

purchases were influenced by the investment by the Fund of Funds in the Fund. The Board will consider, among other things: (i) whether the purchases were consistent with the investment objectives and policies of the Fund (or its respective Master Fund); (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Fund (or its respective Master Fund) in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to ensure that purchases of securities in Affiliated Underwritings are in the best interest of the owners of beneficial interests in Shares of the Fund.

8. Each Fund (or its respective Master Fund) will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by a Fund of Funds in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

9. Before investing in the Shares of a Fund in excess of the limits in section 12(d)(1)(A), a Fund of Funds will execute a FOF Participation Agreement with the Fund stating that their respective boards of directors or trustees and their investment advisers, or trustee and Sponsor, as applicable, understand the terms and conditions of the requested order, and agree to fulfill their responsibilities under the requested order. At the time of its investment in Shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), a Fund of Funds will notify the Fund of the investment. At such time, the Fund of

Funds will also transmit to the Fund a list of the names of each Fund of Funds' Affiliate and Underwriting Affiliate. The Fund of Funds will notify the Fund of any changes to the list as soon as reasonably practicable after a change occurs. The Fund and the Fund of Funds will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

10. Before approving any advisory contract under section 15 of the Act, the Board of each Investing Management Company including a majority of the Independent Board Members, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund (or its respective Master Fund) in which the Investing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of a Fund of Funds will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

12. No Fund (or its respective Master Fund) will acquire securities of an investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent that (i) the Fund (or its respective Master Fund) acquires securities of another investment company pursuant to exemptive relief from the Commission permitting the Fund (or its respective Master Fund) to acquire securities of one or more investment companies for short-term cash management purposes, or (ii) the Fund acquires securities of the Master Fund pursuant to the Master-Feeder Relief.

For the Commission, by the Division of Investment Management, under delegated authority.

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2013-16025 Filed 7-2-13; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69872]

### Order Pursuant to Section 17A of the Securities Exchange Act of 1934 Granting Exemption From the Clearing Agency Registration Requirement Under Section 17A(b) of the Exchange Act for ICE Clear Europe Limited in Connection With Its Proposal To Clear Contracts Traded on the LIFFE Administration and Management Market

June 27, 2013.

#### I. Introduction

Section 17A of the Securities Exchange Act of 1934 ("Exchange Act")<sup>1</sup> sets forth the framework for the regulation of the clearance and settlement of securities transactions and directs the Securities and Exchange Commission ("Commission") to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions. Pursuant to Section 17A(b)(1) of the Exchange Act,<sup>2</sup> absent an exemption, a clearing agency that makes use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to any security (other than an exempted security) is required to register with the Commission. The Commission has required a foreign clearing agency to register or obtain an exemption from clearing agency registration if the foreign clearing agency provides clearance and settlement services for U.S. securities directly to U.S. persons.<sup>3</sup> The Commission, by rule or order, upon its own motion or upon application, may conditionally or unconditionally exempt any clearing agency or security or any class of clearing agencies or securities from any provisions of Section 17A or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of Section 17A, including the prompt and accurate

<sup>1</sup> 15 U.S.C. 78q-1.

<sup>2</sup> 15 U.S.C. 78q-1(b)(1).

<sup>3</sup> See Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 69490 (May 1, 2013), 78 FR 30967 (May 23, 2013), Part V.B, n. 682; and Exemption of Certain Foreign Brokers or Dealers, Exchange Act Release No. 58047 (Jun. 27, 2008), 73 FR 39182 (Jul. 8, 2008), Part III.F.3 (both discussing the Commission's approach to the registration of foreign clearing agencies).

clearance and settlement of securities transactions and the safeguarding of securities and funds.<sup>4</sup>

