

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-80419; File No. SR-NYSEMKT-2017-17)

April 10, 2017

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Amending the Certificate of Incorporation and Bylaws of Its Ultimate Parent Company, Intercontinental Exchange, Inc.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on March 28, 2017, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. On April 6, 2017, the Exchange filed Amendment No. 1 to the proposal.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

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

The Exchange proposes to amend the certificate of incorporation and bylaws of its ultimate parent company, Intercontinental Exchange, Inc. (“ICE”), to (1) update and streamline references to ICE subsidiaries that either are or control national securities exchanges and delete references to other subsidiaries of ICE; (2) eliminate an obsolete cross-reference in ICE’s certificate of incorporation to its bylaws and make a technical correction to a cross-reference

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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.

<sup>4</sup> Amendment No. 1 clarifies that ICE is a public company listed on the NYSE and that the word “indirect” is proposed to be deleted from clause (iii)(y) of the first sentence of Section 2.13(b) of ICE’s bylaws.

within the bylaws; (3) make certain simplifying or clarifying changes in ICE’s bylaws relating to the location of stockholder meetings, quorum requirements, and requirements applicable to persons entitled to nominate directors or make proposals at a meeting of ICE’s stockholders; and (4) replace obsolete references in the bylaws to the Vice Chair with references to the lead independent director. 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 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 ICE’s Third Amended and Restated Certificate of Incorporation (the “ICE Certificate”) and Seventh Amended and Restated Bylaws (the “ICE Bylaws”) to (1) update and streamline references to ICE subsidiaries that either are or control national securities exchanges and delete references to other subsidiaries of ICE; (2) eliminate an obsolete cross-reference in the ICE Certificate to the ICE Bylaws and make a technical correction to a cross-reference within the ICE Bylaws; (3) make certain simplifying or clarifying changes in the ICE Bylaws relating to the location of stockholder meetings, quorum

requirements, and requirements applicable to persons entitled to nominate directors or make proposals at a meeting of ICE's stockholders; and (4) replace obsolete references in the ICE Bylaws to the Vice Chair with references to the lead independent director.

ICE owns 100% of the equity interest in Intercontinental Exchange Holdings, Inc. ("ICE Holdings"), which in turn owns 100% of the equity interest in NYSE Holdings LLC ("NYSE Holdings"). NYSE Holdings owns 100% of the equity interest of NYSE Group, Inc. ("NYSE Group"), which in turn directly owns 100% of the equity interest of the Exchange and its national securities exchange affiliates, the New York Stock Exchange LLC ("NYSE"), NYSE Arca, Inc. ("NYSE Arca") and NYSE National, Inc. ("NYSE National").<sup>5</sup>

#### ICE Certificate

The Exchange proposes to amend the limitations on voting and ownership in Article V of the ICE Certificate to update and streamline references to ICE subsidiaries that are national securities exchanges or that control national securities exchanges, as well as to delete references to other subsidiaries of ICE. In addition, it proposes to revise the amendment provision in Article X of the ICE Certificate to remove an obsolete reference.

#### Limitations on Voting and Ownership

Article V of the ICE Certificate establishes voting limitations and ownership concentration limitations on owners of ICE common stock above certain thresholds for so long as ICE owns any U.S. Regulated Subsidiary. By reference to the ICE Bylaws, "U.S. Regulated Subsidiaries" is defined to mean the four national securities exchanges owned by ICE (the Exchange, NYSE, NYSE Arca, and NYSE National), NYSE Arca, LLC, and NYSE Arca

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<sup>5</sup> ICE is a publicly traded company listed on the NYSE. The Exchange's affiliates NYSE, NYSE Arca, and NYSE National have each submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSE-2017-13, SR-NYSEArca-2017-29, and SR-NYSENAT-2017-01.

Equities, Inc. (“NYSE Arca Equities”), or their successors, in each case to the extent that such entities continue to be controlled, directly or indirectly, by ICE.<sup>6</sup>

Article V of the ICE Certificate also authorizes ICE’s Board of Directors to grant exceptions to the voting and ownership concentration limitations if the Board of Directors makes certain determinations. Those include determinations that such an exception would not impair the ability of ICE, the U.S. Regulated Subsidiaries, ICE Holdings, NYSE Holdings, and NYSE Group to perform their respective responsibilities under the Exchange Act and the rules and regulations thereunder, and that such an exception is otherwise in the best interests of ICE, its stockholders and the U.S. Regulated Subsidiaries.

