

# SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-77782; File Nos. SR-NYSE-2016-14; SR-NYSEArca-2016-25; SR-NYSEMKT-2016-20)

May 6, 2016

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE Arca, Inc.; NYSE MKT LLC; Order Approving Proposed Rule Change Amending and Restating the Fifth Amended and Restated Bylaws of the Exchanges' Ultimate Parent Company, Intercontinental Exchange, Inc., to Implement Proxy Access

## I. Introduction

On March 2, 2016, each of the New York Stock Exchange LLC (“NYSE”), NYSE Arca, Inc. (“NYSE Arca”) and NYSE MKT LLC (“NYSE MKT” and, together with NYSE and NYSE Arca, “Exchanges”) filed with the Securities and Exchange Commission (“Commission”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend and restate the Fifth Amended and Restated Bylaws (“Bylaws”) of the Exchanges' ultimate parent company, Intercontinental Exchange, Inc. (“ICE”),<sup>3</sup> to implement proxy access. The proposed rule changes were published for comment in the Federal Register on March 22, 2016.<sup>4</sup> No comment letters were received in response to the proposals. This order approves the proposed rule changes.

## II. Description of the Proposed Rule Changes

The Exchanges propose to amend and restate the Bylaws to add a new Section 2.15 that

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

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

<sup>3</sup> ICE owns 100% of the equity interest in Intercontinental Exchange Holdings, Inc., which in turn owns 100% of the equity interest in NYSE Holdings LLC. NYSE Holdings LLC owns 100% of the equity interest of NYSE Group, Inc., which owns 100% of the equity interest of each of the Exchanges. ICE is a publicly traded company listed on the NYSE.

<sup>4</sup> See Securities Exchange Act Release Nos. 77384 (Mar. 17, 2016), 81 FR 15371 (Mar. 22, 2016) (SR-NYSE-2016-14); 77385 (Mar. 17, 2016), 81 FR 15378 (Mar. 22, 2016) (SR-NYSEArca-2016-25); and 77386 (Mar. 17, 2016), 81 FR 15366 (Mar. 22, 2016) (SR-NYSEMKT-2016-20) (collectively, “Notices”).

would, subject to a number of requirements, permit stockholders to nominate director nominees for election to the Board of Directors of ICE (“Board”) and require ICE to include such director nominations in its proxy materials for the next annual meeting of stockholders (“Proxy Materials”). The Exchanges further propose to amend certain advance notice provisions in Section 2.13 of the Bylaws to account for the implementation of proxy access in proposed Section 2.15.<sup>5</sup>

Proposed Section 2.15 of the Bylaws

Proposed Section 2.15 of the Bylaws would enable an individual stockholder, or a group of up to 20 stockholders, to nominate director nominees for the Board and have them included in the Proxy Materials, so long as such stockholder or stockholders have collectively owned at least three percent of ICE’s outstanding shares of common stock continuously for at least three years.<sup>6</sup> No stockholder would be permitted to participate in more than one group, and any stockholder appearing as a member of more than one group would be counted as a member of the group with the largest ownership position.<sup>7</sup> Notwithstanding the foregoing, a stockholder whose nominee is elected to the Board at an annual meeting under proposed Section 2.15 would not be eligible to nominate another candidate for the next two annual meetings.<sup>8</sup>

In order to nominate a director nominee to be included in the Proxy Materials under proposed Section 2.15, a stockholder would need to submit a notice (“Nomination Notice”) to the Secretary of ICE, no earlier than the close of business 150 calendar days, and no later than

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<sup>5</sup> See Notices, supra note 4, for a more detailed description of the proposed amendments.

<sup>6</sup> Proposed Section 2.15(c)(i)-(iii). Shares may be counted as “owned” only where a stockholder possesses both the full voting and investment rights pertaining to the shares, as well as the full economic interest in such shares. Id. at 2.15(c)(iv).

<sup>7</sup> Id. at 2.15(c)(v).

<sup>8</sup> Id. at 2.15(c)(i).

the close of business 120 calendar days, before the anniversary of the date that ICE mailed its Proxy Materials for the previous year's annual meeting.<sup>9</sup> In proposed Section 2.15, the Exchanges propose to set forth in the Bylaws the specific information that would be needed to be included in the Nomination Notice. The following information is required for the Nomination Notice:

- a Schedule 14N<sup>10</sup> (or any successor form) relating to the nomination, completed and filed with the Commission;<sup>11</sup>
- a written notice of the nomination<sup>12</sup> containing a statement in support of the nominee's election to the Board, if desired, as well as the following representations and warranties by each nominating stockholder:
  - 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;

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<sup>9</sup> Id. at 2.15(d). If an annual meeting is not scheduled to be held within a period that commences 30 days before and ends 30 days after the anniversary date, the nominating stockholder would be required to submit the Nomination Notice by the later of the close of business 120 days prior to the date of such annual meeting or the tenth day following the first public disclosure of the annual meeting date. Id.

