

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-77795; File No. SR-ISE Gemini-2016-05)

May 10, 2016

Self-Regulatory Organizations; ISE Gemini, LLC; Notice of Filing of Proposed Rule Change Relating to a Corporate Transaction Involving Its Indirect Parent

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 28, 2016 ISE Gemini, LLC (the “Exchange” or “ISE Gemini”) 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 the Substance of the Proposed Rule Change

The Exchange is hereby filing with the U.S. Securities and Exchange Commission (“Commission”) a proposed rule change (the “Proposed Rule Change”) in connection with a proposed business transaction (the “Transaction”) involving the Exchange’s ultimate, indirect, non-U.S. upstream owners, Deutsche Börse AG (“Deutsche Börse”) and Eurex Frankfurt AG (“Eurex Frankfurt”), and Nasdaq, Inc. (“Nasdaq”). Nasdaq is the parent company of The NASDAQ Stock Market LLC (“NASDAQ Exchange”), NASDAQ PHLX LLC (“Phlx Exchange”), NASDAQ BX, Inc. (“BX Exchange”), Boston Stock Exchange Clearing Corporation (“BSECC”) and Stock Clearing Corporation of Philadelphia (“SCCP”).<sup>3</sup> Upon

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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> See Securities Exchange Act Release Nos. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31); 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR-BSE-2008-02; SR-BSE-2008-23; SR-BSE-2008-25; SR-BSECC-2008-01).

completion of the Transaction (the “Closing”), the Exchange’s indirect parent company, U.S. Exchange Holdings, Inc. (“U.S. Exchange Holdings”), will become a direct subsidiary of Nasdaq. The Exchange will therefore become an indirect subsidiary of Nasdaq and, in addition to the Exchange’s current affiliation with International Securities Exchange, LLC (“ISE”) and ISE Mercury, LLC (“ISE Mercury”), an affiliate of NASDAQ Exchange, Phlx Exchange, BX Exchange, BSECC and SCCP through common, ultimate ownership by Nasdaq. Nasdaq will become the ultimate parent of the Exchange.<sup>4</sup>

In order to effect the Transaction, the Exchange hereby seeks the Commission’s approval of the following: (i) that certain corporate resolutions that were previously established by entities that will cease to be non-U.S. upstream owners of the Exchange after the Transaction will cease to be considered rules of the Exchange upon Closing; (ii) that certain governing documents of Nasdaq will be considered rules of the Exchange upon Closing; (iii) that the Third Amended and Restated Trust Agreement (the “Trust Agreement”) that currently exists among International Securities Exchange Holdings, Inc. (“ISE Holdings”), U.S. Exchange Holdings, and the Trustees (as defined therein) with respect to the “ISE Trust” will cease to be considered rules of the Exchange upon Closing and, thereafter, that the parties to the Trust Agreement would be permitted to take the corporate steps necessary to repeal the Trust Agreement and dissolve the ISE Trust; (iv) to amend and restate the Second Amended and Restated Certificate of Incorporation of ISE Holdings (“ISE Holdings COI”) to eliminate provisions relating to the Trust Agreement and the ISE Trust and, in this respect, to reinstate certain text of the ISE Holdings COI that existed prior to Deutsche Börse’s ownership of ISE Holdings; (v) to amend and restate the Second Amended and Restated Bylaws of ISE Holdings (the “ISE Holdings Bylaws”) to

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<sup>4</sup> The Exchange’s current affiliates, ISE and ISE Mercury, have submitted nearly identical proposed rule changes. See SR-ISE-2016-11 and SR-ISEMercury-2016-10.

waive certain voting and ownership restrictions in the ISE Holdings COI to permit Nasdaq to indirectly own 100% of the outstanding common stock of ISE Holdings as of and after Closing of the Transaction; and (vi) to amend and restate the Third Amended and Restated Certificate of Incorporation of U.S. Exchange Holdings (“U.S. Exchange Holdings COI”) to eliminate references therein to the Trust Agreement.

The Exchange requests that the Proposed Rule Change become operative at the Closing of the Transaction. The text of the proposed rule change is available at the Commission’s Public Reference Room and on the Exchange’s Internet website at <http://www.ise.com>.

II. Self-Regulatory Organization’s Statement of the Purpose of, and the 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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange submits this Proposed Rule Change to seek the Commission’s approval of various changes to the organizational and governance documents of the Exchange’s current owners and related actions that are necessary in connection with the Closing of the Transaction, as described below. The Exchange will continue to conduct its regulated activities (including operating and regulating its market and Members) in the manner currently conducted and will not make any changes to its regulated activities in connection with the Transaction. The

Exchange is not proposing any amendments to its trading or regulatory rules at this time relating to the Transaction.<sup>5</sup> The Exchange would continue to be registered as a national securities exchange, with separate rules, membership rosters, and listings, distinct from the rules, membership rosters, and listings of NASDAQ Exchange, Phlx Exchange and BX Exchange as well as from its current affiliates, ISE and ISE Mercury. Neither the Exchange nor its current affiliates engage in clearing securities transactions, nor would they do so after the Transaction. Additionally, the Exchange would continue to be a separate self-regulatory organization (“SRO”).

1. Current Ownership Structure of the Exchange

On December 17, 2007, ISE Holdings, the sole, direct parent of the Exchange, became a direct, wholly-owned subsidiary of U.S. Exchange Holdings.<sup>6</sup> U.S. Exchange Holdings is 85% directly owned by Eurex Frankfurt and 15% directly owned by Deutsche Börse. Eurex Frankfurt is a wholly-owned, direct subsidiary of Deutsche Börse.<sup>7</sup> Deutsche Börse therefore owns 100% of U.S. Exchange Holdings through its aggregate direct and indirect ownership.

2. The Transaction

On March 9, 2016, a Stock Purchase Agreement (the “Agreement”) was entered into among Deutsche Börse, Eurex Frankfurt and Nasdaq. Pursuant to and subject to the terms of the Agreement, at the Closing, Deutsche Börse and Eurex Frankfurt will sell, transfer and deliver to

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<sup>5</sup> If the Exchange determines to make any such changes, it will seek the approval of the Commission only after the approval of this Proposed Rule Change to the extent required by the Securities Exchange Act of 1934, as amended (“Act”), the Commission’s rules thereunder, or the Exchange’s rules.

<sup>6</sup> See Securities Exchange Act Release No. 56955 (December 13, 2007), 72 FR 71979 (December 19, 2007) (SR-ISE-2007-101).

<sup>7</sup> See Securities Exchange Act Release No. 66834 (April 19, 2012), 77 FR 24752 (April 25, 2012) (SR-ISE-2012-21). Each of Deutsche Börse and Eurex Frankfurt is referred to as a “Non-U.S. Upstream Owner” and collectively as the “Non-U.S. Upstream Owners.”

Nasdaq, and Nasdaq will purchase, the capital stock of U.S. Exchange Holdings.