NYSE MKT proposes to amend Article V to replace references to the U.S. Regulated Subsidiaries with references to the “Exchanges.” An “Exchange” would be defined as a national securities exchange registered under Section 6 of the Exchange Act<sup>7</sup> that is directly or indirectly controlled by ICE.<sup>8</sup> Accordingly, Article V would no longer include references to NYSE Arca, LLC or NYSE Arca Equities. NYSE MKT believes omitting such entities is appropriate because the Exchange Act definition of “exchange” states that “exchange” “includes the market place and the market facilities maintained by such exchange.”<sup>9</sup> In addition, NYSE Arca, as the national securities exchange, has the regulatory and self-regulatory responsibility for the NYSE Arca options and equities markets.<sup>10</sup> Moreover, the proposed change would align Article V with

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<sup>6</sup> ICE Certificate, Article V, Section A.10; ICE Bylaws, Article III, Section 3.15. NYSE Arca, LLC, is a subsidiary of NYSE Group, and NYSE Arca Equities is a subsidiary of NYSE Arca.

<sup>7</sup> 15 U.S.C. 78f.

<sup>8</sup> See proposed Fourth Amended and Restated Certificate of Incorporation of Intercontinental Exchange, Inc. (“Proposed ICE Certificate”), Article V, Section A.3(a).

<sup>9</sup> 15 U.S.C. 78c(a)(1).

<sup>10</sup> See NYSE Arca Equities Rule 3.4 (“The NYSE Arca, Inc. (‘NYSE Arca Parent’), as a

voting and ownership concentration limits in the certificates of incorporation of other publicly traded companies that own one or more national securities exchanges, which do not include references to subsidiaries other than national securities exchanges.<sup>11</sup>

As noted above, Article V of the ICE Certificate authorizes ICE’s Board of Directors to grant exceptions to the voting and ownership concentration limitations if it makes certain determinations. Such determinations include that the proposed exception would not impair the ability of ICE Holdings, NYSE Holdings and NYSE Group to perform their respective responsibilities under the Exchange Act and the rules and regulations thereunder.<sup>12</sup> NYSE MKT proposes to amend Article V to replace the references to ICE Holdings, NYSE Holdings and NYSE Group with the defined term “Intermediate Holding Companies.”

Finally, Article V includes lengthy provisions listing the different categories of members and permit holders of each of the NYSE, NYSE MKT and NYSE Arca.<sup>13</sup> NYSE MKT proposes to use a new defined term, “Member,” to mean a person that is a “member” of an Exchange within the meaning of Section 3(a)(3)(A) of the Exchange Act.<sup>14</sup> NYSE MKT believes that using “Member” in place of the list of categories of members and permit holders would simplify the provisions and avoid Exchange-by-Exchange descriptions without substantive change. Each of

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self-regulatory organization registered with the Securities and Exchange Commission pursuant to Section 6 of the Exchange Act, shall have ultimate responsibility in the administration and enforcement of rules governing the operation of its subsidiary, NYSE Arca Equities, Inc. (‘Corporation’). See also NYSE Arca Equities Rule 14.1.

<sup>11</sup> See Second Amended and Restated Certificate of Incorporation of CBOE Holdings, Inc. (“CBOE Certificate”), Article Sixth, Sections (a)(ii)(A) and (b)(ii)(A) (referencing “Regulated Securities Exchange Subsidiaries”); and Amended and Restated Certificate of Incorporation of Bats Global Markets, Inc. (“Bats Certificate”), Article Fifth, Section (b)(i) and (ii) (referencing “Exchanges”).

<sup>12</sup> ICE Certificate, Article V, Sections A.3(a)(i) and B.3(a)(i).

<sup>13</sup> See ICE Certificate, Article V, Section A.3(c)(ii) and (d)(ii) and Section A.9.

<sup>14</sup> 15 U.S.C. 78c(a)(3)(A).

the categories listed—an ETP Holder of NYSE Arca Equities (as defined in the NYSE Arca Equities rules of NYSE Arca); an OTP Holder or OTP Firm of NYSE Arca (each as defined in the rules of NYSE Arca); a “member” or “member organization” of NYSE (as defined in the rules of the NYSE) and NYSE MKT<sup>15</sup>—is a “member” of an exchange within the meaning of Section 3(a)(3)(A) of the Exchange Act.<sup>16</sup>

More specifically, the revised ICE Certificate would require, in the case of a person seeking approval to exercise voting rights in excess of 20% of the outstanding votes, that neither such person nor any of its related persons be a Member of an Exchange, instead of referring to the different categories of membership recognized by each Exchange.<sup>17</sup> Similarly, the conditions relating to a person seeking approval to exceed the ownership concentration limitation would be rephrased in the same way.<sup>18</sup> Use of “Member” would permit a simplification, without substantive change, of the portion of the definition of the term “Related Persons” relating to members and trading permit holders.<sup>19</sup>

NYSE MKT believes that the use of “Member” and the changes to remove the Exchange-by-Exchange lists of categories of Members would be appropriate because it would align the provision in the ICE Certificate with voting and ownership concentration limits in the certificates of incorporation of other publicly traded companies that own one or more national securities exchanges, which use a similar description of membership.<sup>20</sup>

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<sup>15</sup> See id.

