKT-2016-20)

March 17, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending and Restating the Fifth Amended and Restated Bylaws of the Exchange's Ultimate Parent Company, Intercontinental Exchange, Inc., to Implement Proxy Access

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 ("Act")² and Rule 19b-4 thereunder,³ notice is hereby given that, on March 2, 2016, NYSE MKT LLC (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission ("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 Substance of the Proposed Rule Change

The Exchange proposes to amend and restate the Fifth Amended and Restated Bylaws of the Exchange's ultimate parent company, Intercontinental Exchange, Inc. ("ICE"), to implement proxy access. The proposed rule change is available on the Exchange's website 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

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 and restate the Fifth Amended and Restated Bylaws of ICE ("ICE Bylaws"). The proposed amendments to the ICE Bylaws would (1) add a new Section 2.15 that permits a stockholder, or stockholders, that meet specific requirements to nominate director nominees for the board of directors of ICE ("ICE Board"), provided that the nominating stockholder(s) and nominee(s) satisfy the proposed requirements, and (2) amend the advance notice provisions in Section 2.13 to account for proxy access.⁴

ICE owns 100% of the equity interest in Intercontinental Exchange Holdings, Inc. ("ICE Holdings"), which in turn owns 100% of the equity interest in NYSE Holdings LLC ("NYSE Holdings"). NYSE Holdings owns 100% of the equity interest of NYSE Group, Inc., which in turn directly owns 100% of the equity interest of the Exchange and its affiliates New York Stock Exchange LLC and NYSE Arca, Inc.⁵

The proposed amendments to the ICE Bylaws have been approved by the ICE Board, subject to Securities and Exchange Commission ("Commission") approval. Under Section 11.1

⁴ In November 2015, the Comptroller of the City of New York, on behalf of certain city retirement systems that are stockholders of ICE, requested that ICE include a proxy access proposal in its 2016 proxy statement. After discussions with the Comptroller's office, ICE management determined to recommend the amendment reflected in the proposed rule change to the ICE Board and, on that basis, the Comptroller's request was withdrawn.

⁵ The Exchange's affiliates have each submitted proposed rule changes to propose the changes described in this filing. See SR-NYSE-2016-14 and SR-NYSEArca-2016-25.

of the ICE Bylaws, no stockholder approval is required for amendment of the ICE Bylaws. ICE filed a Form 8-K setting forth the proposed amendments on January 22, 2016 after approval by the ICE Board, and will file a further Form 8-K when the amendments are adopted.

Bylaw Section 2.15

The proposed rule change would add new Section 2.15 to the ICE Bylaws. Section 2.15 would permit a stockholder, or group of up to 20 stockholders, to nominate director nominees for the ICE Board, so long as the stockholder(s) have owned at least three percent of ICE's outstanding shares of common stock continuously for at least three years. The director nominees would be included in ICE's annual meeting proxy materials. The proposed provision would limit the number of proposed director nominees to a number equal to twenty percent of the number of directors then serving on the ICE Board (rounded down to the nearest whole number, but no less than two) provided that the stockholder(s) and nominee(s) satisfy the other conditions specified in the ICE Bylaws.

A candidate would be nominated by a nomination notice ("Nomination Notice"). Subject to satisfaction of the conditions of Section 2.15, described below, as determined by the ICE Board, ICE would include in its proxy statement for the next annual meeting of stockholders the following information:

- the names of any person or persons nominated for election;
- disclosure about each nominee and the nominating stockholder required under the rules of the Commission or other applicable law to be included in the proxy statement;

- any statement in support of the nominee's (or nominees', as applicable) election, subject to a limit of 500 words and subject to compliance with Section 14 of the Exchange Act⁶ and the rules thereunder, including Rule 14a-9;⁷ and
- any other information that ICE management or the ICE Board determines, in their discretion, to include relating to the nomination of the nominee(s), including, without limitation, any statement in opposition to the nomination.⁸

ICE Bylaw 2.15 would permit stockholder nominees to constitute up to twenty percent of the number of directors then serving on the ICE Board, subject to the following:

- If twenty percent of the current number of directors is not a whole number, the number of permitted stockholder nominees would be rounded down to the nearest whole number, but no less than two.
- The number of permitted stockholder nominees would be further reduced by (a) the number of any stockholder nominees who are withdrawn or who are instead nominated by the ICE Board and (b) the number of directors, if any, who were stockholder nominees at the preceding annual meeting and whose re-election is recommended by the ICE Board. In the event that one or more vacancies for any reason were to occur on the ICE Board after the deadline for submitting a Nomination Notice, but before the date of the annual meeting, and the ICE Board resolved to reduce the size of the ICE Board, the number of permitted stockholder nominees would be calculated based on the number of directors in office as so reduced. If, after receipt of a Nomination Notice and following the deadline for

⁶ 15 U.S.C. 78n.

⁷ 17 CFR 240.14a-9.

⁸ Proposed ICE Bylaw 2.15(a).

receipt of such notices, either the nominating stockholder becomes ineligible or withdraws the nomination, or the nominee becomes ineligible or unwilling or unable to serve, such nominee will be disregarded.

- Bylaw 2.15(b) would provide a mechanism for pro rata reduction of the number of nominees nominated by different stockholders if the total number of permitted stockholder nominees exceeded the maximum permitted. Each nominating stockholder would select one of its nominees to be included in the proxy statement, with the nominees to be included selected from nominating stockholders going in the order of the largest stockholdings to the smallest, until the available number of nominees has been selected, with this process to be repeated if the maximum number of nominees has not been selected in the first round.

As a result of these potential reductions in the number of stockholder nominees, the number of stockholder nominees in any year could be fewer than two.

Each person or group of up to 20 persons desiring to nominate a candidate would be required to either (1) be a record holder of shares of ICE common stock used to satisfy the eligibility requirements for a stockholder nominee continuously for the three-year period, or (2) provide to the secretary of ICE evidence of continuous ownership of the minimum number of shares for such three-year period from one or more securities intermediaries in a form that the ICE Board determines would be acceptable for purposes of a shareholder proposal under Rule 14a-8(b)(2) under the Exchange Act⁹ (or any successor rule). The minimum number of shares would be determined as three percent of the outstanding shares as of the most recent date for

⁹ 17 CFR 240.14a-8(b)(2).

which the total number of outstanding shares of common stock was included by ICE in a filing with the Commission prior to the submission of the Nomination Notice. Such shares would be required to be held continuously throughout the three-year period preceding and including the date of submission of the Nomination Notice, and through the date of the annual meeting. The proposed rule change includes provisions relating to how the members of a group would be counted and the consequences of withdrawal of a member from a group.¹⁰

A person (or member of a group of persons) whose nominee has been elected as a director at an annual meeting would not be eligible to nominate or participate in the nomination of a nominee for the following two annual meetings other than the nomination of such previously elected nominee.¹¹

The proposed rule change would also specify that shares may be counted as “owned” only if the person making the nomination possess both the full voting and investment rights pertaining to the shares and the full economic interest in (including the opportunity for profit and risk of loss on) such shares. Shares that have been sold, borrowed or hedged are excluded. Loaned shares are included, provided they are recallable within five business days, and are recalled by the record date.¹²

No person would be permitted to be in more than one group nominating a nominee. A person who appears as a member of more than one group would be deemed to be a member of the group that has the largest ownership position as reflected in the Nomination Notice.¹³

¹⁰ Proposed ICE Bylaw 2.15(c).

¹¹ Proposed ICE Bylaw 2.15(c)(i).

¹² Proposed ICE Bylaw 2.15(c)(iv).

¹³ Proposed ICE Bylaw 2.15(c)(v).

