

Exchange believes that viewing commonly owned members together for purposes of billing the Permit Fee will provide an opportunity for an entity that has multiple operations to maintain reasonable expenses while maintaining multiple permits for various member organizations.

The Exchange believes that it is equitable and not unfairly discriminatory to require members transacting an options business to transact orders using an assigned Phlx house account, because the Exchange is requiring all option members to utilize this process in order to increase the efficiency of identifying a member's eligibility for the \$1,100 Permit Fee. This will allow the Exchange to readily determine a member's level of activity in a particular month.

The Exchange believes that it is equitable and not unfairly discriminatory to consider together those transactions of member organizations under common ownership for purposes of assessing the Permit Fee because the Exchange will uniformly calculate the Permit Fee in this manner for all applicable member organizations under common ownership. Each member organization will continue to be assessed a Permit Fee of \$1,100 in the event that a member organization under common ownership transacts one options transaction in an assigned Phlx house account each month. The Exchange believes that a member organization that has multiple operations should not incur greater expenses merely because it determined to conduct its business under separate legal structures. In addition, those members that are not under common ownership with another member can still qualify for the \$1,100 Permit Fee by executing at least one trade in their assigned Phlx house account.

The Exchange believes that increasing the Inactive Nominee Fee from \$500 to \$600 is reasonable because the Exchange incurs administrative costs with respect to its administration of inactive nominees. The Exchange believes that its proposal to assess the Inactive Fee on a monthly basis (\$100 per month) is also reasonable because it will allow member organizations to discontinue payment of the Inactive Nominee Fee in the next full month after notice of termination of the inactive nominee status as the fee will be assessed per month.

The Exchange believes that the amendments to the Inactive Nominee Fee are equitable and not unfairly discriminatory because these fee amendments will be uniformly applied in calculating Inactive Nominee Fees

and assessing those fees on member organizations.

#### *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 not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>14</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-Phlx-2011-134 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 No. SR-Phlx-2011-134. 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

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

only one method. The Commission will post all comments on the Commission's Internet Web site (<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 Web site 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 a.m. and 3 p.m. Copies of such 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 No. SR-Phlx-2011-134 and should be submitted on or before November 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Elizabeth M. Murphy,**  
*Secretary.*

[FR Doc. 2011-27199 Filed 10-19-11; 8:45 am]

**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-65567; File No. SR-NYSEArca-2011-72]**

### **Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to a Corporate Transaction in Which Its Indirect Parent, NYSE Euronext, Will Become a Wholly Owned Subsidiary of Alpha Beta Netherlands Holding N.V.**

October 14, 2011.

Pursuant to Section 19(b)(1) <sup>1</sup> of the Securities Exchange Act of 1934 (the "Exchange Act"), and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 12, 2011, NYSE Arca, Inc. (the "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II

<sup>15</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.

below, which Items have been prepared substantially by NYSE Arca. 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 Combination*

NYSE Arca, a Delaware corporation, registered national securities exchange and self-regulatory organization, is submitting this rule filing (the "Proposed Rule Change") to the Commission in connection with the proposed business combination (the "Combination") of NYSE Euronext, a Delaware corporation, and Deutsche Börse AG, an *Aktiengesellschaft* organized under the laws of the Federal Republic of Germany ("Deutsche Börse").

NYSE Euronext 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 Arca, New York Stock Exchange, LLC ("Exchange") and NYSE Amex LLC ("NYSE Amex")—and (2) 100% of the equity interest of NYSE Market, Inc. ("NYSE Market"), NYSE Regulation, Inc. ("NYSE Regulation"), NYSE Arca L.L.C. ("NYSE Arca LLC") and NYSE Arca Equities, Inc. ("NYSE Arca Equities") (the NYSE Exchanges, together with NYSE Market, NYSE Regulation, NYSE Arca LLC and NYSE Arca Equities, the "NYSE U.S. Regulated Subsidiaries" and each, a "NYSE U.S. Regulated Subsidiary"). The Exchange and NYSE Amex will be separately filing a proposed rule change in connection with the Combination that will be substantially the same as the Proposed Rule Change.

Deutsche Börse indirectly owns 50% of the equity interest of International Securities Exchange Holdings, Inc. ("ISE Holdings"), which in turn holds 100% of the equity interest of International Securities Exchange, LLC ("ISE"), a registered national securities exchange and self-regulatory organization. ISE Holdings also holds 31.54% of the equity interest of Direct Edge Holdings, LLC ("Direct Edge Holdings"), which in turn indirectly holds 100% of the equity interest of two registered national securities exchanges and self-regulatory organizations—EDGA Exchange, Inc. ("EDGA") and EDGX Exchange, Inc. ("EDGX") (each of ISE, EDGA and

EDGX, a "DB Exchange" and a "DB U.S. Regulated Subsidiary" and together, the "DB Exchanges" and the "DB U.S. Regulated Subsidiaries"). The DB Exchanges will be separately filing a proposed rule change in connection with the Combination.

If the Combination is completed, the businesses of NYSE Euronext and Deutsche Börse, including the NYSE U.S. Regulated Subsidiaries and the DB U.S. Regulated Subsidiaries (together, the "U.S. Regulated Subsidiaries" and each, a "U.S. Regulated Subsidiary"), will be held under a single, publicly traded holding company organized under the laws of the Netherlands ("Holdco").<sup>3</sup> The Proposed Rule Change, if approved by the Commission, will not be operative until the consummation of the Combination.

#### *B. Summary of Proposed Rule Change*

NYSE Arca is proposing that, pursuant to the Combination, its indirect parent, NYSE Euronext, will become a wholly owned subsidiary of Holdco. In addition, NYSE Arca is proposing that, in connection with the Combination, the Commission approve certain amendments to the organizational and other governance documents of Holdco, NYSE Euronext, NYSE Group and certain of the NYSE U.S. Regulated Subsidiaries as well as certain rules of the Exchange, NYSE Amex and NYSE Arca Equities.<sup>4</sup> The Proposed Rule Change is summarized as follows:

- *Proposed Approval of Waiver of Ownership and Voting Restrictions of NYSE Euronext.* The Amended and Restated Certificate of Incorporation of NYSE Euronext (the "NYSE Euronext Certificate") currently restricts any person, either alone or together with its related persons, from being entitled to vote or cause the voting of shares to the extent that such shares represent in the aggregate more than 10% of the outstanding votes entitled to be cast on any matter or beneficially owning shares of stock of NYSE Euronext representing in the aggregate more than 20% of the outstanding votes entitled to be cast on

any matter.<sup>5</sup> NYSE Euronext is required to disregard votes which are in excess of the voting restriction and to repurchase NYSE Euronext shares that are held in excess of the ownership restriction. The NYSE Euronext Certificate and the Amended and Restated Bylaws of NYSE Euronext (the "NYSE Euronext Bylaws") provide that the board of directors of NYSE Euronext may waive these voting and ownership restrictions if it makes certain determinations and resolves to expressly 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 Exchange Act<sup>6</sup> and filed with, and approved by, each European Regulator (as defined in the NYSE Euronext Certificate) having appropriate jurisdiction and authority.<sup>7</sup> Acting pursuant to this waiver provision, the board of directors of NYSE Euronext has adopted the resolutions set forth in Exhibit 5A (the "NYSE Euronext Resolutions") in order to permit Holdco to own and vote 100% of the outstanding common stock of NYSE Euronext as of and after the Combination. NYSE Arca is requesting approval by the Commission of the NYSE Euronext Resolutions in order to allow the Combination to take place.

- *Proposed Amendments to Voting and Ownership Restrictions of NYSE Euronext.* Because NYSE Euronext would become a wholly owned subsidiary of Holdco as a result of the Combination, NYSE Arca is proposing to amend the voting and ownership restrictions in the NYSE Euronext Certificate to be consistent with the analogous provisions in the Second Amended and Restated Certificate of Incorporation of NYSE Group (the "NYSE Group Certificate"): (1) First, the NYSE Euronext Certificate would be amended to provide that all of the issued and outstanding shares of NYSE Euronext will be held by Holdco, and that Holdco may not transfer or assign any shares without approval by the Commission under the Exchange Act and the relevant European Regulators under the applicable European Exchange Regulations (as defined in the

<sup>3</sup> Holdco is currently named "Alpha Beta Netherlands Holding N.V.," but it is expected that Holdco will be renamed prior to the completion of the Combination to a name agreed between NYSE Euronext and Deutsche Börse.

<sup>4</sup> Proposed amendments to the governance documents and rules of the Exchange and/or NYSE Amex are included in this Proposed Rule Change, and the text of those proposed amendments are attached as exhibits to this Proposed Rule Change, because they are part of the overall set of changes proposed by the NYSE Exchanges to be made in connection with the Combination.

<sup>5</sup> See Amended and Restated Certificate of Incorporation of NYSE Euronext, Article V Sections 1 & 2.

<sup>6</sup> 15 U.S.C. 78s(b).

<sup>7</sup> See Amended and Restated Certificate of Incorporation of NYSE Euronext, Article V Sections 1 & 2, and Amended and Restated Bylaws of NYSE Euronext, Section 10.12.

NYSE Euronext Certificate);<sup>8</sup> and (2) second, the NYSE Euronext Certificate would be amended to provide that the voting and ownership restrictions contained therein would only apply in the event that Holdco does not own all of the issued and outstanding shares of NYSE Euronext and only for so long as NYSE Euronext directly or indirectly controls any U.S. Regulated Subsidiary or any European Market Subsidiary (as such terms are defined in the NYSE Euronext Certificate).<sup>9</sup> In addition, the voting and ownership restrictions in the NYSE Euronext Certificate would be amended to (a) Change the 10% threshold for the voting restriction to a 20% threshold; (b) change the 20% threshold for the ownership restriction to a 40% restriction (except that a 20% ownership restriction would continue to apply to any person who is, or with respect to whom a related person is, (A) A Member of the Exchange, as defined in the NYSE Euronext Certificate (a "NYSE Member"), (B) a Member of NYSE Amex as defined in the current NYSE Euronext Bylaws (including any person who is a related person of such member, an "Amex Member"), (C) an ETP Holder of NYSE Arca Equities, as defined in the NYSE Euronext Certificate (an "ETP Holder"), or (D) an OTP Holder or OTP Firm of NYSE Arca, as defined in the NYSE Euronext Certificate (an "OTP Holder" and "OTP Firm," respectively)); (c) add the provision, which is currently in the NYSE Euronext Bylaws, that requires the board of directors of NYSE Euronext to make certain determinations relating to NYSE Amex in order to waive the voting and ownership restrictions to the NYSE Euronext Certificate, and delete this provision from the NYSE Euronext Bylaws; (d) update the names of certain European regulatory entities in the definition of "European Regulator" (as currently defined in the NYSE Euronext Certificate and the NYSE Euronext Bylaws); and (e) expand the definition of "Related Persons" to address Amex Members in a manner that is substantively consistent with provisions currently located in the NYSE Rules.

• *Proposed Amendments to Voting and Ownership Restrictions of NYSE Group.* The NYSE Group Certificate currently provides that, if NYSE Euronext and the trust<sup>10</sup> established

pursuant to the Trust Agreement, dated as of April 4, 2007, by and among NYSE Euronext, NYSE Group and the other parties thereto, do not hold 100% of the outstanding stock of NYSE Group, no person, either alone or together with its related persons, may be entitled to vote or cause the voting of shares to the extent that such shares represent in the aggregate more than 10% of the outstanding votes entitled to be cast on any matter or beneficially own shares of stock of NYSE Group representing in the aggregate more than 20% of the outstanding votes entitled to be cast on any matter.<sup>11</sup> NYSE Group is required to disregard votes which are in excess of the voting restriction and to repurchase NYSE Group shares which are held in excess of the ownership restriction.<sup>12</sup> Under the Proposed Rule Change, the voting and ownership restrictions in the NYSE Group Certificate would be amended to (1) Change the 10% threshold for the voting restriction to a 20% threshold; (2) change the 20% threshold for the ownership restriction to a 40% restriction (except that a 20% ownership restriction would continue to apply to any person who is, or with respect to whom a related person is, a NYSE Member, an Amex Member, an ETP Holder or an OTP Holder or OTP Firm); (3) provide that the ownership and voting limitations would apply only for so long as NYSE Group directly or indirectly controls any Regulated Subsidiary (as defined in the NYSE Group Certificate); and (4) expand the definition of "Related Persons" regarding Amex Members so that it is consistent with the language in the NYSE Rules, which language will be incorporated in the NYSE Euronext Certificate pursuant to this Proposed Rule Change.

