

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Robert W. Errett,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-78992; File Nos. SR-NYSE-2016-57; SR-NYSEMKT-2016-80; SR-NYSEArca-2016-119]

### Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE MKT LLC; NYSE Arca, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 2 Thereto, Amending and Restating the Second Amended and Restated Certificate of Incorporation of the Exchanges' Ultimate Parent Company, Intercontinental Exchange, Inc.

September 29, 2016.

#### I. Introduction

On August 17, 2016, each of New York Stock Exchange LLC ("NYSE"), NYSE MKT LLC ("NYSE MKT"), and NYSE Arca, Inc. ("NYSE Arca" and, with NYSE and NYSE MKT, the "Exchanges") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend and restate the Second Amended and Restated Certificate of Incorporation ("ICE Certificate") of the Exchanges' ultimate parent company, Intercontinental Exchange, Inc. ("ICE"), to increase ICE's authorized share capital and to make other, non-substantive changes. The proposed rule changes were published for comment in the **Federal Register** on August 30, 2016.<sup>3</sup> On August 25, 2016, the Exchanges each filed Amendment No. 1 to its respective proposed rule change.<sup>4</sup> On August 29, 2016, the Exchanges each filed Amendment No. 2 to its respective proposed rule change.<sup>5</sup> The Commission

received no comments on the proposed rule changes, as amended. This order approves the proposed rule changes, as modified by Amendment No. 2.

#### II. Description of the Proposed Rule Change

The Exchanges propose to revise the ICE Certificate<sup>6</sup> to increase the total number of authorized shares of ICE common stock, par value \$0.01 per share ("Common Stock"), and to make other, non-substantive changes. More specifically, the Exchanges propose to make the following amendments to the ICE Certificate:

- In Article IV, Section A, the total number of shares of stock that ICE is authorized to issue would be changed from 600,000,000 to 1,600,000,000 shares, and the portion of that total constituting Common Stock would be changed from 500,000,000 to 1,500,000,000 shares.
- In Article V, Section A.5, the reference to "this Section A of ARTICLE VI" would be corrected to refer to "this Section A of ARTICLE V".
- References to the "Second Amended and Restated Certificate of Incorporation" would be changed throughout to refer to the "Third Amended and Restated Certificate of Incorporation," and related technical and conforming changes would be made to the recitals and signature page of the ICE Certificate.

The Exchanges state that the proposed amendments to the ICE Certificate were approved by the board of directors of ICE ("ICE Board") on August 1, 2016.<sup>7</sup> The Exchanges further state that the amendments to the ICE Certificate would be effective when filed with the Department of State of Delaware, which would not occur until approval of the amendments by the stockholders of ICE is obtained at a Special Meeting of Stockholders on October 12, 2016.<sup>8</sup>

According to the Exchanges, the trading price of ICE's Common Stock has risen significantly since ICE's initial public offering in 2005, and the ICE Board believes that such price appreciation may impact the liquidity of ICE's Common Stock, making it more

difficult to efficiently trade and potentially less attractive to certain investors.<sup>9</sup> Accordingly, the ICE Board approved pursuing a 5-for-1 stock split by way of a stock dividend, pursuant to which the holders of record of shares of Common Stock would receive, by way of a dividend, four shares of Common Stock for each share of Common Stock held by such holder ("Stock Dividend"). The Exchanges state that the ICE Board's approval of the Stock Dividend was contingent upon Commission and ICE stockholder approval of the proposed amendments to the ICE Certificate.

Further, the Exchanges state that the number of shares of Common Stock proposed to be issued in the Stock Dividend exceeds ICE's authorized but unissued shares of Common Stock. The proposed rule changes would increase ICE's authorized shares of Common Stock and shares of capital stock to allow ICE to effectuate the Stock Dividend.

According to the Exchanges, the proposed changes to the ICE Certificate would not alter the limitations on voting and ownership set forth in Section V of the ICE Certificate.<sup>10</sup> Such limitations were introduced at the time of ICE's acquisition of the Exchanges, to "minimize the potential that a person could improperly interfere with or restrict the ability of the Commission, the Exchange, or its subsidiaries to effectively carry out their regulatory oversight responsibilities under the Act."<sup>11</sup>

#### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule changes, as modified by Amendment No. 2, are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>12</sup>

The Commission finds that the proposed rule changes by the Exchanges to modify the ICE Certificate are consistent with the requirements of Section 6 of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>13</sup> In

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See Securities Exchange Act Release No. 70210 (August 15, 2013), 78 FR 51758 (August 21, 2013) (SR-NYSE-2013-42; SR-NYSEMKT-2013-50; and SR-NYSEArca-2013-62), at 51760.

<sup>12</sup> In approving the proposed rule changes, the Commission has considered their impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>13</sup> Certain provisions of the ICE Certificate are considered rules of NYSE, NYSE MKT, and NYSE Arca if they are stated policies, practices, or interpretations, as defined in Rule 19b-4 under the Act, of NYSE, NYSE MKT, and NYSE Arca, and

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

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

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

<sup>3</sup> See Securities Exchange Act Release Nos. 78661 (August 24, 2016), 81 FR 59699 (August 30, 2016) ("NYSE Notice"); 78663 (August 24, 2016), 81 FR 59696 (August 30, 2016); and 78662 (August 24, 2016), 81 FR 59674 (August 30, 2016).