<sup>16</sup> 15 U.S.C. 78c(a)(3)(A).

<sup>17</sup> See Proposed ICE Certificate, Article V, Section A.3(c)(ii) and (d)(ii).

<sup>18</sup> See Proposed ICE Certificate, Article V, Section B.3(d).

<sup>19</sup> See Proposed ICE Certificate, Article V, Section A.10. For the current definition of “Related Persons,” see ICE Certificate, Article V, Section A.9.

<sup>20</sup> See Bats Certificate, Article Fifth, Sections (a)(ii)(D) and (E) (defining an “Exchange

To implement the proposed changes, NYSE MKT proposes the following amendments to Article V of the ICE Certificate:

- In Article V, Section A.1, the text “any U.S. Regulated Subsidiary (as defined below)” would be replaced with “a national securities exchange registered under Section 6 of the Securities Exchange Act of 1934, as amended (the ‘Exchange Act’).”
- In Article V, Section A.2, the text “Securities Exchange Act of 1934, as amended (the ‘Exchange Act’),” would be replaced with “Exchange Act.”
- In Article V, Section A.3(a), the text “U.S. Regulated Subsidiary” would be replaced with the text “national securities exchange registered under Section 6 of the Exchange Act that is directly or indirectly controlled by the Corporation (each such national securities exchange so controlled, an ‘Exchange’), any entity controlled by the Corporation that is not itself an Exchange but that directly or indirectly controls an Exchange (each such controlling entity, an ‘Intermediate Holding Company’) or”; the text “, Intercontinental Exchange Holdings, Inc. (‘ICE Holdings’), NYSE Holdings LLC (‘NYSE Holdings’) or NYSE Group, Inc. (‘NYSE Group’) (if and to the extent that NYSE Group continues to exist as a separate entity)” would be deleted; and “the U.S. Regulated Subsidiaries” would be replaced with “each Exchange.”

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Member” as “a Person that is a registered broker or dealer that has been admitted to membership in any national securities exchange registered under Section 6 of the Act with the Securities and Exchange Commission... that is a direct or indirect subsidiary of” Bats Global Markets, Inc.); and CBOE Certificate, Article Sixth, Sections (a)(ii)(C)(y) and (b)(ii)(D) (defining a “Trading Permit Holder” “as defined in the Bylaws of any Regulated Securities Exchange Subsidiary as they may be amended from time to time”).

- In Article V, Section A.3(c), “and” would be added between (i) and (ii); the text “NYSE Arca, Inc. (‘NYSE Arca’) or NYSE Arca Equities, Inc. (‘NYSE Arca Equities’) or any facility of NYSE Arca” would be replaced with “one or more Exchanges”; and the text “a Member (as defined below) of any Exchange” would replace the text from “an ETP Holder (as defined in the NYSE Arca Equities rules of NYSE Arca” through the end of the paragraph.
- In Article V, Section A.3(d), “and” would be added between (i) and (ii); the text “NYSE Arca or NYSE Arca Equities or any facility of NYSE Arca” would be replaced with “one or more Exchanges”; and the text “a Member of any Exchange” would replace the text from “an ETP Holder” through the end of the paragraph.
- The definition of “Member” would be added as new Article V, Section A.8, defined to “mean a Person that is a ‘member’ of an Exchange within the meaning of Section 3(a)(3)(A) of the Exchange Act.” Article V, Sections A.8 and A.9 would be renumbered as Sections A.9 and A.10, respectively.
- In Article V, Section A.9 (which would be renumbered A.10), the definition of the term “Related Person” would be simplified to eliminate the Exchange-by-Exchange definition, as follows:
  - In Section A.10(d), the text “‘member organization’ (as defined in the rules of New York Stock Exchange, as such rules may be in effect from time to time), any ‘member’ (as defined in the rules of New York Stock Exchange, as such rules may be in effect from time to time)” would be replaced with “Member, any Person”;



- In Section A.10(e), the text “an OTP Firm, any OTP Holder that is associated with such Person” would be replaced with “natural person and is a Member, any broker or dealer that is also a Member with which such Person is associated”;
- “and” would be added between Sections A.10(g) and (h); and
- Sections A.10(i) through (l) would be deleted.
- The definition of “U.S. Regulated Subsidiary” and “U.S. Regulated Subsidiaries” in Article V, Section A.10 would be deleted.
- In Article V, Section B.1, the term “Exchange” would replace the term “U.S. Regulated Subsidiary.”
- In Article V, Section B.3(a), the text “Exchange, Intermediate Holding Company or” would replace the text “U.S. Regulated Subsidiaries,”; the text “ICE Holdings, NYSE Holdings or NYSE Group (if and to the extent that NYSE Group continues to exist as a separate entity)” would be deleted; and “each Exchange” would replace “the U.S. Regulated Subsidiaries.”
- In Article V, Section B.3(d), the text “NYSE Arca or NYSE Arca Equities or any facility of NYSE Arca” would be replaced with “any Exchange”; and the text “an ETP Holder” through the end of the paragraph would be replaced with “a Member of any Exchange.”
- The word “and” would be added between Article V, Section B.3(c) and (d); and Article V, Section B.3(e) and (f) would be deleted.