A Nomination Notice would be required to be submitted to the secretary of ICE at ICE's principal executive office, no earlier than the close of business 150 calendar days, and no later than the close of business 120 calendar days, before the anniversary of the date that ICE mailed its proxy statement for the prior year's annual meeting of stockholders. If an annual meeting were not scheduled to be held within a period that commences 30 days before and ends 30 days after such anniversary date, a Nomination Notice would be required to be given by the later of the close of business on the date that is 120 days prior to the date of such annual meeting or the tenth day following the date on which such annual meeting date is first publicly announced or disclosed.¹⁴

ICE Bylaw 2.15 would provide that any determination to be made by the ICE Board may be made by the ICE Board, a committee of the ICE Board or any officer of ICE designated by the ICE Board or a committee of the ICE Board and that any such determination shall be final and binding on ICE, any Eligible Holder (as defined in ICE Bylaw 2.15), any nominating stockholder, any nominee and any other person so long as made in good faith. The chairman of any annual meeting of stockholders shall have the power and duty to determine whether a Nominee has been nominated in accordance with the requirements of proposed Section 2.15 and, if not so nominated, shall direct and declare at the annual meeting that such Nominee shall not be considered.¹⁵

The proposed rule change specifies information that would be required in a Nomination Notice, including:

- a Schedule 14N¹⁶ (or any successor form) relating to the nomination, completed and filed with the Commission;

¹⁴ Proposed ICE Bylaw 2.15(d).

¹⁵ The Exchange notes that having the chairman of the annual meeting make such determination is consistent with the procedure in Section 2.13(f) of the ICE Bylaws with respect to non-proxy access nominations.

¹⁶ 17 CFR 240.14n-101.

- a written notice, in a form deemed satisfactory by the ICE Board, of the nomination of such nominee that includes additional information, agreements, representations and warranties by the nominating stockholder (including, in the case of a group, each group member),
 - the information otherwise required with respect to the nomination of directors by the ICE Bylaws;
 - the details of any relationship that existed within the past three years and that would have been described pursuant to Item 6(e) of Schedule 14N (or any successor item) if it existed on the date of submission of the Schedule 14N;
 - a representation and warranty that the nominating stockholder did not acquire, and is not holding, securities of ICE for the purpose or with the effect of influencing or changing control of ICE;
 - a representation and warranty that the nominee's candidacy or, if elected, membership on the ICE Board would not violate applicable state or federal law or the rules of the principal national securities exchange on which ICE's securities are traded;
 - a representation and warranty that the nominee:
 - does not have any direct or indirect relationship with ICE that will cause the nominee to be deemed not independent pursuant to the ICE Board's Independence Policy¹⁷ as most recently published on

¹⁷ The Commission notes that the Independence Policy can be found at the following website: <http://ir.theice.com/~media/Files/I/Ice-IR/documents/corporate-governance-documents/board-independence-policy.pdf>.

its website and otherwise qualifies as independent under the rules of the principal national securities exchange on which ICE's common stock is traded;¹⁸

- meets the audit committee independence requirements under the rules of the principal national securities exchange on which ICE's common stock is traded;¹⁹
- is a “non-employee director” for the purposes of Rule 16b-3 under the Exchange Act²⁰ (or any successor rule);
- is an “outside director” for the purposes of Section 162(m) of the Internal Revenue Code²¹ (or any successor provision); and
- is not and has not been subject to any event specified in Rule 506(d)(1) of Regulation D²² (or any successor rule) under the Securities Act of 1933 or Item 401(f) of Regulation S-K²³ (or any successor rule) under the Exchange Act, without reference to whether the event is material to an evaluation of the ability or integrity of the nominee;

¹⁸ The Commission notes the independent director standards of New York Stock Exchange LLC (“NYSE”), which is the principal market for ICE's common stock, are set forth in NYSE's Listed Company Manual in Sections 303A.00, 303A.01 and 303A.02.

¹⁹ The Commission notes that the audit committee independence requirements of NYSE, the principle market for ICE's common stock, are set forth in NYSE's Listed Company Manual under Sections 303A.06 and 303A.07.

²⁰ 17 CFR 240.16b-3.

²¹ 26 U.S.C. 162(m).

²² 17 CFR 230.506(d).

²³ 17 CFR 229.401(f).