<sup>10</sup> 17 CFR 240.14n-101.

<sup>11</sup> Proposed Section 2.15(d)(i).

<sup>12</sup> Id. at 2.15(d)(ii). The written notice would need to include certain information that is required for the nomination of directors by Section 2.13(b) of the Bylaws and details regarding any relationship in the past three years that would have been described by Item 6(e) of Schedule 14N if that relationship had existed on the date of submission of the Schedule 14N. Id. at 2.15(d)(ii)(A) and (B). In the case of a nomination by a group, the notice would also need to include the designation by all group members of one group member authorized to act on behalf of all group members with respect to matters relating to the nomination, including withdrawal of the nomination. Id. at 2.15(d)(ii)(K).

- that the nominee’s candidacy or, if elected, membership on the 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;
- that the nominee does not have any direct or indirect relationship with ICE that will cause the nominee to be deemed not independent under the Board’s Independence Policy;<sup>13</sup>
- that the nominee qualifies as independent under the rules of the principal national securities exchange on which ICE’s common stock is traded and meets that exchange’s audit committee independence requirements;<sup>14</sup>
- that the nominee is a “non-employee director” for the purposes of Rule 16b-3 under the Exchange Act,<sup>15</sup> is an “outside director” for purposes of Section 162(m) of the Internal Revenue Code,<sup>16</sup> and is not and has not been subject to any event specified in Rule 506(d)(1) of Regulation D under the Securities Act of 1933<sup>17</sup> or Item 401(f) of Regulation S-K under

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<sup>13</sup> The Board’s current Independence Policy can be found at:  
<http://ir.theice.com/~media/Files/I/Ice-IR/documents/corporate-governance-documents/board-independence-policy.pdf>.

<sup>14</sup> The NYSE is the principal market for ICE’s common stock. Its independent director standards are set forth in NYSE’s Listed Company Manual in Sections 303A.00, 303A.01 and 303A.02, and its audit committee independence requirements are set forth in NYSE’s Listed Company Manual under Sections 303A.06 and 303A.07.

<sup>15</sup> 17 CFR 240.16b-3.

<sup>16</sup> 26 U.S.C. 162(m).

<sup>17</sup> 17 CFR 230.506(d)(1) (identifying “bad actors” who will be disqualified from a safe harbor related to the private offering exemption of Section 4(a)(2) of the Securities Act).

- the Exchange Act;<sup>18</sup>
- that the nominating stockholder satisfies the eligibility requirements set forth in proposed Section 2.15 of the Bylaws and intends to continue to satisfy such requirements through the date of the annual meeting; and
  - that the nominating stockholder will not engage in a “solicitation” within the meaning of Rule 14a-1(l) under the Exchange Act<sup>19</sup> 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 Board of Directors and will not use any proxy card other than ICE’s proxy card in soliciting stockholders in connection with the election of its nominee.
- an executed agreement,<sup>20</sup> pursuant to which each nominating stockholder 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 stockholders relating to ICE directors, director nominees, or the nominating stockholder’s nominee with the Commission;
    - to assume all liability stemming from an action, suit, or proceeding relating to any actual or alleged legal or regulatory violations arising out of any communication by the nominating stockholder or its nominee in

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<sup>18</sup> 17 CFR 229.401(f) (requiring director nominees to disclose participation in certain legal proceedings).

<sup>19</sup> 17 CFR 240.14a-1(l).

<sup>20</sup> Proposed Section 2.15(d)(iii).

connection with the nomination or election of directors, including the Nomination Notice;

- to indemnify ICE and its directors, officers, and employees against any liability incurred in connection with any action, suit, or proceeding relating to a failure or alleged failure of the nominating stockholder or its nominees to comply with, or a breach or alleged breach of, its respective obligations, agreements, or representations under proposed Section 2.15; and
- to promptly notify ICE and any other recipients of communications by the nominating stockholder in connection with the nomination or election of a director nominee if (1) any information included in such communications or in the Nomination Notice ceases to be true and accurate in all material respects or a material fact necessary to make a statement not misleading has been omitted or (2) the nominating stockholder has failed to continue to satisfy the eligibility requirements described in proposed Section 2.15(c); and
- an executed agreement,<sup>21</sup> 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 Board and to adhere to ICE's Corporate Governance Guidelines and

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<sup>21</sup> Id. at 2.15(d)(iv).

