

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-71395; File No. SR-NYSEMKT-2014-10)

January 24, 2014

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Relating to a Corporate Action in which Its Indirect Parent, NYSE Euronext Holdings LLC, Will Become a Wholly Owned Subsidiary of IntercontinentalExchange, Inc.

Pursuant to Section 19(b)(1)<sup>1</sup> of the U.S. Securities Exchange Act of 1934, as amended (the “Exchange Act”), and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 22, 2014, NYSE MKT LLC (“NYSE MKT”) filed with the U.S. Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which items have been prepared substantially by NYSE MKT. 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

A. Overview of the Proposed Merger

NYSE MKT, a New York limited liability company, registered national securities exchange and self-regulatory organization, is submitting this rule filing (the “Proposed Rule Change”) to the U.S. Securities and Exchange Commission (the “Commission”) in connection with the contribution by IntercontinentalExchange Group, Inc., a Delaware corporation (“ICE Group”), of its 100% membership interest in NYSE Euronext Holdings LLC, a Delaware limited liability company (“NYX Holdings”), which is an

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

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

indirect owner of a 100% interest in NYSE MKT, to another wholly owned subsidiary of ICE Group, IntercontinentalExchange, Inc., a Delaware corporation (“ICE Inc.”).

NYX Holdings owns 100% of the equity interest of NYSE Group, Inc., a Delaware corporation (“NYSE Group”), which in turn directly or indirectly owns (1) 100% of the equity interest of three registered national securities exchanges and self-regulatory organizations (together, the “NYSE Exchanges”) – NYSE MKT, The New York Stock Exchange, LLC (the “Exchange”) and NYSE Arca, Inc. (“NYSE Arca”) – and (2) 100% of the equity interest of NYSE Market (DE), Inc. (“NYSE Market”), NYSE Regulation, Inc. (“NYSE Regulation”), NYSE Arca L.L.C., NYSE Arca Equities, Inc. (“NYSE Arca Equities”) and NYSE Amex Options LLC (“NYSE Amex Options”) (the NYSE Exchanges, together with (x) NYSE Market, NYSE Regulation, NYSE Arca L.L.C., NYSE Arca Equities and NYSE Amex Options and (y) any similar U.S. regulated entity acquired, owned or created after the date hereof, the “U.S. Regulated Subsidiaries” and each, a “U.S. Regulated Subsidiary”). Each of NYSE Arca and the Exchange will be separately filing a proposed rule change in connection with the matters addressed herein that will be substantially the same as the Proposed Rule Change.

Upon completion of ICE Group’s contribution to ICE Inc. of 100% of NYX Holdings (the “Transfer”), each U.S. Regulated Subsidiary will become an indirect wholly owned subsidiary of ICE Inc. ICE Inc. will remain a direct wholly owned subsidiary of ICE Group, a public company that is listed on the Exchange. The Transfer is strictly an internal reorganization that does not affect the interests of ICE Group’s stockholders. The Transfer will not affect the operation of the U.S. Regulated Subsidiaries.

The Transfer is part of the process pursuant to which ICE Group will prepare for the previously announced sale of the continental European cash equity platforms and the derivatives trading on them (the “Euronext Sale”) currently owned by Euronext N.V., a Dutch company with limited liability (“Euronext”) and a wholly owned subsidiary of ICE Group. The Transfer also will facilitate the transitioning of the derivatives businesses of another current subsidiary of Euronext, Liffe Administration and Management (“LAM”), to ICE Futures Europe, a subsidiary of ICE Inc., and will enable ICE Inc. to continue in compliance with certain debt covenants after the Euronext Sale. (The transitioning of the derivatives business of LAM is subject to regulatory approval in the United Kingdom.)

**B. Summary of Proposed Rule Change**

NYSE MKT is proposing that, in connection with the Transfer, the Commission approve the organizational documents of ICE Inc. and amendments to the Amended and Restated Limited Liability Company Agreement of NYX Holdings (“NYX Holdings Operating Agreement”) and the Amended and Restated Bylaws of ICE Group (“ICE Group Bylaws”). The Proposed Rule Change is summarized as follows:

Certificate of Incorporation and Bylaws of ICE Inc. ICE Inc. would take appropriate steps to incorporate voting and ownership restrictions, provisions relating to the qualifications of directors and officers and their submission to jurisdiction, compliance with the federal securities laws, access to books and records, and other matters related to its control of the U.S. Regulated Subsidiaries. Specifically, the Fifth Amended and Restated Certificate of Incorporation of ICE Inc. (the “ICE Inc. Certificate”)<sup>3</sup> and the Second Amended and Restated Bylaws of ICE Inc. (the “ICE Inc.