ICE Clear Europe Limited (“ICE Clear Europe”) is an indirectly wholly-owned subsidiary of IntercontinentalExchange, Inc. (“ICE”). Incorporated in England and Wales in 2007 as a private limited company, ICE Clear Europe is subject to supervision by the Bank of England as a Recognised Clearing House (“RCH”) in the United Kingdom. Pursuant to Section 763(b) of the Dodd-Frank Act,<sup>5</sup> on July 16, 2011, ICE Clear Europe became registered with the Commission as a clearing agency solely for the purpose of clearing security-based swaps (“SBS”).<sup>6</sup>

In connection with the proposed merger of ICE with NYSE Euronext, ICE Clear Europe filed with the Commission a proposed rule change under Section 19(b) of the Exchange Act<sup>7</sup> and Rule 19b-4<sup>8</sup> thereunder to clear futures and options contracts traded on the LIFFE Administration and Management Market (“LIFFE A&M”), including contracts traded over-the-counter and processed through LIFFE A&M’s BClear<sup>9</sup> service.<sup>10</sup> The contracts traded

on LIFFE A&M proposed to be cleared by ICE Clear Europe (“LIFFE Contracts”) include instruments that constitute securities for the purposes of U.S. securities laws (“LIFFE Securities Products”), including U.S. securities, which for purposes of the Proposal, include futures or options on underlying U.S. equities and equity indices.

In this context, ICE Clear Europe has filed with the Commission an application on Form CA-1 for exemption from clearing agency registration under Section 17A(b) of the Exchange Act and Rule 17Ab2-1 thereunder in connection with ICE Clear Europe’s proposed clearing activity involving LIFFE Securities Products.<sup>11</sup> Based on the rules and procedures contained in the Proposal, the representations made and information submitted by ICE Clear Europe in the Proposal, its Form CA-1 application, including the ICE Clear Europe Letter, and additional supplemental materials (collectively, the “Exemptive Application”), and for the reasons discussed in this Order, the Commission is exempting ICE Clear Europe from the registration requirement under Section 17A(b)(1) of the Exchange Act solely with respect to ICE Clear Europe’s provision of clearance and settlement services for LIFFE Securities Products, subject to certain conditions.

## II. Discussion

### A. Applicable Standards

Section 17A(b)(1) of the Exchange Act<sup>12</sup> prohibits any clearing agency from directly or indirectly making use of the mails or any means or instrumentality of interstate commerce

Filing”). On June 4, 2013, ICE Clear Europe submitted Amendment No. 2 to the proposed rule change to set forth more fully the statutory basis for the proposed rule changes and to make certain additional rule changes relevant to changes in margin requirements. See Exchange Act Release No. 69703 (Jun. 5, 2013), 78 FR 35335 (Jun. 12, 2013) (SR-ICEEU-2013-09) (“Amendment No. 2”). On June 20, 2013, ICE Clear Europe filed Amendment No. 3 to the proposed rule change, which modified proposed Rule 207(f) to further define the persons that are subject to the restriction from clearing U.S. securities to include any clearing member having a U.S. residence, based upon the location of its executive office or principal place of business, including, without limitation, (i) a U.S. bank (as defined by Section 3(a)(6) of the Exchange Act) and (ii) a foreign branch of a U.S. bank or U.S. registered broker-dealer. The initial rule filing and all subsequent amendments filed are collectively referred to hereinafter as the “Proposal.”

<sup>11</sup> ICE Clear Europe’s Form CA-1 incorporates a letter from Paul Swann, President, ICE Clear Europe, to Elizabeth Murphy, Secretary, SEC, dated June 11, 2013, requesting exemptive relief from clearing agency registration in connection with the clearing of LIFFE Securities Products (“ICE Clear Europe Letter”).

