

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97059; File No. SR-NYSENAT-2023-08)

March 7, 2023

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Its Certificate of Incorporation and Bylaws

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on February 23, 2023, NYSE National, Inc. (“NYSE National” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend its certificate of incorporation and bylaws to provide that the board of directors of its ultimate parent, or that board’s compensation committee, may fix the compensation of the board of directors of the Exchange, and make certain clarifying, technical and conforming changes. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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

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

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

1. Purpose

The Exchange proposes to amend its Amended and Restated Certificate of Incorporation (“Certificate”) and the Seventh Amended and Restated By-laws of the Exchange (“Exchange Bylaws”) to (a) provide that the board of directors of its ultimate parent, Intercontinental Exchange, Inc. (“ICE,” and its board of directors, the “ICE Board”), or the compensation committee of the ICE Board (the “ICE Compensation Committee”), may fix the compensation of the Board of Directors of the Exchange (the “Exchange Board”), and (b) make certain clarifying, technical and conforming changes.

The changes described herein would become operative upon the Certificate becoming effective pursuant to its filing with the Secretary of State of the State of Delaware.

Proposed Compensation Amendments

Currently, pursuant to Exchange Bylaws Article III, Section 3.15 (Compensation), the sole stockholder of the Exchange, NYSE Group Inc. (“NYSE Group”), has the authority to fix the compensation of all directors for services to the Exchange.⁴ Through the deletion of

⁴ See Bylaws, Article III, Section 3.15.

Exchange Bylaws Section 3.15 and additions to Certificate Section FIFTH, the Exchange proposes to move the compensation provision to the Certificate and have the ICE Board or ICE Compensation Committee set director compensation instead of NYSE Group.⁵

NYSE Group is wholly owned by NYSE Holdings LLC, which is a wholly owned subsidiary of Intercontinental Exchange Holdings, Inc. Intercontinental Exchange Holdings, Inc. is in turn wholly owned by ICE, a public company listed on the New York Stock Exchange LLC (“NYSE”).⁶

The Exchange proposes to amend Section FIFTH of the Certificate as follows:

- The Exchange proposes to add the following sentence to the end of Section FIFTH(a):

Notwithstanding anything herein to the contrary, as set forth below, the Board of Directors of Intercontinental Exchange, Inc. (“ICE”) or the compensation committee thereof shall have the authority to fix the compensation of directors of the Corporation.

- The Exchange proposes to add a new Section FIFTH(c), which would read as follows:

⁵ Under the Delaware General Corporation Law (“DGCL”), the terms of the certificate of incorporation of a corporation supersede any inconsistent bylaw provisions. See DGCL Section 109(b); see also *Sinchareonkul v. Fahnemann*, 2015 WL 292314, at *6 (Del.Ch., 2015) (stating that “when evaluating corporate action for legal compliance, a court examines whether the action contravenes the entity-specific corporate contract. The components of that contract form a hierarchy, comprising from top to bottom (i) the Delaware General Corporation Law (the ‘DGCL’), (ii) the certificate of incorporation, and (iii) the bylaws. Each of the lower components of the contractual hierarchy must conform to the higher components.”).

⁶ See Exchange Act Release No. 79902 (January 30, 2017), 82 FR 9258 (February 3, 2017) (SR-NSX-2016-16) (Order Approving Proposed Rule Change, as Modified by Amendment No. 1, in Connection With a Proposed Acquisition of the Exchange by NYSE Group, Inc.).

(c) Compensation. The Board of Directors of ICE or the compensation committee thereof shall have the authority to fix the compensation of directors of the Corporation. The directors of the Corporation may be paid their expenses, if any, of attendance at each meeting of the Board of Directors of the Corporation and may be paid a fixed sum for attendance at each meeting of the Board of Directors of the Corporation or a stated salary as director (which amounts may be paid in cash or such other form as the Board of Directors of ICE or the compensation committee thereof may from time to time authorize). No such payment shall preclude any director from serving the Corporation in any other capacity and receiving compensation therefor.

The Exchange proposes to delete Exchange Bylaws Article III, Section 3.15 in its entirety.

As a result of the proposed change, compensation for the Exchange Board members would be fixed by a body that is required to have at least a majority of its members be independent.

Currently, the board of directors of NYSE Group is not required to be independent. This was not always true: when the New York Stock Exchange, Inc. combined with Archipelago Holdings, Inc. under NYSE Group in 2006, NYSE Group was publicly traded, required to have an independent board of directors, and subject to an independence policy.⁷ That changed when

⁷ See Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (Order Granting Approval of Proposed Rule Change and Amendment Nos. 1, 3, and 5 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 6 and 8 Relating to the NYSE's Business Combination With Archipelago Holdings, Inc.). The NYSE Group was expected to fix the compensation of the Exchange Board through a compensation committee. Id. at 11256.