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<sup>3</sup> The text of the proposed ICE Inc. Certificate is attached to the Proposed Rule

Bylaws”)<sup>4</sup> would contain provisions to incorporate these concepts with respect to itself, as well as its directors, officers, employees and agents (as applicable):

- Voting and Ownership Restrictions in the ICE Inc. Certificate. The ICE Inc. Certificate would contain voting and ownership restrictions that will take effect only in the event ICE Group does not hold all of the issued and outstanding shares of stock of ICE Inc. The ICE Inc. Certificate would restrict any person, either alone or together with its related persons, from having voting control over ICE Inc. shares entitling the holder thereof to cast more than 10% of the then outstanding votes entitled to be cast on a matter or beneficially owning ICE Inc. shares representing more than 20% of the outstanding votes entitled to be cast on a matter. The ICE Inc. Certificate would provide that ICE Inc. will be required to disregard any votes purported to be cast in excess of the voting restriction. In the event that any person(s) exceeds the ownership restrictions, it will be obligated to sell promptly, and ICE Inc. will be obligated to purchase promptly, at a price equal to the par value of such shares and to the extent funds are legally available for such purchase, the number of shares of ICE Inc. necessary so that such person, together with its related persons, will beneficially own shares of ICE Inc. representing in the aggregate no more than 20% of the then outstanding votes entitled to be cast on any matter, after taking into account that such repurchased shares will become treasury shares and will no longer be deemed

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Change as Exhibit 5A.

<sup>4</sup> The text of the proposed ICE Inc. Bylaws is attached to the Proposed Rule Change as Exhibit 5B.

to be outstanding. The ICE Inc. board of directors may waive the voting and ownership restrictions if it makes certain determinations and expressly resolves to permit the voting and ownership that is subject to such restrictions, and such resolutions have been filed with, and approved by, the Commission under Section 19(b) of the U.S. Securities Exchange Act of 1934, as amended (together, with the rules promulgated thereunder, the “Exchange Act”) and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority. The ICE Inc. Certificate further provides that the board of directors may not approve either voting or ownership rights in excess of a 20% threshold with respect to any person that is a Member of the Exchange (an “NYSE Member”), a Member of NYSE MKT (including any person who is a related person of such member, a “NYSE MKT Member”), an ETP Holder of NYSE Arca Equities (an “ETP Holder”), or an OTP Holder or OTP Firm of NYSE Arca, (an “OTP Holder” and “OTP Firm,” respectively), as each of these terms is defined in the ICE Inc. Certificate.

- Jurisdiction. The ICE Inc. Bylaws will provide that ICE Inc. and its directors, and, to the extent they are involved in the activities of the U.S. Regulated Subsidiaries, its officers, and those of its employees whose principal place of business and residence is outside the United States will be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for the purposes of any suit, action or proceedings pursuant to the U.S. federal securities laws and the rules or regulations thereunder, arising

out of, or relating to, the activities of the U.S. Regulated Subsidiaries. In addition, the ICE Inc. Bylaws would provide that, so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the directors, officers and employees will be deemed to be directors, officers and employees of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act. The ICE Inc. Bylaws would provide that ICE Inc. will take reasonable steps necessary to cause its officers, directors and employees to agree and consent in writing to the applicability to them of these jurisdictional and oversight provisions with respect to their activities related to any U.S. Regulated Subsidiary.

- Books and Records. The ICE Inc. Bylaws would provide that for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the books, records and premises of ICE Inc. will be deemed to be the books, records and premises of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act, and that ICE Inc.'s books and records will at all times be made available for inspection and copying by the Commission, and by any U.S. Regulated Subsidiary to the extent they are related to the activities of such U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated Subsidiary has regulatory authority or oversight. In addition, ICE Inc.'s books and records related to the U.S. Regulated Subsidiaries will be maintained within the United States, except that to the extent that books and records may relate to both European subsidiaries and U.S. Regulated Subsidiaries, ICE Inc. may

maintain such books and records either in the home jurisdiction of one or more European subsidiaries or in the United States.

- Restrictions on Amendments to ICE Inc. Certificate and Bylaws. The ICE Inc. Certificate would provide that before any amendment to the ICE Inc. Certificate may be effectuated, such amendment would need to be submitted to the board of directors of each U.S. Regulated Subsidiary and, if so determined by any such board, would need to be filed with, or filed with and approved by, the Commission before such amendment may become effective. The ICE Inc. Bylaws would include the same requirement.
- Additional Matters. The ICE Inc. Bylaws would include provisions regarding cooperation with the Commission and the U.S. Regulated Subsidiaries, compliance with U.S. federal securities laws, confidentiality of information regarding the U.S. Regulated Subsidiaries' self-regulatory function, preservation of the independence of the U.S. Regulated Subsidiaries' self-regulatory function, and directors' consideration of the effect of ICE Inc.'s actions on the U.S. Regulated Subsidiaries' ability to carry out their respective responsibilities under the Exchange Act.
- Proposed Amendments to NYX Holdings Operating Agreement.<sup>5</sup> The NYX Holdings Operating Agreement currently provides that all membership interests in NYX Holdings must be held by ICE Group. In order that ICE Group may contribute all of the membership interests in NYX Holdings to

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<sup>5</sup> The text of the proposed Second Amended and Restated Limited Liability Company Operating Agreement of NYX Holdings is attached to the Proposed Rule Change as Exhibit 5C.