3. Post-Closing Ownership Structure of the Exchange

As a result of the Transaction, Nasdaq will directly own 100% of the equity interest of U.S. Exchange Holdings. U.S. Exchange Holdings will remain the sole, direct owner of ISE Holdings. ISE Holdings will remain the sole, direct owner of the Exchange. The Exchange will therefore become an indirect subsidiary of Nasdaq and Nasdaq will become the ultimate parent of the Exchange. The Exchange will become an affiliate of NASDAQ Exchange, Phlx Exchange, BX Exchange, BSECC and SCCP through common, ultimate ownership by Nasdaq. As a result of the Transaction, Deutsche Börse and Eurex Frankfurt will cease to be owners of the Exchange. The Exchange will therefore cease to have any Non-U.S. Upstream Owners. The Transaction will not have any effect on ISE Holdings' direct ownership of the Exchange. However, consummation of the Transaction is subject to approval of this Proposed Rule Change by the Commission, as described below.

4. Non-U.S. Upstream Owner Resolutions

Deutsche Börse and Eurex Frankfurt, as the Non-U.S. Upstream Owners of the Exchange, have previously taken appropriate steps to incorporate provisions regarding ownership, jurisdiction, books and records, and other issues related to their control of the Exchange. Specifically, each of such Non-U.S. Upstream Owners has adopted resolutions (“Non-U.S. Upstream Owner Resolutions”), which were previously approved by the Commission, to incorporate these concepts with respect to itself, 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>8</sup> For example, the resolution of each of such Non-U.S. Upstream Owners provides that it shall comply with the U.S. federal securities laws and the rules and regulations thereunder and shall cooperate with the Commission and with the Exchange. In addition, the resolution of each of such Non-U.S. Upstream Owners provides that the board members, including each person who becomes a board member, would so consent to comply and cooperate and the particular Non-U.S. Upstream Owner would take reasonable steps to cause its officers, employees, and agents to also comply and cooperate, to the extent that he or she is involved in the activities of the Exchange.

Section 19(b) of the Act,<sup>9</sup> and Rule 19b-4 thereunder,<sup>10</sup> require an SRO to file proposed rule changes with the Commission. Although the Non-U.S. Upstream Owners are not SROs, the Non-U.S. Upstream Owner Resolutions have previously been filed with the Commission as stated policies, practices, or interpretations of the Exchange and therefore are considered rules of the Exchange.<sup>11</sup> As Deutsche Börse and Eurex Frankfurt will both cease to be Non-U.S. Upstream Owners of the Exchange after the Transaction, the Exchange proposes that the resolutions of Deutsche Börse and Eurex Frankfurt will cease to be stated policies, practices, or interpretations of the Exchange and, therefore, will cease to be considered rules of the Exchange as of a date that corresponds to the Closing date of the Transaction.<sup>12</sup>

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<sup>8</sup> See Securities Exchange Act Release No. 70050 (July 26, 2013), 78 FR 46622 (August 1, 2013) (File No. 10-209) (Order Approving Topaz Exchange, LLC for Registration as a National Securities Exchange). The Exchange was originally named “Topaz Exchange, LLC.”

<sup>9</sup> 15 U.S.C. 78s(b).

<sup>10</sup> 17 CFR 240.19b-4.

<sup>11</sup> See File No. 10-209, supra note 8.

<sup>12</sup> The “Form of German Parent Corporate Resolutions” is attached hereto as Exhibit 5A. As referenced above, resolutions in relation to board members, officers, employees, and agents (as applicable) of Deutsche Börse and Eurex Frankfurt also would cease

## 5. Nasdaq Governing Documents

Nasdaq will become the ultimate parent of the Exchange upon the Closing of the Transaction. As described above, Section 19(b) of the Act and Rule 19b-4 thereunder require an SRO to file proposed rule changes with the Commission. Although the Exchange's existing U.S. upstream owners are not SROs, their governing documents have previously been filed with the Commission as stated policies, practices, or interpretations of the Exchange and therefore are considered rules of the Exchange.<sup>13</sup> The Exchange proposes that the Nasdaq Amended and Restated Certificate of Incorporation ("Nasdaq COI") and the Nasdaq Bylaws ("Nasdaq Bylaws, and together with the Nasdaq COI, the "Nasdaq governing documents") will become stated policies, practices, or interpretations of the Exchange as of the Closing and, therefore, will be considered rules of the Exchange as of a date that corresponds to the Closing date of the Transaction.<sup>14</sup>

The Nasdaq Bylaws contain certain provisions regarding ownership, jurisdiction, books

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accordingly. Resolution 11 provides that, notwithstanding any provision of the resolutions, before: (a) any amendment to or repeal of any provision of this or any of the resolutions; or (b) any action that would have the effect of amending or repealing any provision of the resolutions shall be effective, the same shall be submitted to the board of directors of the Exchange, and if the same must be filed with, or filed with and approved by, the Commission before the same may be effective, under Section 19 of the Act and the rules promulgated thereunder, then the same shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be. In addition, Deutsche Börse, Eurex Frankfurt, U.S. Exchange Holdings, ISE Holdings, and ISE previously became parties to an agreement to provide for adequate funding for the Exchange's regulatory responsibilities. The Exchange subsequently became a party to the agreement along with ISE Mercury. This agreement will be terminated upon the Closing of the Transaction.

<sup>13</sup> See File No. 10-209, supra note 8.

<sup>14</sup> The Nasdaq COI dated January 24, 2014 is attached hereto as Exhibit 5B along with subsequent amendments thereto dated November 17, 2014 and September 8, 2015 and the Certificate of Elimination of the Series A Convertible Preferred Stock dated January 27, 2014. The Nasdaq Bylaws are attached hereto as Exhibit 5C.

and records, and other issues, with respect to Nasdaq, as well as its board members, officers, employees, and agents (as applicable), relating to Nasdaq’s control of any “Self-Regulatory Subsidiary” (i.e., any subsidiary of Nasdaq that is an SRO as defined under Section 3(a)(26) of the Act).<sup>15</sup> The Exchange would be a “Self-Regulatory Subsidiary” of Nasdaq upon the Closing of the Transaction. The provisions in the Nasdaq Bylaws are comparable to the provisions of the Non-U.S. Upstream Owners Resolutions, including in the following manner:

- Giving due regard to the preservation of the independence of the self-regulatory function of each of Nasdaq’s Self-Regulatory Subsidiaries.<sup>16</sup>
- Maintaining the confidentiality of all books and records of each Self-Regulatory Subsidiary reflecting confidential information pertaining to the self-regulatory function of such Self-Regulatory Subsidiary (including but not limited to disciplinary matters, trading data, trading practices and audit information) that comes into Nasdaq’s possession, which shall not be used for any non-regulatory purposes; making such books and records available for inspection and copying by the Commission; and maintaining such books and records relating to each Self-Regulatory Subsidiary in the United States.<sup>17</sup>
- To the extent they are related to the activities of a Self-Regulatory Subsidiary, the books, records, premises, officers, Directors, and employees of Nasdaq shall be deemed to be the books, records, premises, officers, directors, and employees of such Self-Regulatory Subsidiary for the purposes of, and subject to oversight pursuant to, the Act.<sup>18</sup>

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<sup>15</sup> 15 U.S.C. 78c(a)(26).

<sup>16</sup> Nasdaq Bylaws Section 12.1(a) (Self-Regulatory Organization Functions of the Self-Regulatory Subsidiaries).

<sup>17</sup> Nasdaq Bylaws Section 12.1(b).

<sup>18</sup> Nasdaq Bylaws Section 12.1(c).