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 any (i) undisclosed financial agreement or arrangement with any person or entity other than ICE in connection with his or her service or action as a director of ICE, (ii) undisclosed agreement or arrangement with any person or entity as to how the nominee would vote or act on any issue or question as a director of ICE; or (iii) voting commitment that could reasonably be expected to interfere with the nominee's ability to comply, if elected, with his or her fiduciary duties under applicable law.

If so requested in the relevant Nomination Notice, and subject to the requirements set forth in proposed Section 2.15,<sup>22</sup> ICE must include in its Proxy Materials information regarding a director nominee nominated for election pursuant to proposed Section 2.15, including: (1) the name of the nominee (which must also be included on ICE's form of proxy and ballot), (2) certain disclosures regarding the director nominee and each nominating stockholder that are required by the Commission or other applicable law to be included in the Proxy Materials, (3) a statement in support of the nominee's election to the Board included in the Nomination Notice, subject to compliance with Section 14 of the Exchange Act<sup>23</sup> and the rules thereunder, and (4) any other information that ICE or the Board determines,<sup>24</sup> in its discretion, to include in the

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<sup>22</sup> 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. Id. at 2.15(a).

<sup>23</sup> 15 U.S.C. 78n.

<sup>24</sup> For the purposes of proposed Section 2.15, any determination to be made by the Board may be made by the Board, a committee of the Board, or any officer of ICE designated

Proxy Materials relating to the nomination of the nominee, including any statement in opposition to the nomination.<sup>25</sup>

Notwithstanding the foregoing, ICE may omit from the Proxy Materials, or may 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 Board determines that: (1) such information is not true in all material respects or omits a material statement necessary to make the statements made not misleading; (2) 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 (3) the inclusion of such information in the Proxy Materials would otherwise violate the federal proxy rules or any other applicable law, rule or regulation.<sup>26</sup> ICE may solicit against, and include in the Proxy Materials its own statement relating to, any nominee.<sup>27</sup>

Under the proposal, there is a limit to the number of director nominees submitted pursuant to proposed Section 2.15 that may be included in the Proxy Materials. Specifically, ICE would not be required to include in the Proxy Materials more nominees submitted pursuant to proposed Section 2.15 than that number of directors constituting twenty percent of the total number of directors of the Board (rounded down to the nearest whole number, but not less than two).<sup>28</sup> This maximum number of permitted nominees would be further reduced by (1) the

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by the Board or a committee of the Board, and such determination will be final and binding on ICE and any other person so long as made in good faith. Proposed Section 2.15(a).

<sup>25</sup> Id.

<sup>26</sup> Id. at 2.15(e)(ii)

<sup>27</sup> Id.

<sup>28</sup> Id. at 2.15(b)(i).

number of nominees that are subsequently withdrawn after nomination or that the Board itself decides to nominate for election and (2) the number of incumbent directors, if any, who were nominated pursuant to proposed Section 2.15 at the preceding annual meeting and whose re-election is recommended by the Board.<sup>29</sup> Thus, the maximum number of nominees permitted pursuant to proposed Section 2.15 in any given year could be fewer than two.<sup>30</sup> Where the number of nominees submitted pursuant to proposed Section 2.15 exceeds the maximum number permitted, each nominating stockholder – in order of ownership position, largest to smallest – would select a director nominee until the maximum number of nominees is reached.<sup>31</sup>

Proposed Section 2.15 would allow the Board to disregard director nominations submitted pursuant to proposed Section 2.15 in certain circumstances. If the Board determines that a nominee or nominating stockholder no longer satisfies the eligibility requirements, a nominating stockholder withdraws its nomination, or a nominee is unwilling or unable to serve as a director, the Board may disregard the nomination and ICE would not be required to include the nominee in the Proxy Materials and could affirmatively inform stockholders that the nominee would not be voted on at the annual meeting.<sup>32</sup>

In addition, the proposal permits ICE to omit nominees submitted pursuant to proposed Section 2.15 from the Proxy Materials (and to prohibit any vote on such nominee) in the following situations:

- the nominating stockholder(s) (or representatives thereof) fail to present the nomination at the annual meeting or withdraw the nomination;

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<sup>29</sup> Id.

<sup>30</sup> See Notices, supra note 4, at 81 FR 15372, 15379, and 15367, respectively.