ICE Inc., the NYX Holdings Operating Agreement would be amended to reflect that ICE Inc. is the “Member” and previously was the “Initial Member”, as those terms are used throughout the NYX Holdings Operating Agreement, and to make nonsubstantive conforming changes to the recitals and definitions.

- Proposed Approval of Transfer of NYX Holdings Membership Interests.

NYX Holdings Operating Agreement currently provides that ICE Group, as the sole member, may not transfer or assign any membership interests of NYX Holdings to any person or entity without the Commission’s approval. ICE Group has adopted the resolutions in order to permit ICE Group to transfer its membership interest in NYX Holdings to ICE Inc. and to amend the NYX Holdings Operating Agreement to reflect the change of ownership (the “ICE Group 2013 Resolutions”).<sup>6</sup> NYX Holdings has adopted resolutions making the determinations required under the NYX Holdings Operating Agreement to approve the assumption of ownership by ICE Inc. (the “NYX Holdings Resolutions”).<sup>7</sup>

The proposed Fifth Amended and Restated Certificate of Incorporation of IntercontinentalExchange, Inc., effective as of the consummation of the Transfer; the proposed Second Amended and Restated Bylaws of IntercontinentalExchange, Inc., effective as of the consummation of the Transfer; the proposed Second Amended and

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<sup>6</sup> A copy of the ICE Group 2013 Resolutions is attached to the Proposed Rule Change as Exhibit 5D-1.

<sup>7</sup> A copy of the NYX Holdings Resolutions is attached to the Proposed Rule Change as Exhibit 5E.

Restated Limited Liability Company Agreement of NYSE Euronext Holdings LLC, effective as of the consummation of the Transfer; the resolutions of the Board of Directors of IntercontinentalExchange Group, Inc., adopted by the Board of Directors of IntercontinentalExchange Group, Inc. on December 13, 2013; the resolutions of the Board of Directors of IntercontinentalExchange Group, Inc. that will be adopted by the Board of Directors of IntercontinentalExchange Group, Inc. as of the consummation of the Transfer; the resolutions of the Board of Managers of NYSE Euronext Holdings LLC, that will be adopted by the Board of Directors of NYSE Euronext Holdings LLC; and the proposed Second Amended and Restated Bylaws of IntercontinentalExchange Group, Inc., effective as of the consummation of the Transfer are attached to the Proposed Rule Change as Exhibits 5A, 5B, 5C, 5D-1, 5D-2, 5E and 5F, respectively.

The text of the Proposed Rule Change is available at NYSE MKT, the Commission's Public Reference Room, and on the website of NYSE MKT ([www.nyse.com](http://www.nyse.com)). The text of Exhibits 5A through 5F to the Proposed Rule Change is also available on NYSE MKT's website and on the Commission's website ([www.sec.gov/rules/sro.shtml](http://www.sec.gov/rules/sro.shtml)).

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

In its filing with the Commission, NYSE MKT has included statements concerning the purpose of, and basis for, the Proposed Rule Change. The text of these statements may be examined at the places specified in Item IV below. NYSE MKT 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 purpose of this rule filing is to adopt the rules necessary to permit ICE Group to effect the Transfer.

#### **1. Overview of the Transfer**

NYSE MKT is submitting the Proposed Rule Change to the Commission in connection with the transfer by ICE Group of all membership interests in NYX Holdings to ICE Inc. Other than as described herein and in the separate proposed rule changes filed by each NYSE Exchange, ICE Group, ICE Inc. and the NYSE Exchanges do not plan to make any changes to the regulated activities of the U.S. Regulated Subsidiaries in connection with the Transfer. If ICE Group or ICE Inc. determines to make any such changes to the regulated activities of any U.S. Regulated Subsidiary, it will seek the approval of the Commission. The Proposed Rule Change, if approved by the Commission, will not be effective until the consummation of the Transfer.

ICE Inc. is a wholly owned subsidiary of ICE Group and a sister subsidiary of NYX Holdings. ICE Group will contribute the equity interests in NYX Holdings to ICE Inc., at which point NYX Holdings will become a direct wholly owned subsidiary of ICE Inc., and the U.S. Regulated Subsidiaries owned by NYX Holdings will become indirect wholly owned subsidiaries of ICE Inc. ICE Group will continue as the ultimate parent entity of NYX Holdings through ICE Inc.