NYSE Group combined with Euronext N.V. After that combination, NYSE Euronext, the publicly traded parent company, had an independent board of directors subject to an independence policy, and the board of directors of NYSE Group, which became a subsidiary of NYSE Euronext, did not.⁸

When ICE acquired NYSE Euronext, the requirement to have a majority of independent directors moved to ICE.⁹ The requirement is in accordance with NYSE listing requirements, which require that listed companies have a majority of independent directors.¹⁰ Accordingly, if

⁸ See Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120) (Order Granting Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Regarding the Proposed Combination Between NYSE Group, Inc. and Euronext N.V.). See also Exhibit 5E to SR-NYSE-2006-120, Section 3.2 (deleting the independence requirements for the NYSE Group board of directors).

⁹ See Securities Exchange Act Release No. 70210 (August 15, 2013), 78 FR 51758 (August 21, 2013) (SR-NYSE-2013-42; SR-NYSEMKT-2013-50; SR-NYSEArca-2013-62) (Order Granting Approval of Proposed Rule Change Relating to a Corporate Transaction in which NYSE Euronext Will Become a Wholly-Owned Subsidiary of IntercontinentalExchange Group, Inc.). IntercontinentalExchange Group, Inc., subsequently changed its name to IntercontinentalExchange, Inc. See Exchange Act Release No. 72158 (May 13, 2014), 79 FR 28784 (May 19, 2014) (SR-NYSE-2014-23) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Name Changes of Its Ultimate Parent, IntercontinentalExchange Group, Inc., and Its Indirect Parents, IntercontinentalExchange, Inc. and NYSE Euronext Holdings LLC). The ICE Board is subject to the requirements of the Independence Policy of the Board of Directors of Intercontinental Exchange, Inc., available at https://s2.q4cdn.com/154085107/files/doc_downloads/governance_docs/ICE-Independence-Policy.pdf. The bylaws of ICE require that the members of the ICE Board take into consideration the effect that ICE's actions would have on the ability of the Exchange to carry out its responsibility under Exchange Act. See Ninth Amended and Restated Bylaws of Intercontinental Exchange, Inc. ("ICE Bylaws"), Article III, Section 3.14. The ICE Bylaws are available at https://s2.q4cdn.com/154085107/files/doc_downloads/governance_docs/2022/ICE-Ninth-Amended-and-Restated-Bylaws.pdf.

¹⁰ See NYSE Listed Company Manual Sections 303A.01 (Independent Directors) and 303A.02(a)(ii) (Independence Tests), and ICE Bylaws, Article III, Section 3.4.

the ICE Board fixed the compensation of the Exchange Board, the decision would be made by a body that required to have at least a majority of its members be independent.

If the ICE Compensation Committee fixed the Exchange Board compensation,¹¹ compensation decisions would be made by a body that is made up of independent members. As a company listed on the NYSE, ICE is required to have a compensation committee that is composed entirely of independent directors that satisfy the additional independence requirements specific to compensation committee members.¹²

The proposed rule text is more comprehensive than the Exchange Bylaws provision it would replace since, unlike Exchange Bylaws Section 3.15, it would provide that directors may receive compensation on a per-meeting basis or as a salary and clarify the form of compensation that may be granted.

As a result of the proposed change, the provision governing director compensation would move from the Exchange Bylaws to the Certificate, which would result in a change to what body can approve changes to the relevant provision. More specifically, Bylaw Section 3.15 may be amended by the Board or by action of NYSE Group, as the stockholder of the Exchange. By contrast, the Certificate can be amended by the Corporation but first must be approved by the

¹¹ Pursuant to its Charter, the Compensation Committee of the ICE Board is charged with, among other things, reviewing and approving compensation for the members of the board of directors of any ICE subsidiary, which includes the Exchange. See Charter of the Compensation Committee of the Board of Directors of ICE, at https://s2.q4cdn.com/154085107/files/doc_downloads/governance_docs/2022/Intercontinental-Exchange-Inc.-Compensation-Committee-Charter-March-3-2022.pdf. See also NYSE Listed Company Manual Section 303A.05(b).