- Compliance by Nasdaq with the U.S. federal securities laws and the rules and regulations thereunder, cooperation by Nasdaq with the Commission and Nasdaq’s Self-Regulatory Subsidiaries, and reasonable steps by Nasdaq necessary to cause its agents to cooperate with the Commission and, where applicable, the Self-Regulatory Subsidiaries pursuant to their regulatory authority.<sup>19</sup>
- Consent by Nasdaq and its officers, Directors, and employees to the jurisdiction of the United States federal courts, the Commission, and each Self-Regulatory Subsidiary for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, the activities of any Self-Regulatory Subsidiary.<sup>20</sup>
- Reasonable steps by Nasdaq necessary to cause its current and future officers, Directors, and employees, to consent in writing to the applicability to them of certain provisions of the Nasdaq Bylaws, as applicable, with respect to their activities related to any Self-Regulatory Subsidiary.<sup>21</sup>
- Approval by the Commission under Section 19 of the Act prior to any resolution of the Nasdaq Board to approve an exemption for any person from the ownership limitations of the Nasdaq COI.<sup>22</sup>

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<sup>19</sup> Nasdaq Bylaws Section 12.2(a) (Cooperation with the Commission). The officers, Directors, and employees of Nasdaq, by virtue of their acceptance of such position, shall be deemed to agree to cooperate with the Commission and each Self-Regulatory Subsidiary in respect of the Commission’s oversight responsibilities regarding the Self-Regulatory Subsidiaries and the self-regulatory functions and responsibilities of the Self-Regulatory Subsidiaries. Nasdaq Bylaws Section 12.2(b).

<sup>20</sup> Nasdaq Bylaws Section 12.3 (Consent to Jurisdiction).

<sup>21</sup> Nasdaq Bylaws Section 12.4 (Further Assurances).

<sup>22</sup> Nasdaq Bylaws Section 12.5 (Board Action with Respect to Voting Limitations of the Certificate of Incorporation).

- Filing with, or filing with and approval by, the Commission (as the case may be) under Section 19 of the Act prior to amending the Nasdaq COI or the Nasdaq Bylaws.<sup>23</sup>

The Exchange believes that the provisions in the Nasdaq Bylaws should minimize the potential that a person could improperly interfere with, or restrict the ability of, the Commission or the Exchange to effectively carry out their regulatory oversight responsibilities under the Act.<sup>24</sup>

Additionally, and similar to the ISE Holdings COI, the Nasdaq COI imposes limits on direct and indirect changes in control, which are designed to prevent any shareholder from exercising undue control over the operation of its SRO subsidiaries and to ensure that its SRO subsidiaries and the Commission are able to carry out their regulatory obligations under the Act. Specifically, no person who beneficially owns shares of common stock, preferred stock, or notes of Nasdaq in excess of 5% of the securities generally entitled to vote may vote the shares in excess of 5%.<sup>25</sup> This limitation would mitigate the potential for any Nasdaq shareholder to exercise undue control over the operations of the Exchange, and it facilitates the Exchange's and the Commission's ability to carry out their regulatory obligations under the Act. The Nasdaq Board may approve exemptions from the 5% voting limitation for any person that is not a

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<sup>23</sup> Nasdaq Bylaws Section 12.6 (Amendments to the Certificate of Incorporation); Nasdaq Bylaws Section 11.3 (Review by Self-Regulatory Subsidiaries).

<sup>24</sup> The U.S. Exchange Holdings COI also includes similar provisions, including that U.S. Exchange Holdings will take reasonable steps necessary to cause ISE Holdings to be in compliance with the "Ownership Limit" and the "Voting Limit." See U.S. Exchange Holdings COI, Articles TENTH through SIXTEENTH. The U.S. Exchange Holdings COI provides that U.S. Exchange Holdings will notify the Exchange's Board if any "Person," either alone or together with its "Related Persons," at any time owns (whether by acquisition or by a change in the number of shares outstanding) of record or beneficially, whether directly or indirectly, 10%, 15%, 20%, 25%, 30%, 35%, or 40% or more of the then outstanding shares of U.S. Exchange Holdings. See SR-ISE-2007-101, supra note 6, at 71981.

<sup>25</sup> See Article FOURTH, Section C of the Nasdaq COI.

broker-dealer, an affiliate of a broker-dealer, or a person subject to a statutory disqualification under Section 3(a)(39) of the Act,<sup>26</sup> provided that the Nasdaq Board also determines that granting such exemption would be consistent with the self-regulatory obligations of its SRO subsidiary.<sup>27</sup> Further, any such exemption from the 5% voting limitation would not be effective until approved by the Commission pursuant to Section 19 of the Act.<sup>28</sup>

6. Trust Agreement<sup>29</sup>

The ISE Holdings COI currently contains certain ownership limits (“Ownership Limits”) and voting limits (“Voting Limits”) with respect to the outstanding capital stock of ISE Holdings.<sup>30</sup> The Trust Agreement was entered into in 2007 to provide for an automatic transfer

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<sup>26</sup> 15 U.S.C. 78c(a)(39).

<sup>27</sup> See Article FOURTH, Section C.6. of the Nasdaq COI. Specifically, the Nasdaq Board must determine that granting such exemption would (1) not reasonably be expected to diminish the quality of, or public confidence in, Nasdaq or the other operations of Nasdaq, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (2) promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to an facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system.

<sup>28</sup> See Section 12.5 of the Nasdaq Bylaws.

<sup>29</sup> The Trust Agreement exists among ISE Holdings, U.S. Exchange Holdings, and the Trustees (as defined therein). By its terms, the Trust Agreement originally related solely to ISE Holdings’ ownership of ISE, and not to any other national securities exchange that ISE Holdings might control, directly or indirectly. In 2010, the Commission approved proposed rule changes that revised the Trust Agreement to replace references to ISE with references to any Controlled National Securities Exchange. See Securities Exchange Act Release Nos. 59135 (December 22, 2008), 73 FR 79954 (December 30, 2008) (SR-ISE-2008-85) and 61498 (February 4, 2010), 75 FR 7299 (February 18, 2010) (SR-ISE-2009-90); see also ISE Trust Agreement, Articles I and II, Sections 1.1 and 2.6. Thus, the ISE Trust Agreement also applies to ISE Gemini and ISE Mercury.

<sup>30</sup> See Article FOURTH, Section III of the ISE Holdings COI.

of ISE Holdings shares to a trust (the “ISE Trust”) if a Person<sup>31</sup> were to obtain an ownership or voting interest in ISE Holdings in excess of these Ownership Limits and Voting Limits, through ownership of one of the Non-U.S. Upstream Owners, without obtaining the approval of the Commission. In this regard, the Trust Agreement serves four general purposes: (i) to accept, hold and dispose of Trust Shares<sup>32</sup> on the terms and subject to the conditions set forth therein; (ii) to determine whether a Material Compliance Event<sup>33</sup> has occurred or is continuing; (iii) to determine whether the occurrence and continuation of a Material Compliance Event requires the exercise of the Call Option;<sup>34</sup> and (iv) to transfer Deposited Shares from the Trust to the Trust Beneficiary<sup>35</sup> as provided in Section 4.2(h) therein. The ISE Trust, and corresponding Trust Agreement, is the mechanism by which the Ownership Limits and Voting Limits in the ISE Holdings COI currently would be protected in the event that a Non-US Upstream Owner

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<sup>31</sup> See SR-ISE-2007-101, supra note 6. Under the Trust Agreement, the term “Person” means any individual, corporation (including not-for-profit), general or limited partnership, limited liability company, joint venture, estate, trust, association, organization, government or any agency or political subdivision thereof, or any other entity of any kind or nature.