<sup>12</sup> 15 U.S.C. 78q-1(b)(1).

to perform the functions of a clearing agency with respect to any security (other than an exempted security), unless it is registered with the Commission. Section 17A(b)(1) further provides that the Commission, by rule or order, may conditionally or unconditionally exempt any clearing agency or security or any class of clearing agencies or securities from any provisions of Section 17A of the Exchange Act or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of Section 17A, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds.<sup>13</sup>

The Commission has required a foreign clearing agency to register, or obtain an exemption from clearing agency registration, when the foreign clearing agency provides clearance and settlement services for U.S. securities directly to U.S. persons.<sup>14</sup>

### B. ICE Clear Europe’s Request for Exemption

ICE Clear Europe is a foreign clearing agency registered in the U.S. solely for the purpose of clearing SBS. The Commission has not previously addressed the registration requirements applicable to a foreign clearing agency registered solely for the purpose of clearing SBS that proposes to clear non-SBS securities products. However, the Commission believes that the proposed clearing of the LIFFE Securities Products would exceed the scope of activities permitted by ICE Clear

<sup>13</sup> *Id.*

<sup>14</sup> See *supra* n. 3. See, also, e.g., Order Approving Application for Exemption from Registration as a Clearing Agency, Exchange Act Release No. 38328 (Feb. 24, 1997), 62 FR 9225 (Feb. 28, 1997) (granting an exemption from registration as a clearing agency under Section 17A in connection with performing the functions of a clearing agency with respect to transactions involving U.S. government and agency securities for U.S. entities); Order Approving Application for Exemption from Registration as a Clearing Agency, Exchange Act Release No. 39643 (Feb. 11, 1998), 63 FR 8232 (Feb. 18, 1998); and Order Approving Application to Modify an Existing Exemption from Clearing Agency Registration, Exchange Act Release No. 43775 (Dec. 28, 2000), 66 FR 819 (Jan. 4, 2001).

*Cf.* Order Approving Proposed Rule Change to Allow The Depository Trust Company to Provide Settlement Services to European Central Counterparty Limited for U.S. Securities Traded on European Trading Venues, Exchange Act Release No. 61593 (Feb. 25, 2010), 75 FR 9987 (Mar. 4, 2010) (SR-DTC-2009-17) (approving a proposed rule change to allow The Depository Trust Company (“DTC”) to provide settlement services to European Central Counterparty Limited, a separately incorporated foreign subsidiary of The Depository Trust and Clearing Corporation and a RCH, for U.S. securities).

<sup>4</sup> See Section 17A(b)(1) of the Exchange Act, 15 U.S.C. 78q-1(b)(1).

<sup>5</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111-203, 124 Stat. 1376 (2010).

<sup>6</sup> Section 763(b) of the Dodd-Frank Act amended Section 17A of the Exchange Act by adding new Section 17A(l) to the Exchange Act, 15 U.S.C. 78q-1(l), which provides that (i) a depository institution registered with the Commodity Futures Trading Commission (“CFTC”) that cleared swaps as a multilateral clearing organization prior to the date of enactment of the Dodd-Frank Act and (ii) a derivatives clearing organization registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act will be deemed registered with the Commission as a clearing agency solely for the purpose of clearing SBS.

<sup>7</sup> 15 U.S.C. 78s(b).

<sup>8</sup> 17 CFR 240.19b-4.

<sup>9</sup> BClear is a service operated by LIFFE A&M, which enables LIFFE A&M clearing members to report certain bilaterally agreed off-exchange trades to LIFFE A&M. After ICE Clear Europe launches its clearing business for LIFFE A&M, trades would be eligible for clearing by ICE Clear Europe upon being reported.