#### **2. Overview of ICE Inc. Following the Transaction**

Following the Transfer, ICE Group will continue to hold all of the equity interests in ICE Inc., and ICE Inc. will hold all the membership interests in NYX Holdings. NYX

Holdings will continue to hold (1) 100% of the equity interests of NYSE Group (which, in turn, directly or indirectly holds 100% of the equity interests of the U.S. Regulated Subsidiaries) and (2) 100% of the equity interest of Euronext (which, in turn, directly or indirectly holds 100% of the equity interests in certain regulated trading markets in Belgium, France, the Netherlands, Portugal and the United Kingdom). The Transfer is part of the process pursuant to which ICE Group will prepare for the Euronext Sale.

The ICE Inc. Certificate and Bylaws will include ownership and voting limitations and certain other provisions to satisfy U.S. and European regulatory requirements as described in detail in the Proposed Rule Change. These provisions are modeled on provisions currently in the ICE Group Certificate of Incorporation and Bylaws, as well as those in the NYX Holdings Operating Agreement.

Other than certain modifications described herein, the current corporate structure, governance and self-regulatory independence and separation of each U.S. Regulated Subsidiary will be preserved.

ICE Group and ICE Inc. acknowledge that to the extent either becomes aware of possible violations of the rules of the Exchange, NYSE Arca or NYSE MKT, it will be responsible for referring such possible violations to each such exchange, respectively.

### **3. Proposed Approval of Transfer of NYX Holdings Membership Interests**

Article VII of the current NYX Holdings Operating Agreement provides that the sole Member, ICE Group, may not transfer or assign any membership interests of NYX Holdings to any person or entity unless such transfer shall (1) be filed with and approved by the Commission under Section 19 of the Exchange Act and (2) filed with and approved by the relevant European Regulators under the Applicable European Exchange

Regulations. ICE Group, as sole Member, has adopted the ICE Group 2013 Resolutions in order to permit ICE Group to transfer its membership interests in NYX Holdings to ICE Inc. and to amend the NYX Holdings Operating Agreement to reflect the change of ownership. NYX Holdings has adopted the NYX Holdings Resolutions making the determinations required under the NYX Holdings Operating Agreement to approve the assumption of ownership by ICE Inc. NYSE MKT is requesting approval by the Commission of the ICE Group 2013 Resolutions and the NYX Holdings Resolutions to allow the Transfer to take place.

#### **4. Proposed Amendments to Ownership and Voting Restrictions after the Transfer**

##### Overview

NYSE MKT is proposing that, effective as of the completion of the Transfer, the ICE Inc. Certificate would contain voting and ownership restrictions that are substantially identical to those currently in the ICE Group Certificate and the NYX Holdings Operating Agreement and would restrict any person, either alone or together with its related persons, from having voting control over ICE Inc. shares entitling the holder thereof to cause more than 10% of the votes entitled to be cast on any matter or beneficially owning ICE Inc. shares representing more than 20% of the outstanding votes that may be cast on any matter. These limitations would apply only in the event that ICE Group does not own all of the issued and outstanding stock in ICE Inc. and only for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary or any European Market Subsidiary.

##### Voting and Ownership Restrictions in the ICE Inc. Certificate

Under the Proposed Rule Change, the ICE Inc. Certificate would provide that, in

the event ICE Group does not own all of the issued and outstanding shares of stock of ICE Inc., (1) no person, either alone or together with its related persons (as defined in the ICE Inc. Certificate), may be entitled to vote or cause the voting of shares of stock of ICE Inc. beneficially owned by such person or its related persons, in person or by proxy or through any voting agreement or other arrangement, to the extent that such shares represent in the aggregate more than 10% of the then outstanding votes entitled to be cast on such matter, and (2) no person, either alone or together with its related persons, may acquire the ability to vote more than 10% of the then outstanding votes entitled to be cast on any such matter by virtue of agreements or arrangements entered into with other persons to refrain from voting shares of stock of ICE Inc. (the “ICE Inc. Voting Restriction”).<sup>8</sup> The ICE Inc. Certificate will require ICE Inc. to disregard any votes purported to be cast in excess of the ICE Inc. Voting Restriction.

In addition, the ownership restrictions in the ICE Inc. Certificate would provide that, if such restrictions apply, no person, either alone or together with its related persons, may at any time own beneficially shares of ICE Inc. representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (the “ICE Inc. Ownership Restrictions”).<sup>9</sup> If any person, either alone or together with its related persons, owns shares of ICE Inc. in excess of the ICE Inc. Ownership Restriction, then such person and its related persons are obligated to sell promptly, and ICE Inc. is obligated to purchase promptly, at a price equal to the par value of such shares and to the extent funds are legally available for such purchase, the number of shares of ICE Inc.

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<sup>8</sup> See ICE Inc. Certificate, Article V Section A.

<sup>9</sup> See ICE Inc. Certificate, Article V Section B.

necessary so that such person, together with its related persons, will beneficially own shares of ICE Inc. representing in the aggregate no more than 20% of the then outstanding votes entitled to be cast on any matter, after taking into account that such repurchased shares will become treasury shares and will no longer be deemed to be outstanding.<sup>10</sup>

The ICE Inc. Certificate would provide that the ICE Inc. Voting Restriction and the ICE Inc. Ownership Restriction would apply only for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary.