<sup>32</sup> Under the Trust Agreement, the term “Trust Shares” means either Excess Shares or Deposited Shares, or both, as the case may be. The term “Excess Shares” means that a Person obtained an ownership or voting interest in ISE Holdings in excess of certain ownership and voting restrictions pursuant to Article FOURTH of the ISE Holdings COI, through, for example, ownership of one of the Non-U.S. Upstream Owners or U.S. Exchange Holdings, without obtaining the approval of the Commission. The term “Deposited Shares” means shares that are transferred to the Trust pursuant to the Trust’s exercise of the Call Option.

<sup>33</sup> Under the Trust Agreement, the term “Material Compliance Event” means, with respect to a Non-U.S. Upstream Owner, any state of facts, development, event, circumstance, condition, occurrence or effect that results in the failure of any of the Non-U.S. Upstream Owners to adhere to their respective commitments under the resolutions (i.e., as referenced in note 7) in any material respect.

<sup>34</sup> Under the Trust Agreement, 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 therein.

<sup>35</sup> Under the Trust Agreement, the term “Trust Beneficiary” means U.S. Exchange Holdings.

purportedly transfers any related ownership or voting rights other than in accordance with the ISE Holdings COI.

As described above, Section 19(b) of the Act and Rule 19b-4 thereunder require an SRO to file proposed rule changes with the Commission. Although the ISE Trust is not an SRO, the Trust Agreement has previously been filed with the Commission as stated policies, practices, or interpretations of the Exchange and therefore is considered rules of the Exchange.<sup>36</sup> The purpose for which the ISE Trust was formed will not be relevant after the Closing of the Transaction, given that the Exchange will no longer have Non-U.S. Upstream Owners and that the Exchange's current and resulting U.S. upstream owners' governing documents provide for similar protections (e.g., U.S. Exchange Holdings COI Article THIRTEENTH and Nasdaq Bylaws Section 12.5). Accordingly, the Exchange proposes that the Trust Agreement will cease to be stated policies, practices, or interpretations of the Exchange and, therefore, will cease to be considered rules of the Exchange as of a date that corresponds to the Closing date of the Transaction.<sup>37</sup> The Exchange also proposes that, as of the Closing of the Transaction, the parties to the Trust Agreement would be permitted to take the corporate steps necessary to repeal the Trust Agreement and dissolve the ISE Trust.

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<sup>36</sup> See File No. 10-209, *supra* note 8.

<sup>37</sup> The current Trust Agreement is attached hereto as Exhibit 5D. Section 8.2 of the Trust Agreement provides, in part, that, for so long as ISE Holdings controls, directly or indirectly, the Exchange, before any amendment or repeal of any provision of the Trust Agreement shall be effective, such amendment or repeal shall be submitted to the board of directors of the Exchange, as applicable, and if such amendment or repeal must be filed with or filed with and approved by the Commission under Section 19 of the Act and the rules promulgated thereunder before such amendment or repeal may be effectuated, then such amendment or repeal shall not be effectuated until filed with or filed with and approved by the Commission, as the case may be. The Exchange notes that, according to the terms of the Trust Agreement, Sections 6.1 and 6.2 thereof, which relate to limits on disclosure of confidential information and certain permitted disclosure, will survive the termination of the Trust Agreement for a period of ten years.

7. ISE Holdings COI

The ISE Holdings COI was amended in 2007 in relation to the ownership of ISE by Deutsche Börse.<sup>38</sup> At that time, provisions were added to the ISE Holdings COI relating to the ISE Trust to provide for an automatic transfer of ISE Holdings' shares to the ISE Trust if a Person were to obtain an ownership or voting interest in ISE Holdings in excess of Voting Limits and Ownership Limits, without obtaining the approval of the Commission.

As described above, the Exchange is proposing that the Trust Agreement will cease to be considered rules of the Exchange as of a date that corresponds to the Closing date of the Transaction. Accordingly, the Exchange proposes to remove provisions relating to the Trust Agreement and the ISE Trust from the ISE Holdings COI.<sup>39</sup> The Exchange proposes to reinstate certain provisions of the ISE Holdings COI that existed prior to Deutsche Börse's ownership of ISE Holdings that were removed upon introduction of the provisions relating to the ISE Trust and the Trust Agreement.<sup>40</sup>

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<sup>38</sup> See SR-ISE-2007-101, supra note 6.

<sup>39</sup> The proposed, amended ISE Holdings COI is attached hereto as Exhibit 5E. Capitalized terms used to describe the ISE Holdings COI that are not otherwise defined herein shall have the meanings prescribed in the ISE Holdings COI. Article FOURTEENTH of the ISE Holdings COI provides that, for so long as U.S. Exchange Holdings shall control, directly or indirectly, the Exchange, or facility thereof, before any amendment to or repeal of any provision of the ISE Holdings COI shall be effective, the same shall be submitted to the board of directors of the Exchange, and if the same must be filed with, or filed with and approved by, the Commission before the same may be effective, under Section 19 of the Act and the rules promulgated thereunder, then the same shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.

<sup>40</sup> See, e.g., Exhibit 5A to SR-ISE-2007-101, supra note 6. See also Securities Exchange Act Release No. 51029 (January 12, 2005), 70 FR 3233 (January 21, 2005) (SR-ISE-2004-29), through which ISE, which was organized as a corporation at that time (i.e., "ISE, Inc."), amended its Certificate of Incorporation and Constitution at that time in connection with ISE's then-contemplated initial public offering. ISE subsequently reorganized into a holding company structure, whereby it became a limited liability company, as it is so organized currently, and whereby ISE Holdings became the sole

The changes to the ISE Holdings COI proposed herein would describe the corrective treatment of “Excess Shares” (i.e., any sale, transfer, assignment or pledge that, if effective would result in any Person, either alone or together with its Related Persons, owning shares in excess of any of the Ownership Limits). The proposed changes would apply corrective procedures if any Person, alone or together with its Related Persons, purports to sell, transfer, assign or pledge any shares of ISE Holdings stock in violation of the Ownership Limits. Specifically, any such sale, transfer, assignment or pledge would be void, and that number of shares in excess of the Ownership Limits would be deemed to have been transferred to ISE Holdings, as “Special Trustee” of a “Charitable Trust” for the exclusive benefit of a “Charitable Beneficiary” to be determined by ISE Holdings.<sup>41</sup> These corrective procedures also would apply if there is any other event causing any holder of ISE Holdings stock to exceed the Ownership Limits, such as a repurchase of shares by ISE Holdings. The automatic transfer would be deemed to be effective as of the close of business on the business day prior to the date of the violative transfer or other event. The Special Trustee of the Charitable Trust would be required to sell the Excess Shares to a person whose ownership of shares is not expected to violate the Ownership Limits, subject to the right of ISE Holdings to repurchase those shares. The proposed changes

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owner of ISE. See Securities Exchange Act Release No. 53705 (April 21, 2006), 71 FR 25260 (April 28, 2006) (SR-ISE-2006-04). As a result, and at the time of the reorganization, ISE eliminated the “ISE, Inc.” Certificate of Incorporation and Constitution. The ISE Holdings COI and ISE Holdings Bylaws were introduced at that time and included substantially the same ownership and voting limitations that had been contained in the ISE, Inc. Certificate of Incorporation and Constitution.

