

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-56955; File No. SR-ISE-2007-101]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Order Granting Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Relating to a Corporate Transaction in Which Its Parent, International Securities Exchange Holdings, Inc., Will Become a Wholly-Owned Indirect Subsidiary of Eurex Frankfurt AG

December 13, 2007.

#### I. Introduction

On November 1, 2007, International Securities Exchange, LLC ("Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change regarding a corporate transaction ("Transaction") in which the ISE's parent, International Securities Exchange Holdings, Inc. ("Holdings"), would become a wholly-owned, indirect subsidiary of Eurex Frankfurt AG ("Eurex Frankfurt"). The proposed rule change was published for comment in the **Federal Register** on November 7, 2007.<sup>3</sup> The Commission has received no comments on the proposal.

On December 11, 2007, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> This order approves the proposed rule change, grants accelerated approval to Amendment No. 1, and solicits comments from interested persons on Amendment No. 1.

The Commission has reviewed carefully the proposed rule change and finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>5</sup> In particular, the Commission finds that the proposed rule change is consistent with section 6(b) of the Act,<sup>6</sup> which,

among other things, requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange. Section 6(b) of the Act also requires that the rules of the exchange be designed to promote just and equitable principles of trade, 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.

#### A. Accelerated Approval of Amendment No. 1

The Commission, pursuant to section 19(b)(2) of the Act,<sup>7</sup> finds good cause for approving Amendment No. 1 prior to the thirtieth day after publishing notice of Amendment No. 1 in the **Federal Register**. In Amendment No. 1, the ISE proposes to amend the Trust Agreement (as defined below)<sup>8</sup> to provide that, if there is a Material Compliance Event (as described below),<sup>9</sup> Holdings and U.S. Exchange Holdings, Inc. ("U.S. Exchange Holdings") would be required to promptly transfer to the Trust a majority of capital stock of Holdings that have the right by its terms to vote in the election of the board of directors of Holdings ("Holdings Board") or on other matters (other than matters affecting the rights, preferences, or privileges of the said capital stock).<sup>10</sup> The Commission finds this change to the Trust Agreement consistent with the Act and that it is designed to facilitate the Exchange's ability to comply with the requirements of the Act.

The Exchange also proposes to amend the Certificate of Incorporation of Holdings ("Holdings Certificate") to provide that if a person exceeds Ownership Limit or Voting Limit (both as described below),<sup>11</sup> then a majority of capital stock of Holdings that have the right by its terms to vote in the election of the Holdings Board or on other matters (other than matters affecting the rights, preferences, or privileges of the said capital stock) would automatically be transferred to the Trust.<sup>12</sup>

Further, the Exchange proposes to amend the Holdings Certificate with the Certificate of Designation of Series A Preferred Stock ("Certificate of Designation").<sup>13</sup> Specifically, pursuant to the Certificate of Designation, the Exchange proposes to issue 100,000 shares of Holdings Series A Preferred Stock, par value \$.01 per share ("Holdings Preferred"). The Commission notes that the Exchange proposes to issue Holdings Preferred to finance, and thereby facilitate the completion of, the Transaction.

The Exchange represents that Holdings Preferred is not capital stock of Holdings that have the right by its terms to vote in the election of the Holdings Board or on other matters (other than matters affecting the rights, preferences, or privileges of Holdings Preferred).<sup>14</sup> Therefore, the Exchange represents that Holdings Preferred does not affect Ownership Limit or Voting Limit.