• *Proposed Amendments to Certain Public-Company-Related and Other Provisions of NYSE Euronext Organizational and Corporate Governance Documents.* Under the Proposed Rule Change, in light of the fact that NYSE Euronext would become a wholly owned subsidiary of Holdco following completion of the Combination, the NYSE Euronext Certificate and the NYSE Euronext Bylaws would be amended to (1) Simplify and provide for a more efficient governance and capital structure that is appropriate for a wholly

owned subsidiary; (2) conform certain provisions to analogous provisions of the organizational documents of NYSE Group, which will likewise be an indirect wholly owned subsidiary of Holdco following completion of the Combination; and (3) make certain clarification and technical edits (for example, to conform the use of defined terms and other provisions, and to update cross-references to sections, consistent with the other amendments to the NYSE Euronext Certificate and the NYSE Euronext Bylaws set forth in this Proposed Rule Change). In addition, the current Independence Policy of the NYSE Euronext board of directors would cease to be in effect.

• *Proposed Amendments to Board Composition Requirements for the Exchange, NYSE Amex, NYSE Market and NYSE Regulation.* Under the Proposed Rule Change, certain provisions of the Third Amended and Restated Operating Agreement, dated as of April 1, 2009, of the Exchange (the "Exchange Operating Agreement") relating to the composition of the Exchange's board of directors would be amended, including to provide that the independent directors of the Exchange would perform certain functions currently allocated to the NYSE Euronext nominating and governance committee and that the Exchange's board of directors would have its own director independence policy, instead of referring to the director independence policy of NYSE Euronext. Substantially the same revisions would be made to the analogous provisions of the Amended and Restated Operating Agreement of NYSE Amex,<sup>13</sup> the Amended and Restated Bylaws of NYSE Market<sup>14</sup> and the Third Amended and Restated Bylaws of NYSE Regulation.<sup>15</sup>

• *Proposed Amendments to the NYSE Group Certificate and NYSE Group Bylaws.* Under the Proposed Rule Change, the NYSE Group Certificate and the NYSE Group Bylaws would be amended in order to (1) Conform certain provisions to analogous provisions of the organizational documents of NYSE Euronext, which will likewise be a wholly owned subsidiary of Holdco following completion of the Combination; and (2) make certain clarification and technical edits (for example, to conform the use of defined terms and other provisions to be consistent with the other amendments to the NYSE Group Certificate and the

<sup>8</sup> The analogous provision in the NYSE Group Certificate is Section 4(a) of Article IV.

<sup>9</sup> The analogous provision in the NYSE Group Certificate is Section 4(b) of Article IV.

<sup>10</sup> No changes are being proposed to the current Delaware trust and stichting for "regulatory overspill" matters, except that references to the Nominating and Governance Committee of NYSE Euronext would be replaced with references to the

Holdco Nominating, Governance and Corporate Responsibility Committee.

<sup>11</sup> See Second Amended and Restated Certificate of Incorporation of NYSE Group, Inc., Article IV Section 4(b)(1) & (2).

<sup>12</sup> See Second Amended and Restated Certificate of Incorporation of NYSE Group, Inc., Article IV Sections 4(b)(1)(A) & 4(b)(2)(D).

<sup>13</sup> See Amended and Restated Operating Agreement of NYSE Amex LLC, Section 2.03(a).

<sup>14</sup> See Amended and Restated Bylaws of NYSE Market, Inc., Article III Section 1.

<sup>15</sup> See Third Amended and Restated Bylaws of NYSE Regulation, Inc., Article III Section 1.

NYSE Group Bylaws set forth in this Proposed Rule Change).

- *Proposed Amendments to the Exchange Rules, NYSE Amex Rules and NYSE Arca Equities Rules.* Under the Proposed Rule Change, certain technical amendments would be made to the rules of the Exchange (the “Exchange Rules”) to (1) Replace references therein to “NYSE Euronext” with references to Holdco; and (2) delete the definitions of “member” and “member organization” relating to NYSE Amex which are set forth in Rule 2 for purposes of Section 1(L) of Article 5 of the NYSE Euronext Certificate, because the Proposed Rule Change will revise the NYSE Euronext Certificate to include analogous language relating to NYSE Amex Members. In addition, certain technical amendments would be made to the rules of NYSE Amex (the “NYSE Amex Rules”) and to the rules of NYSE Arca Equities (the “NYSE Arca Equities Rules”) to replace references therein to “NYSE Euronext” with references to Holdco.

The text of the proposed amended NYSE Euronext Certificate, NYSE Euronext Bylaws, NYSE Group Certificate, NYSE Group Bylaws, Exchange Operating Agreement, Amended and Restated Operating Agreement of NYSE Amex, Amended and Restated Bylaws of NYSE Market, Third Amended and Restated Bylaws of NYSE Regulation, Exchange Rules, form of Director Independence Policy for certain NYSE U.S. Regulated Subsidiaries, NYSE Amex Rules and NYSE Arca Equities Rules are attached to the Proposed Rule Change as Exhibits 5B, 5C, 5D, 5E, 5F, 5G, 5H, 5I, 5J, 5K, 5P and 5Q, respectively.

Under the Proposed Rule Change, Holdco would take appropriate steps to incorporate voting and ownership restrictions, requirements relating to submission to jurisdiction, access to books and records and other requirements related to its control of the U.S. Regulated Subsidiaries. Specifically, the Articles of Association of Holdco in effect as of the completion of the Combination (the “Holdco Articles”) would contain provisions<sup>16</sup> 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 Holdco Articles.* The Holdco Articles would contain voting and ownership restrictions that will restrict any person, either alone or together with its related persons, from having voting

control over Holdco shares entitling the holder thereof to cast more than 20% of the then outstanding votes entitled to be cast on a matter or beneficially owning Holdco shares representing more than 40% of the outstanding votes entitled to be cast on a matter (except that a 20% ownership restriction would apply to any person who is a NYSE Member, an Amex Member, an ETP Holder, an OTP Holder or OTP Firm, a Member (as such term is defined in Section 3(a)(3)(A) of the Exchange Act) of ISE (an “ISE Member”), or a member of EDGA or EDGX (as such terms are defined in the rules of EDGA and EDGX, respectively, an “EDGA Member” and “EDGX Member,” respectively)). The Holdco Articles would provide that Holdco will be required to disregard any votes purported to be cast in excess of the voting restriction. In the event that any such person(s) exceeds the ownership restriction, it will be required to offer for sale and transfer the number of Holdco shares required to comply with the ownership restriction, and the rights to vote, attend general meetings of Holdco shareholders and receive dividends or other distributions attached to shares held in excess of the 40% threshold (or 20% threshold, if applicable) will be suspended for so long as such threshold is exceeded. If such person(s) fails to comply with the transfer obligation within two weeks, then the Holdco Articles would provide that Holdco will be irrevocably authorized to take actions on behalf of such person(s) in order to cause it to comply with such obligations. Consistent with the current NYSE Euronext Certificate, the Holdco board of directors may waive the voting and ownership restrictions if it makes certain determinations (which will be subject to the same requirements which are currently required to be made by the board of directors of NYSE Euronext and ISE Holdings in order to waive the voting and ownership restrictions in the current NYSE Euronext Certificate and the Certificate of Incorporation of ISE Holdings (the “ISE Certificate”), as applicable) and resolves to expressly 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 Exchange Act and filed with, and approved by, the relevant European Regulators having appropriate jurisdiction and authority.

- *Jurisdiction.* The Holdco Articles will provide that Holdco and its directors, and to the extent they are involved in the activities of the U.S. Regulated Subsidiaries, (x) Holdco’s officers, and (y) 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 proceeding 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 Holdco Articles would provide that so long as Holdco 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 Holdco Articles would provide that Holdco will take reasonable steps necessary to cause its officers, directors and employees, prior to accepting a position as an officer, director or employee, as applicable, 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. Furthermore, the Holdco Articles would provide that no person may be a director of Holdco unless he or she has agreed and consented in writing to the applicability to him or her of these jurisdictional and oversight provisions with respect to his or her activities related to any U.S. Regulated Subsidiary. Holdco would sign an irrevocable agreement and consent for the benefit of each U.S. Regulated Subsidiary that it will comply with these provisions of the Holdco Articles.

- *Books and Records.* The Holdco Articles would provide that for so long as Holdco directly or indirectly controls any U.S. Regulated Subsidiary, the books, records and premises of Holdco 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 Holdco’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, Holdco’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.

<sup>16</sup> The text of the proposed Holdco Articles is attached to the Proposed Rule Change as Exhibit 5L.

Regulated Subsidiaries, Holdco may maintain such books and records either in the home jurisdiction of one or more European subsidiaries or in the United States.

- *Amendments to Holdco Articles.*

The Holdco Articles would provide that before any amendment to the Holdco Articles may be effectuated by execution of a notarial deed of amendment, 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.

- *Additional Matters.* The Holdco Articles 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 Holdco's actions on the U.S. Regulated Subsidiaries' ability to carry out their respective responsibilities under the Exchange Act. In addition, the Holdco Articles would provide that Holdco will take reasonable steps necessary to cause its officers, directors and employees, prior to accepting a position as an officer, director or employee, as applicable, of Holdco to agree and consent in writing to the applicability to them of these provisions of the Holdco Articles with respect to their activities related to any U.S. Regulated Subsidiary. The Holdco Articles would also provide that no person may be a director of Holdco unless he or she has agreed and consented in writing to the applicability to him or her of these provisions with respect to his or her activities related to any U.S. Regulated Subsidiary. Holdco will sign an irrevocable agreement and consent for the benefit of each U.S. Regulated Subsidiary<sup>17</sup> that it will comply with these provisions of the Holdco Articles.<sup>18</sup>

In addition, Holdco would adopt a Director Independence Policy in the form attached hereto as Exhibit 5N (the

"Holdco Independence Policy"), which would be substantially similar to the current Independence Policy of the NYSE Euronext board of directors, except for certain changes described in this Proposed Rule Change.

The text of the Proposed Rule Change is available at NYSE Arca, the Commission's Public Reference Room, and on the Web site of NYSE Euronext (<http://www.nyse.com>). The text of Exhibits 5A through 5Q of the Proposed Rule Change are also available on NYSE Euronext's Web site and on the Commission's Web site (<http://www.sec.gov/rules/sro.shtml>).

Other than as described herein and set forth in the attached Exhibits 5A through 5Q, NYSE Arca will continue to conduct its regulated activities in the manner currently conducted and will not make any changes to its regulated activities in connection with the Combination. If NYSE Arca determines to make any such changes, it will seek approval of the Commission.

## 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 Arca 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 Arca has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

### A. Purpose [sic]

The purpose of this rule filing is to adopt the rules necessary to permit NYSE Euronext to effect the Combination and to amend certain provisions of the organizational and other governance documents of NYSE Euronext, NYSE Group and certain of the NYSE U.S. Regulated Subsidiaries, including certain Exchange Rules, NYSE Amex Rules and NYSE Arca Equities Rules.

#### 1. Overview of the Combination

NYSE Arca is submitting this Proposed Rule Change to the Commission in connection with the Combination of NYSE Euronext and Deutsche Börse. The Combination will create a holding company, Holdco, which will hold the businesses of NYSE Euronext and Deutsche Börse. Following the Combination, each of NYSE Euronext and Deutsche Börse will be a separate subsidiary of Holdco. Holdco expects the Combination will create a group that will be both a world

leader in derivatives and risk management and the premier global venue for capital raising, with a truly global franchise and presence in many of the world's financial centers including New York, London, Frankfurt, Paris and Luxembourg. This global presence should facilitate providing world-class services to global and local customers worldwide.