The ICE Inc. Voting Restriction applies to each person unless and until (1) such person has delivered a notice in writing to the board of directors of ICE Inc., not less than 45 days (or such shorter period as the board of directors of ICE Inc. expressly permits) prior to any vote, of such person's intention, either alone or together with its related persons, to vote or cause the voting of shares of ICE Inc. stock beneficially owned by such person or its related persons in excess of the ICE Inc. Voting Restriction; (2) the board of directors of ICE Inc. has resolved to expressly permit such voting; and (3) such resolution has been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act<sup>11</sup> and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority.<sup>12</sup> Subject to its fiduciary duties under applicable law, the ICE Inc. board of directors may not adopt any resolution pursuant to the foregoing clause (2) unless the board has determined that the exercise of such voting rights (or the entering into of a voting agreement), as applicable:

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<sup>10</sup> See ICE Inc. Certificate, Article V Section B.4.

<sup>11</sup> 15 U.S.C. 78s(b).

<sup>12</sup> See ICE Inc. Certificate, Article V Section A.2.

- will not impair the ability of any U.S. Regulated Subsidiary, ICE Inc., NYX Holdings or NYSE Group to discharge their respective responsibilities under the Exchange Act and the rules and regulations thereunder;
- will not impair the ability of any European Market Subsidiary, ICE Inc., NYX Holdings or Euronext NV to discharge their respective responsibilities under the European Exchange Regulations (as defined in the ICE Inc. Bylaws);
- is otherwise in the best interests of ICE Inc., its stockholder(s), the U.S. Regulated Subsidiaries and the European Market Subsidiaries, and will not impair the Commission's ability to enforce the Exchange Act or the European Regulators' ability to enforce the European Exchange Regulations;
- for so long as ICE Inc. directly or indirectly controls NYSE Arca, Inc. or NYSE Arca Equities or any facility of NYSE Arca, neither such person nor any of its related persons is an ETP Holder, an OTP Holder or an OTP Firm; and
- for so long as ICE Inc. directly or indirectly controls the Exchange or NYSE Market, neither such person nor any of its related persons is a NYSE Member;
- for so long as ICE Inc. directly or indirectly controls NYSE MKT, neither such person nor any of its related persons is an MKT Member; and

- neither such person nor any of its related persons is a U.S. Disqualified Person or a European Disqualified Person (as such terms are defined in the ICE Inc. Certificate).<sup>13</sup>

The ICE Inc. Ownership Restriction applies to each person unless and until (1) such person has delivered a notice in writing to the board of directors of ICE Inc., not less than 45 days (or such shorter period as the board of directors of ICE Inc. expressly permits) prior to the acquisition of any shares of ICE Inc. that would cause such person, either alone or together with its related persons, to exceed the ICE Inc. Ownership Restriction, of such person's intention, either alone or together with its related persons, to acquire such ownership; (2) the board of directors of ICE Inc. has resolved to expressly permit such ownership; and (3) such resolution has been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act<sup>14</sup> and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority.<sup>15</sup> Subject to its fiduciary duties under applicable law, the ICE Inc. board of directors may not adopt any resolution pursuant to the foregoing clause (2) unless the board has determined that such ownership:

- will not impair the ability of any U.S. Regulated Subsidiary, ICE Inc., NYX Holdings or NYSE Group to discharge their respective responsibilities under the Exchange Act and the rules and regulations thereunder;

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<sup>13</sup> See ICE Inc. Certificate, Article V Sections A.3(c)(i), A.3(d)(i) and B.3(c)(i).

<sup>14</sup> 15 U.S.C. 78s(b).

<sup>15</sup> See ICE Inc. Certificate, Article V Section B.2.

- will not impair the ability of any European Market Subsidiary, ICE Inc., NYX Holdings or Euronext NV to discharge their respective responsibilities under the European Exchange Regulations (as defined in the ICE Inc. Bylaws);
- is otherwise in the best interests of ICE Inc., its stockholder(s), the U.S. Regulated Subsidiaries and the European Market Subsidiaries, and will not impair the Commission's ability to enforce the Exchange Act or the European Regulators' ability to enforce the European Exchange Regulations;
- for so long as ICE Inc. directly or indirectly controls NYSE Arca, Inc. or NYSE Arca Equities or any facility of NYSE Arca, neither such person nor any of its related persons is an ETP Holder, an OTP Holder or an OTP Firm;
- for so long as ICE Inc. directly or indirectly controls the Exchange or NYSE Market, neither such person nor any of its related persons is a NYSE Member;
- for so long as ICE Inc. directly or indirectly controls NYSE MKT, neither such person nor any of its related persons is an MKT Member; and
- neither such person nor any of its related persons is a U.S. Disqualified Person or a European Disqualified Person.