<sup>31</sup> Proposed Section 2.15(b)(ii).

<sup>32</sup> Id. at 2.15(b)(ii). See also infra note 33 and accompanying text (permitting the Board to omit stockholder nominees from the Proxy Materials in the same circumstances).

- the Board determines that the nomination or election of the nominee would result in ICE violating or failing to be in compliance with its certificate of incorporation, the Bylaws, or any applicable law, rule or regulation to which it is subject, including any rule or regulation of the principal national securities exchange on which ICE's securities are traded;
- the nominee was nominated for election to the Board pursuant to Section 2.15 at one of ICE's two preceding annual meetings of stockholders and withdrew, became ineligible, or failed to receive 20% of the vote;
- the nominee has been, within the past three years an officer or director of a competitor or is a U.S. Disqualified Person as defined in ICE's certificate of incorporation;
- ICE is notified, or the Board determines, that: (i) a nominating stockholder has failed to continue to satisfy the eligibility requirements of proposed Section 2.15; (ii) any of the representations and warranties made in the Nomination Notice cease to be true and accurate in all material respects (or omit a material fact necessary to make the statements made not misleading); (iii) the nominee becomes unwilling or unable to serve on the Board, or (iv) the nominee or nominating stockholder materially violate or breach the obligations, agreements, representations, or warranties made under proposed Section 2.15; or
- ICE receives a notice under Section 2.13 that a stockholder intends to nominate a candidate for director at the annual meeting.<sup>33</sup>

Amendments to Section 2.13 of the Bylaws

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<sup>33</sup> Id. at 2.15(e)(i).

Currently, Section 2.13 of the Bylaws sets forth a process by which ICE stockholders may nominate directors at their annual and special meetings, including certain advance notice requirements.<sup>34</sup> The Exchanges propose to amend the advance notice provisions in Section 2.13 to address the application of those provisions to stockholder nominations submitted under the proxy access provision in proposed Section 2.15. The proposed amendments would require director nominations submitted by stockholders pursuant to proposed Section 2.15 to be specified in the notice of annual meeting given by the Board, but they would exempt such nominations from other timing and notice requirements set forth in Section 2.13.<sup>35</sup>

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule changes are consistent with the requirements of Section 6 of the Act<sup>36</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>37</sup> In particular, the Commission finds that the proposed rule changes are consistent with the requirements of Section 6(b)(5) of the Act, which requires, among other things, that an exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.<sup>38</sup>

A shareholder who wishes to nominate his or her own candidate for director may initiate

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<sup>34</sup> See Bylaws, Section 2.13.

<sup>35</sup> Proposed Section 2.13(b). The Exchanges have also proposed to amend Section 2.13(d) to clarify that the definition of “publicly announced or disclosed” set forth in that provision shall apply to Section 2.15. Proposed Section 2.13(d).

<sup>36</sup> 15 U.S.C. 78f(b).

<sup>37</sup> In approving these proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>38</sup> 15 U.S.C. 78f(b)(5).

a proxy contest in order to solicit proxies from fellow shareholders, but doing so requires the preparation and dissemination of separate proxy materials and entails substantial cost. Proposed Section 2.15 of the Bylaws provides ICE shareholders an alternative path for having their nominees considered through the proxy process. This proposed rule change is intended to respond to a request made by ICE shareholders regarding proxy access.<sup>39</sup>

The Exchanges state that the proposal, by providing a process for certain stockholders to nominate directors to be included in the Proxy Materials,<sup>40</sup> should help to strengthen the corporate governance of ICE and foster accountability to ICE's stockholders, thereby protecting investors and the public interest.<sup>41</sup> The Commission believes that the proposal to provide a process for shareholder proxy access in the Bylaws of ICE, the ultimate parent company of the Exchanges, should help to provide the stockholders of ICE that meet the stated requirements of proposed Section 2.15 with an alternative opportunity to exercise their right to nominate directors for the Board, consistent with the Exchange Act.

The proposed rule changes will require ICE to include in its Proxy Materials information regarding a director nominee nominated pursuant to proposed Section 2.15 in its Proxy Materials, including disclosures regarding the nominee and nominating stockholder(s), any statement in support of the nominee provided by the nominating stockholder(s), and any other

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<sup>39</sup> 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 proposed rule changes to the Board and, on that basis, the Comptroller's request was withdrawn. See Notices, supra note 4, at 81 FR 15374, 15382, and 15370, respectively.