- a representation and warranty that the nominating stockholder satisfies the eligibility requirements set forth in Bylaw 2.15 and has provided evidence of ownership to the extent required by Bylaw 2.15(c)(i);
- a representation and warranty that the nominating stockholder intends to continue to satisfy the eligibility requirements described in Bylaw 2.15(c) through the date of the annual meeting;
- a representation and warranty that the nominating stockholder will not engage in a “solicitation” within the meaning of Rule 14a-1(l)²⁴ (without reference to the exception in Rule 14a-1(l)(2)(iv)²⁵) (or any successor rules) under the Exchange Act in support of the election of any individual as a director at the applicable annual meeting, other than its nominee(s) or any nominee of the ICE Board;
- a representation and warranty that the nominating stockholder will not use any proxy card other than ICE’s proxy card in soliciting stockholders in connection with the election of a nominee at the annual meeting;
- if desired, a statement in support of the nominee meeting the standards identified above; and
- in the case of a nomination by a group, the designation by all group members of one group member that is authorized to act on behalf of all group members with respect to matters relating to the nomination, including withdrawal of the nomination;

²⁴ 17 CFR 240.14a-1(l).

²⁵ 17 CFR 240.14a-1(l)(2)(iv).

- an executed agreement, in a form deemed satisfactory by the ICE Board, pursuant to which the nominating stockholder (including each group member) agrees:
 - to comply with all applicable laws, rules and regulations in connection with the nomination, solicitation and election of a nominee;
 - to file any written solicitation or other communication with ICE's stockholders relating to one or more of ICE's directors or director nominees or any stockholder nominee with the Commission, regardless of whether any such filing is required under any rule or regulation or whether any exemption from filing is available for such materials under any rule or regulation;
 - to assume all liability stemming from an action, suit or proceeding concerning any actual or alleged legal or regulatory violation arising out of any communication by the nominating stockholder or any of its nominees with ICE, its stockholders or any other person in connection with the nomination or election of directors, including, without limitation, the Nomination Notice;
 - to indemnify and hold harmless (jointly with all other group members, in the case of a group member) ICE and each of its directors, officers and employees individually against any liability, loss, damages, expenses or other costs (including attorneys' fees) incurred in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against ICE or any of its directors, officers or employees arising out of or relating to a failure or alleged failure of the

- nominating stockholder or any of its nominees to comply with, or any breach or alleged breach of, its respective obligations, agreements or representations under Bylaw 2.15; and
- in the event that (1) any information included in the Nomination Notice or any other communication by the nominating stockholder (including with respect to any group member) with ICE, its stockholders or any other person in connection with the nomination or election of a nominee ceases to be true and accurate in all material respects (or omits a material fact necessary to make the statements made not misleading) or (2) the nominating stockholder (including any group member) has failed to continue to satisfy the eligibility requirements described in Bylaw 2.15(c), to promptly (and in any event within 48 hours of discovering such misstatement, omission or failure) notify ICE and any other recipient of such communication of (1) the misstatement or omission in such previously provided information and of the information that is required to correct the misstatement or omission or (2) of such failure; and
 - an executed agreement, in a form deemed satisfactory by the ICE Board, by the nominee:
 - to provide to ICE such other information and certifications, including completion of ICE's director questionnaire, as it may reasonably request;
 - that the nominee has read and agrees, if elected, to serve as a member of the ICE Board, to adhere to ICE's Corporate Governance Guidelines and

Global Code of Business Conduct and any other policies and guidelines applicable to directors; and

- that the nominee is not and will not become a party to (i) any compensatory, payment or other financial agreement, arrangement or understanding with any person or entity other than ICE in connection with service or action as a director of ICE that has not been disclosed to ICE, (ii) any agreement, arrangement or understanding with any person or entity as to how the nominee would vote or act on any issue or question as a director (a “Voting Commitment”) that has not been disclosed to ICE or (iii) any Voting Commitment that could reasonably be expected to limit or interfere with the nominee’s ability to comply, if elected as a director of ICE, with its fiduciary duties under applicable law.

ICE Bylaw 2.15 would specify that the information and documents required to be provided by the nominating stockholder must be: (i) provided with respect to and executed by each group member, in the case of information applicable to group members; and (ii) provided with respect to the persons specified in Instruction 1 to Items 6(c) and (d) of Schedule 14N (or any successor item) in the case of a nominating stockholder or group member that is an entity. A Nomination Notice would be deemed submitted on the date on which all of the information and documents required by ICE Bylaw 2.15 (other than such information and documents contemplated to be provided after the date the Nomination Notice is provided) have been delivered to or, if sent by mail, received by the Secretary of ICE.

