

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-84635; File No. SR-NYSE-2018-56)

November 20, 2018

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Article II, Section 2.03(h)(ii) and Article VI of Its Operating Agreement

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on November 14, 2018, New York Stock Exchange LLC (“NYSE” or “Exchange”) 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 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 agree [sic] to harmonize certain provisions with similar provisions in the governing documents of the Exchange’s national securities exchange affiliates and parent companies, as well as make clarifying, technical and conforming changes. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

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

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

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

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

(1) Generally

The Exchange proposes to amend Article II, Section 2.03(h)(ii) (Board) and Article VI (Indemnification and Exculpation) of the Eleventh Amended and Restated Operating Agreement of the Exchange (“Operating Agreement”) to harmonize certain provisions with similar provisions in the governing documents of the Exchange’s national securities exchange affiliates<sup>4</sup> and parent companies, as well as make clarifying, technical and conforming changes.

The Exchange is owned by NYSE Group, Inc., which in turn is indirectly wholly owned by NYSE Holdings LLC (“NYSE Holdings”). NYSE Holdings is a wholly owned subsidiary of Intercontinental Holdings, Inc. (“ICE Holdings”), which is in turn wholly owned by the Intercontinental Exchange, Inc. (“ICE”).<sup>5</sup>

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<sup>4</sup> The Exchange has four registered national securities exchange affiliates: NYSE America [sic] LLC (“NYSE American”), NYSE Arca, Inc. (“NYSE Arca”), NYSE National, Inc. (“NYSE National”), and Chicago Stock Exchange, Inc. (“CHX” and together with the Exchange, NYSE American, NYSE Arca, and NYSE National, the “NYSE Group Exchanges”). CHX has filed to change its name to NYSE Chicago, Inc. See Exchange Act Release No. 84494 (October 26, 2018), 83 FR 54953 (November 1, 2018) (SR-CHX-2018-05) (“NYSE Chicago Release”) (notice of filing and immediate effectiveness of proposal to reflect name changes of the Exchange and its direct parent company and to amend certain corporate governance provisions). The rule changes set forth in the NYSE Chicago Release will become operative upon the Second Amended and Restated Certificate of Incorporation of Chicago Stock Exchange, Inc. (“NYSE Chicago Certificate”) becoming effective pursuant to its filing with the Secretary of State of the State of Delaware.

<sup>5</sup> See Exchange Act Release No. 72158 (May 13, 2014), 79 FR 28784 (May 19, 2014)

The Exchange operates as a separate self-regulatory organization and has rules, membership rosters and listings distinct from the rules, membership rosters and listings of the other 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.<sup>6</sup> The proposed amendments to the Operating Agreement reflect the expectation that the Exchange will continue to be operated with a governance structure substantially similar to that of other NYSE Group Exchanges.

The proposed amendment to Article II, Section 2.03(h)(ii) is based on the Second Amended and Restated By-Laws of NYSE Chicago, Inc. (“NYSE Chicago Bylaws”).<sup>7</sup> The proposed amendments to Article VI are based on the Eighth Amended and Restated Bylaws of Intercontinental Exchange, Inc. (“ICE Bylaws”) and the Sixth Amended and Restated Bylaws of Intercontinental Exchange Holdings, Inc. (“ICE Holdings Bylaws”).

The Exchange proposes to amend the Operating Agreement as follows.

Article II, Section 2.03(h)(ii)

Article II, Section 2.03(h)(ii) establishes the powers and responsibilities of the Regulatory Oversight Committee (“ROC”), and is substantially the same as the related provisions in the governing documents of the other NYSE Group Exchanges.<sup>8</sup> Among other

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(SR-NYSE-2014-23) (notice of filing and immediate effectiveness of proposed rule change relating to name changes of its ultimate parent and its indirect parents).

<sup>6</sup> See NYSE Chicago Release, supra note 4, at 54953.

<sup>7</sup> The NYSE Chicago Bylaws will become operative when the NYSE Chicago Certificate becomes effective pursuant to its filing with the Secretary of State of the State of Delaware. Id.