<sup>40</sup> As discussed above, however, the number of permitted director nominees under Section 2.15 may constitute less than twenty percent of the number of directors currently serving on the Board under certain circumstances and could be less than two nominees. See supra notes 28-30 and accompanying text; Proposed Section 2.15(b)(i).

<sup>41</sup> See Notices, supra note 4, at 81 FR 15371, 15378, and 15367, respectively.

information that ICE or the Board determines to include relating to the nomination. The Commission believes that the provision of such information could help stockholders to assess whether a nominee submitted pursuant to proposed Section 2.15 possesses the necessary qualifications and experience to serve as a director.

The proposed rule changes limit the availability of proxy access in certain circumstances. For example, in order to be eligible to submit a nomination to be included in the Proxy Materials pursuant to proposed Section 2.15, a shareholder (or group of shareholders) is required to own at least three percent of ICE's outstanding shares of common stock continuously for at least three years. Furthermore, a shareholder may not nominate a director to be included in the Proxy Materials pursuant to proposed Section 2.15 if he or she is holding ICE's securities with the intent of effecting a change of control of ICE. The proposed rule changes also generally would limit the number of director nominees submitted pursuant to proposed Section 2.15 that may be included in the Proxy Materials to twenty percent of the total number of directors of the Board. The proposed rule changes would allow ICE to disregard or omit nominees submitted pursuant to proposed Section 2.15 from the Proxy Materials in certain circumstances, including if the Board determines that the nomination or election of the nominee would result in ICE violating or failing to be in compliance with its governing documents or any applicable law, rule or regulation to which it is subject.<sup>42</sup> The Commission notes that such limitations on proxy access seem designed to balance the ability of ICE shareholders to participate more fully in the nomination and election process against the potential cost and practical difficulties of requiring inclusion of shareholder nominations in proxy materials.

The Commission notes that the proposed proxy access provisions include safeguards to

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<sup>42</sup> See, e.g., Proposed Section 2.15(e)(i)(C).

help verify that any director nominees submitted pursuant to proposed Section 2.15 would qualify as independent directors and that the nominating shareholder's nomination of the nominee, and the nominee's membership on the Board, if elected, would not violate any applicable laws, rules or regulations of any government entity or relevant self-regulatory organization. Specifically, the nominating stockholder must represent and warrant, among other things, that: (i) the nominee's candidacy or, if elected, membership on the 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; (ii) the nominee does not have any direct or indirect relationship with ICE that will cause the nominee to be deemed not independent under the Board's Independence Policy;<sup>43</sup> and (iii) the nominee qualifies as independent under the rules of the principal national securities exchange on which ICE's common stock is traded and meets that exchange's audit committee independence requirements.<sup>44</sup> In addition, each nominating stockholder is required to provide an executed agreement, pursuant to which he or she agrees to comply with all applicable laws, rules and regulations in connection with the nomination, solicitation, and election of a nominee. The nominee is also required to provide an executed agreement, pursuant to which: (i) if elected, the nominee agrees to adhere to ICE's Corporate Governance Guidelines and Global Code of Business Conduct and any other policies and guidelines applicable to directors; and (ii) the nominee agrees that he or she is not and will not become party to certain financial or voting arrangements that may present conflicts of interest or

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<sup>43</sup> See also id. (permitting ICE to omit from its Proxy Materials any nominee submitted pursuant to proposed Section 2.15 if the Board determines that nomination or election of that nominee to the Board would cause ICE to violate or fail to be in compliance with its Bylaws, its certificate of incorporation, or any applicable law, rule or regulation, including any rules or regulations of the principal national securities exchange on which ICE's common stock is traded).

<sup>44</sup> See supra notes 12-19 and accompanying text.

interfere with the nominee's ability to comply, if elected, with his or her fiduciary duties under applicable law.<sup>45</sup>

The Commission notes that the safeguards and limitations described above should help to ensure ICE can comply with its bylaws and any applicable laws, rules, regulations, including, among others, the Board's Independence Policy and exchange listing standards on independent directors and audit committees, consistent with Section 6(b)(5) of the Act. Based on the foregoing, the Commission finds that the proposed rule changes filed by the Exchanges are consistent with the Act.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>46</sup> that the proposed rule changes (SR-NYSE-2016-14, SR-NYSEArca-2016-25, SR-NYSEMKT-20), be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>47</sup>

Robert W. Errett  
Deputy Secretary

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<sup>45</sup> See supra notes 20-21 and accompanying text.

<sup>46</sup> 15 U.S.C. 78s(b)(2).

<sup>47</sup> 17 CFR 200.30-3(a)(12).