

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79376; File No. SR-NYSEARCA-2016-147)

November 22, 2016

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Equities Rule 5.1(c) Regarding the Requirements for the Listing of Securities that are Issued by the Exchange or Any of Its Affiliates

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 November 10, 2016, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) 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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend NYSE Arca Equities Rule 5.1(c) regarding the requirements for the listing of securities that are issued by the Exchange or any of its affiliates. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 NYSE Arca Equities Rule 5.1(c) (Listing of an Affiliate or Entity that Operates and/or Owns a Trading System or Facility of the Corporation) (“Rule 5.1(c)”) regarding the requirements for the listing of securities that are issued by the Exchange or any of its affiliates. The proposed changes are based on Rule 497 of the Exchange’s affiliate New York Stock Exchange LLC (“NYSE”) and Rule 497-Equities of the Exchange’s affiliate NYSE MKT LLC (“NYSE MKT”) (together, “Rule 497”).⁴ The Exchange proposes to amend Rule 5.1(c) to be substantially similar to Rule 497, thereby expanding the Rule 5.1(c) requirements.

Rule 5.1(c) provides that if a “security of an affiliate of the Corporation or any entity that operates and/or owns a trading system or facility of the Corporation” is listed pursuant to the rules of NYSE Arca Equities, then NYSE Arca Equities shall:⁵

- file monthly reports with the Securities and Exchange Commission (“Commission”) regarding its monitoring of the issuer’s compliance with listing standards and trading in the security;
- have an independent accounting firm conduct an annual review of

⁴ NYSE Rule 497 and NYSE MKT Rule 497-Equities are substantially similar. See Securities Exchange Act Release Nos. 79130 (October 21, 2016), 81 FR 74847 (October 27, 2016) (SR-NYSE-2016-67) and 79132 (October 21, 2016), 81 FR 74851 (October 27, 2016) (SR-NYSEMKT-2016-94).

⁵ Rule 5.1(c).

compliance with listing standards and provide a copy of the review to the Commission; and

- notify any non-compliant issuer and provide the Commission with information regarding the non-compliance and plan of remediation.

Rule 497 sets forth similar reporting requirements regarding securities issued by the Exchange’s ultimate parent, Intercontinental Exchange, Inc. (“ICE”), and its affiliates. However, Rule 497 goes further in its requirements than Rule 5.1(c) in several ways.

First, in its first sentence, Rule 5.1(c) states that securities “of an affiliate of the Corporation or any entity that operates and/or owns a trading system or facility of the Corporation”⁶ are subject to its requirements. However, Rule 5.1(c) does not define what constitutes an “affiliate of the Corporation.” By contrast, Rule 497 provides the relevant criteria in its definition of “ICE Affiliate”:

“ICE Affiliate” means ICE and any entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with ICE, where “control” means that one entity possesses, directly or indirectly, voting control of the other entity either through ownership of capital stock or other equity securities or through majority representation on the board of directors or other management body of such entity.⁷

A second, substantive difference between the rules is that, unlike Rule 5.1(c), Rule 497 applies not just to securities issued by ICE Affiliates, but also to any listed option on such

⁶ Id.

⁷ NYSE Rule 497(a)(1) and NYSE MKT Rule 497-Equities(a)(1). ICE is the Exchange’s ultimate parent. Unlike Rule 5.1(c), under Rule 497 an entity that operates and/or owns a trading system or facility of the relevant exchange would not be an ICE Affiliate unless it meets the definition’s control requirements.

securities, as set forth in the definition of “Affiliate Security.”⁸ Also unlike Rule 5.1(c), Rule 497 has pre-listing requirements that must be met before any Affiliate Security can be listed, including pre-listing approval by the relevant Regulatory Oversight Committee (each, a “ROC”) of the board of directors.⁹ Finally, Rule 497 requires quarterly, not monthly reports, and both the quarterly and annual reports must be provided to the relevant ROC.¹⁰

The Exchange proposes to include the definitions of “ICE Affiliate” and “Affiliate Security” in revised Rule 5.1(c), adding them as a new sub-paragraph (a), together with a definition of “NYSE Arca Equities, Inc.” stating that it is a wholly owned subsidiary of ICE. A new sub-paragraph (b) would incorporate the Rule 497 pre-listing requirements. The existing reporting requirements would be included as sub-paragraphs (c)(1)-(c)(3), the text of which would be revised consistent with Rule 497.

As a result of such changes, under the proposed Rule 5.1(c), prior to listing any security issued by an ICE Affiliate or a new class of options on a security issued by an ICE Affiliate, Exchange regulatory staff would be required to make a finding that the security or option class satisfied the Exchange’s rules for listing, and the Exchange’s ROC would be required to approve such finding. Throughout the continued listing and trading of the Affiliate Security on the Exchange, NYSE Arca Equities would prepare quarterly reports and have annual reviews conducted by an independent accounting firm, providing copies of both reports to the Commission and the Exchange’s ROC. Finally, if an Affiliate Security were not in compliance with listing standards, Exchange regulatory staff would notify the issuer, request a plan of compliance, and provide the Commission with information regarding the non-compliance and

⁸ NYSE Rule 497(a)(2) and NYSE MKT Rule 497-Equities(a)(2).