Other than as described herein, Holdco and the NYSE Exchanges will not make any changes to the regulated activities of the NYSE U.S. Regulated Subsidiaries in connection with the Combination, and, other than as described in the separate proposed rule changes filed by each of the DB Exchanges in connection with the Combination, Holdco and the DB Exchanges will not make any changes to the regulated activities of the DB U.S. Regulated Subsidiaries in connection with the Combination. If Holdco 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 operative until the consummation of the Combination.

The Combination will occur pursuant to the terms of the Business Combination Agreement, dated as of February 15, 2011, as amended by Amendment No. 1 dated as of May 2, 2011 and by Amendment No. 2 dated as of June 16, 2011 (as it may be further amended from time to time, the "Combination Agreement"), by and among NYSE Euronext, Deutsche Börse, Holdco and Pomme Merger Corporation, a Delaware corporation and newly formed wholly owned subsidiary of Holdco ("Merger Sub"). Subject to the terms and conditions set forth in the Combination Agreement and in compliance with applicable law, Holdco has conducted a public exchange offer (the "Exchange Offer"), in which shareholders of Deutsche Börse have been afforded the opportunity to tender each share of Deutsche Börse for one ordinary share of Holdco (each, a "Holdco Share").

Immediately after the time that Holdco accepts for exchange, and exchanges, the Deutsche Börse shares that are validly tendered and not withdrawn in the Exchange Offer, Merger Sub will merge with and into NYSE Euronext, as a result of which NYSE Euronext will become a wholly owned subsidiary of Holdco (the "Merger"). In the Merger, each outstanding share of NYSE Euronext common stock will be converted into the right to receive 0.47 of a fully paid

<sup>17</sup> The form of Holdco's agreement and consent is attached as Exhibit 5M to this Proposed Rule Change.

<sup>18</sup> The Holdco Articles will also set forth certain restrictions and requirements relating to Holdco's European subsidiaries and applicable European regulatory matters, which will be substantially consistent with the analogous restrictions and requirements applicable with respect to Holdco's U.S. Regulated Subsidiaries and U.S. regulatory matters.

and non-assessable Holdco Share. NYSE Euronext's obligation to complete the Merger is subject to the completion of the Exchange Offer and the acquisition by Holdco of all of the Deutsche Börse shares validly tendered and not withdrawn in the Exchange Offer. The completion of the Exchange Offer (and, therefore, the completion of the Merger) is subject to the satisfaction of a number of conditions, including that Deutsche Börse shares representing at least 75% of the Deutsche Börse shares outstanding, on a fully diluted basis, must be validly tendered and not withdrawn in the Exchange Offer, and that holders of a majority of the outstanding shares of NYSE Euronext shall have adopted the Combination Agreement. Both of these conditions have been satisfied.

Following the completion of the Exchange Offer, and depending on the percentage of Deutsche Börse shares acquired by Holdco in the Exchange Offer, Deutsche Börse and Holdco intend to complete a post-completion reorganization pursuant to which Holdco will enter into a domination agreement, or a combination of a domination agreement and a profit and loss transfer agreement, pursuant to which the remaining shareholders of Deutsche Börse will have limited rights, including a limited ability to participate in the profits of Deutsche Börse.

Holdco expects the Combination will create a group that will be both a world leader in derivatives and risk management and the premier global venue for capital raising, with a truly global franchise and presence in many of the world's financial centers including New York, London, Frankfurt, Paris and Luxembourg. This global presence should facilitate providing world-class services to global and local customers worldwide. Following the Combination, Holdco and its subsidiaries (together, the "Holdco Group") expect to serve as a benchmark regulatory model, facilitating transparency and harmonization of capital markets globally, while continuing to operate all national exchanges under local regulatory frameworks and their respective brand names.

## 2. Overview of the Holdco Group Following the Combination

Following the Combination, Holdco will be a for-profit, publicly traded corporation formed under the laws of the Netherlands and will act as the holding company for the businesses of NYSE Euronext and Deutsche Börse. Holdco will hold all of the equity interests in NYSE Euronext, which

holds (1) 100% of the equity interest of NYSE Group (which, in turn, directly or indirectly holds 100% of the equity interests of the NYSE U.S. Regulated Subsidiaries) and (2) 100% of the equity interest of Euronext N.V. (which, in turn, directly or indirectly holds 100% of the equity interests of trading markets in Belgium, France, the Netherlands, Portugal and the United Kingdom). Holdco will also hold a majority of the equity interests in Deutsche Börse, which indirectly holds 50% of the equity interest of ISE Holdings (which, in turn, holds (1) 100% of the equity interest of ISE and (2) 31.54% of the equity interest of Direct Edge Holdings). Direct Edge Holdings indirectly holds 100% of the equity interest of EDGA and EDGX. Holdco intends to list its ordinary shares on the New York Stock Exchange, the Frankfurt Stock Exchange and Euronext Paris. The Holdco Group will have dual headquarters in Frankfurt and New York.

After the Combination, NYSE Group will continue to be directly wholly owned by NYSE Euronext and will continue to directly or indirectly own the three NYSE Exchanges—the Exchange, NYSE Arca and NYSE Amex—which provide marketplaces where investors buy and sell listed companies' common stock and other securities as well as equity options and securities traded on the basis of unlisted trading privileges. NYSE Regulation, Inc., an indirect not-for-profit subsidiary of NYSE Group, oversees FINRA's performance of certain market surveillance and enforcement functions for NYSE Euronext's U.S. securities exchanges, enforces listed company compliance with applicable standards, and oversees regulatory policy determinations, rule interpretation and regulation related rule development.

In Europe, NYSE Euronext, Deutsche Börse and their respective subsidiaries own several European exchanges, including trading operations on regulated and non-regulated markets for cash products in Germany, France, Belgium, the Netherlands, and Portugal and derivatives in the United Kingdom and in the five above-mentioned locations. As a result, the activities of the NYSE Euronext and Deutsche Börse European markets are or may be subject to the jurisdiction and authority of a number of European regulators, including the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*), the Hessian Exchange Supervisory Authority, the Dutch Minister of Finance, the French Minister of the Economy, the French Financial Market Authority (*Autorité des Marchés*

*Financiers*), the French Prudential Supervisory Authority (*Autorité de Contrôle Prudentiel*), the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*), the Belgian Financial Services and Markets Authority (*Autorité des Services et Marchés Financiers*), the Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários—CMVM*) and the U.K. Financial Services Authority (*FSA*).

Other than certain modifications described herein, the current corporate structure, governance and self-regulatory independence and separation of each NYSE U.S. Regulated Subsidiary will be preserved. Specifically, after the Combination, NYSE Group's businesses and assets will continue to be structured as follows:

- The Exchange will remain a direct wholly owned subsidiary of NYSE Group and an indirectly wholly owned subsidiary of NYSE Euronext.
- NYSE Market will remain a wholly owned subsidiary of the Exchange and will continue to conduct the Exchange's business.
- NYSE Regulation will remain a wholly owned subsidiary of the Exchange and continue to perform, and/or oversee the performance of, regulatory responsibilities of the Exchange pursuant to a delegation agreement with the Exchange and regulatory functions of NYSE Arca and NYSE Amex pursuant to services agreements with them.<sup>19</sup>
- Archipelago Holdings, Inc., a Delaware corporation ("Arca Holdings"), will remain a wholly owned subsidiary of NYSE Group and indirect wholly owned subsidiary of NYSE Euronext.
- NYSE Arca Holdings, Inc., a Delaware corporation ("NYSE Arca Holdings"), and NYSE Arca, L.L.C., a Delaware limited liability company ("NYSE Arca LLC"), will remain wholly owned subsidiaries of Arca Holdings.
- NYSE Arca will remain a wholly owned subsidiary of NYSE Arca Holdings.
- NYSE Arca Equities, a Delaware corporation, will remain a wholly owned subsidiary of NYSE Arca.
- NYSE Amex will remain a direct wholly owned subsidiary of NYSE Group and an indirectly wholly owned subsidiary of NYSE Euronext.
- The Combination will have no effect on the ability of any party to trade securities on the Exchange, NYSE Arca or NYSE Amex.

<sup>19</sup> Certain regulatory functions have been allocated to, and/or are otherwise performed by, FINRA.

Similarly, Deutsche Börse and its subsidiaries, and NYSE Euronext and its subsidiaries, will continue to conduct their regulated activities in the same manner as they are currently conducted, with any changes subject to the relevant approvals of their respective European regulators and, in the case of the U.S. Regulated Subsidiaries, with any changes subject to the approval of the Commission.

Holdco acknowledges that to the extent it becomes aware of possible violations of the rules of the Exchange, NYSE Arca or NYSE Amex, it will be responsible for referring such possible violations to each such exchange, respectively. In addition, Holdco will become a party to the agreement among NYSE Euronext, NYSE Group, the Exchange, NYSE Market and NYSE Regulation to provide for adequate funding for NYSE Regulation.

### 3. Proposed Approval of Waiver of Voting and Ownership Restrictions of NYSE Euronext

Article V of the current NYSE Euronext Certificate provides that (1) No person, either alone or together with its "related persons" (as defined in the NYSE Euronext Certificate), may be entitled to vote or cause the voting of shares of NYSE Euronext 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 NYSE Euronext (the "NYSE Euronext Voting Restriction").<sup>20</sup> NYSE Euronext must disregard any votes purposed to be cast in excess of the NYSE Euronext Voting Restriction.<sup>21</sup>

In addition, the NYSE Euronext Certificate provides that no person, either alone or together with its related persons, may at any time beneficially own shares of NYSE Euronext representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (the "NYSE Euronext Ownership

Restriction").<sup>22</sup> If any person, either alone or together with its related persons, owns shares of NYSE Euronext in excess of the NYSE Euronext Ownership Restriction, then such person and its related persons are obligated to sell promptly, and NYSE Euronext 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 NYSE Euronext necessary so that such person, together with its related persons, will beneficially own shares of NYSE Euronext 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>23</sup>

The NYSE Euronext Voting Restriction and the NYSE Euronext Ownership Restriction are applicable to each person unless and until (1) Such person has delivered a notice in writing to the board of directors of NYSE Euronext, not less than 45 days (or such shorter period as the board of directors of NYSE Euronext expressly permits) prior to any vote or, in the case of the NYSE Euronext Ownership Restriction, prior to the acquisition of any shares of NYSE Euronext that would cause such person, either alone or together with its related persons, to exceed the NYSE Euronext Ownership Restriction, of such person's intention, either alone or together with its related persons, to vote or cause the voting of shares of NYSE Euronext stock beneficially owned by such person or its related persons in excess of the NYSE Euronext Voting Restriction or, in the case of the NYSE Euronext 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 NYSE Euronext has resolved to expressly permit such voting or ownership, as applicable; (3) such resolution has been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act<sup>24</sup> and has become effective thereunder; and (4) such resolution has been filed with, and approved by, each European Regulator having appropriate jurisdiction and authority. Subject to its fiduciary duties under applicable law, the NYSE Euronext board of directors may not

adopt any resolution pursuant to the foregoing clause (2) unless it has determined that the exercise of such voting rights (or the entering into of a voting agreement) or ownership, as applicable:

- Will not impair the ability of any NYSE U.S. Regulated Subsidiary, NYSE Euronext or NYSE Group (if and to the extent that NYSE Group continues to exist as a separate entity) to discharge their respective responsibilities under the Exchange Act and the rules and regulations thereunder;

- Will not impair the ability of any of the European Market Subsidiaries (as defined in the NYSE Euronext Bylaws) of NYSE Euronext or Euronext (to the extent that Euronext continues to exist as a separate entity) to discharge their respective responsibilities under the European Exchange Regulations (as defined in the NYSE Euronext Bylaws);

- Is otherwise in the best interest of NYSE Euronext, its stockholders, the NYSE 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 NYSE Euronext 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 NYSE Euronext directly or indirectly controls NYSE Amex, neither such person nor any of its related persons is an Amex Member;

- For so long as NYSE Euronext directly or indirectly controls NYSE Arca, 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

- 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 NYSE Euronext Certificate).<sup>25</sup>

In order to allow Holdco to wholly own and vote all of the outstanding common stock of NYSE Euronext upon consummation of the Combination, Holdco has delivered written notice to the board of directors of NYSE Euronext pursuant to the procedures set forth in the NYSE Euronext Certificate requesting approval of its voting and ownership of NYSE Euronext shares in excess of the NYSE Euronext Voting Restriction and the NYSE Euronext

<sup>20</sup> See Amended and Restated Certificate of Incorporation of NYSE Euronext, Article V Section 1.