<sup>41</sup> ISE Holdings may also determine to appoint as “Special Trustee” any entity that is unaffiliated with ISE Holdings and any Person or its Related Persons owning Excess Shares, and any successor trustee appointed by ISE Holdings. Currently, the ISE Trust would hold capital stock of ISE Holdings in the event that a person obtains ownership or voting interest in ISE Holdings in excess of the Ownership Limits or Voting Limits or in the event of a Material Compliance Event. See SR-ISE-2007-101, supra note 6, for a discussion of the ISE Trust, including the operation thereof.

to the ISE Holdings COI are as follows:<sup>42</sup>

- The Exchange proposes to delete the current provisions in Article Fourth, Sections III(a)(ii), III(a)(iii) and III(b)(i) of the ISE Holdings COI that provide that the ISE Holdings Board of Directors shall deliver to the ISE Trust copies of certain written notice and updates thereto currently required under Sections III(a)(ii) and III(a)(iii) of Article FOURTH (i.e., if any Person at any time owns, of record or beneficially, whether directly or indirectly, five percent (5%) or more of the then outstanding Voting Shares).
- The Exchange proposes to adopt new Article FOURTH, Section III(b)(iii) of the ISE Holdings COI, which would provide that, notwithstanding any other provisions contained in the ISE Holdings COI, to the fullest extent permitted by applicable law, any shares of capital stock of ISE Holdings (whether such shares are common stock or preferred stock) not entitled to be voted due to the restrictions set forth in Section III(b)(i) of Article FOURTH of the ISE Holdings COI (and not waived by the ISE Holdings Board of Directors and approved by the Commission pursuant to Section III(b)(i) of Article FOURTH of the ISE Holdings COI), shall not be deemed to be outstanding for purposes of determining a quorum or a minimum vote required for the transaction of any business at any meeting of stockholders of ISE Holdings, including, without limitation, when specified business is to be voted on by a class or a series voting as a class.
- As a result of the addition of new Article FOURTH, Section III(b)(iii) of the ISE

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<sup>42</sup> The Exchange is not proposing any changes to the actual Ownership Limits or Voting Limits specified in the current ISE Holdings COI. See Article FOURTH, Sections III(a) and III(b) of the ISE Holdings COI. The Exchange proposes to delete certain defined terms from the ISE Holdings COI, such as “ISE Trust,” “Trust Beneficiary” and “Trustee,” and replace them with new defined terms within the ISE Holdings COI, such as “Charitable Trust,” “Charitable Beneficiary” and “Special Trustee.” The Exchange also proposes to renumber certain sections of the ISE Holdings COI to account for proposed new and deleted sections therein.



Holdings COI, the Exchange proposes to renumber current Article FOURTH, Section III(b)(iii) as resulting Article FOURTH, Section III(b)(iv).

- The Exchange proposes several changes to Article FOURTH, Section III(c) of the ISE Holdings COI, which relates to violations of any Ownership Limits or Voting Limits and the treatment of Excess Shares, including the following:
  - Addition of new text relating to the designation as “Excess Shares” for any shares held in excess of the relevant Ownership Limits; such designation and treatment being effective as of the close of business on the business day prior to the date of the purported transfer or other event leading to such Excess Shares.<sup>43</sup>
  - Deletion of current text requiring notification to the ISE Trust upon the occurrence of certain events and the transfer of Voting Shares to the ISE Trust.<sup>44</sup>
  - Addition of new text describing the treatment of “Excess Shares” upon any sale, transfer, assignment or pledge that, if effective would result in any Person, either alone or together with its Related Persons, owning shares in excess of any of the Ownership Limits. Specifically, the Exchange proposes within new Article FOURTH, Section III(c)(i) of the ISE Holdings COI that any such purported event shall be void ab initio as to such Excess Shares, and the intended transferee shall acquire no rights in such Excess Shares. Such Excess Shares shall be deemed to have been transferred to ISE Holdings (or to an entity appointed by ISE Holdings that is unaffiliated with ISE Holdings and any Person or its Related Persons owning such Excess Shares), as Special Trustee of the Charitable Trust

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<sup>43</sup> See resulting Article FOURTH, Section III(c).

<sup>44</sup> Id.

for the exclusive benefit of the Charitable Beneficiary or Beneficiaries.<sup>45</sup>

- Addition of new text describing the treatment of dividends or other distributions paid with respect to Excess Shares.<sup>46</sup>
- Addition of new text describing the handling of any distribution of assets received in respect of the Excess Shares in any liquidation, dissolution or winding up of, or any distribution of the assets of ISE Holdings.<sup>47</sup>
- Addition of new text describing the authority of the Special Trustee with respect to rescinding as void any votes cast by a purported transferee or holder of Excess Shares as well as recasting of votes in accordance with the desires of the Special Trustee acting for the benefit of ISE Holdings.<sup>48</sup>
- Addition of new text describing the sale by the Special Trustee, to a Person or Persons designated by the Special Trustee whose ownership of Voting Shares will not violate any Ownership Limit or Voting Limit, of Excess Shares transferred to the Charitable Trust, within 20 days of receiving notice from ISE Holdings that Excess Shares have been so transferred.<sup>49</sup> Existing text would be deleted that requires the Trustees of the ISE Trust to use their commercially reasonable efforts

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<sup>45</sup> See proposed Article FOURTH, Section III(c)(ii). The “Charitable Beneficiary” would be one or more organizations described in Sections 170(b)(1)(A) or 170(c) of the Internal Revenue Code of 1986, as amended from time to time. The “Charitable Trust” would be the trust established for the benefit of the Charitable Beneficiary for which ISE Holdings is the trustee. The “Special Trustee” would be ISE Holdings, in its capacity as trustee for the Charitable Trust, any entity appointed by ISE Holdings that is unaffiliated with ISE Holdings and any Person or its Related Persons owning Excess Shares, and any successor trustee appointed by ISE Holdings.

<sup>46</sup> See proposed Article FOURTH, Section III(c)(iii).

<sup>47</sup> See proposed Article FOURTH, Section III(c)(iv).

<sup>48</sup> See proposed Article FOURTH, Section III(c)(v).

<sup>49</sup> See proposed Article FOURTH, Section III(c)(vi).

to sell the Excess Shares upon receipt of written instructions from the ISE Trust Beneficiary. New text also would be added describing the handling of any proceeds of such a sale.

- Addition of new text describing that Excess Shares shall be deemed to have been offered for sale to ISE Holdings on the date of the transaction or event resulting in such Excess Shares.<sup>50</sup>
- Deletion of current Article FOURTH, Section III(c)(v), which currently relates to the ISE Trust Beneficiary's right to reacquire Excess Shares from the ISE Trust under certain circumstances.

The Exchange is not proposing to reinstate all of the ISE Holdings COI text that existed prior to Deutsche Börse's ownership of ISE Holdings, as certain of such text would continue to not be applicable, even after the Transaction, given the Exchange's resulting ownership. For example, prior to Deutsche Börse's ownership of ISE Holdings, the ISE Holdings COI contained certain provisions that dealt with the publicly-traded nature of ISE Holdings' stock. This text was removed from the ISE Holdings COI upon Deutsche Börse's ownership of ISE Holdings, as ISE Holdings' stock ceased to be publicly-traded.<sup>51</sup> Therefore, the Exchange is not proposing to reinstate the following provisions of the ISE Holdings COI that existed prior to Deutsche Börse's ownership of ISE Holdings relating to:

- Regulation 14A under the Act (pertaining to solicitations of proxies).
- the treatment of transactions of ISE Holdings stock on or through the facilities of any national securities exchange or national securities association.