<sup>10</sup> On May 13, 2013, ICE Clear Europe filed a proposed rule change with the Commission. On May 22, 2013, ICE Clear Europe submitted Amendment No. 1 to the proposed rule change to, among other things, clarify the scope of products proposed to be cleared, add new Rule 207(f) prohibiting broker-dealer/futures commission merchant Clearing Members and other Clearing Members organized in the U.S. from clearing LIFFE Contracts that are futures or options on underlying U.S. securities, add additional clarification surrounding the operation of the combined F&O Guaranty Fund and the margining of LIFFE Contracts, and supplement the statutory basis for the proposed rule change. See Exchange Act Release No. 69628 (May 23, 2013), 78 FR 32287 (May 29, 2013) (SR-ICEEU-2013-09) (“Original

Europe's registration as a SBS clearing agency under Section 17A(l) of the Exchange Act, and therefore ICE Clear Europe may not clear the LIFFE Securities Products pursuant to its existing Commission registration. In addition, because the LIFFE Securities Products include certain products that are considered U.S. securities, and ICE Clear Europe clearing members include financial institutions that are organized or resident in the United States, the Commission has determined that ICE Clear Europe must register or seek an exemption from registration as a clearing agency under Section 17A(b)(1) of the Exchange Act prior to providing clearing services for the LIFFE Securities Products.

In light of the Commission's precedents pertaining to registration requirements for foreign clearing agencies, ICE Clear Europe is proposing to amend its rule book to prohibit U.S. clearing members ("U.S. participants") from clearing U.S. securities. Specifically, new ICE Clear Europe Rule 207(f) would prohibit U.S. participants<sup>15</sup> from clearing U.S. securities. In addition, ICE Clear Europe has developed policies and procedures to enforce proposed Rule 207(f), including market access controls that prevent U.S. participants from creating or holding cleared positions in U.S. securities and, consequently, from engaging in any clearing-related activity (including give-ups or take-ups in respect of those products).<sup>16</sup> In addition, when a new U.S. participant is approved for clearing, LIFFE A&M and ICE Clear Europe will be jointly responsible to ensure that these access limitations are properly in place.<sup>17</sup> ICE

Clear Europe represents that it will report any incidents not in compliance with such proposed Rule 207(f).<sup>18</sup>

In connection with its clearing of the LIFFE Contracts, ICE Clear Europe has represented that it is not seeking an exemption from substantive regulation that it is currently subject to as a registered clearing agency.<sup>19</sup> ICE Clear Europe states that it will clear LIFFE Contracts in a manner consistent with the requirements of Section 17A of the Exchange Act and Rule 17Ad-22 thereunder, including the requirements as to financial resources, operational and managerial resources, participant requirements, settlement procedures, safeguarding of funds and default procedures, among others.<sup>20</sup> ICE Clear Europe further represents that it will manage its clearing activities involving the LIFFE Contracts, including LIFFE Securities Products, to the standards applicable to registered clearing agencies.<sup>21</sup> ICE Clear Europe has noted that, since ICE Clear Europe is a registered clearing agency for SBS, ICE Clear Europe's clearing of LIFFE Contracts, including LIFFE Securities Products, will be subject to the requirements under the Exchange Act applicable to a registered clearing agency, including the rule approval requirements under Section 19(b) of the Exchange Act, regardless of whether ICE Clear Europe is exempt from the registration requirement of Section 17A(b)(1).<sup>22</sup> ICE Clear Europe also acknowledges the Commission's current supervision and examination authority over ICE Clear Europe's business generally, including the authority to conduct regular on-site examination.<sup>23</sup>

In its exemptive request, ICE Clear Europe has expressed concerns that a delay in its ability to clear the LIFFE Contracts beginning July 1, 2013, would cause disruption to the market for these products.<sup>24</sup> In addition, ICE Clear Europe noted that by September 2013, all European clearing agencies will need to apply for authorization under the European Markets and Infrastructure Directive (EMIR).<sup>25</sup> ICE Clear Europe states that the current LIFFE A&M clearing arrangements are not built out for EMIR compliance, and therefore LIFFE A&M, ICE Clear Europe, LCH.Clearnet Limited, and market participants are relying on this

transition taking place to be compliant with EU law.<sup>26</sup>

### C. Effect of Exemption

Based on ICE Clear Europe's representations to clear LIFFE Contracts in a manner consistent with the standards applicable to clearing agencies registered under Section 17A, and the Commission's existing authority over ICE Clear Europe as a registered clearing agency under Section 17A(l), granting an exemption from the clearing agency registration requirement under Section 17A(b) to ICE Clear Europe for the clearing of LIFFE Securities Products would operate as an exemption from the registration process and not from the Commission's statutory authority to substantively oversee and regulate such activities.