<sup>21</sup> See Amended and Restated Certificate of Incorporation of NYSE Euronext, Article V Section 1(A).

<sup>22</sup> See Amended and Restated Certificate of Incorporation of NYSE Euronext, Article V Section 2.

<sup>23</sup> See Amended and Restated Certificate of Incorporation of NYSE Euronext, Article V Section 2(D).

<sup>24</sup> 15 U.S.C. 78s(b).

<sup>25</sup> See Amended and Restated Certificate of Incorporation of NYSE Euronext, Article V Sections 1(B), 1(C), 2(B) and 2(C), and Amended and Restated Bylaws of NYSE Euronext, Section 10.12.



Ownership Restriction. Among other things, in this notice, Holdco represented to the board of directors of NYSE Euronext that neither it, nor any of its related persons, is (1) A "member" or "member organization" of the Exchange; (2) a "member" of NYSE Amex; (3) an ETP Holder; (4) an OTP Holder or an OTP Firm; or (5) a U.S. Disqualified Person or a European Disqualified Person.

At a meeting duly convened on September 15, 2011, the board of directors of NYSE Euronext adopted the NYSE Euronext Resolutions to permit Holdco, either alone or with its related persons, to exceed the NYSE Euronext Ownership Restriction and the NYSE Euronext Voting Restriction. In adopting such resolutions, the board of directors of NYSE Euronext made the necessary determinations set forth above and approved the submission of this Proposed Rule Change to the Commission. The NYSE U.S. Regulated Subsidiaries will continue to operate and regulate their markets and members exactly as they have done prior to the Combination. Except as set forth in this Proposed Rule Change, Holdco is not proposing any amendments to their trading or regulatory rules.

With respect to the ability of the Commission to enforce the Exchange Act as it applies to the NYSE U.S. Regulated Subsidiaries after the Combination, the NYSE U.S. Regulated Subsidiaries will operate in the same manner following the Combination as they operate today.<sup>26</sup> Thus, the Commission will continue to have plenary regulatory authority over the NYSE U.S. Regulated Subsidiaries, as is the case currently with these entities. As described in the following sections of this filing, NYSE Arca is proposing a series of amendments to the NYSE Euronext Certificate, the NYSE Euronext Bylaws, the NYSE Group Certificate and the NYSE Group Bylaws, as well as certain provisions of the Holdco Articles, that will create 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.

<sup>26</sup> NYSE Arca has been informed by Deutsche Börse that the DB U.S. Regulated Subsidiaries are also expected to operate in the same manner following the Combination as they operate today. This is addressed in the separate proposed rule change filed by each of the DB Exchanges.

The NYSE Euronext board of directors also determined that ownership of NYSE Euronext by Holdco is in the best interests of NYSE Euronext, its shareholders and the NYSE U.S. Regulated Subsidiaries. With respect to the interests of the NYSE U.S. Regulated Subsidiaries, the board of directors of NYSE Euronext has noted, among other things, its expectation that the Combination would over time create substantial incremental efficiency and growth opportunities and that the Holdco Group is expected to be a leader in a diverse set of large and growing businesses, including derivatives, listings, cash equities, post-trade settlement and asset servicing, market data and technology servicing.

In addition, neither Holdco, nor any of its related persons, is (1) A NYSE Member; (2) an Amex Member; (3) an ETP Holder, an OTP Holder or an OTP Firm; or (4) a U.S. Disqualified Person or a European Disqualified Person.

An extract with the relevant provisions of the NYSE Euronext Resolutions is attached as Exhibit 5A to the Proposed Rule Change and can be found on NYSE Euronext's Web site and the Commission's Web site.

NYSE Arca hereby requests that the Commission approve the NYSE Euronext Resolutions and allow Holdco, either alone or with its related persons, to own and vote all of the outstanding common stock of NYSE Euronext upon and following the consummation of the Combination.

#### 4. Proposed Amendments to Ownership and Voting Restrictions After the Combination

##### Overview

NYSE Arca is proposing that, effective as of the completion of the Combination, the Holdco Articles would contain voting and ownership restrictions that restrict any person, either alone or together with its related persons, from having voting control over Holdco shares entitling the holder thereof to cast more than 20% of the votes entitled to be cast on any matter or beneficially owning Holdco shares representing more than 40% of the outstanding votes that may be cast on any matter (except that a 20% ownership restriction would apply to any person who is a NYSE Member, an Amex Member, an ETP Holder, an OTP Holder, an OTP Firm, an ISE Member, an EDGA Member or an EDGX Member).

In addition, NYSE Arca is proposing that, effective as of the Combination, the voting and ownership restrictions currently in the NYSE Euronext Certificate and NYSE Euronext Bylaws,

as well as the related waiver provisions set forth therein, would remain in effect, except that they would be modified in certain respects as described herein.<sup>27</sup>

#### Voting and Ownership Restrictions in Holdco Articles

Under the Proposed Rule Change, the Holdco Articles would provide that no person, either alone or together with its related persons, will be entitled to vote or cause the voting of a number of shares of Holdco, in person or by proxy or through any voting agreement or other arrangement, which represent in the aggregate (1) More than 20% of the then outstanding votes entitled to be cast on such matter; or (2) more than 20% 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 Holdco (the "Holdco Voting Restriction").<sup>28</sup> The Holdco Articles would provide that Holdco will be required to disregard any votes purported to be cast in excess of the Holdco Voting Restriction.

In addition, the Holdco Articles would provide that any person who, either alone or together with its related persons, beneficially owns Holdco shares which represent in the aggregate more than 40% of the outstanding votes entitled to be cast on any matter (except that a 20% restriction would apply to any person who is a NYSE Member, an Amex Member, an ETP Holder, an OTP Holder, an OTP Firm, an ISE Member, an EDGA Member or an EDGX Member) (the "Holdco Ownership Restriction"), will be obligated to offer for sale and to transfer a number of Holdco shares necessary so that such person, together with its related persons, beneficially owns a number of Holdco shares that complies with the Holdco Ownership Restriction (the "Holdco Transfer Obligation").<sup>29</sup> If such person(s) fails to comply with the Holdco Transfer Obligation within two weeks, Holdco will be irrevocably authorized to act on behalf of such person(s) in order to

<sup>27</sup> As described in the proposed rule change filed by each of the DB Exchanges, the current voting and ownership restrictions contained in the certificate of incorporation of ISE Holdings, as well as the related provisions contained in the amended and restated bylaws of U.S. Exchange Holdings and the board resolutions of Deutsche Börse, Eurex Frankfurt AG and other indirect parent entities of ISE, would remain in effect. The DB Trust would also remain unaltered and would continue to have rights to enforce these restrictions.

<sup>28</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 34.1.

<sup>29</sup> See Form of Deed of Amendment to Holdco Articles of Association, Articles 35.1 and 35.4.



ensure compliance with the Holdco Transfer Obligation.<sup>30</sup>

Furthermore, the Holdco Articles would provide that in the event any person, either alone or together with its related persons, exceeds the Holdco Ownership Restriction (any such person(s), a "Non-Compliant Owner"), the Non-Compliant Owner would cease to have certain rights to the extent that its shareholding exceeds the Holdco Ownership Restriction. Specifically, the Non-Compliant Owner's rights to vote, to attend general meetings of Holdco shareholders and to receive dividends or other distributions attached to such shares in excess of the Holdco Ownership Restriction would be suspended for so long as the Holdco Ownership Restriction is exceeded.<sup>31</sup>

Pursuant to Section 2:87a of the Dutch Civil Code, the Non-Compliant Owner may request that an independent expert be appointed to determine the value of the Holdco shares, but such expert will have discretion to determine that the value of the shares is equal to the price received for the shares by the Non-Compliant Owner on any stock exchange where the Holdco shares are listed.<sup>32</sup>

The voting and ownership restrictions will apply to each person unless it (1) Delivers to the Holdco board of directors a written notice of its intention to acquire voting power or ownership in excess of the relevant limitation, and such notice is delivered at least 45 days (or such shorter period as the Holdco board of directors expressly consents to) prior to acquiring Holdco shares in excess of the Holdco Voting Restriction or Holdco Ownership Restriction; (2) obtains a written confirmation from the Holdco board of directors that the board has expressly resolved to permit such voting or ownership; and (3) such resolution has been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act and filed with, and approved by, the relevant European regulators having appropriate jurisdiction and authority.<sup>33</sup> The Holdco board of directors may waive the Holdco Voting Restriction and Holdco Ownership Restriction if it makes certain determinations, which will be consistent with the determinations currently required to be made by the board of directors of NYSE Euronext and ISE Holdings in order to

waive the voting and ownership restrictions in the NYSE Euronext Certificate and the ISE Holdings Certificate, respectively.<sup>34</sup>

#### Amendments to NYSE Group Voting and Ownership Restrictions

The voting restrictions contained in the current NYSE Group Certificate provide that, if such restrictions apply, (1) No person, either alone or together with its related persons (as defined in the NYSE Group Certificate), may be entitled to vote or cause the voting of shares of stock of NYSE Group 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 NYSE Group (the "NYSE Group Voting Restriction").<sup>35</sup> NYSE Group must disregard any votes purported to be cast in excess of the NYSE Group Voting Restriction.

In addition, the ownership restrictions contained in the current NYSE Group Certificate provide that, if such restrictions apply, no person, either alone or together with its related persons, may at any time own beneficially shares of NYSE Group representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (the "NYSE Group Ownership Restriction"). If any person, either alone or together with its related persons, owns shares of NYSE Group in excess of the NYSE Group Ownership Restriction, then such person and its related persons are obligated to sell promptly, and NYSE Group 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 NYSE Group necessary so that such person, together with its related persons, will beneficially own shares of NYSE Group 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.

The NYSE Group Voting Restriction and the NYSE Group Ownership Restriction apply to each person unless and until (1) Such person has delivered a notice in writing to the board of directors of NYSE Group, not less than 45 days (or such shorter period as the board of directors of NYSE Group expressly permits) prior to any vote or, in the case of the NYSE Group Ownership Restriction, prior to the acquisition of any shares of NYSE Group that would cause such person, either alone or together with its related persons, to exceed the NYSE Group Ownership Restriction, of such person's intention, either alone or together with its related persons, to vote or cause the voting of shares of NYSE Group stock beneficially owned by such person or its related persons in excess of the NYSE Group Voting Restriction or, in the case of the NYSE Group 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 NYSE Group has resolved to expressly permit such voting or ownership, as applicable; and (3) such resolution has been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act<sup>36</sup> and has become effective thereunder. Subject to its fiduciary duties under applicable law, the NYSE Group board of directors may not adopt any resolution pursuant to the foregoing clause (2) unless the board has made certain determinations which are substantially similar to the determinations required to be made by the NYSE Euronext board of directors in connection with a waiver of the NYSE Euronext Voting Limitation and/or the NYSE Euronext Ownership Limitation (as described above).

Under the Proposed Rule Change, the NYSE Group Certificate would be amended, effective as of the Combination, to (1) Change the 10% threshold for the NYSE Group Voting Restriction to a 20% threshold; and (2) change the 20% threshold for the NYSE Group Ownership Restriction to a 40% restriction (except that a 20% restriction would continue to apply to any person who is a NYSE Member, an Amex Member, an ETP Holder, an OTP Holder or an OTP Firm). These percentage thresholds are consistent with those applicable to ISE Holdings and other regulated exchanges and have been approved on several occasions by the

<sup>30</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 35.7.

<sup>31</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 35.6.

<sup>32</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 35.5.

<sup>33</sup> See Form of Deed of Amendment to Holdco Articles of Association, Articles 34.2 and 35.2.