In order to allow ICE Inc. to own and vote all of the outstanding common stock of NYX Holdings after the Transfer, ICE Inc. has delivered written notice to the board of NYX Holdings pursuant to the procedures set forth in the NYX Holdings Operating Agreement requesting approval of its voting and ownership of NYX Holdings shares in excess of the Voting Restriction and the Ownership Restriction applicable to NYX Holdings. Among other things, in this notice, ICE Inc. represented to the board of NYX

Holdings that neither it, nor any of its related persons, is (1) an NYSE Member; (2) an NYSE MKT Member; (3) an ETP Holder; (4) an OTP Holder or OTP Firm; or (5) a U.S. Disqualified Person or a European Disqualified Person.

On December 13, 2013, the board of directors of ICE Group adopted the ICE Group 2013 Resolutions to authorize and instruct the transfer ownership of NYX Holdings to ICE Inc. On ● , 2014, the board of managers of NYX Holdings, acting by unanimous written consent, adopted the NYX Holdings Resolutions to permit ICE Inc., either alone or with its related persons, to exceed the Voting Restriction and the Ownership Restriction applicable to NYX Holdings. In adopting such resolutions, the board of managers of NYX Holdings made the necessary determinations set forth in the NYX Holdings Operating Agreement (which are similar to those set forth above) and approved the submission of the Proposed Rule Change to the Commission.

**5. Additional Matters to be Addressed in the ICE Inc. Certificate and Bylaws<sup>16</sup>**

Jurisdiction over Individuals

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that ICE Inc. and its directors, and, to the extent that they are involved in the activities of the U.S. Regulated Subsidiaries, ICE Inc.'s officers and those of its employees whose principal place of business and residence is outside the United States, would be deemed to irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for the purposes of any suit, action or proceeding pursuant to the U.S. federal securities laws,

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<sup>16</sup> The ICE Inc. Certificate and Bylaws will also set forth certain restrictions and requirements relating to ICE Group's [sic] European subsidiaries and applicable European regulatory matters, which will be substantially consistent with the analogous restrictions and requirements applicable with respect to ICE Group's [sic] U.S. Regulated Subsidiaries and U.S. regulatory matters.

and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of the U.S. Regulated Subsidiaries. The ICE Inc. Bylaws would also provide that, with respect to any such suit, action, or proceeding brought by the Commission, ICE Inc. and its directors, officers and employees would (1) be deemed to agree that ICE Inc. may serve as U.S. agent for purposes of service of process in such suit, action, or proceedings relating to ICE Inc. or any of its subsidiaries; and (2) be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise, in any such suit, action, or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that the suit, action, or proceeding is an inconvenient forum or that the venue of the suit, action, or proceedings is improper, or that the subject matter thereof may not be enforced in or by the U.S. federal courts of the Commission.<sup>17</sup>

In addition, the ICE Inc. Bylaws would provide that, so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the directors, officers and employees of ICE Inc. will be deemed to be directors, officers and employees of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act.<sup>18</sup>

The ICE Inc. Bylaws would provide that ICE Inc. will take reasonable steps necessary to cause its directors, officers and employees, prior to accepting a position as an officer, director or employee, as applicable, of ICE Inc. to agree and consent in writing to the applicability to them of these jurisdictional and oversight provisions with respect to

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<sup>17</sup> See ICE Inc. Bylaws, Section 7.1.

<sup>18</sup> See ICE Inc. Bylaws, Section 8.4.

their activities related to any U.S. Regulated Subsidiary.<sup>19</sup>

NYSE MKT anticipates that the functions and activities of each U.S. Regulated Subsidiary generally will be carried out by the officers and directors of such U.S. Regulated Subsidiary, over each of whom the Commission has direct authority pursuant to Section 19(h)(4) of the Exchange Act.<sup>20</sup>

#### Access to Books and Records

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that for so long as ICE Inc. directly or indirectly controls any U.S. Regulated Subsidiary, the books, records and premises of ICE Inc. will be deemed to be the books, records and premises of such U.S. Regulated Subsidiaries for purposes of, and subject to oversight pursuant to, the Exchange Act.<sup>21</sup> In addition, ICE Inc.'s books and records related to the U.S. Regulated Subsidiaries will be maintained within the United States, except that to the extent that books and records may relate to both European subsidiaries and U.S. Regulated Subsidiaries, ICE Inc. may maintain such books and records either in the home jurisdiction of one or more European subsidiaries or in the United States.<sup>22</sup> The ICE Inc. Bylaws also would provide that ICE Inc.'s books and records will at all times be made available for inspection and copying by the Commission, and any U.S. Regulated Subsidiary to the extent they are related to the activities of the U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated Subsidiary has

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<sup>19</sup> See ICE Inc. Bylaws, Section 9.3.