#### Amendments

In addition to the amendments to Article V, NYSE MKT proposes to amend Article X (Amendments) of the ICE Certificate.

Clause (A) of Article X requires the vote of 80% of all outstanding shares entitled to vote in order to reduce the voting requirement set forth in Section 11.2(b) of the ICE Bylaws. However, Section 11.2(b) of the ICE Bylaws was deleted in 2015 after the sale by ICE of the Euronext business.<sup>21</sup> Accordingly, NYSE MKT proposes to delete the requirement.

Clause (B) of Article X currently requires that, so long as ICE controls any of the U.S. Regulated Subsidiaries, any proposed amendment or repeal of any provision of the ICE Certificate must be submitted to the boards of the NYSE, NYSE Market, NYSE Regulation, NYSE Arca, NYSE Arca Equities, and NYSE MKT for a determination as to whether such amendment or repeal must be filed with the Commission under Section 19 of the Exchange Act.<sup>22</sup> NYSE MKT proposes that, in Clause (B) of Article X, the text “of the U.S. Regulated Subsidiaries” would be replaced with “Exchange”; and “New York Stock Exchange, NYSE Market, NYSE Regulation, Inc., NYSE Arca, NYSE Arca Equities and NYSE MKT” would be replaced with “each Exchange.” NYSE MKT believes that the use of “Exchange” is appropriate for the reasons discussed above.

#### Additional Changes

The ICE Certificate includes references to NYSE Market (DE), Inc., defined as “NYSE Market,” and NYSE Regulation, Inc. (“NYSE Regulation”). NYSE Market and NYSE Regulation were previously parties to a Delegation Agreement whereby the NYSE delegated certain regulatory functions to NYSE Regulation and certain market functions to NYSE Market.

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<sup>21</sup> See Securities Exchange Act Release No. 74930 (May 12, 2015), 80 FR 28315 (May 18, 2015) (SR-NYSEMKT-2015-32).

<sup>22</sup> 15 U.S.C. 78s.

The Delegation Agreement was terminated when the NYSE re-integrated its regulatory and market functions. As a result, the two entities ceased being regulated subsidiaries.<sup>23</sup> NYSE Regulation was subsequently merged out of existence. The proposed changes described above would delete all references to NYSE Market and NYSE Regulation from the ICE Certificate.<sup>24</sup>

Finally, conforming changes would be made to the title, recitals and signature line of the ICE Certificate.

#### ICE Bylaws

The Exchange proposes to make certain amendments to the ICE Bylaws to correspond to the proposed amendments to the ICE Certificate. In addition, the Exchange proposes to amend the ICE Bylaws to make certain changes relating to the location of stockholder meetings, quorum requirements, and requirements applicable to persons entitled to nominate directors or make proposals at a meeting of ICE's stockholders. Finally, it proposes to replace obsolete references to the Vice Chair with references to the lead independent director.

#### Changes Corresponding to the Proposed Amendments to the ICE Certificate

The Exchange proposes to make changes to the ICE Bylaws corresponding to the proposed amendments to the ICE Certificate, as described above.

First, NYSE MKT proposes to use "Exchanges" in place of "U.S. Regulated Subsidiaries," as in the proposed changes to the ICE Certificate. Accordingly, it proposes to make the following changes:

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<sup>23</sup> See Securities Exchange Act Release No. 75991 (September 28, 2015), 80 FR 59837 (October 2, 2015 (SR-NYSE-2015-27)).

<sup>24</sup> See ICE Certificate Article V, Sections A.3(c)(iii) and (d)(iii) and Section B.3(e), and Article X, clause (B).