Access to ICE’s proxy statement for stockholder nominations under ICE Bylaw 2.15(e)(i) would not be available in any year in which ICE has received advance notice under ICE Bylaw

Section 2.13 that a stockholder intends to nominate a director. In addition, nominations would be disregarded under ICE Bylaw 2.15(e)(i) if

- the nominating stockholder or its representative fails to appear at the annual meeting to present the nomination or withdraws its nomination;
- the nomination or election of the nominee would be in violation of ICE's certificate of incorporation or bylaws, or applicable law, rule or regulation, including those of stock exchanges;
- the nominee was nominated pursuant to ICE Bylaw 2.15 at one of the past two annual meetings and either withdrew or became ineligible, or failed to receive 20% of the vote;
- the nominee is, or has within the last three years been, an officer or director of a competitor of ICE or is a U.S. Disqualified Person as defined in ICE's certificate of incorporation; or
- ICE is notified, or the ICE Board determines, that a nominating stockholder has failed to continue to satisfy the eligibility requirements, any of the representations and warranties made in the Nomination Notice ceases to be true and accurate in all material respects (or omits a material fact necessary to make the statements made not misleading), the nominee becomes unwilling or unable to serve on the ICE Board or any material violation or breach occurs of the obligations, agreements, representations or warranties of the nominating stockholder or the nominee under ICE Bylaw Section 2.15.

In addition, Bylaw 2.15(e)(ii) would permit ICE to omit from its proxy statement, or supplement or correct, any information, including all or any portion of the statement in support

of the Nominee included in the Nomination Notice, if the ICE Board determines that:

- Such information is not true in all material respects or omits a material statement necessary to make the statements made not misleading;
- Such information directly or indirectly impugns the character, integrity or personal reputation of, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation, with respect to, any person; or
- The inclusion of such information in the proxy statement would otherwise violate the federal proxy rules or any other applicable law, rule or regulation.

Bylaw Section 2.13

The proposed rule change also would amend the existing advance notice provisions in Bylaw 2.13 to extend their application to stockholder nominations under the proxy access provision in Bylaw 2.15.

- Bylaw 2.13(b) would be amended to provide that stockholder nominations would be subject to inclusion in the ICE Board’s notice of annual meeting, and that the timing and notice requirements of the existing advance notice bylaw would not apply to stockholder nominations, which have different timing and notice requirements as described above.
- Bylaw 2.13(d) would be amended to specify that the definition therein of “publicly announced or disclosed” would also apply in Bylaw 2.15.

Conforming Changes

Finally, the Exchange proposes to make conforming changes to the title of the Bylaws.

2. Statutory Basis

The Exchange believes that this filing is consistent with Section 6(b) of the Exchange Act,²⁶ in general, and Section 6(b)(1) of the Exchange Act,²⁷ in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange believes that, by permitting a stockholder, or a group of up to twenty stockholders, of ICE that meet the stated requirements to nominate and have included in ICE's annual meeting proxy materials director nominees, the proposed rule change strengthens the corporate governance of the Exchange's ultimate parent company and is thus consistent with Section 6(b)(1).

For similar reasons, the Exchange also believes that this filing furthers the objectives of Section 6(b)(5) of the Exchange Act,²⁸ because the proposed rule change would be consistent with and facilitate a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. As discussed above, the Exchange believes that by expanding the ability of stockholders to nominate directors that could constitute a significant percent (20%) of the number of directors currently serving on the ICE Board, the

²⁶ 15 U.S.C. 78f(b).

²⁷ 15 U.S.C. 78f(b)(1).

²⁸ 15 U.S.C. 78f(b)(5).

proposed rule change would ensure better corporate governance and accountability to stockholders, thereby protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rule change is not designed to address any competitive issue in the U.S. or European securities markets or have any impact on competition in those markets; rather, adoption of a proxy access bylaw by ICE is intended to enhance corporate governance and accountability to stockholders.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEMKT-2016-20 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEMKT-2016-20. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should

submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEMKT-2016-20 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Robert W. Errett
Deputy Secretary

²⁹ 17 CFR 200.30-3(a)(12).