Furthermore, ICE Clear Europe's proposed limitations to prevent U.S. participants from clearing U.S. securities, including proposed Rule 207(f) and related policies, procedures, and market access controls, are consistent with clearing arrangements involving foreign clearing agencies for which the Commission has granted exemptive relief from registration requirements under Section 17A(b).<sup>27</sup>

An exemption granted to ICE Clear Europe from the clearing agency registration requirement under Section 17A(b)(1) of the Exchange Act provides legal certainty for ICE Clear Europe as to its activities associated with the clearing of LIFFE Securities Products, avoids disruption in the European markets, and facilitates compliance with EMIR, consistent with promoting the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions. In addition, the Commission's continued supervision over ICE Clear Europe as a registered clearing agency, notwithstanding the exemption from the registration requirement, permits the Commission to oversee that ICE Clear Europe provides clearance and settlement services with respect to LIFFE Contracts, including LIFFE Securities Products, in a manner consistent with the requirements of Section 17A of the Exchange Act. Accordingly, based on the foregoing, the amended rules and procedures contained in the Proposal, and the representations made by ICE Clear Europe in its Exemptive Application, the Commission finds that an exemption from registration with respect to the clearing activity for the LIFFE Securities Products under Section 17A(b)(1) is

<sup>15</sup> The term "U.S. participant" was previously defined for the limited purposes of a clearing agency exemptive order as a person having a U.S. residence, based upon the location of its executive office or principal place of business, including, without limitation, (i) a U.S. bank (as defined by Section 3(a)(6) of the Exchange Act), (ii) a foreign branch of a U.S. bank or U.S. registered broker-dealer, and (iii) any broker-dealer registered as such with the Commission even if such broker-dealer does not have a U.S. residence. See Exchange Act Release No. 39643 (Feb. 11, 1998), 63 FR 8232 (Feb. 18, 1998) (order exempting Euroclear Bank's predecessor, Morgan Guaranty Trust Company, as operator of the Euroclear system, from clearing agency registration), n. 62. Consistent with this definition of U.S. participant, ICE Clear Europe's Proposal contains rule changes that would prohibit a person (i) that is a FCM/BD, (ii) organized in the United States of America, or (iii) having a U.S. residence, based on the location of its executive office or principal place of business, including, without limitation, a U.S. bank (as defined by Section 3(a)(6) of the Exchange Act) or a foreign branch of a U.S. bank or U.S. registered broker-dealer, from participating in clearing U.S. securities.

<sup>16</sup> See Amendment No. 2 at 35337.

<sup>17</sup> *Id.*

<sup>18</sup> See Exemptive Application.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* See also Original Filing, *supra* n. 10.

<sup>21</sup> See Exemptive Application.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See *supra* n. 14.

consistent with the public interest, the protection of investors, and the purposes of Section 17A, including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds.

### III. Scope and Modification of Order

This exemption granted by this order is solely with respect to the registration requirement in Section 17A(b)(1) applicable to the clearance and settlement services to be provided by ICE Clear Europe for LIFFE Securities Products as described in ICE Clear Europe's Proposal, and does not in any way affect the Commission's existing supervisory authority over ICE Clear Europe as a registered clearing agency. ICE Clear Europe as a registered clearing agency continues to be subject to the applicable provisions of the Exchange Act, including Sections 17A,<sup>28</sup> 17(a),<sup>29</sup> 17(b),<sup>30</sup> and 19(b),<sup>31</sup> and the rules and regulations thereunder applicable to clearance and settlement activities and registered clearing agencies.

