

(SECURITIES AND EXCHANGE COMMISSION)

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

September 29, 2016

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.

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

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<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

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.

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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.

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>

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

<sup>8</sup> See id.

<sup>9</sup> See id.

<sup>10</sup> See id.

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 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

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<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 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).

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.

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

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

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

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