- The definition of “U.S. Regulated Subsidiary” in Section 3.15 would be deleted and replaced with a definition of “Exchange” that is the same as the definition in the proposed amended ICE Certificate.
- In Section 3.14(a)(2), the text “U.S. Regulated Subsidiaries, NYSE Group, Inc. (“NYSE Group”) (if and to the extent that NYSE Group continues to exist as a separate entity), NYSE Holdings LLC (“NYSE Holdings”), Intercontinental Exchange Holdings, Inc. (“ICE Holdings”)” would be replaced with “Exchanges, any entity controlled by the Corporation that is not itself an Exchange but that directly or indirectly controls an Exchange (each such controlling entity, an ‘Intermediate Holding Company’)”; and the text “U.S. Regulated Subsidiaries, NYSE Group (if and to the extent that NYSE Group continues to exist as a separate entity), NYSE Holdings, ICE Holdings” would be replaced with “Exchanges, Intermediate Holding Companies.”
- In Section 3.14(b)(3), the text “the U.S. Regulated Subsidiaries” and “their” would be replaced with “each Exchange” and “its,” respectively.
- In Article VII, “the U.S. Regulated Subsidiaries” would be replaced with “any Exchange.”
- In Sections 3.14(a)(1), 8.1, 8.2, 8.3(b), 8.4, 9.1, 9.2, 9.3 and 11.3, the text “U.S. Regulated Subsidiary” and “of the U.S. Regulated Subsidiaries” would be replaced with “Exchange” and the text “U.S. Regulated Subsidiaries” would be replaced with “Exchanges.”
- In Sections 8.2(b), 8.4, 9.1, and 9.3, the text “the U.S. Regulated Subsidiaries” and “U.S. Regulated Subsidiaries” would be replaced with “an Exchange.”

- In Section 9.3, the text “the U.S. Regulated Subsidiaries” would be replaced with “each Exchange”; “U.S. Regulated Subsidiary’s” would be replaced with “Exchange’s”; and “their respective” would be replaced with “its.”
- In Section 8.1, the text “New York Stock Exchange LLC, NYSE Arca, Inc., NYSE Arca Equities, Inc., NYSE MKT LLC and NYSE National, Inc. or their successors” would be replaced with “any Exchange.” Similarly, in Section 11.3, the text “New York Stock Exchange LLC, NYSE Arca, Inc., NYSE Arca Equities, Inc., NYSE MKT LLC and NYSE National, Inc. or the boards of directors of their successors” would be replaced with “each Exchange.”
- In Sections 8.1 and 8.2, the defined term “U.S. Subsidiaries’ Confidential Information” would be replaced with “Exchange Confidential Information,” with the same meaning except limited to Exchanges.
- In Section 8.3(b), the text “U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated Subsidiary has regulatory authority or oversight” would be replaced with “Exchange.” The proposed change would remove the current provision that allows any U.S. Regulated Subsidiary to inspect the books and records of another U.S. Regulated Subsidiary over which the first has regulatory authority or oversight. As a result, the ICE Bylaws would no longer provide that NYSE Arca may inspect the books and records of NYSE Arca Equities or NYSE Arca, LLC. However, the proposed change would have no substantive effect, because NYSE Arca would retain its authority pursuant to NYSE Arca Equities Rules 14.1 and 14.3.<sup>25</sup> The national securities exchanges

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<sup>25</sup> NYSE Arca Equities Rule 14.1(b) provides, among other things, that the books and

NYSE, NYSE MKT, NYSE Arca and NYSE National do not have regulatory authority or oversight over each other.

Article XII of the ICE Bylaws was added in connection with the acquisition of NYSE National, previously National Stock Exchange, Inc., in 2016.<sup>26</sup> The Exchange proposes to delete Article XII of the ICE Bylaws in its entirety. Because the substance of Article XII would be addressed by the proposed amendments to the ICE Certificate, Article XII would no longer be necessary. Specifically,

- the substance of Section 12.1(a)(1) of the ICE Bylaws would be addressed in revised Article V, Section A.3.(c)(ii) of the ICE Certificate;
- the substance of Section 12.1(a)(2) of the ICE Bylaws would be addressed in revised Article V, Section A.3.(d)(ii) of the ICE Certificate;
- the substance of Section 12.1(b) of the ICE Bylaws would be addressed in revised Article V, Section B.3.(d) of the ICE Certificate; and
- the substance of Section 12.2 of the ICE Bylaws would be addressed in revised Article X(B) of the ICE Certificate.

#### Meetings of Stockholders

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records of NYSE Arca Equities are subject to the oversight of the NYSE Arca pursuant to the Act, and that the books and records of NYSE Arca Equities shall be subject at all times to inspection and copying by NYSE Arca. NYSE Arca Equities Rule 14.3(a) provides, among other things, that the books and records of NYSE Arca, LLC are deemed to be the books and records of NYSE Arca and NYSE Arca Equities for purposes of and subject to oversight pursuant to the Exchange Act. See also CBOE Holdings, Inc. Certificate of Incorporation, Article Fifteenth (providing that the books and records of a Regulated Securities Exchange Subsidiary shall be subject at all times to inspection by such subsidiary).