<sup>8</sup> See Eleventh Amended and Restated Operating Agreement of NYSE American LLC, Article II, Section 2.03(h)(ii); NYSE Arca Rule 3.3; Fifth Amended and Restated Bylaws

things, the provision states that “[t]he Board may, on affirmative vote of a majority of directors, at any time remove a member of the ROC for cause.” The Exchange proposes to add language clarifying that the majority affirmative vote requirement is based on the “directors then in office,” as opposed to total number of seats on the Board. The change would be consistent with Article IV, Section 6 of the NYSE Chicago Bylaws.<sup>9</sup>

## Article VI

### Section 6.02 (Indemnification)

Current Section 6.02 includes provisions related to indemnification by the Exchange. As a wholly-owned subsidiary of ICE, the Exchange believes it appropriate to harmonize the Exchange’s indemnification provisions with those of ICE and the Exchange’s intermediate holding company, ICE Holdings.<sup>10</sup> The same change was made to Article VI of the NYSE Chicago Bylaws.<sup>11</sup>

Accordingly, the Exchange proposes to delete the text of Section 6.02 in its entirety and replace it with proposed text that is substantially similar to the CHX, ICE and ICE Holdings provisions, with the exception of changes to be consistent with the Operating Agreement’s

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of NYSE National, Inc., Article V, Section 5.6; NYSE Chicago Bylaws, Article IV, Section 6.

<sup>9</sup> See NYSE Chicago Release, supra note 4, at 54961. The Exchange understands that NYSE American, NYSE National and NYSE Arca propose to file similar changes to their respective ROC provisions.

<sup>10</sup> See ICE Bylaws, Article X, Section 10.6, and ICE Holdings Bylaws, Article X, Section 10.6.

<sup>11</sup> See NYSE Chicago Release, supra note 4, at 54962-54963. The Exchange understands that NYSE American, NYSE National and NYSE Arca propose to file similar changes to their respective indemnification provisions.

terminology<sup>12</sup> and, in Section 6.02(e), references to the New York Business Corporation Law, rather than the General Corporation Law of the State of Delaware.<sup>13</sup> The proposed text follows:

(a) The Company shall, to the fullest extent permitted by Law (as defined below), as such Law may be amended and supplemented from time to time, indemnify any director or officer made, or threatened to be made, a party to any action, suit or proceeding, whether criminal, civil, administrative or investigative, by reason of being a director or officer of the Company or a predecessor company or, at the Company's request, a director, officer, partner, member, employee or agent of another entity; provided, however, that the Company shall indemnify any director or officer in connection with a proceeding initiated by such person only if such proceeding was authorized in advance by the Board of Directors of the Company. The indemnification provided for in this Section 6.02 shall: (i) not be deemed exclusive of any other rights to which those indemnified may be entitled under any bylaw, agreement or vote of stockholders or disinterested directors or otherwise, both as to action in their official capacities and as to action in another capacity while holding such office; (ii) continue as to a person who has ceased to be a director or officer; and (iii) inure to the benefit of the heirs, executors and administrators of an indemnified person.

(b) Expenses incurred by any such person in defending a civil or criminal action, suit or proceeding by reason of the fact that he is or was a director or officer of the Company (or was serving at the Company's request as a director,

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<sup>12</sup> For example, proposed Section 6.02 uses "officer" instead of "Senior Officers," "Company" instead of "Corporation," and "Section 6.02" instead of "Section 10.6."

<sup>13</sup> The NYSE is a New York limited liability company. CHX, ICE, and ICE Holdings are all organized under the laws of the State of Delaware.

officer, partner, member, employee or agent of another entity) shall be paid by the Company in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the Company as authorized by Law. Notwithstanding the foregoing, the Company shall not be required to advance such expenses to a person who is a party to an action, suit or proceeding brought by the Company and approved by a majority of the Board of Directors of the Company that alleges willful misappropriation of corporate assets by such person, disclosure of confidential information in violation of such person's fiduciary or contractual obligations to the Company or any other willful and deliberate breach in bad faith of such person's duty to the Company or its stockholders.

(c) The foregoing provisions of this Section 6.02 shall be deemed to be a contract between the Company and each director or officer who serves in such capacity at any time while this bylaw is in effect, and any repeal or modification thereof shall not affect any rights or obligations then existing with respect to any state of facts then or theretofore existing or any action, suit or proceeding theretofore or thereafter brought based in whole or in part upon any such state of facts. The rights provided to any person by this bylaw shall be enforceable against the Company by such person, who shall be presumed to have relied upon it in serving or continuing to serve as a director or officer or in such other capacity as provided above.