<sup>34</sup> See Form of Deed of Amendment to Holdco Articles of Association, Articles 34.3 and 35.3.

<sup>35</sup> See Second Amended and Restated Certificate of Incorporation of NYSE Group, Inc., Article IV Section 4(b).

<sup>36</sup> 15 U.S.C. 78s(b).

Commission.<sup>37</sup> The NYSE Group Certificate would also be updated to provide that the NYSE Group Voting Restriction and the NYSE Group Ownership Restriction would apply only for so long as NYSE Group directly or indirectly controls any Regulated Subsidiary (as defined in the NYSE Group Certificate).

Under the Proposed Rule Change, the definition of “Related Persons” would be expanded to provide that (1) In the case of a person that is a “member” (as defined in Section 3(a)(3)(A)(i) of the Exchange Act) of NYSE Amex, such person’s “Related Persons” would include the “member” (as defined in Section 3(a)(3)(A)(iv) of the Exchange Act, in addition to Sections 3(a)(3)(A)(ii) and 3(a)(3)(A)(iii) of the Exchange Act which are currently referenced in this provision of the NYSE Group Certificate) with which such person is associated; and (2) in the case of any person that is a “member” (as defined in Section 3(a)(3)(A)(iv) of the Exchange Act, in addition to Sections 3(a)(3)(A)(ii) and 3(a)(3)(A)(iii) of the Exchange Act which are currently referenced in this provision of the NYSE Group Certificate) of NYSE Amex, such person’s “Related Persons” would include any “member” (as defined in Section 3(a)(3)(A)(i) of the Exchange Act) that is associated with such person. These provisions are substantively consistent with language in the NYSE Rules, which language would be deleted under the Proposed Rule Change.

#### Amendments to NYSE Euronext Voting and Ownership Restrictions

Under the Proposed Rule Change, the NYSE Euronext Certificate would be amended, effective as of the Combination, to be consistent with the NYSE Group Certificate in the following respects: (1) First, the NYSE Euronext Certificate would be amended to provide that all of the issued and outstanding shares of NYSE Euronext will be held by Holdco, and that Holdco may not transfer or assign any shares without approval by the Commission under the Exchange Act and the relevant European Regulators (as defined in the NYSE Euronext Certificate) under the applicable

European Exchange Regulations (as defined in the NYSE Euronext Certificate);<sup>38</sup> and (2) the NYSE Euronext Certificate would be amended to provide that the NYSE Euronext Voting Restriction and NYSE Euronext Ownership Restriction contained therein would only apply in the event that Holdco does not own all of the issued and outstanding shares of NYSE Euronext.<sup>39</sup> In addition, the NYSE Euronext Certificate would be amended to (a) change the 10% threshold for the NYSE Euronext Voting Restriction to a 20% threshold; (b) change the 20% threshold for the NYSE Euronext Ownership Restriction to a 40% restriction (except that a 20% ownership restriction would continue to apply to any person who is a NYSE Member, an Amex Member, an ETP Holder, an OTP Holder or an OTP Firm); (c) provide that the NYSE Euronext Voting Restriction and NYSE Euronext Ownership Restriction contained therein would only apply only for so long as NYSE Euronext directly or indirectly controls any U.S. Regulated Subsidiary or any European Market Subsidiary (as such terms are defined in the NYSE Euronext Certificate); (d) add the provision, which is currently in the NYSE Euronext Bylaws, that requires the board of directors of NYSE Euronext to make certain determinations relating to NYSE Amex in order to waive the voting and ownership restrictions in the NYSE Euronext Certificate, and delete this provision from the NYSE Euronext Bylaws; (e) update the names of certain European regulatory entities in the definition of “European Regulator”; and (f) expand the definition of “Related Persons” to address Amex Members in a manner that is substantively consistent with language currently located in the NYSE Rules, as described above.

#### 5. Additional Matters To Be Addressed in the Holdco Articles<sup>40</sup>

##### Jurisdiction Over Individuals

Under the Proposed Rule Change, the Holdco Articles would provide that Holdco and its directors, and to the extent that they are involved in the activities of the U.S. Regulated

Subsidiaries, (x) Holdco’s officers, and (y) 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, 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.<sup>41</sup> The Holdco Articles would also provide that, with respect to any such suit, action, or proceeding brought by the Commission, Holdco and its directors, officers and employees would (1) Be deemed to agree that NYSE Group may serve as U.S. agent for purposes of service of process in such suit, action, or proceeding relating to NYSE Group or any of its subsidiaries, and ISE Holdings may serve as the U.S. agent for proceedings relating to ISE Holdings 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 proceeding is improper, or that the subject matter thereof may not be enforced in or by the U.S. federal courts or the Commission.<sup>42</sup>

In addition, the Holdco Articles would provide that, so long as Holdco directly or indirectly controls any U.S. Regulated Subsidiary, the directors, officers and employees of Holdco 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>43</sup>

The Holdco Articles would provide that Holdco 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 Holdco 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.<sup>44</sup> The Holdco Articles would also provide that no person may be a director of Holdco

<sup>37</sup> See, e.g., SEC Release No. 34-49718 (May 17, 2004) (File No. SR-PCX-2004-08), 69 FR 29611 (approval of rule change proposed by the Pacific Exchange, Inc.); SEC Release No. 34-49098 (January 16, 2004) (File No. SR-PHLX-2003-73), 69 FR 3974 (approval of rule change proposed by the Philadelphia Stock Exchange, Inc.); and SEC Release No. 34-50170 (August 9, 2004) (File No. SR-PCX-2004-56), 69 FR 50419 (approval of rule change proposed by the Pacific Exchange, Inc. relating to initial public offering of parent of Archipelago Exchange, L.L.C.).

<sup>38</sup> The analogous provision in the NYSE Group Certificate is Section 4(a) of Article IV.

<sup>39</sup> The analogous provision in the NYSE Group Certificate is Section 4(b) of Article IV.

<sup>40</sup> The Holdco Articles will also set forth certain restrictions and requirements relating to Holdco’s European subsidiaries and applicable European regulatory matters, which will be substantially consistent with the analogous restrictions and requirements applicable with respect to Holdco’s U.S. Regulated Subsidiaries and U.S. regulatory matters.

<sup>41</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(c).

<sup>42</sup> See *id.*

<sup>43</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(f).

<sup>44</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(m).

unless he or she has agreed and consented in writing to the applicability to him or her of these jurisdictional and oversight provisions with respect to his or her activities related to any U.S. Regulated Subsidiary.<sup>45</sup> Furthermore, Holdco would sign an irrevocable agreement and consent for the benefit of each U.S. Regulated Subsidiary<sup>46</sup> that it will comply with these provisions in the Holdco Articles.

NYSE Arca 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, each of whom the Commission has direct authority over pursuant to Section 19(h)(4) of the Exchange Act.<sup>47</sup>

#### Access to Books and Records

Under the Proposed Rule Change, the Holdco Articles would provide that for so long as Holdco directly or indirectly controls any U.S. Regulated Subsidiary, the books, records and premises of Holdco 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>48</sup> In addition, the Holdco Articles would provide that Holdco'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 such U.S. Regulated Subsidiary or any other U.S. Regulated Subsidiary over which such U.S. Regulated Subsidiary has regulatory authority or oversight.<sup>49</sup> In addition, Holdco'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, Holdco may maintain such books and records either in the home jurisdiction of one or more European subsidiaries or in the United States.<sup>50</sup>

#### Additional Matters

Under the Proposed Rule Change, the Holdco Articles would provide that Holdco 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>51</sup> In addition, Holdco 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>52</sup> The Holdco Articles would also provide that, in discharging his or her responsibilities as a member of the Holdco board of directors or as an officer or employee of Holdco, 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 Holdco to any person to consider, or afford any particular weight to, any such matters or to limit his or her consideration to such matters).<sup>53</sup>

The Holdco Articles would also provide that all confidential information that comes into the possession of Holdco pertaining to the self-regulatory function of any U.S. Regulated Subsidiary will (a) not be made available to any persons other than to those officers, directors, employees and agents of Holdco that have a reasonable need to know the contents thereof; (b) be retained in confidence by Holdco and the officers, directors, employees and agents of Holdco; and (c) not be used for any commercial purposes.<sup>54</sup> In addition, the Holdco Articles 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 Holdco to disclose such confidential information to the Commission or any U.S. Regulated Subsidiary.<sup>55</sup>

Additionally, the Holdco Articles would provide that, for so long as Holdco directly or indirectly controls

any U.S. Regulated Subsidiary, Holdco and its directors, officers and employees will give due regard to the preservation of the independence of the self-regulatory function of such U.S. Regulated Subsidiary 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 such 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>56</sup>

Finally, the Holdco Articles would provide that each director of Holdco would, in discharging his or her responsibilities, to the fullest extent permitted by applicable law, take into consideration the effect that Holdco'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, ISE Holdings and Holdco to (1) Engage in conduct that fosters and does not interfere with the ability of the U.S. Regulated Subsidiaries, NYSE Group, ISE Holdings and Holdco 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>57</sup> This requirement would not, however, create any duty owed by any director, officer or employee of Holdco 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.<sup>58</sup>

In addition, the Holdco Articles would provide that Holdco will take reasonable steps necessary to cause its officers, directors and employees, prior to accepting a position as an officer, director or employee, as applicable, of Holdco to agree and consent in writing to the applicability to them of these

<sup>45</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 14.11.

<sup>46</sup> The form of Holdco's agreement and consent is attached as Exhibit 5M to this Proposed Rule Change.

<sup>47</sup> 15 U.S.C. 78s(h)(4).

<sup>48</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(f).

<sup>49</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(e).

<sup>50</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(g).

<sup>51</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(a).

<sup>52</sup> See *id.*

<sup>53</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(l).

<sup>54</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(h).

<sup>55</sup> See *id.*

<sup>56</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(i).

<sup>57</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(k).

<sup>58</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(k).

provisions of the Holdco Articles with respect to their activities related to any U.S. Regulated Subsidiary.<sup>59</sup> The Holdco Articles would also provide that no person may be a director of Holdco unless he or she has agreed and consented in writing to the applicability to him or her of these provisions with respect to his or her activities related to any U.S. Regulated Subsidiary.<sup>60</sup>

Holdco would also sign an irrevocable agreement and consent for the benefit of each U.S. Regulated Subsidiary that it will comply with provisions in the Holdco Articles regarding (1) Cooperation with the Commission and such U.S. Regulated Subsidiaries; (2) compliance with U.S. federal securities laws; (3) inspection and copying of Holdco's books, records and premises; (4) Holdco's books, records, premises, officers, directors and employees being deemed to be those of U.S. Regulated Subsidiaries; (5) maintenance of books and records in the United States; (6) confidentiality of information regarding the U.S. Regulated Subsidiaries' self-regulatory function; (7) preservation of the independence of the self-regulatory function of the U.S. Regulated Subsidiaries; and (8) taking reasonable steps to cause Holdco's officers, directors and employees to consent to the applicability to them of the Holdco Articles. The form of Holdco's agreement and consent is attached as Exhibit 5M to this Proposed Rule Change.

#### Amendments to the Holdco Articles

Under the Proposed Rule Change, the Holdco Articles would provide that, before any amendment to or repeal of any provision of the Holdco Articles may become effectuated by means of a notarial deed of amendment, the same will 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 the same must be filed with, or filed with and approved by, the Commission before the same may be effective under Section 19 of the Exchange Act and the rules promulgated thereunder, then the same will not be effective until filed with, or filed with and approved by, the Commission, as the case may be. These requirements would also apply to any action by Holdco that would have the effect of amending or repealing any provision of the Holdco Articles.