<sup>26</sup> See Securities Exchange Act Releases No. 79902 (January 30, 2017) 82 FR 9258 (February 3, 2017) (SR-NSX-2016-16); and 79901 (January 30, 2017), 82 FR 9251 (February 3, 2017) (SR-NYSE-2016-90, SR-NYSEArca2016-167, SR-NYSEMKT-2016-122).

In addition to the proposed changes corresponding to the proposed amendments to the ICE Certificate, the Exchange proposes to amend several sections of Article II (Meetings of Stockholders).

The Exchange proposes to simplify Section 2.1 of the ICE Bylaws, which relates to the location of stockholder meetings. The revised provision would provide that, as is true now, the location, if any, as well as the decision to hold a stockholder meeting solely by remote communication, would be determined by the Board of Directors and stated in the notice of meeting. The proposed changes are as follow:

- The first sentence would be revised to remove the text “for the election of directors”, “in the City of Atlanta, State of Georgia,” and “as may be fixed from time to time by the Board of Directors, or at such other place.” The text “as shall be designated from time to time by the Board of Directors and stated in the notice of the meeting.” would be deleted and “or may” would be added in its place. The second sentence would be deleted in its entirety.
- In the third sentence, the text “The Board of Directors may, in its sole discretion, determine that any meeting of stockholders shall” and “as authorized by law” would be deleted. The word “solely” would be added after “instead be held” and the text “, in each case as may be designated by the Board of Directors from time to time and stated in the notice of meeting” added to the end of the sentence.

Section 2.7 relates to the quorum for stockholder meetings. The Exchange proposes to conform the quorum requirements in the ICE Bylaws to those in the ICE Certificate. To do so, it proposes to delete the first three sentences of Section 2.7 and replace it with the sentence

“Section B of Article IX of the certificate of incorporation sets forth the requirements for establishing a quorum at meetings of stockholders of the Corporation.”

Section 2.13(b) sets forth the advance notice requirements for stockholder proposals. The Exchange proposes to make the following changes to Section 2.13(b).

- In addition to stockholders of record, the ICE Bylaws permit certain beneficial holders (defined as “Nominee Holders”) to nominate directors or bring other matters for consideration before the Board of Directors meeting. The Exchange proposes to make simplifying wording changes in clause (iii) of the first sentence of Section 2.13(b), as follows:
  - In clause (x), the text “stockholder that holds of record stock of the Corporation” would be amended so that it read [sic] “stockholder of record.”
  - In clause (y), the following text would be deleted: “holds such”; “street name”; “of such stock and can demonstrate to”; “indirect”; “of, and such Nominee Holder’s”; and the comma before “such stock on such matter.” The revised clause would read as follows: “is a person (a ‘Nominee Holder’) that beneficially owns stock of the Corporation through a nominee or other holder of record and provides the Corporation with proof of such beneficial ownership, including the entitlement to vote such stock on such matter.”
  - In the current third and fourth sentences of Section 2.13(b), the term “indirect ownership” would be changed to “beneficial ownership” for consistency.



- The Exchange proposes to add a new defined term, “Proponent,” to capture both stockholders and Nominee Holders. Accordingly:
  - A new sentence would be added to Section 2.13(b)(iii) between the first and second sentences, stating that “Stockholders and Nominee Holders who bring matters before the annual meeting pursuant to Section 2.13(b)(iii) are hereinafter referred to as ‘Proponents’.”
  - Throughout Section 2.13(b), “stockholder,” “stockholders” and “stockholder’s” would be replaced with “Proponent,” “Proponents” and “Proponent’s,” respectively.
  - Throughout Section 2.13(b), “Proponent” would replace the phrases “stockholder or beneficial owner,” “stockholder, by such beneficial owner,” “stockholder, such beneficial owner,” “stockholder and by such beneficial owner, if any,” and “stockholder or any beneficial owner on whose behalf a nomination or nominations are being made or business or matter is being proposed.” The word “Proponent’s” would replace the phrase “stockholder’s or such beneficial owner’s.”
- Presently, the requirement for disclosing share ownership appears three times: in the current third sentence, which sets forth the provisions for stockholder notices relating to director nominations, the current fourth sentence, which sets forth the provisions for stockholder notices relating to other matters, and the current fifth sentence, which sets forth the information that a shareholder must include in any stockholder notice. Rather than keep the duplication, Exchange proposes to remove the requirement from the third and fourth sentences and retain the

requirement in clause (i) of the fifth sentence. Accordingly, the text “, the number and class of all shares of each class of stock of the Corporation owned of record and beneficially by such stockholder” would be deleted from the current third and fourth sentences.