(d) The Board of Directors in its discretion shall have power on behalf of the Company to indemnify any person, other than a director or officer, made or threatened to be made a party to any action, suit or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that such person, or his or her testator or intestate, is or was an officer, employee or agent of the Company or, at the Company's request, is or was serving as a director, officer, partner, member, employee or agent of another company or other entity.

(e) For purposes of this Section 6.02, "Law" shall mean the laws governing the indemnification of, and advancement of expenses to, directors, officers, employees and agents of New York corporations, including Section 722 of the New York Business Corporation Law ("Section 722"), with such laws being applicable to the Exchange as if the Exchange were a New York corporation. To assure indemnification under this Section 6.02 of all directors, officers, employees and agents who are determined by the Company or otherwise to be or to have been "fiduciaries" of any employee benefit plan of the Company that may exist from time to time, Section 722 shall, for the purposes of this Section 6.02, be interpreted as follows: an "other enterprise" shall be deemed to include such an employee benefit plan, including without limitation, any plan of the Company that is governed by the Act of Congress entitled "Employee Retirement Income Security Act of 1974," as amended from time to time; the Company shall be deemed to have requested a person to serve an employee benefit plan where the performance by such person of his duties to the Company also imposes duties on, or otherwise involves services by, such person to the plan

or participants or beneficiaries of the plan; excise taxes assessed on a person with respect to an employee benefit plan pursuant to such Act of Congress shall be deemed “fines.”

**Section 6.03 (Non Exclusivity of Rights)**

Current Section 6.03 states that the rights to indemnification and the payment of expenses conferred are not exclusive of any other right a person has. Because the non-exclusivity of rights would now be addressed in the final sentence of proposed Section 6.02(a), the Exchange proposes to delete Section 6.03 in its entirety. The deletion would be consistent with the indemnity provisions of the ICE, ICE Holdings and NYSE Chicago Bylaws, which do not have separate provisions regarding the non-exclusivity of rights.<sup>14</sup>

The remaining sections of Article VI would be renumbered accordingly.

**Additional Proposed Amendments**

The Exchange proposes to make technical and conforming changes to the title, recitals and signature page of the Operating Agreement.

**2. Statutory Basis**

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,<sup>15</sup> in general, and furthers the objectives of Section 6(b)(1)<sup>16</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 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

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<sup>14</sup> See ICE Bylaws, Article X; ICE Holdings Bylaws, Article X; and NYSE Chicago Bylaws, Article VI.

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

<sup>16</sup> 15 U.S.C. 78f(b)(1).

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,<sup>17</sup> 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 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 amendments to the Operating Agreement would contribute to the orderly operation of the Exchange and would enable 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. The proposed changes would create greater conformity between the ROC and indemnification provisions of the Operating Agreement and those of the governing documents of CHX, ICE and ICE Holdings. The Exchange believes that such conformity would streamline the NYSE Group Exchanges' corporate processes, create more equivalent governance processes among them, and also provide clarity to the Exchange's members, which is beneficial to both investors and the public interest. At the same time, the Exchange will continue to operate as a separate self-regulatory organization and to have rules, membership rosters and listings distinct from the rules, membership rosters and listings of the other NYSE Group Exchanges.

For the same reason, the Exchange believes that the greater consistency among the governing documents of the NYSE Group Exchanges, ICE and ICE Holdings would promote the maintenance of a fair and orderly market, the protection of investors and the protection of the

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<sup>17</sup> 15 U.S.C. 78f(b)(5).

public interest. Indeed, the proposed amendments would make the corporate requirements and administrative processes relating to the Board and ROC more similar to those of CHX, which have been established as fair and designed to protect investors and the public interest.<sup>18</sup>

The proposed amendments to effect 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 Exchange further believes that the proposed amendments 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

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 and administration 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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>19</sup> and Rule 19b-4(f)(6) thereunder.<sup>20</sup> Because the proposed rule change does not: (i)

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<sup>18</sup> See, e.g. NYSE Chicago Release, supra note 4; and Exchange Act Release Nos. 83303 (May 22, 2018), 83 FR 24517 (May 29, 2018) (SR-CHX-2018-004).

<sup>19</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>20</sup> 17 CFR 240.19b-4(f)(6).

significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

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)<sup>21</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

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

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2018-56 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.

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<sup>21</sup> 15 U.S.C. 78s(b)(2)(B).

All submissions should refer to File Number SR-NYSE-2018-56. 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-2018-56 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>22</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>22</sup> 17 CFR 200.30-3(a)(12).