#### Holdco Director Independence Policy

Under the Proposed Rule Change, Holdco would adopt the Holdco Independence Policy in the form attached hereto as Exhibit 5N, which would be substantially similar to the current Independence Policy of the NYSE Euronext board of directors, except that (1) A majority (as opposed to 75%) of the board of Holdco would be required to be independent; (2) executive officers of listed companies would no longer be prohibited from being considered independent for purposes of the Holdco board; (3) the "additional independence requirements" at the end of the current Independence Policy of NYSE Euronext, which provide that executive officers of foreign private issuers, executive officers of NYSE Euronext and directors of affiliates of member organizations must together comprise no more than a minority of the total board, would be eliminated; (4) references to certain European regulatory authorities would be updated, because their names have changed; (5) references to NYSE Alternext, Inc. would refer instead to NYSE Amex, because of this entity's name change; (6) footnote 2 of the current Independence Policy of NYSE Euronext would be deleted because the Holdco Independence Policy would not be applicable to NYSE Regulation, Inc., the Exchange, NYSE Amex or NYSE Market, which would have their own director independence policy in the form attached to this Proposed Rule Change as Exhibit 5K; and (7) references to the independence standards and criteria in the Dutch Corporate Governance Code would be added, because such standards and criteria will apply to Holdco, a Dutch company, and will supplement (rather than supersede or limit) the other independence standards and criteria set forth in the Holdco Independence Policy.

NYSE Arca believes that a majority independence standard is appropriate to ensure that Holdco's board as a whole consists of individuals with independent, objective perspectives, while at the same time affording Holdco sufficient flexibility to include persons with expertise and qualifications that will contribute meaningfully to the board's performance of its oversight function. The importance of allowing highly qualified individuals to serve on the board is underscored by the fact that Holdco will serve as the holding company for a complex, global business with highly specialized operations and regulatory functions. Although Holdco has unique responsibilities and functions as the holding company for

the NYSE U.S. Regulated Subsidiaries, it will be subject to various corporate governance and regulatory obligations that will be addressed by means of ownership and voting limitations on its shareholders, commitments to provide access to its books and records and to submit to the jurisdiction of the Commission, director qualification requirements and other undertakings that are addressed in the Proposed Rule Change and will be formalized in the Holdco Articles and undertakings of Holdco to its U.S. Regulated Subsidiaries. NYSE Arca submits that some of these undertakings call for in-depth industry knowledge and expertise on the Holdco board, such as the requirement that Holdco's directors take into consideration the effect that Holdco's actions would have on the ability of its U.S. Regulated Subsidiaries to (i) Foster cooperation and coordination with persons engaging in regulating, clearing, settling and processing information with respect to, and facilitating transactions in securities, and (ii) remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system.

In addition, NYSE Arca believes that the per se disqualification of listed company executives from being deemed independent should not be applicable to Holdco. The per se disqualification was initially adopted by the New York Stock Exchange, Inc. in early 2005 in the context of its unique circumstances and history and its management structure and board composition at that time.<sup>61</sup> NYSE Arca submits that those circumstances are no longer applicable and, following the proposed combination of NYSE Euronext and Deutsche Börse, the disqualification of listed company executives would impede rather than facilitate Holdco's efforts to ensure a qualified and balanced board composition and promote various other important corporate governance objectives, such as ensuring appropriate expertise and experience on its board, as well as representation of the interests of a diverse range of market constituencies and local European and U.S. interests. A per se disqualification would narrow the pool of potential Holdco director candidates and arbitrarily eliminate from consideration a large number of highly qualified, experienced individuals who have proven track records as business leaders. In addition, because the listed companies of the U.S.

<sup>59</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 3.2(m).

<sup>60</sup> See Form of Deed of Amendment to Holdco Articles of Association, Article 14.11.

<sup>61</sup> See Securities Exchange Act Release No. 34-51217 (February 16, 2005) (File No. SR-NYSE-2004-54), 70 FR 9688.

Regulated Subsidiaries tend to be U.S. domestic companies, this requirement could disproportionately restrict the eligibility of persons affiliated with U.S. companies as compared to non-U.S. companies to serve on the board of Holdco. Under the Holdco Independence Policy, the Holdco board would still need to assess whether a listed company executive meets the various independence criteria, including whether he or she has any "material relationship" with Holdco and its subsidiaries.

Furthermore, NYSE Euronext believes that the objectivity of board members is adequately protected by the various other independence criteria in the proposed Holdco Independence Policy, such as the requirement that independent directors may not be or have been within the last year, and may not have an immediate family member who is or within the last year was, a member of the Exchange, NYSE Arca or NYSE Amex. In addition, if and to the extent that a matter concerning a listed company whose executive is a Holdco director were ever to come before the Holdco board for consideration, such director would be required to be recused from acting on such matter pursuant to the Holdco board's conflicts of interest policy.

Finally, the current Independence Policy of NYSE Euronext provides that the sum of (a) executive officers of foreign private issuers, (b) executive officers of NYSE Euronext and (c) directors of affiliates of "members" (as defined in Sections 3(a)(A)(3)(ii), 3(a)(A)(3)(iii) and 3(a)(A)(3)(iv) of the Exchange Act) of NYSE, NYSE Arca or NYSE Amex, may not constitute more than a minority of the total number of directors of NYSE Euronext. The purpose of this requirement is to ensure that, although executives of listed companies who are foreign private issuers are not disqualified from serving on the board, such executives may not, together with NYSE Euronext executives and directors of affiliates of members, constitute more than a minority of the board. In light of NYSE Arca's proposal to eliminate the disqualification of listed company executives from the Holdco Independence Policy, this requirement would serve no purpose because the exception to such disqualification for foreign private issuer executives would also be eliminated. NYSE Arca further notes that under the proposed Holdco Independence Policy, executives of Holdco and directors of affiliates of exchange members would not be deemed independent and, accordingly,

could not in any event constitute more than a minority of the Holdco board.

#### 6. Proposed Amendments to Certain Public-Company-Related and Other Provisions of NYSE Euronext Organizational and Corporate Governance Documents

Pursuant to the Combination, NYSE Euronext will merge with Merger Sub, a wholly owned subsidiary of Holdco. NYSE Euronext, as the surviving corporation in the Merger, will become a wholly owned subsidiary of Holdco. Following the Merger, the current organizational documents of NYSE Euronext will remain in effect, except that NYSE Arca is proposing that, in addition to the aforementioned revisions relating to voting and ownership limitations, certain provisions will be amended to reflect the fact that, after the Combination, NYSE Euronext will be an intermediate holding company and will no longer be a public company traded on the Exchange, and the registration of its capital stock under Section 12 of the Exchange Act will be terminated upon application to the Commission. As a result, NYSE Euronext will no longer be subject to the Exchange's listing standards or to the corporate governance requirements applicable to publicly traded companies. As summarized below, the following revisions to the NYSE Euronext Certificate and NYSE Euronext Bylaws are proposed in order to (1) Simplify and provide for a more efficient governance and capital structure that is appropriate for a wholly owned subsidiary; (2) conform certain provisions to analogous provisions of the organizational documents of NYSE Group, which will likewise be an indirect wholly owned subsidiary of Holdco following completion of the Combination; and (3) make certain clarification and technical edits (for example, to conform the use of defined terms and other provisions, and to update cross-references to sections, to reflect the other amendments to the NYSE Euronext Certificate and the NYSE Euronext Bylaws set forth in this Proposed Rule Change):

- The NYSE Euronext Certificate would be revised to provide that the registered office and agent of NYSE Euronext in Delaware will be the Corporation Trust Company, which is the registered agent of other subsidiaries of NYSE Euronext;
- The number of authorized shares of NYSE Euronext common stock and preferred stock will be reduced to 1,000 and 100, respectively, because it would no longer be necessary for NYSE Euronext to have a large number of

widely held and actively traded shares;<sup>62</sup>

- The restrictions on transfers of NYSE Euronext shares contained in Section 4 of Article IV of the NYSE Euronext Certificate have now expired in accordance with their terms and would accordingly be deleted;

- Sections 2(A) and 2(B) of Article VI of the NYSE Euronext Certificate, and Section 2.2 of the NYSE Euronext Bylaws, would be amended to allow shareholders to call special meetings of shareholders and to postpone such meetings, in order to give Holdco additional flexibility to take actions in its capacity as the sole shareholder of NYSE Euronext following completion of the Combination;

- Section 6 of Article VI of the NYSE Euronext Certificate, and Section 3.6 of the NYSE Euronext Bylaws (which would be renumbered as Section 3.5), would be amended to allow shareholders to fill board vacancies in order to give Holdco additional flexibility to take actions in its capacity as the sole shareholder of NYSE Euronext following completion of the Combination;

- Section 1 of Article VIII of the NYSE Euronext Certificate, and Section 2.11 of the NYSE Euronext Bylaws (which would be renumbered as Section 2.9), would be amended to allow shareholders to take actions without a meeting and without prior notice if written consents are signed by the minimum number of votes that would be required to approve the action at a meeting, in order to give Holdco additional flexibility to take actions in its capacity as the sole shareholder of NYSE Euronext following completion of the Combination, and the reference at the end of Section 3.5 of the NYSE Euronext Bylaws to a special meeting of shareholders would be deleted because the NYSE Euronext shareholder may act by written consent to fill board vacancies;

- The supermajority shareholder vote requirements pursuant to Article X to

<sup>62</sup> Effective as of the time that NYSE Euronext merges with Pomme Merger Corporation, the Second Amended and Restated Certificate of Incorporation of NYSE Euronext (as the surviving corporation in the merger) will provide that 800,000,000 shares of common stock will be authorized and 100 shares of preferred stock will be authorized. All of the outstanding shares of NYSE Euronext will be held by Alpha Beta Netherlands Holding N.V. Promptly thereafter, (1) NYSE Euronext will conduct a reverse stock split so that Alpha Beta Netherlands Holding N.V. will hold a substantially reduced number of NYSE Euronext shares (e.g., 1,000 common shares), and (2) the Second Amended and Restated Certificate of Incorporation of NYSE Euronext will accordingly be amended to reduce the total number of authorized shares of common stock to 1,000.

amend or repeal certain provisions of the NYSE Euronext Certificate would be eliminated and replaced with a majority vote requirement, because a supermajority vote requirement would no longer serve any purpose after NYSE Euronext becomes wholly owned by a single shareholder and a majority voting standard is consistent with the standard generally applicable for actions by shareholders under the Delaware General Corporation Law and for actions by the parent entity of other wholly owned subsidiaries of NYSE Euronext such as NYSE Group;

- Section 2.3 of the NYSE Euronext Bylaws would be amended to clarify that notice of shareholder meetings is not required if waived in accordance with Section 10.3 of the NYSE Euronext Bylaws;

- The requirement in Section 2.6 of the NYSE Euronext Bylaws for the appointment of an inspector of elections for shareholders meetings would be deleted, because the requirement for an inspector of elections pursuant to Section 231 of the Delaware General Corporation Law would no longer apply to NYSE Euronext after completion of the Combination;<sup>63</sup>

- The requirement in Section 2.7 (which would be renumbered as Section 2.6) of the NYSE Euronext Bylaws that directors be elected by a majority of the votes cast (and that they must tender their resignation if such a majority vote is not received), except in the case of contested elections, and that the NYSE Euronext board of directors may fill any resulting vacancy or may decrease the size of the board, would be deleted and a plurality voting standard would be adopted for all director elections, because these requirements would no longer serve any purpose after NYSE Euronext becomes wholly owned by a single shareholder and a plurality voting standard is consistent with the standard generally applicable for elections of directors under the Delaware General Corporation Law and for actions by the parent entity of other wholly owned subsidiaries of NYSE Euronext such as NYSE Group;

- The requirements in Section 2.10 of the NYSE Euronext Bylaws requiring certain advance notice from shareholders of director nominations and shareholder proposals, and the requirement that only business brought before a special meeting of stockholders pursuant to NYSE Euronext's notice of the meeting may be brought before the meeting, would be eliminated, because these requirements would no longer

serve any purpose after NYSE Euronext becomes wholly owned by a single shareholder;

- Section 3.1 of the NYSE Euronext Bylaws would be amended to clarify that the right of the NYSE Euronext board of directors to fix and change the number of directors on such board is subject to any rights of holders of any preferred stock to elect additional directors, in order to make this provision consistent with Section 2 of Article IV of the NYSE Euronext Certificate, which provides that preferred stock may be issued which may have voting rights;