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<sup>50</sup> See proposed Article FOURTH, Section III(c)(vii).

<sup>51</sup> See Exhibit 5A to SR-ISE-2007-101, supra note 6.

- inspection of the ISE Holdings accounts and records by ISE Holdings stockholders.
- stockholder voting to amend, repeal or adopt provisions of the ISE Holdings COI or the ISE Holdings Bylaws.
- stockholder action called at annual or special meetings of stockholders.
- nominations for directors and the election thereof.

The Exchange also is not proposing to reinstate the ISE Holdings COI text that existed prior to Deutsche Börse’s ownership of ISE Holdings that related to changes in terminology used throughout the ISE Holdings COI.<sup>52</sup> Additionally, provisions of the ISE Holdings COI that authorize shares of capital stock of ISE Holdings have been amended since Deutsche Börse acquired ownership of ISE Holdings.<sup>53</sup> The Exchange does not propose to amend the text of the ISE Holdings COI relating to share authorization. The Exchange also does not propose to reinstate the location or specific wording of text of the ISE Holdings COI that was adjusted or relocated upon Deutsche Börse’s ownership of ISE Holdings, but that otherwise has the same practical effect and meaning as it did prior to Deutsche Börse’s ownership of ISE Holdings.

#### 7. U.S. Exchange Holdings COI

The Exchange proposes to remove the reference to the Trust Agreement in Article THIRTEENTH of the U.S. Exchange Holdings COI. As proposed herein, the Trust Agreement will cease to be considered rules of the Exchange as of the Closing of the Transaction and would be repealed in connection with the Transaction. The Exchange also proposes to retitle the document as the “Fourth” Amended and Restated Certificate of Incorporation of U.S. Exchange

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<sup>52</sup> For example, the ISE Holdings COI currently refers to Delaware General Corporation Law as “DGCL.” The Exchange would not reinstate the prior “GCL” term that was used in the ISE Holdings COI.

<sup>53</sup> See, e.g., Securities Exchange Act Release No 73860 (December 17, 2014), 79 FR 77066 (December 23, 2014) (SR-ISE-2014-44).

Holdings and update the effective date thereof.<sup>54</sup>

8. ISE Holdings Bylaws

The ISE Holdings COI Voting Limits restrict any person, either alone or together with its related persons, from having voting control, either directly or indirectly, over more than 20% of the outstanding capital stock of ISE Holdings. The ISE Holdings COI Ownership Limits restrict any person, either alone or together with its related persons, from directly or indirectly owning of record or beneficially more than 40% of the outstanding capital stock of ISE Holdings (or in the case of any Exchange member, acting alone or together with its related persons, from directly or indirectly owning of record or beneficially more than 20% of the outstanding capital stock of ISE Holdings).<sup>55</sup>

The ISE Holdings COI and the ISE Holdings Bylaws provide that the board of directors of ISE Holdings may waive these voting and ownership restrictions in an amendment to the ISE Holdings Bylaws if the board makes the following three findings: (1) the waiver will not impair the ability of the Exchange to carry out its functions and responsibilities as an exchange under the Act and the rules thereunder; (2) the waiver is otherwise in the best interests of ISE Holdings, its stockholders, and the Exchange; and (3) the waiver will not impair the ability of the Commission to enforce the Act. However, the board of directors may not waive these voting and

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<sup>54</sup> The proposed, amended U.S. Exchange Holdings COI is attached hereto as Exhibit 5F. Article SIXTEENTH of the U.S. Exchange Holdings COI provides that, for so long as U.S. Exchange Holdings shall control, directly or indirectly, the Exchange, or facility thereof, before any amendment to or repeal of any provision of the U.S. Exchange Holdings COI shall be effective, the same shall be submitted to the board of directors of the Exchange, and if the same must be filed with, or filed with and approved by, the Commission before the same may be effective, under Section 19 of the Act and the rules promulgated thereunder, then the same shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be. The Exchange also proposes to amend the U.S. Exchange Holdings COI to consistently refer to such document as the “Restated Certificate,” which is a defined term therein.

<sup>55</sup> See ISE Holdings COI, Article FOURTH, Section III.

ownership restrictions as they apply to Exchange members. In addition, the board of directors may not waive these voting and ownership restrictions if such waiver would result in a person subject to a “statutory disqualification” owning or voting shares above the stated thresholds. Any waiver of these voting and ownership restrictions must be by way of an amendment to the Bylaws approved by the board of directors, which amendment must be approved by the Commission.<sup>56</sup>

Acting pursuant to this waiver provision, the board of directors of ISE Holdings has approved the amendment to the ISE Holdings Bylaws to waive the Ownership Limits and Voting Limits in order to permit Nasdaq to indirectly own 100% of the outstanding common stock of ISE Holdings as of and after Closing of the Transaction.<sup>57</sup> In adopting such amendment, the board of directors of ISE Holdings made the necessary determinations and approved the submission of the Proposed Rule Change to the Commission. In so waiving the applicable voting and ownership restrictions, the board of directors of ISE Holdings has determined, with

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<sup>56</sup> See ISE Holdings COI, Article FOURTH, Sections III(a)(i) and III(b)(i). Such amendment to Holdings Bylaws must be filed with and approved by the Commission under Section 19(b) of the Act and become effective thereunder. In this regard, Section 10.1 of the Bylaws provides that the Bylaws may be amended, added to, rescinded or repealed at any meeting of the Board of Directors of ISE Holdings or meeting of the stockholders. With respect to each national securities exchange controlled, directly or indirectly, by ISE Holdings (the “Controlled National Securities Exchanges”), or facility thereof, before any amendment to or repeal of any provision of the Bylaws of ISE Holdings shall be effective, the same shall be submitted to the board of directors of each Controlled National Securities Exchange, and if the same must be filed with, or filed with and approved by, the Commission before the same may be effective, under Section 19 of the Act and the rules promulgated thereunder, then the same shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.

<sup>57</sup> The proposed, amended ISE Holdings Bylaws are attached hereto as Exhibit 5G. The proposed amendment to the ISE Holdings Bylaws would also clarify that Eurex Global Derivatives AG or “EGD,” which is referenced in Section 11.2 of the ISE Holdings Bylaws, ceased to be an Upstream Owner of the Exchange as a result of a prior transaction that did not require an amendment to the ISE Holdings Bylaws. See Securities Exchange Act Release No. 73530 (November 5, 2014), 79 FR 77066 (December 17, 2014) (SR-ISE-2014-44).

respect to Nasdaq, that: (i) such waiver will not impair the ability of ISE Holdings and each Controlled National Securities Exchange, or facility thereof, to carry out its respective functions and responsibilities under the Act and the rules promulgated thereunder;<sup>58</sup> (ii) such waiver is otherwise in the best interests of ISE Holdings, its stockholders, and each Controlled National Securities Exchange, or facility thereof;<sup>59</sup> (iii) such waiver will not impair the ability of the Commission to enforce the Act;<sup>60</sup> (iv) neither Nasdaq nor any of its Related Persons (as that term is defined in the ISE Holdings COI) are subject to any applicable “statutory disqualification” (within the meaning of Section 3(a)(39) of the Act); and (v) neither Nasdaq nor any of its Related Persons is a member (as such term is defined in Section 3(a)(3)(A) of the Act) of such Controlled National Securities Exchange.