- In the current fourth sentence, the requirement that a stockholder notice include information regarding any material interest in the matter proposed “(other than as a stockholder)” would be clarified by adding “or beneficial owner of stock” after “stockholder” within the parenthetical, because a Proponent who is a nominee holder is not a stockholder.
- In clause (i) of the current fifth sentence, the text “such Proponent or” would be added before “any Associated Person.”
- Clause (i) of the current sixth sentence sets forth the meaning of “Associated Person.” The Exchange proposes to narrow the text to eliminate all beneficial owners of stock held of record or beneficially by the Proponent from the definition, and instead to cover only those beneficial owners on whose behalf the stockholder notice is being delivered. Accordingly, the Exchange proposes to replace the text “stockholder or any beneficial owner on whose behalf a nomination or nominations are being made or business or matter is being proposed,” with “Proponent” and, in clause (i)(x), replace the text “owned of record or beneficially by such stockholder or by such beneficial owner” with “on whose behalf such Proponent is delivering a Stockholder Notice.”

#### Additional Proposed Changes

In addition to the changes proposed above, the Exchange proposes to amend several

additional sections of the ICE Bylaws.

The ICE Bylaws refer to a “Vice Chairman of the Board.” However, the Board of Directors of ICE has not had a Vice Chairman since the sale of the Euronext business in 2014. Accordingly, in Sections 2.9, 3.6(b) and 3.8, the Exchange proposes to replace “Vice Chairman of the Board” with “lead independent director.” As a result, the lead independent director would preside over meetings of stockholders in the absence of the Chairman of the Board (Section 2.9), have the authority to call a special meeting of the Board of Directors (Section 3.6(b)) and would preside over meetings of the Board of Directors in the absence of the Chairman of the Board (Section 3.8).

In Section 3.12, relating to the conduct of meetings of committees of the Board of Directors of ICE, a reference to “Article II of these Bylaws” would be corrected to read “this Article III of these Bylaws.”

Section 3.14 sets forth considerations directors must take into account in discharging their responsibilities as members of the board of directors. The Exchange proposes to amend the last sentence of Section 3.14(c), which limits claims against directors, officers and employees of ICE and against ICE. The revised text would be expanded in scope to apply to any “past or present stockholder, employee, beneficiary, agent, customer, creditor, community or regulatory authority or member thereof or other person or entity,” and to protect agents of ICE as well as directors, officers and employees. These changes would conform the provision to the analogous statement in the governing documents of other holding companies of national securities exchanges, which are substantially similar.<sup>27</sup>

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<sup>27</sup> See Amended and Restated Bylaws of Bats Global Markets, Inc., Article XII, Section 12.01; Amended and Restated Limited Liability Company Agreement of BOX Holdings Group LLC, Article 4, Section 4.12; Bylaws of IEX Group, Inc., Section 34; and

Finally, conforming changes would be made to the title and date of the ICE Bylaws.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act<sup>28</sup> in general, and with Section 6(b)(1)<sup>29</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 Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

In particular, the Exchange believes that the proposed amendments to replace references to the U.S. Regulated Subsidiaries and to the NYSE, NYSE MKT, NYSE Arca, NYSE Arca Equities and NYSE Arca, LLC with references to an “Exchange” or the “Exchanges,” as appropriate, would contribute to the orderly operation of the Exchange by adding clarity and transparency to the Exchange’s rules by eliminating references to entities that are not national securities exchanges in the ICE Certificate and ICE Bylaws. The Exchange Act definition of “exchange” states that “exchange” “includes the market place and the market facilities maintained by such exchange.”<sup>30</sup> Accordingly, all market places and market facilities maintained by an Exchange would fall within the definition of Exchange and therefore would fall within the scope of the ICE Certificate and ICE Bylaws. The Exchange notes that the proposed change would align Article V of the ICE Certificate with voting and ownership concentration limits in the certificates of incorporation of other publicly traded companies that own one or more

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Amended and Restated Bylaws of Miami International Holdings, Inc., Article VII, Section 1.

<sup>28</sup> 15 U.S.C. 78f(b).

<sup>29</sup> 15 U.S.C. 78f(b)(1).

<sup>30</sup> 15 U.S.C. 78c(a)(1).

national securities exchanges, which do not include references to subsidiaries other than national securities exchanges.<sup>31</sup> NYSE Arca, as the national securities exchange, would retain the regulatory and self-regulatory responsibility for the NYSE Arca options and equities markets.