⁹ NYSE Rule 497(b) and NYSE MKT Rule 497-Equities(b).

¹⁰ NYSE Rule 497(c)(1)-(2) and NYSE MKT Rule 497-Equities(c)(1)-(2).

plan of compliance.

Rule 497 requires that the quarterly report describe the monitoring of the Affiliate Security's compliance with applicable listing standards, including the Affiliate Security's compliance with both the minimum share price requirement and the quantitative listing requirements. Because NYSE Arca Equities requirements differ from those of NYSE and NYSE MKT, proposed Rule 5.1(c)(1) would include "bid price requirement" in place of "minimum share price requirement"¹¹ and "quantitative and qualitative maintenance requirements" in place of "quantitative listing requirements."¹² Proposed Rule 5.1(c) would also differ from Rule 497 in that it would refer to the Corporation as well as the Exchange.

Finally, the Exchange notes that the proposed Rule 5.1(c) would be consistent with Bats BZX Exchange, Inc. ("BZX") Rule 14.3 regarding requirements for the listing of securities listed by BZX or any of its affiliates.¹³

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act¹⁴ in general, and Section 6(b)(5)¹⁵ in particular, in that it is designed to prevent

¹¹ See NYSE Arca Equities Rule 5.5(b)(4) (Common Stock—Select Market Companies, Equity Securities and Similar Issues) (maintenance requirement of a share bid price of at least \$3) and NYSE Arca Equities Rule 5.5(h)(4) (Common Stock—Development Stage Companies) (maintenance requirement of a share bid price of at least \$1).

¹² The NYSE Arca Equities rules regarding maintenance requirements provide that the Exchange may consider qualitative factors in determining whether maintenance requirements have been met. See NYSE Arca Equities Rule 5.5(b).02; NYSE Arca Equities NYSE Arca Equities Rule 5.5(g)(1)(C) (Unit Investment Trusts ("UITs")); Rule 5.5(g)(2)(a) (Investment Company Units); NYSE Arca Equities Rule 5.5(h).02 and NYSE Arca Equities Rule 5.5(l) (Other Reasons for Suspending or Delisting).

¹³ See Securities Exchange Act Release No. 77639 (April 18, 2016), 81 FR 23768 (April 22, 2016) (SR-BatsBZX-2016-08).

¹⁴ 15 U.S.C. 78f(b).

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 would remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest by requiring heightened oversight of the listing and trading on the Exchange of Affiliate Securities and related reporting to the Commission and the ROC. The proposed changes would help protect against concerns that the Exchange will not effectively enforce its rules with respect to the listing and trading of such securities. The proposed defined terms would add clarity regarding what entities would be considered to be an affiliate and what securities fall within the scope of the rule. Expanding Rule 5.1(c) to incorporate Exchange-listed options on any security issued by an ICE Affiliate and require pre-listing requirements would strengthen the rule's requirements. In addition, the proposed changes would enhance reporting requirements by requiring NYSE Arca Equities to provide copies of both the annual and quarterly reports to the Commission and the Exchange's ROC. For these reasons, the Exchange believes that the proposed amendments to Rule 5.1(c) would continue to eliminate any perception of a potential conflict of interest if an ICE Affiliate seeks to list a security on the Exchange.

The proposed changes will provide greater harmonization between NYSE Arca Equities, NYSE and NYSE MKT rules of similar purpose, resulting in more comparable and consistent

¹⁵ 15 U.S.C. 78f(b)(5).

information being provided to the Commission and ROCs. As such, the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system.

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 provide market participants with additional specificity and transparency regarding the Exchange's controls that are in place to address the potential conflicts of interest that may arise in the listing of Affiliate Securities on 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 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 Act¹⁶ and Rule 19b-4(f)(6) thereunder.¹⁷

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the 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.

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act¹⁸ normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)¹⁹ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange notes that the proposed rule change would amend Rule 5.1(c) to be substantially similar to Rule 497 of its affiliates NYSE and NYSE MKT, which would result in enhancing the Rule 5.1(c) requirements. The Exchange believes that the proposed rule change would provide market participants with additional specificity and transparency regarding the Exchange's controls that are in place to address the potential conflicts of interest that may arise in the listing of Affiliate Securities on the Exchange. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to implement the proposed changes to Rule 5.1(c) without delay. Therefore, the Commission hereby waives the operative delay and designates the proposal operative upon filing.²⁰

At any time within 60 days of the filing of the 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 to determine whether the proposed rule change should be

¹⁸ 17 CFR 240.19b-4(f)(6).

¹⁹ 17 CFR 240.19b-4(f)(6)(iii).

²⁰ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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. Please include File Number SR-NYSEARCA-2016-147 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-NYSEARCA-2016-147. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the

principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEARCA-2016-147, 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.²¹

Robert W. Errett
Deputy Secretary

²¹ 17 CFR 200.30-3(a)(12).