- Sections 3.2(B) and 4.4 of the NYSE Euronext Bylaws would be amended to add "if any" after the references therein to the Nominating and Governance Committee, because NYSE Euronext would become a wholly owned subsidiary of Holdco and, as such, may not have a Nominating and Governance Committee;

- The requirement in Section 3.4 of the NYSE Euronext Bylaws that at least 75% of the board must be independent would be deleted, because NYSE Euronext would be a wholly owned subsidiary of Holdco after completion of the Combination and, therefore, it may be appropriate for executives of Holdco and its subsidiaries to serve on this board, and the reference to Section 3.4 in Section 3.2(A) would accordingly be deleted;

- Section 3.9 (which would be renumbered as Section 3.8) of the NYSE Euronext Bylaws would be amended to clarify that notice of board meetings is not required if waived in accordance with Section 10.3 of the NYSE Euronext Bylaws;

- The advance notice period in Section 3.9 (which would be renumbered as Section 3.8) of the NYSE Euronext Bylaws for electronic or telephonic notices of board meetings would be reduced from 24 hours to 12 hours, in order to simplify the requirements for board meetings and to be consistent with the analogous 12-hour time period currently required for notices pursuant to Section 3.7 of the NYSE Group Bylaws;

- Section 3.12 of the NYSE Euronext Bylaws (which would be renumbered as Section 3.11) would be amended to delete the requirement that, if the chairman or deputy chairman of the board of directors is also the chief executive officer or deputy chief executive officer, he or she may not participate in executive sessions of the board of directors, and if the chairman is not the chief executive officer or deputy chief executive officer, he or she will act as a liaison between the board

of directors and the chief executive officer or the deputy chief executive officer, in light of the fact that there are not expected to be any independent, non-executive directors of NYSE Euronext and in order to simplify the governance requirements for NYSE Euronext as a wholly owned subsidiary of Holdco;

- Certain aspects of the indemnification and expense advancement provisions in Section 10.6 of the NYSE Euronext Bylaws, including the terms of any insurance policy maintained by NYSE Euronext, would be simplified in light of the fact that there are not expected to be any independent, non-executive directors of NYSE Euronext, and, therefore, a more streamlined process for indemnification claims is appropriate;

- The supermajority shareholder vote requirements in Section 10.10(B) of the NYSE Euronext Bylaws would be changed to a majority vote requirement, because a supermajority vote requirement would no longer serve any purpose after NYSE Euronext becomes wholly owned by a single shareholder and a majority voting standard is consistent with the standard generally applicable for actions by shareholders under the Delaware General Corporation Law and for actions by the parent entity of other wholly owned subsidiaries of NYSE Euronext such as NYSE Group;

- In light of the fact that NYSE Alternext US LLC formally changed its name to NYSE Amex LLC, references to NYSE Alternext US LLC in the NYSE Euronext Bylaws would be amended to refer instead to NYSE Amex LLC;

- Section 10.13 of the NYSE Euronext Bylaws—which requires that, for so long as NYSE Euronext directly or indirectly controls NYSE Amex, any amendments to the NYSE Euronext Certificate must be approved by the Commission—would be deleted and Article X of the NYSE Euronext Certificate would be amended to incorporate this requirement; and

- Certain clarifying, conforming or other technical edits would be made to Sections 1(B), 1(C), 1(L), 2(C) and 2(E) of Article V, Article X and Article XIII of the NYSE Euronext Certificate and to Sections 3.7 (which would be renumbered as Section 3.6) and 3.15(A)(2) and 3.15(B) (which would be renumbered as Section 3.14(A)(2) and 3.14(B), respectively) of the NYSE Euronext Bylaws. In addition, the numbering of certain sections of the NYSE Euronext Certificate and NYSE Euronext Bylaws, and cross-references to such sections, would be deleted or updated to reflect the amendments to

<sup>63</sup> See Section 231(e) of the Delaware General Corporation Law.

the NYSE Euronext Certificate and the NYSE Euronext Bylaws set forth above.

In addition, the current Independence Policy of the NYSE Euronext board of directors would, effective as of the Combination, cease to apply.

#### 7. Proposed Amendments to the NYSE Group Certificate and NYSE Group Bylaws

Under the Proposed Rule Change, the revisions summarized below to the NYSE Group Certificate and the NYSE Group Bylaws are proposed in order to: (1) Conform certain provisions to the analogous provisions of the organizational documents of NYSE Euronext, which would likewise be a wholly owned subsidiary of Holdco following completion of the Combination; and (2) make certain clarification and technical edits (for example, to conform the use of defined terms and other provisions to reflect the other amendments set forth in this Proposed Rule Change):

- Section 2 of Article IV of the NYSE Group Certificate would be amended to clarify that (1) Preferred stock may be issued “from time to time,” and (2) the certificate of designations for such stock would fix, among other things, the “relative, participating, optional and other” rights of such shares including the qualifications and restrictions of any series of preferred stock, which is consistent with the analogous provisions in Section 2 of Article IV of the NYSE Euronext Certificate;

- Section 3 of Article V of the NYSE Group Certificate would be revised to clarify that the number of directors will be fixed “from time to time,” which is consistent with the analogous provision in Section 3 of Article VI of the NYSE Euronext Certificate;

- Section 5 of Article V of the NYSE Group Certificate would be amended to clarify that the right of the NYSE Group board of directors to remove directors is subject to any rights of holders of any preferred stock, in order to make this provision consistent with Section 2 of Article IV of the NYSE Group Certificate, which provides that preferred stock may be issued that may have voting rights, and also to make it consistent with the analogous provision in Section 5 of Article VI of the NYSE Euronext Certificate;

- Section 2.3 of the NYSE Group Bylaws would be amended to clarify that notice of shareholder meetings is not required if waived in accordance with Section 7.3 of the NYSE Group Bylaws;

- A new Section 2.8 would be added to the NYSE Group Bylaws to clarify that a list of shareholders entitled to

vote will be open to examination by shareholders, because this is required by Section 219 of the Delaware General Corporation Law and is consistent with the analogous provision in Section 2.9 (which would be renumbered as Section 2.8) of the NYSE Euronext Bylaws;

- The reference at the end of Section 3.4 of the NYSE Group Bylaws to a special meeting of shareholders would be deleted because the shareholder of NYSE Group may act by written consent to fill board vacancies pursuant to Section 2.9 of the NYSE Group Bylaws;

- Section 3.7 of the NYSE Group Bylaws would be amended to clarify that notice of any special meeting of directors is not required if waived in accordance with Section 7.3 of the NYSE Group Bylaws, and the methods of delivery of notices would be updated to delete references to telegrams, provide certain requirements for notices sent to non-U.S. addresses and add a reference to email or other electronic transmission of notices, in each case to be consistent with the analogous provisions in Section 3.9 (which would be renumbered as Section 3.8) of the NYSE Euronext Bylaws;

- The reference in Section 3.8 of the NYSE Group Bylaws to restrictions on telephonic participation in meetings would be deleted, because the NYSE Group Bylaws and the NYSE Group Certificate do not contain any such restrictions, and the wording of this provision would be amended to be consistent with the analogous language in Section 3.10 (renumbered as Section 3.9) of the NYSE Euronext Bylaws;

- Section 7.4 would be revised to provide that the persons who are authorized to execute contracts and other instruments on behalf of NYSE Group would include the Chief Executive Officer, which is consistent with the analogous provision in Section 10.4 of the NYSE Euronext Bylaws;

- Certain aspects of the indemnification and expense advancement provisions in Section 7.6 of the NYSE Group Bylaws, including the terms of any insurance policy maintained by NYSE Group, would be simplified in light of the fact that there are not expected to be any independent, non-executive directors of NYSE Group and, therefore, a more streamlined process for indemnification claims is appropriate, and these revisions would be consistent with the revisions to the analogous provisions of the NYSE Euronext Bylaws set forth in this Proposed Rule Change;

- Section 7.9 of the NYSE Group Bylaws would be amended to clarify that they may be amended or repealed, and new bylaws may be adopted, by

either (1) The NYSE Group board of directors or (2) subject to any vote of holders of any class or series of NYSE Group stock required by law or the NYSE Group Certificate, the affirmative vote of holders of a majority of the votes entitled to be cast by holders of outstanding shares of NYSE Group entitled to vote generally in the election of directors, voting together as a single class;

- In light of the fact that NYSE Alternext US LLC formally changed its name to NYSE Amex LLC, references to NYSE Alternext US LLC in the NYSE Group Bylaws would be amended to refer instead to NYSE Amex LLC, and the definition of “Regulated Subsidiary” in the NYSE Group Certificate would be amended to include NYSE Amex; and

- Certain other clarifying, conforming or other technical edits would be made to Sections 4(a), 4(b)(1)(A)(w), 4(b)(1)(A)(y), 4(b)(1)(A)(z), 4(b)(1)(E)(iv), 4(b)(1)(E)(vi), 4(b)(1)(E)(x), 4(b)(1)(E)(xii), 4(b)(2)(C) and 4(b)(2)(E) of Article IV, Sections 6 and 8 of Article V, Article X, Article XII and Article XIV of the NYSE Group Certificate and to Sections 2.3, 2.9, 5.1 and 7.9 of the NYSE Group Bylaws. In addition, the numbering of certain sections of the NYSE Group Certificate and NYSE Group Bylaws would be updated to reflect the amendments set forth above.

#### 8. Proposed Amendments to Board Composition Requirements for the Exchange, NYSE Amex, NYSE Market and NYSE Regulation

The Third Amended and Restated Operating Agreement, dated as of April 1, 2009, of the Exchange (the “Exchange Operating Agreement”), currently provides that (1) A majority of the members of the Exchange’s board of directors must be U.S. persons and members of the board of directors of NYSE Euronext who satisfy the independence requirements of the NYSE Euronext board, and (2) at least 20% of the Exchange’s board members must be persons who are not board members of NYSE Euronext but who qualify as independent under the independence policy of the NYSE Euronext board of directors (the “Non-Affiliated Exchange Directors”).<sup>64</sup> The nominating and governance committee of the NYSE Euronext board of directors is required to designate as Non-Affiliated Exchange Directors the candidates recommended jointly by the Director Candidate Recommendation Committees of each of NYSE Market and

<sup>64</sup> See Third Amended and Restated Operating Agreement of New York Stock Exchange LLC, Section 2.03(a).



NYSE Regulation or, in the event there are Petition Candidates (as such term is defined in the Exchange Operating Agreement), the candidates that emerge from a specified process will be designated as the Non-Affiliated Exchange Directors.<sup>65</sup>

Under the Proposed Rule Change, these provisions would be amended (1) To provide that the independent members of the Exchange's board of directors, rather than the nominating and governance committee of the NYSE Euronext board of directors, will designate the Non-Affiliated Exchange Directors and make the other related determinations that were previously to be made by the nominating and governance committee of the NYSE Euronext board of directors; (2) to provide that instead of using the independence policy of the NYSE Euronext board of directors to assess the independence of the Exchange's board members, the Exchange will have its own independence policy in the form attached to this Proposed Rule Change as Exhibit 5K (the "SRO Director Independence Policy"); (3) in light of the fact that the board of directors of NYSE Euronext will be decreased in size once it becomes a wholly owned subsidiary of Holdco, the requirement that a majority of the members of the Exchange's board of directors must be members of the board of directors of NYSE Euronext would be eliminated; and (4) to provide that at least 20% of the Exchange's directors must be persons who are not members of the board of directors of Holdco (rather than referring to the board of directors of NYSE Euronext). Substantially the same revisions would be made to the analogous provisions of the Amended and Restated Operating Agreement of NYSE Amex,<sup>66</sup> the Amended and Restated Bylaws of NYSE Market<sup>67</sup> and the Third Amended and Restated Bylaws of NYSE Regulation.<sup>68</sup>

The Amended and Restated Bylaws of NYSE Market and the Third Amended and Restated Bylaws of NYSE Regulation would also be amended to change the registered office of these entities from National Registered Agents to The Corporation Trust Company and CT Corporation, respectively. In addition, references to NYSE Alternext US LLC in the Third Amended and Restated Bylaws of NYSE Regulation

would be changed to refer instead to NYSE Amex.