The Exchange will continue to conduct its regulated activities (including operating and regulating its market and Members) in the manner currently conducted and will not make any changes to its regulated activities in connection with the Transaction. In addition, the Transaction will not impair the ability of the Exchange’s, or any facility thereof, to carry out their respective functions and responsibilities under the Act and will not impair the ability of the

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<sup>58</sup> For example, the Exchange will continue to conduct its regulated activities (including operating and regulating its market and Members) in the manner currently conducted and will not make any changes to its regulated activities in connection with the Transaction. The Exchange is not proposing any amendments to its trading or regulatory rules at this time relating to the Transaction.

<sup>59</sup> For example, the Transaction will produce a stronger and more efficient infrastructure that will have an improved ability to provide innovative products and services.

<sup>60</sup> For example, the Commission will continue to have plenary regulatory authority over the Exchange, as is currently the case, as well as jurisdiction over the Exchange’s direct and indirect owners with respect to activities related to the Exchange. The Commission will continue to have appropriate oversight tools to ensure that the Commission will have the ability to enforce the Act with respect to the Exchange, its direct and indirect owners and their directors (where applicable), officers, employees and agents to the extent they are involved in the activities of the Exchange.

Commission to enforce the Act. The Exchange therefore seeks approval of the waiver described herein with respect to the Ownership Limits and Voting Limits in order to permit Nasdaq to indirectly own 100% of the outstanding common stock of ISE Holdings as of and after Closing of the Transaction.

### Summary

The Exchange will continue to conduct its regulated activities (including operating and regulating its market and Members) in the manner currently conducted and will not make any changes to its regulated activities in connection with the Transaction. The Transaction will not impair the ability of ISE Holdings, the Exchange, or any facility thereof, to carry out their respective functions and responsibilities under the Act. Moreover, the Transaction will not impair the ability of the Commission to enforce the Act with respect to the Exchange. As such, the Commission's plenary regulatory authority over the Exchange will not be affected by the approval of this Proposed Rule Change. The Exchange is requesting approval by the Commission of changes proposed herein in order to allow the Transaction to take place.

### 2. Statutory Basis

The Exchange believes that this proposal is consistent with Section 6(b) of the Act,<sup>61</sup> in general, and furthers the objectives of Section 6(b)(1) of the Act,<sup>62</sup> 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 Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. The Proposed Rule Change is designed to enable the Exchange to continue to have the authority and ability to effectively fulfill its self-regulatory

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<sup>61</sup> 15 U.S.C. 78s(b).

<sup>62</sup> 15 U.S.C. 78s(b)(1).



duties pursuant to the Act and the rules promulgated thereunder. The Exchange will continue to conduct its regulated activities (including operating and regulating its market and Members) in the manner currently conducted and will not make any changes to its regulated activities in connection with the Transaction. Thus, the Commission will continue to have plenary regulatory authority over the Exchange, as is currently the case, as well as jurisdiction over the Exchange's direct and indirect owners with respect to activities related to the Exchange. The Proposed Rule Change is consistent with and will facilitate an ownership structure that will continue to provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Act with respect to the Exchange, its direct and indirect owners and their directors (where applicable), officers, employees and agents to the extent they are involved in the activities of the Exchange.

The Exchange also believes that this Proposed Rule Change furthers the objectives of Section 6(b)(5)<sup>63</sup> of the Act 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. Specifically, the Exchange believes that the Proposed Rule Change will continue to provide the Commission and the Exchange with access to necessary information that will allow the Exchange to efficiently and effectively enforce

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<sup>63</sup> 15 U.S.C. 78f(b)(5).

compliance with the Act, as well as allow the Commission to provide proper oversight, which will ultimately promote just and equitable principles of trade and protect investors.

Approval of this Proposed Rule Change will enable ISE Holdings to continue its operations and the Exchange to continue its orderly discharge of regulatory duties 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.

In addition, the Exchange expects that the Transaction will facilitate efficiencies and innovation for clients and efficient, transparent and well-regulated markets for issuers and clients, thus removing impediments to, and perfecting the mechanism of a free and open market and a national market system. The Transaction will benefit investors, the market as a whole, and shareholders by, among other things, enhancing competition among securities venues and reducing costs. In particular, the Transaction will contribute to streamlined and efficient operations, thereby intensifying competition for transaction order flow with other exchange and non-exchange trading centers, as well as potentially in other areas, such as proprietary market data products and listings. This enhanced level of competition among trading centers will benefit investors through new or more competitive product offerings and, ultimately, lower costs.

Furthermore, the Exchange will continue to conduct its regulated activities (including operating and regulating its market and Members) in the manner currently conducted and will not make any changes to its regulated activities in connection with the Transaction. Therefore,

the Exchange believes that it will continue to satisfy the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange.

The Exchange believes it is consistent with the Act to allow Nasdaq to become the ultimate parent of the Exchange. Neither Nasdaq nor any of its related persons is subject to any statutory disqualification or is a Member of the Exchange. Moreover, the Nasdaq governing documents include certain provisions designed to maintain the independence of the Exchange's self-regulatory functions. Accordingly, the Exchange believes that Nasdaq's acquisition of ultimate ownership and exercise of voting control of the Exchange will not impair the ability of the Commission or the Exchange to discharge their respective responsibilities under the Act.

Although Nasdaq will not carry out regulatory functions, its activities with respect to the operation of the Exchange must be consistent with, and not interfere with, the Exchange's self-regulatory obligations. Nasdaq's governing documents include certain provisions that are designed to maintain the independence of the Exchange's self-regulatory functions, enable the 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,<sup>64</sup> and facilitate the ability of the Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act. For example, the Nasdaq governing documents provide that Nasdaq will comply with the U.S. federal securities laws and the rules and regulations thereunder and shall cooperate with the Commission and the Exchange. Also, each board member, officer, and employee of Nasdaq, in discharging his or her responsibilities, shall comply with the U.S. federal securities laws and the rules and regulations thereunder, cooperate with the Commission, and cooperate with the Exchange. In discharging his or her responsibilities as a board member of Nasdaq, each such

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<sup>64</sup> 15 U.S.C. 78f(b) and 15 U.S.C. 78s(g).

member must, to the fullest extent permitted by applicable law, take into consideration the effect that Nasdaq's actions would have on the ability of the Exchange to carry out its responsibilities under the Act. In addition, Nasdaq, its board members, officers and employees shall give due regard to the preservation of the independence of the self-regulatory function of the Exchange.

Further, Nasdaq (along with its respective board members, officers, and employees) and U.S. Exchange Holdings agree to keep confidential, to the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of the Exchange, including, but not limited to, confidential information regarding disciplinary matters, trading data, trading practices, and audit information, contained in the books and records of the Exchange and not use such information for any non-regulatory purposes.