<sup>20</sup> 15 U.S.C. 78s(h)(4).

<sup>21</sup> See ICE Inc. Bylaws, Section 8.4.

<sup>22</sup> See ICE Inc. Bylaws, Sections 8.4 and 8.6.

regulatory authority or oversight.<sup>23</sup>

Additional Matters

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that ICE Inc. will comply with the U.S. federal securities laws and the rules and regulations thereunder, and will cooperate with the Commission and with the U.S. Regulated Subsidiaries pursuant to and to the extent of their respective regulatory authority.<sup>24</sup> In addition, ICE Inc. would be required to take reasonable steps necessary to cause its agents to cooperate with the Commission and, where applicable, the U.S. Regulated Subsidiaries pursuant to their regulatory authority.<sup>25</sup> The ICE Inc. Bylaws would also provide that, in discharging his or her responsibilities as a member of the ICE Inc. board of directors or as an officer or employee of ICE Inc., each such director, officer or employee will (a) comply with the U.S. federal securities laws and the rules and regulations thereunder; (b) cooperate with the Commission; and (c) cooperate with the U.S. Regulated Subsidiaries pursuant to and to the extent of their regulatory authority (but this provision will not create any duty owed by any director, officer or employee of ICE Inc. to any person to consider, or afford any particular weight to, any such matters or to limit his or her consideration of such matters).<sup>26</sup>

The ICE Inc. Bylaws would also provide that all confidential information that comes into the possession of ICE Inc. pertaining to the self-regulatory function of any U.S. Regulated Subsidiary will (a) not be made available to any persons other than to

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<sup>23</sup> See ICE Inc. Bylaws, Section 8.3.

<sup>24</sup> See ICE Inc. Bylaws, Section 9.1.

<sup>25</sup> See id.

<sup>26</sup> See ICE Inc. Bylaws, Section 3.14(b).

those officers, directors, employees and agents of ICE Inc. that have a reasonable need to know the contents thereof; (b) be retained in confidence by ICE Inc. and the officers, directors, employees and agents of ICE Inc.; and (c) not be used for any commercial purposes.<sup>27</sup> In addition, the ICE Inc. Bylaws would provide that these obligations regarding such confidential information will not be interpreted so as to limit or impede (i) the rights of the Commission or the relevant U.S. Regulated Subsidiary to have access to and examine such confidential information pursuant to the U.S. federal securities laws and the rules and regulations thereunder; or (ii) the ability of any officers, directors, employees or agents of ICE Inc. to disclose such confidential information to the Commission or any U.S. Regulated Subsidiary.<sup>28</sup>

In addition, the ICE Inc. Bylaws would provide that ICE Inc. and its directors, officers and employees will give due regard to the preservation of the independence of the self-regulatory function of the U.S. Regulated Subsidiaries (to the extent of each U.S. Regulated Subsidiary's self-regulatory function) and to its obligations to investors and the general public, and will not take any actions that would interfere with the effectuation of any decisions by the board of directors or managers of any U.S. Regulated Subsidiary relating to its regulatory responsibilities (including enforcement and disciplinary matters) or that would interfere with the ability of such U.S. Regulated Subsidiary to carry out its responsibilities under the Exchange Act.<sup>29</sup>

Finally, the ICE Inc. Bylaws would provide that each director of ICE Inc. would, in discharging his or her responsibilities, to the fullest extent permitted by applicable law,

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<sup>27</sup> See ICE Inc. Bylaws, Section 8.1.

<sup>28</sup> See ICE Inc. Bylaws, Section 8.2.

<sup>29</sup> See ICE Inc. Bylaws, Section 9.4.

take into consideration the effect that ICE Inc.'s actions would have on the ability of (a) the U.S. Regulated Subsidiaries to carry out their responsibilities under the Exchange Act; and (b) the U.S. Regulated Subsidiaries, NYSE Group, NYX Holdings and ICE Inc. to (1) engage in conduct that fosters and does not interfere with the ability of the U.S. Regulated Subsidiaries, NYSE Group, NYX Holdings and ICE Inc. to prevent fraudulent and manipulative acts and practices in the securities markets; (2) promote just and equitable principles of trade in the securities markets; (3) foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; (4) remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system; and (5) in general, protect investors and the public interest.<sup>30</sup>

#### Amendments to the ICE Inc. Certificate and Bylaws

Under the Proposed Rule Change, the ICE Inc. Bylaws would provide that, before any amendment to or repeal of any provision of the ICE Inc. Bylaws shall be effective, such amendment or repeal shall be submitted to the board of directors of each U.S. Regulated Subsidiary (or the boards of directors of their successors) and if any or all of such boards of directors determine that, before such amendment or repeal may be effectuated, the same must be filed with, or filed with and approved by, the Commission pursuant to Section 19 of the Exchange Act and the rules promulgated thereunder, then