Similarly, as a result of the proposed use of “Exchanges” instead of “U.S. Regulated Subsidiaries,” ICE Bylaws Section 8.3 would no longer provide that any U.S. Regulated Subsidiary is authorized to inspect the books and records of another U.S. Regulated Subsidiary over which the first has regulatory authority or oversight, adding further clarity and transparency to the Exchange’s rules.<sup>32</sup>

Further, the proposed use of the defined term “Member” in place of the lists of categories of members and permit holders in Article V of the ICE Certificate would simplify the provisions without substantive change, thereby further adding clarity and transparency to the Exchange’s rules and aligning the provision in the ICE Certificate with the voting and ownership concentration limits in the certificates of incorporation of other publicly traded companies that own one or more national securities exchanges, which use a similar description of membership.<sup>33</sup> Similarly, the proposed use of the defined term “Intermediate Holding Company” in place of the list of intermediate holding companies in Article V of the ICE Certificate and Section 3.14 of the ICE Bylaws would simplify the provisions without substantive change, thereby further adding clarity and transparency to the Exchange’s rules.

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<sup>31</sup> See note 11, supra.

<sup>32</sup> As noted above, the ICE Bylaws would no longer provide that NYSE Arca may inspect the books and records of NYSE Arca Equities or NYSE Arca, LLC. However, the proposed change would have no substantive effect, because NYSE Arca would retain its authority pursuant to NYSE Arca Equities Rules 14.1 and 14.3. NYSE, NYSE MKT, NYSE Arca and NYSE National do not have regulatory authority or oversight over each other, and so the proposed change would have no effect on those entities’ rights.

<sup>33</sup> See note 20, supra.

For similar reasons, the Exchange also believes that this filing furthers the objectives of Section 6(b)(5) of the Exchange Act<sup>34</sup> because the proposed rule change would be consistent with and would create a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

Specifically, the proposed amendments (1) replacing references to the U.S. Regulated Subsidiaries and to the NYSE, NYSE MKT, NYSE Arca, NYSE Arca Equities and NYSE Arca, LLC with references to an “Exchange” or the “Exchanges,” as appropriate; (2) using “Member” in place of the lists of categories of members and permit holders in Article V of the ICE Certificate; (3) using “Intermediate Holding Company” in place of the list of intermediate holding companies in Article V of the ICE Certificate and Section 3.14 of the ICE Bylaws; and (4) removing the ability of a U.S. Regulated Subsidiary to inspect the books and records of other U.S. Regulated Subsidiaries in ICE Bylaws Section 8.3 would remove impediments to and perfect the mechanism of a free and open market by simplifying and streamlining the Exchange’s rules, thereby ensuring that persons subject to the Exchange’s jurisdiction, regulators, and the investing public can more easily navigate and understand the ICE governing documents.

The Exchange believes that the proposed amendments to the last sentence of Section 3.14(c) of the ICE Bylaws, which limits claims against directors, officers and employees of ICE and against ICE, would remove impediments to, and perfect the mechanism of a free and open

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<sup>34</sup> 15 U.S.C. 78f(b)(5).

market and a national market system and, in general, protect investors and the public interest because the proposed changes would conform the provision to the analogous statement in the governing documents of other holding companies of national securities exchanges, which are substantially similar.<sup>35</sup>

The Exchange believes that the proposed amendments to remove references to NYSE Market, NYSE Regulation and the Vice Chairman and to remove the cross reference to Section 11.2(b) of the ICE Bylaws from Article X of the ICE Certificate 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 because the changes would eliminate obsolete references, thereby reducing potential confusion. Market participants and investors would not be harmed and in fact could benefit from the increased clarity and transparency in the ICE Certificate and ICE Bylaws. Such increased clarity and transparency would ensure that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the ICE governing documents.

The Exchange believes that the proposed amendments to Article II of the ICE Bylaws, regarding meetings of stockholders, would also 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 because the changes would increase the clarity of the relevant sections of Article II, thereby reducing potential confusion. Market participants and investors would not be harmed and in fact could benefit from the increased clarity and transparency

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<sup>35</sup> See Amended and Restated Bylaws of Bats Global Markets, Inc., Article XII, Section 12.01; Amended and Restated Limited Liability Company Agreement of BOX Holdings Group LLC, Article 4, Section 4.12; Bylaws of IEX Group, Inc., Section 34; and Amended and Restated Bylaws of Miami International Holdings, Inc., Article VII, Section 1.

regarding the location of stockholder meetings and advance notice requirements, and the conformance of the quorum requirements with those in the ICE Certificate, and so would more easily navigate and understand the ICE Bylaws.

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 designed to address any competitive issue but rather update and streamline the ICE Certificate and Bylaws, delete obsolete or unnecessary references and make other simplifying or clarifying changes to the ICE governing documents. The Exchange believes that the proposed rule change will serve to promote clarity and consistency, thereby reducing burdens on the marketplace and facilitating investor protection. The proposed rule change would result in no concentration or other changes of ownership of exchanges.

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

Within 45 days of the date of publication of this notice in the Federal Register or up to 90 days (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, as modified by Amendment No. 1, 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-2017-17 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-NYSEMKT-2017-17. 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-2017-17 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>36</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>36</sup> 17 CFR 200.30-3(a)(12).