The SRO Director Independence Policy to be adopted by each of the Exchange, NYSE Market, NYSE Regulation and NYSE Amex under the Proposed Rule Change would be substantially similar to the current Independence Policy of the NYSE Euronext board of directors, except that certain conforming changes would be made, including the deletion of provisions that currently apply only to NYSE Euronext directors and expressly do not apply to directors of these NYSE U.S. Regulated Subsidiaries. In particular, (1) References to NYSE Euronext would refer instead to the relevant NYSE U.S. Regulated Subsidiary or Holdco, as applicable; (2) the requirement that at least three-fourths of the directors must be independent would be deleted, since the organizational documents of these NYSE U.S. Regulated Subsidiaries contain the independence and other qualification requirements for directors; (3) the requirement in the Independence Policy of NYSE Euronext that the board consider the special responsibilities of a director in light of NYSE Euronext's ownership of NYSE U.S. Regulated Subsidiaries and European regulated entities would be deleted, because unlike NYSE Euronext, these NYSE U.S. Regulated Subsidiaries are not holding companies; (4) the requirement for directors to inform the Chairman of the Nominating and Governance Committee of certain relationships and interests would be deleted, since the boards of these NYSE U.S. Regulated Subsidiaries do not have a Nominating and Governance Committee, except that in the SRO Director Independence Policy to be adopted by NYSE Regulation, this provision would reference the Nominating and Governance Committee of NYSE Regulation, Inc.; (5) references to NYSE Alternext, Inc. would refer instead to NYSE Amex, because of this entity's name change; (6) because the current Independence Policy of NYSE Euronext provides that a director of an affiliate of a Member Organization cannot qualify as an independent director of these NYSE U.S. Regulated Subsidiaries, the conflicting language stating that a director of an affiliate of a Member Organization shall not per se fail to be independent would be deleted; and (7) because language in the current Independence Policy of NYSE Euronext provides that an executive officer of an issuer whose securities are listed on a NYSE Exchange cannot qualify as an independent director of these NYSE U.S. Regulated Subsidiaries, the conflicting

language providing an exception applicable only to NYSE Euronext directors would be deleted. In addition, the "additional independence requirements" at the end of the current Independence Policy of NYSE Euronext, which provides that executive officers of foreign private issuers, executive officers of NYSE Euronext and directors of affiliates of member organizations must together comprise no more than a minority of the total board, would be eliminated. This provision is designed to ensure that although persons who are directors of an affiliate of a Member Organization or who are executive officers of a "foreign private issuer" listed on a NYSE Exchange may in some circumstances qualify as independent for purposes of NYSE Euronext board membership, such persons may not, together with executive officers of NYSE Euronext, constitute more than a minority of the total NYSE Euronext directors. Under the proposed SRO Director Independence Policy, such persons could not be deemed to be independent directors of the relevant NYSE U.S. Regulated Subsidiary and, accordingly, this limitation on the number of such persons who may serve on the board is unnecessary.

#### 9. Proposed Amendments to the Exchange Rules, NYSE Amex Rules and NYSE Arca Equities Rules

Under the Proposed Rule Change, certain technical amendments would be made to the Exchange Rules, as summarized below:

- References therein to "NYSE Euronext" would be replaced with references to Holdco, except that references to NYSE Euronext in Rule 22 and Rule 422 would be retained and references to Holdco would be added; and
  - Rule 2 would be revised to delete the definitions of "member" and "member organization" relating to NYSE Amex which are set forth in Rule 2 for purposes of Section 1(L) of Article 5 of the NYSE Euronext Certificate, because under the Proposed Rule Change, that section of the NYSE Euronext Certificate will be revised to incorporate this language [sic]
- In addition, certain technical amendments would be made to the NYSE Amex Rules and NYSE Arca Equities Rules to replace references therein to "NYSE Euronext" with references to Holdco.

#### 10. Proposed Technical Amendment to the NYSE Trust Agreement

Following completion of the Combination, NYSE Euronext will become a wholly owned subsidiary of

<sup>65</sup> See *id.*

<sup>66</sup> See Amended and Restated Operating Agreement of NYSE Amex LLC, Section 2.03(a).

<sup>67</sup> See Amended and Restated Bylaws of NYSE Market, Inc., Article III Section 1.

<sup>68</sup> See Third Amended and Restated Bylaws of NYSE Regulation, Inc., Article III Section 1.

Holdco and, as such, its board of directors will likely be reduced in size and may not include directors who satisfy the independence criteria that are currently applicable. Accordingly, under the Proposed Rule Change, the functions currently performed by the nominating and governance committee of NYSE Euronext in connection with reviewing and appointing trustees pursuant to the Trust Agreement, dated as of April 4, 2007, by and among NYSE Euronext, NYSE Group and the other parties thereto, would be transferred to the Holdco Nominating, Governance and Corporate Responsibility Committee. References in such trust agreement to the nominating and governance committee of NYSE Euronext would be replaced with references to the Holdco Nominating, Governance and Corporate Responsibility Committee, as indicated in Exhibit 5O attached to this Proposed Rule Change.

#### 11. Statutory Basis

NYSE Arca believes that this filing is consistent with Section 6(b)<sup>69</sup> of the Exchange Act in general, and furthers the objectives of Section 6(b)(1)<sup>70</sup> in particular, in that it enables NYSE Arca 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 Arca. With respect to the ability of the Commission to enforce the Exchange Act as it applies to the U.S. Regulated Subsidiaries after the Combination, the U.S. Regulated Subsidiaries will operate in the same manner following the Combination 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 Arca also believes that this filing furthers the objectives of Section

6(b)(5)<sup>71</sup> of the Exchange Act 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. NYSE Arca expects that the Combination will position the Holdco Group to be a leader in a diverse set of large and growing businesses, including derivatives, listings, cash equities, post-trade settlement and asset servicing, market data and technology servicing. NYSE Arca believes this will enable the Holdco Group to leverage technology and a unique collection of markets to create a mutually reinforcing capital markets community driving efficiencies and innovation for clients and efficient, transparent and well-regulated markets for issuers and clients. As a true pacesetter across the spectrum of capital markets services, the Holdco Group would be positioned to offer clients global scale, product innovation, operational and capital efficiencies and an enhanced range of technology and market information solutions.

In addition, NYSE Arca expects that the Holdco Group would be positioned to serve as a benchmark regulatory model, facilitating transparency and standardization in capital markets globally, while continuing to operate all national exchanges under local regulatory frameworks.

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

NYSE Arca 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.

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

NYSE Arca 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 (i) As the Commission may designate up to 90 days of such date 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 such 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-NYSEArca-2011-72 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-NYSEArca-2011-72. 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 Web site (<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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official

<sup>69</sup> 15 U.S.C. 78(f)(b).

<sup>70</sup> 15 U.S.C. 78(f)(b)(1).

<sup>71</sup> 15 U.S.C. 78(f)(b)(5).

business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2011–72 and should be submitted on or before November 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>72</sup>

Elizabeth M. Murphy,  
Secretary.

[FR Doc. 2011–27197 Filed 10–19–11; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65566; File No. SR–ISE–2011–69]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change Relating to a Corporate Transaction in which Its Indirect Parent, Deutsche Börse AG, Will Become a Wholly Owned Subsidiary of Alpha Beta Netherlands Holding N.V.

October 14, 2011.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Exchange Act”), and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on October 12, 2011, International Securities Exchange, LLC (the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared substantially by the Exchange. 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 Combination

The Exchange, a Delaware limited liability company, registered national securities exchange and self-regulatory organization, is submitting this rule

filing (the “Proposed Rule Change”) to the Commission in connection with the proposed business combination (the “Combination”) of NYSE Euronext, a Delaware corporation, and Deutsche Börse AG, an *Aktiengesellschaft* organized under the laws of the Federal Republic of Germany (“Deutsche Börse”).

NYSE Euronext 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”)—the New York Stock Exchange, LLC (“NYSE”), NYSE Arca, Inc. (“NYSE Arca”) and NYSE Amex LLC (“NYSE Amex”)—and (2) 100% of the equity interest of NYSE Market, Inc. (“NYSE Market”), NYSE Regulation, Inc. (“NYSE Regulation”), NYSE Arca L.L.C. (“NYSE Arca LLC”) and NYSE Arca Equities, Inc. (“NYSE Arca Equities”) (the NYSE Exchanges, together with NYSE Market, NYSE Regulation, NYSE Arca LLC and NYSE Arca Equities, the “NYSE U.S. Regulated Subsidiaries” and each, a “NYSE U.S. Regulated Subsidiary”). NYSE, NYSE Arca and NYSE Amex will be separately filing a proposed rule change in connection with the Combination.

Deutsche Börse indirectly owns 50% of the equity interest of International Securities Exchange Holdings, Inc. (“ISE Holdings”), which in turn holds 100% of the equity interest of the Exchange. ISE Holdings also holds 31.54% of the equity interest of Direct Edge Holdings, LLC (“Direct Edge Holdings”), which in turn indirectly holds 100% of the equity interest of two registered national securities exchanges and self-regulatory organizations—EDGA Exchange, Inc. (“EDGA”) and EDGX Exchange, Inc. (“EDGX”) (each of the Exchange, EDGA and EDGX, a “DB Exchange” and a “DB U.S. Regulated Subsidiary” and together, the “DB Exchanges” and the “DB U.S. Regulated Subsidiaries”). EDGA and EDGX will be separately filing a proposed rule change in connection with the Combination that will be the substantially the same as the Proposed Rule Change.

If the Combination is completed, the businesses of NYSE Euronext and Deutsche Börse, including the NYSE U.S. Regulated Subsidiaries and the DB U.S. Regulated Subsidiaries (together, the “U.S. Regulated Subsidiaries” and each, a “U.S. Regulated Subsidiary”), will be held under a single, publicly traded holding company organized under the laws of the Netherlands

(“Holdco”).<sup>3</sup> The Proposed Rule Change, if approved by the Commission, will not be operative until the consummation of the Combination.

##### B. Summary of Proposed Rule Change

The Exchange is proposing that, pursuant to the Combination, its indirect parent, Deutsche Börse, will become a wholly owned subsidiary of Holdco. In addition, the Exchange is proposing that, in connection with the Combination, the Commission approve certain amendments to the organizational and other governance documents of Holdco and ISE Holdings. The Proposed Rule Change is summarized as follows:

- *Proposed Approval of Waiver of Ownership and Voting Restrictions of ISE Holdings.* The Amended and Restated Certificate of Incorporation of ISE Holdings (the “ISE Holdings Certificate”) currently restricts any person, either alone or together with its related persons, from having voting control over more than 20% of the outstanding capital stock of ISE Holdings and from owning of record or beneficially more than 40% of the outstanding capital stock of ISE Holdings (or in the case of any Exchange member, acting alone or together with its related persons, from owning of record or beneficially more than 20% of the outstanding capital stock of ISE Holdings).<sup>4</sup> If a person were to obtain a voting or ownership interest in excess of the voting or ownership restrictions without obtaining the approval of the Commission, the shares of ISE Holdings would automatically transfer to a statutory trust established under and pursuant to the provisions of the Delaware Statutory Trust Act, 12 Del. C. §§ 3801 *et seq.* (“ISE Trust”). The ISE Holdings Certificate and the Amended and Restated Bylaws of ISE Holdings (the “ISE Holdings Bylaws”) provide that the board of directors of ISE Holdings may waive these voting and ownership restrictions in an amendment to the ISE Holdings Bylaws if it makes certain findings and the amendment to the ISE Holdings Bylaws has been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act.<sup>5</sup> Acting pursuant to this waiver provision, the board of directors of ISE Holdings has approved the amendment

<sup>3</sup> Holdco is currently named “Alpha Beta Netherlands Holding N.V.,” but it is expected that Holdco will be renamed prior to the completion of the Combination to a name agreed between NYSE Euronext and Deutsche Börse.

<sup>4</sup> See Amended and Restated Certificate of Incorporation of ISE Holdings, Article FOURTH, Section III.

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

<sup>72</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.