The Commission may modify by order the terms, scope, or condition of this exemptive order if the Commission determines that such modification is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act. Furthermore, the Commission may limit, suspend, or revoke this exemption if the Commission finds that ICE Clear Europe has violated or is unable to comply with the conditions of this Order or applicable provisions in the Exchange Act with respect to a registered clearing agency, if such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.

### IV. Conclusion

The Commission finds that ICE Clear Europe's application for exemption from the registration requirement under Section 17A(b)(1) is consistent with the public interest, the protection of investors, and the purposes of Section 17A.

*It is hereby ordered*, pursuant to Section 17A(b)(1) of the Exchange Act, that the application for exemption from registration under Section 17A(b)(1) filed by ICE Clear Europe Limited be, and hereby is, approved within the scope described in this order subject to the following conditions:

(1) ICE Clear Europe shall have rules, policies, and procedures reasonably designed to prohibit the clearing of U.S. securities by U.S. participants, including market access controls preventing U.S. participants from creating or holding cleared positions in U.S. securities and, consequently, from engaging in any clearing-related activity for such products.

(2) ICE Clear Europe shall immediately notify the Commission of incidents of non-compliance with its rules, policies, or procedures prohibiting U.S. participants from clearing U.S. securities, whether intentional or otherwise, including any failure of any operational controls proposed by ICE Clear Europe to prevent U.S. participants from creating or holding cleared positions in U.S. securities.

(3) ICE Clear Europe shall clear LIFFE Contracts, including LIFFE Securities Products, in a manner consistent with the requirements of Section 17A of the Exchange Act and Rule 17Ad-22 thereunder.

(4) ICE Clear Europe, as a registered clearing agency, shall continue to be subject to the applicable provisions of the Exchange Act, including Sections 17A,<sup>32</sup> 17(a),<sup>33</sup> 17(b),<sup>34</sup> and 19(b),<sup>35</sup> and the rules and regulations thereunder applicable to clearance and settlement activities and registered clearing agencies.

By the Commission.

**Kevin M. O'Neill,**

*Deputy Secretary.*

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**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69880; File No. SR-NASDAQ-2013-090]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 4754 Governing the NASDAQ Closing Cross ("Cross")

June 27, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on June 20, 2013, The NASDAQ Stock Market LLC

("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. 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 the Substance of the Proposed Rule Change

Nasdaq proposes to amend Exchange Rule 4754 governing the NASDAQ Closing Cross ("Cross") to specify contingency plans for determining the NASDAQ Official Closing Price ("NOCP") in the event NASDAQ experiences a system disruption that precludes normal execution of the Cross pursuant to Rule 4754.

The text of the proposed rule change is attached as Exhibit 5.<sup>3</sup>

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

In its filing with the Commission, the Exchange 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. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

##### 1. Purpose

*Background.* Since June of 2002, NASDAQ has published contingency plans in the event the NASDAQ closing process was to be disrupted during the annual reconstitution of the Russell indexes. The Russell-targeted contingency plans began as a series of scenarios, and the set has accreted new scenarios from year to year as NASDAQ's system and the market-wide trading ecosystem have evolved. NASDAQ has established a pattern of communication and testing of contingency plans to ensure that NASDAQ, its members, and the public are prepared to implement the contingency plans if needed.

While NASDAQ has communicated the contingency plans broadly to its members and to the investing public, NASDAQ has never included those

<sup>3</sup> The Commission notes that Exhibit 5 is attached to the filing, not to this Notice.

<sup>28</sup> 15 U.S.C. 78q-1.

<sup>29</sup> 15 U.S.C. 78q(a).

<sup>30</sup> 15 U.S.C. 78q(b).

<sup>31</sup> 15 U.S.C. 78s(b).

<sup>32</sup> 15 U.S.C. 78q-1.

<sup>33</sup> 15 U.S.C. 78q(a).

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

<sup>35</sup> 15 U.S.C. 78s(b).

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

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