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<sup>30</sup> See ICE Inc. Bylaws, Section 3.14(a). This requirement would not, however, create any duty owed by any director, officer or employee of ICE Inc. to any person to consider, or afford any particular weight to, any of the foregoing matters or to limit his or her consideration to such matters. See ICE Inc. Bylaws, Section 3.14(c).

the same will not be effectuated until filed with, or filed with and approved by, the Commission, as the case may be.<sup>31</sup> These requirements would also apply to any action by ICE Inc. that would have the effect of amending or repealing any provisions of the ICE Inc. Certificate.<sup>32</sup>

#### **6. Proposed Amendment to the NYX Holdings Operating Agreement**

In addition, NYSE MKT proposes that the NYX Holdings Operating Agreement be amended to reflect that ICE Inc. will be the sole member of the LLC as a result of ICE Group's transfer of the membership interest in NYX Holdings to ICE Inc.<sup>33</sup> The NYX Holdings Operating Agreement also would be amended to reflect that ICE Inc. previously was the "Initial Member", to delete references to NYSE Euronext LLC and to make nonsubstantive conforming changes to the recitals and definitions.

#### **7. Proposed Amendment to the ICE Group Bylaws**

The provisions in the ICE Group Certificate establishing the standard for each director's approval of ownership or voting rights in excess of the limitations in the ICE Group Certificate do not currently require a director to consider whether such approval would impair the ability of ICE Inc. and NYX Holdings to comply with the Exchange Act and the rules and regulations thereunder.<sup>34</sup> Also, the provisions in the ICE Group Bylaws establishing the standards for the Board's approval of any action by ICE Group does not currently require a director to take into consideration the effect that such action would have on the ability of ICE Inc. and NYX Holdings (a) to engage in conduct that

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<sup>31</sup> See ICE Inc. Bylaws, Section 11.3.

<sup>32</sup> See ICE Inc. Certificate, Article IX(C).

<sup>33</sup> See NYX Holdings Operating Agreement, Preamble.

<sup>34</sup> ICE Group Certificate, Article V, Sections A.3(a)(i) and B.3(a)(i).

fosters and does not interfere with the ability of each such entity to prevent fraudulent and manipulative acts and practices in the securities markets; (b) to promote just and equitable principles of trade in the securities markets; (c) to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; (d) 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 (e) in general, to protect investors and the public interest.<sup>35</sup> Under the Proposed Rule Change, the ICE Group Bylaws would be amended to add references to ICE Inc. and NYX Holdings in each such provision.<sup>36</sup>

## 2. Statutory Basis

NYSE MKT believes that this filing is consistent with Section 6(b) of the Exchange Act<sup>37</sup> in general, and furthers the objectives of Section 6(b)(1)<sup>38</sup> in particular, in that it enables NYSE MKT 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 NYSE MKT. With respect to the ability of the Commission to enforce the Exchange Act as it applies to the U.S. Regulated Subsidiaries after the Transfer, the U.S. Regulated

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<sup>35</sup> ICE Group Bylaws, Section 3.14(a)(3).

<sup>36</sup> Resolutions of the Board of Directors of ICE Group approving these amendments are attached to the Proposed Rule Change as Exhibit 5D-2 (the “ICE Group 2014 Resolutions”). The proposed amendments to the ICE Group Bylaws are attached as Exhibit 5F to the Proposed Rule Change. See Proposed ICE Group Bylaws 3.14(a)(3) and 3.15(g).

<sup>37</sup> 15 U.S.C. 78f(b).

<sup>38</sup> 15 U.S.C. 78f(b)(1).

Subsidiaries will operate in the same manner following the Transfer as they operate today. Thus, the Commission will continue to have plenary regulatory authority over the U.S. Regulated Subsidiaries, as is the case currently with these entities. The Proposed Rule Change is consistent with and will facilitate an ownership structure that will provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Exchange Act with respect to each U.S. Regulated Subsidiary, its direct and indirect parent entities and its directors, officers, employees and agents to the extent they are involved in the activities of such U.S. Regulated Subsidiary.

NYSE MKT also believes that this filing furthers the objectives of Section 6(b)(5) of the Exchange Act<sup>39</sup> because the Proposed Rule Change summarized herein 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.

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

NYSE MKT 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 relates to an internal reorganization of subsidiaries of ICE Group and is not designed to address any competitive issue in the

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<sup>39</sup> 15 U.S.C. 78f(b)(5).

U.S. securities markets, or have any impact on competition in those markets. The Proposed Rule Change is part of ICE Group's process to implement the Euronext Sale. The Euronext Sale will be subject to review and approval by multiple European regulators.

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

NYSE MKT has neither solicited nor received written comments on the Proposed Rule Change.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days after publication (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the 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:

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-NYSEMKT-2014-10 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEMKT-2014-10. 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-NYSEMKT-2014-10, 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>40</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>40</sup> 17 CFR 200.30-3(a)(12).