In addition, Nasdaq's books and records relating to the activities of the Exchange will at all times be made available for, and books and records of U.S. Exchange Holdings will be subject at all times to, inspection and copying by the Commission and the Exchange. Books and records of U.S. Exchange Holdings related to the activities of the Exchange also will continue to be maintained within the U.S. Moreover, for so long as Nasdaq directly or indirectly controls the Exchange, the books, records, officers, directors (or equivalent), and employees of Nasdaq shall be deemed to be the books, records, officers, directors, and employees of the Exchange.

To the extent involved in the activities of the Exchange, Nasdaq, its board members, officers, and employees irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for purposes of any action arising out of, or relating to, the activities of the Exchange. Likewise, U.S. Exchange Holdings, its officers and directors, and employees whose principal place of business and residence is outside of the U.S., to the extent such directors, officers, or employees are involved in the activities of the Exchange, irrevocably submit to the

jurisdiction of the U.S. federal courts and the Commission for purposes of any action arising out of, or relating to, the activities of the Exchange.

The Nasdaq governing documents, the U.S. Exchange Holdings COI, and the U.S. Exchange Holdings Bylaws require that any change thereto must be submitted to the Exchange's Board. If such change must be filed with, or filed with and approved by, the Commission under Section 19 of the Act and the rules thereunder, then such change shall not be effective until filed with, or filed with and approved by, the Commission. This requirement to submit changes to the Exchange's Board continues for so long as Nasdaq or U.S. Exchange Holdings, as applicable, directly or indirectly, control the Exchange.

As Deutsche Börse and Eurex Frankfurt will both cease to be Non-U.S. Upstream Owners of the Exchange upon the Closing of the Transaction, the Exchange believes that its proposal that the resolutions of Deutsche Börse and Eurex Frankfurt will cease to be considered rules of the Exchange as of a date that corresponds to the Closing date of the Transaction is consistent with the Act.

The purpose for which the ISE Trust was formed will not be relevant after the Closing of the Transaction, given that the Exchange will no longer have Non-U.S. Upstream Owners and that the Exchange's current and resulting U.S. upstream owners' governing documents provide for similar protections (e.g., U.S. Exchange Holdings COI Article THIRTEENTH and Nasdaq Bylaws Section 12.5). Accordingly, the Exchange believes that its proposal that the Trust Agreement will cease to be considered rules of the Exchange as of a date that corresponds to the Closing date of the Transaction is consistent with the Act.

Given the Exchange's proposal to repeal the Trust Agreement and dissolve the ISE Trust, the Exchange believes that the proposed changes to the ISE Holdings COI are consistent with the

Act. The proposed changes would delete provisions of the ISE Holdings COI that will no longer be relevant and would reinstate certain provisions of the ISE Holdings COI that were removed upon introduction of the provisions relating to the ISE Trust and the Trust Agreement.

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

In accordance with Section 6(b)(8) of the Act,<sup>65</sup> the Exchange believes that the Proposed Rule Change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Indeed, the Exchange believes that the Proposed Rule Change will enhance competition among intermarket trading venues, as the Exchange believes that the Transaction will produce a stronger and more efficient infrastructure that will have an improved ability to provide innovative products and services. Moreover, the Exchange will continue to conduct regulated activities (including operating and regulating its market and Members) of the type it currently conducts, but will be able to do so in a more efficient manner to the benefit of its Members.

The Exchange's conclusion that the Proposed Rule Change would not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act is consistent with the Commission's prior conclusions about similar combinations involving multiple exchanges in a single corporate family.<sup>66</sup> In this regard, the Exchange notes that the

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<sup>65</sup> 15 U.S.C. 78f(b)(8).

<sup>66</sup> See, e.g., Securities Exchange Act Release No. 66071 (Dec. 29, 2011), 77 FR 521 (Jan. 05, 2012) (SR-CBOE-2011-107 and SR-NSX-2011-14); Securities Exchange Act Release No. 58324 (Aug. 7, 2008), 73 FR 46936 (Aug. 12, 2008) (SR-BSE-2008-02; SR-BSE-2008-23; SR-BSE-2008-25; SR-BSECC-2008-01); Securities Exchange Act Release No. 53382 (Feb. 27, 2006), 71 FR 11251 (Mar. 06, 2006) (SR-NYSE-2005-77); Securities Exchange Act Release No. 71449 (Jan. 30, 2014), 79 FR 6961 (Feb. 05, 2014) (SR-EDGA-2013-34; SR-EDGX-2013-43); Securities Exchange Act Release No. 66171 (January 17, 2012), 77 FR 3297 (January 23, 2012) (File Nos. SR-EDGA-2011-34; SR-EDGX-2011-33; SR-ISE-2011-69; SR-NYSE-2011-51; SR-NYSEAmex-2011-78; SR-NYSEArca-2011-72).

Exchange, and its affiliates ISE and ISE Mercury, function only as options trading markets – they do not function as equity trading markets or as clearing agencies, as do certain of Nasdaq’s existing subsidiaries.

The Exchange believes that there is considerable support for a finding that the Transaction is consistent with the Act with respect to competition. 14 exchanges currently compete for options trading business. Exchanges compete on technology, market model, trading venue, fees and fee structure. Additionally, low switching costs allow customers to easily move to another exchange, which customers do regularly, as reflected in constantly varying market shares among the existing exchange operators. In addition, the Commission has approved several, new registered options exchanges in recent history, which highlights an increase in competition in the market for listed options trading.<sup>67</sup>

The Exchange believes that the Transaction will not change the competitive landscape for listed options trading and the changes proposed herein are consistent with other recent Commission approvals. For example, a similar proposed combination of Deutsche Börse and NYSE Euronext in 2011 received Commission approval and would have resulted in a combined greater than 40% market share of listed options volume among its three, respective options

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<sup>67</sup> See, e.g., Securities Exchange Act Release Nos. 76998 (January 29, 2016), 81 FR 6066 (February 4, 2016) (Order approving application for exchange registration of ISE Mercury, LLC); 75650 (August 7, 2015), 80 FR 48600 (August 13, 2015) (Order approving rules governing the trading of options on the EDGX Options Market); 70050 (July 26, 2013), 78 FR 46622 (August 1, 2013) (Order approving application for exchange registration of Topaz Exchange, LLC (n/k/a ISE Gemini, LLC)); 68341 (December 3, 2012), 77 FR 73065 (December 7, 2012) (Order approving application for exchange registration of Miami International Securities Exchange, LLC); 61419 (January 26, 2010), 75 FR 5157 (February 1, 2010) (Order approving rules governing the trading of options on the BATS Options Exchange).

exchanges (based on 2010 data).<sup>68</sup> Similarly, as a result of the Transaction, the options exchanges owned by Nasdaq would account for approximately 41% aggregate market share of listed options volume.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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

Within 45 days of the publication date of this notice or within such longer period (1) as the Commission may designate up to 45 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (2) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve such 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:

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<sup>68</sup> See Securities Exchange Act Release No. 66171 (January 17, 2012), 77 FR 3297 (January 23, 2012) (File Nos. SR-EDGA-2011-34; SR-EDGX-2011-33; SR-ISE-2011-69; SR-NYSE-2011-51; SR-NYSEAmex-2011-78; SR-NYSEArca-2011-72).



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](mailto:rule-comments@sec.gov). Please include File Number SR-ISEGemini-2016-05 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-ISEGemini-2016-05. 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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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-ISEGemini-2016-05, 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.<sup>69</sup>

Robert W. Errett  
Deputy Secretary

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<sup>69</sup> 17 CFR 200.30-3(a)(12).