<sup>4</sup> On August 26, 2016, the Exchanges withdrew Amendment No. 1.

<sup>5</sup> Amendment No. 2 made technical, non-substantive changes to the ICE Certificate to remove unnecessary underlining and to italicize a comma. Because Amendment No. 2 adds clarification and

does not materially alter the substance of the proposed rule changes or raise unique or novel regulatory issues, Amendment No. 2 is not subject to notice and comment.

<sup>6</sup> ICE owns 100% of the equity interest of Intercontinental Exchange Holdings, Inc., which in turn owns 100% of the equity interest of NYSE Holdings LLC. NYSE Holdings LLC owns 100% of the equity interest of NYSE Group, Inc., which in turn directly owns 100% of the equity interest of each Exchange. ICE is a publicly traded company listed on the NYSE.

<sup>7</sup> See, e.g., NYSE Notice, *supra* note 3.

<sup>8</sup> See *id.*

particular, the Commission finds that the proposed rule changes are consistent with Section 6(b)(1) of the Act, which, among other things, requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members with the provisions of the Act, the rule and regulations thereunder, and the rules of the exchange.<sup>14</sup> The proposed revisions to the ICE Certificate are intended to increase ICE's authorized shares of Common Stock and shares of capital stock and thus would allow ICE to effectuate the Stock Dividend. The Exchanges represent that the proposed rule changes would not alter the limitations on voting and ownership set forth in Section V of the ICE Certificate, which are designed to "minimize the potential that a person could improperly interfere with or restrict the ability of the Commission, the Exchange, or its subsidiaries to effectively carry out their regulatory oversight responsibilities under the Act."<sup>15</sup>

In addition, the Commission finds that the proposed rule changes are consistent with Section 6(b)(5) of the Act,<sup>16</sup> which requires, among other things, that the rules of an exchange be 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. As noted above, the proposed rule changes would revise the ICE Certificate to increase ICE's authorized share capital and thus would facilitate ICE's proposed Stock Dividend. In addition, the proposed rule changes would correct an erroneous reference, which may reduce potential confusion and enhance the clarity of the ICE Certificate.

#### IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule changes (SR-NYSE-2016-57; SR-NYSEMKT-2016-80; SR-NYSEArca-2016-119), as modified by

must be filed with the Commission pursuant to Section 19(b)(4) of the Act and Rule 19b-4 thereunder. See 15 U.S.C. 78c(a)(27); 15 U.S.C. 78s(b); and 17 CFR 240.19b-4.

<sup>14</sup> 15 U.S.C. 78f(b)(1).

<sup>15</sup> See *supra* note 11.

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> 15 U.S.C. 78s(b)(2).

Amendment No. 2, be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Robert W. Errett,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-78984; File No. SR-SCCP-2016-01]

### Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Notice of Filing of Proposed Rule Change To Amend the By-Laws of Nasdaq, Inc. To Implement Proxy Access

September 29, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 15, 2016, Stock Clearing Corporation of Philadelphia ("SCCP") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the clearing agency. 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

SCCP is filing this proposed rule change with respect to amendments of the By-Laws (the "By-Laws") of its parent corporation, Nasdaq, Inc. ("Nasdaq" or the "Company"), to implement proxy access. The proposed amendments will be implemented on a date designated by the Company following approval by the Commission. The text of the proposed rule change is available on SCCP's Web site at <http://nasdaqphlx.cchwallstreet.com/nasdaqomxphlx/sccp/>, at the principal office of SCCP, 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, SCCP 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 these statements may be examined at the places specified in Item IV below. SCCP 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 Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

##### Background

At Nasdaq's 2016 annual meeting held on May 5, 2016, Nasdaq's stockholders considered a stockholder proposal submitted under Rule 14a-8 under the Act.<sup>3</sup> The proposal, which passed with 73.52% of the votes cast, requested that Nasdaq's Board of Directors (the "Board") take steps to implement a "proxy access" by-law. Proxy access by-laws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company's proxy materials. Such provisions allow stockholders to nominate candidates without undertaking the expense of a proxy solicitation.

Following the 2016 annual meeting, the Nominating & Governance Committee (the "Committee") of the Board and the Board reviewed the voting results on the stockholder proposal and discussed proxy access generally. The Committee ultimately recommended to the Board, and the Board approved, certain changes to Nasdaq's By-Laws to implement proxy access. Nasdaq now proposes to make these changes by adopting new Section 3.6 of the By-Laws and making certain conforming changes to current Sections 3.1, 3.3 and 3.5 of the By-Laws, all of which are described further below.

In developing its proposal, Nasdaq has generally tried to balance the relative weight of arguments for and against proxy access provisions. On the one hand, Nasdaq recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are

<sup>3</sup> See 17 CFR 240.14a-8, which establishes procedures pursuant to which stockholders of a public company may have their proposals placed alongside management's proposals in the company's proxy materials for presentation to a vote at a meeting of stockholders.

<sup>18</sup> 17 CFR 200.30-3(a)(12).

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

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