¹² See NYSE Listed Company Manual Section 303A.05(a) (Compensation Committee). See also NYSE Listed Company Manual Section 303A.02(a)(ii) and ICE annual report on Form 10-K for the fiscal year ended December 31, 2021, at 19, available at <https://www.sec.gov/ix?doc=/Archives/edgar/data/1571949/000157194922000006/ice-20211231.htm>.

Board. Accordingly, any change proposed to the compensation provision would require Board approval and could no longer be amended by action of the NYSE Group.

The Exchange operates as a separate self-regulatory organization and has rules, and membership rosters distinct from the rules, membership rosters and listings of its affiliates the NYSE, NYSE American LLC, NYSE Arca, Inc., and NYSE Chicago, Inc. (collectively with the Exchange, the “NYSE Group Exchanges”). At the same time, however, the Exchange believes it is important for each of the NYSE Group Exchanges to have a consistent approach to corporate governance in certain matters, to simplify complexity and create greater consistency among the NYSE Group Exchanges.¹³ To that end, each of the NYSE Group Exchanges is proposing a substantially similar change to its governing documents.¹⁴

The proposed amendment is based on Article III, Section 3.13 (Compensation of Directors) of the ICE Bylaws.¹⁵

Additional Proposed Amendments

The Exchange proposes to make the following non-substantive technical and conforming changes to the Certificate:¹⁶

¹³ See Exchange Act Release No. 84644 (November 21, 2018), 83 FR 61177 (November 28, 2018) (SR-NYSE-2018-24) (Notice of Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Certificate of Incorporation and Bylaws).

¹⁴ See SR-NYSE-2023-13; SR-NYSEAmer-2023-15, SR-NYSEArca-2023-18, and SR-NYSECHX-2023-10. Presently, three different entities fix the compensation of the boards of directors of the NYSE Group Exchanges: NYSE Group fixes the compensation of the directors of NYSE National, the NYSE, and NYSE American LLC; NYSE Chicago Holdings, Inc. fixes the compensation of the directors of NYSE Chicago, Inc.; and the board of directors of NYSE Arca, Inc. fixes its own compensation.

¹⁵ See ICE Bylaws, Article III, Section 3.13.

¹⁶ See 83 FR 61177, note 13, supra (proposing to make conforming and non-substantive changes to the title, cover page, and table of contents of the Fifth Amended and Restated

- In the first paragraph, change “NYSE NATIONAL, INC.” to “NYSE National, Inc.”
- In Sections EIGHTH and ELEVENTH, add “Amended and Restated” before “Certificate of Incorporation.”
- Update the date in the signature line.

In a non-substantive change, the Exchange proposes to update the title of the Exchange Bylaws to make them the “Eighth Amended and Restated By-laws of NYSE National, Inc.”

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,¹⁷ in general, and furthers the objectives of Section 6(b)(1)¹⁸ in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,¹⁹ in that it 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 facilitating transactions in securities, to remove impediments to and perfect

Bylaws of the Exchange and Amended and Restated Certificate of Incorporation of the Exchange).

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(1).

¹⁹ 15 U.S.C. 78f(b)(5).

the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed change would allow the Exchange to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply with the provisions of the Exchange Act by its members and persons associated with members, because the Exchange Board would no longer have its compensation fixed by a body whose members are not subject to independence requirements. The Exchange believes that it is more advisable to have compensation determinations made by a body that is required to have at least a majority of its members be independent, like the ICE Board or ICE Compensation Committee. Otherwise, the compensation could be fixed by a body that is made up of employees or persons related to the Exchange. Indeed, the change would be consistent with prior practice, as immediately after the combination between New York Stock Exchange, Inc. and Archipelago Holdings, Inc., the members of the board of directors of NYSE Group were both subject to independence requirements and expected to fix the compensation of the Exchange Board through a compensation committee.²⁰ For the same reason, the Exchange believes that the change would contribute to the orderly operation of the Exchange and would promote the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

The Exchange believes that, because at least a majority of the members of the ICE Board and all of the ICE Compensation Committee must be independent, there is no substantial

²⁰ 71 FR 11251, supra note 7, at 11256 (“It is expected that, upon completion of the Merger, the NYSE Group board of directors will have [a] . . . compensation committee”) and 11257 (“[T]he board of directors of New York Stock Exchange LLC is not expected to have its own committees and that any necessary functions with respect to . . . compensation . . . will be performed by the relevant committee[] of the NYSE Group board of directors”).

likelihood of a potential conflict of interest. Indeed, the Exchange believes that the proposal lessens the potential for conflicts of interest by eliminating the fixing of compensation by an entity that is not subject to any independence requirements. Further, the governing documents of ICE require that the members of the ICE Board take into consideration the effect that ICE's actions — including actions by the ICE Board or ICE Compensation Committee — would have on the ability of the Exchange “to carry out [its] responsibilities under the Exchange Act” and “to engage in conduct that fosters and does not interfere with the ability of the Exchange[] . . . to remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system; and . . . to protect investors and the public interest.”²¹ For the foregoing reasons, the Exchange believes that the proposed change would allow the Exchange to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply with the provisions of the Exchange Act by its members and persons associated with members, and would contribute to the orderly operation of the Exchange and would promote the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

The Exchange believes that moving the provision governing director compensation from the Exchange Bylaws to the Certificate would allow the Exchange to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply with the provisions of the Exchange Act by its members and persons associated with members, and would contribute to the orderly operation of the Exchange and would promote the maintenance of a fair and orderly

²¹ See ICE Bylaws, Article III, Section 3.14(a). Although it is not currently a listing market, the Exchange has adopted a rule prohibiting the listing of affiliate securities and setting forth additional reporting requirements. See Rule 3.1 (Additional Requirements for Listed Securities Issued by Intercontinental Exchange, Inc. or its Affiliates).

market, the protection of investors and the protection of the public interest, because any change proposed to the compensation provision would require Board approval. As a result, any change to the compensation provision in the Certificate would have to be approved by a body subject to the requirements that at least half of the directors of the Exchange be independent and at least 20% of them must be individuals nominated by the permit holders of the Exchange.²² The provision would not be able to be amended by NYSE Group alone, whose directors are not subject to independence requirements.

Moreover, the Exchange believes that the proposal would promote greater consistency in the compensation philosophy and director compensation structure across affiliated exchanges, thereby promoting the maintenance of a fair and orderly markets, the protection of investors and the public interest. As noted above, the other NYSE Group Exchanges are filing similar proposed changes to their governing documents. By locating the authority to fix compensation in the hands of the ICE Board or the ICE Compensation Committee, the proposed change would permit compensation for each board of directors of an NYSE Group Exchange to be set centrally and with greater uniformity and consistency across affiliated exchanges. The Exchange believes that such conformity would streamline the NYSE Group Exchanges' corporate processes and create more equivalent compensation processes among them, to the benefit of both investors and the public interest. The proposal also reflects the fact that, no matter the size or role of the relevant NYSE Group Exchange, every NYSE Group Exchange board of directors must manage its business while considering the government of the exchange as an "exchange" within the meaning of the Exchange Act.²³

²² See Exchange Bylaws, Article III, Section 3.2(a) (General Composition).

²³ See By-laws, Article III, Section 3.1 (Powers) and Article X, Section 10.1 (Management of the Exchange); Thirteenth Amended and Restated Operating Agreement of NYSE,

The Exchange believes that the more comprehensive provision would remove impediments to and perfect the mechanism of a free and open market, as it would make the provision relating to director compensation more comprehensive and transparent for market participants, making it so that they can more easily navigate and understand the governing documents. As noted, the proposed text is more comprehensive than the provision it would replace and would set forth additional detail regarding the compensation that directors may receive, such as whether directors may receive compensation on a per-meeting basis or as a salary and what form of compensation may be granted. The Exchange believes that the greater additional detail would add transparency and clarity to the Exchange's governing documents and would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency and clarity, thereby reducing potential confusion.

Finally, the proposed non-substantive technical and conforming changes would remove impediments to and perfect the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the governing documents. The proposed non-substantive amendments also would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency and clarity, thereby reducing potential confusion.

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

Article II, Section 2.03(k); Twelfth Amended and Restated Operating Agreement of NYSE American, Inc., Article II, Section 2.03(k) (Board); Bylaws of NYSE Arca, Inc., Article III, Section 3.01 (Powers); and Second Amended and Restated Bylaws of NYSE Chicago, Inc., Article II, Section 1 (Powers) and Article IX, Sec. 1 (Management of the Corporation).

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with the corporate governance of the Exchange.

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

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

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act²⁴ and Rule 19b-4(f)(6) thereunder.²⁵

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)²⁶ of the Act to determine whether the proposed rule change should be approved or disapproved.

²⁴ 15 U.S.C. 78s(b)(3)(A).

²⁵ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²⁶ 15 U.S.C. 78s(b)(2)(B).

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSENAT-2023-08 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-NYSENAT-2023-08. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the

Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-NAT-2023-08, 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.²⁷

Sherry R. Haywood

Assistant Secretary

²⁷ 17 CFR 200.30-3(a)(12).