The Certificate of Designation amends the Holdings Certificate to provide that, for so long as any shares of Holdings Preferred are outstanding, there shall be a total of three directors on the Holdings Board.<sup>15</sup> If and when Holdings files for a reorganization or relief under bankruptcy law, approves a plan to dissolve or wind up, or fails to pay dividends of Holdings Preferred in any two consecutive calendar years, the holders of Holdings Preferred shall be entitled to appoint two additional directors to the Holdings Board.<sup>16</sup> However, the Certificate of Designation also provides that the number of directors constituting the entire Holdings Board may not be increased until the board of directors of ISE ("ISE Board") is notified and such change is filed with, or filed with and approved by, the Commission under the Act and rules thereunder.<sup>17</sup> Furthermore, any change to the Certificate of Designation must be submitted to the ISE Board. If such change must be filed with, or filed with and approved by, the Commission under section 19 of the Act<sup>18</sup> and the rules thereunder, then such change shall not be effective until filed with, or filed with and approved by, the Commission.<sup>19</sup>

The Commission believes the changes to the Holdings Certificate are consistent with the Act and therefore finds good

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

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

<sup>3</sup> See Securities Exchange Act Release No. 56733 (November 1, 2007), 72 FR 62885.

<sup>4</sup> The text of Amendment No. 1 and Exhibits 5A through 5I, which set forth certain governing documents and resolutions as proposed to be amended, are available on the Commission's Web site (<http://www.sec.gov/rules/sro/ise.shtml>), at the Commission's Public Reference Room, at the ISE, and on the ISE's Web site (<http://www.ise.com>).

<sup>5</sup> In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

<sup>7</sup> 15 U.S.C. 78s(b)(2).

<sup>8</sup> See *infra* notes 70 to 114 and accompanying text for a discussion of a Trust proposed in context of this filing.

<sup>9</sup> See *infra* notes 73 to 74 and accompanying text for a discussion of Material Compliance Event.

<sup>10</sup> Trust Agreement, Article IV, Section 4.2(g)(ii).

<sup>11</sup> See *infra* note 27 and accompanying text for a discussion of Ownership Limit and Voting Limit.

<sup>12</sup> Proposed Holdings Certificate, Article FOURTH, Sections III(c).

<sup>13</sup> The Certificate of Designation was approved by the unanimous written consent of the Holdings Board on November 19, 2007.

<sup>14</sup> Certificate of Designation, Section 5(a).

<sup>15</sup> Certificate of Designation, Section 7.

<sup>16</sup> Certificate of Designation, Section 5(b).

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

<sup>18</sup> 15 U.S.C. 78s.

<sup>19</sup> Certificate of Designation, Section 8(c).

cause to accelerate approval of these changes prior to the thirtieth day after publication in the **Federal Register**. The shares of Holdings Preferred do not affect Ownership Limit or Voting Limit. Further, in the event the holders of Holdings Preferred become entitled to appoint directors to the Holdings Board, the ISE must file this appointment right with the Commission pursuant to section 19 of the Act<sup>20</sup> and the rules thereunder.

In addition, the Exchange proposes certain clarifying, conforming, technical, non-material, and non-substantive changes to the Purpose Section of Form 19b-4, the Holdings Certificate, and the Amended and Restated Bylaws of Holdings ("Holdings Bylaws"). Further, the Exchange proposes certain clarifying, conforming, technical, non-material, and non-substantive changes to Form of German Parent Corporate Resolutions ("German Resolutions"), Form of Swiss Parent Corporate Resolutions, and Form of Swiss Parent Association Resolutions (Form of Swiss Parent Corporate Resolutions and Form of Swiss Parent Association Resolutions, together referred to herein as "Swiss Resolutions," and with German Resolutions, "Resolutions"). Finally, the Exchange also makes certain clarifying, conforming, technical, non-material, and non-substantive changes to the Amended and Restated Certificate of Incorporation of U.S. Exchange Holdings, Inc. ("U.S. Exchange Holdings Certificate"), the Amended and Restated Bylaws of U.S. Exchange, Inc. ("U.S. Exchange Holdings Bylaws"), and the Trust Agreement.

The changes described in the foregoing paragraph are non-substantive and technical in nature and are necessary to clarify the proposal. Therefore, they raise no new or novel issues. The Commission finds that these changes proposed in Amendment No. 1 are consistent with the Act. Further, pursuant to section 19(b)(2) of the Act,<sup>21</sup> the Commission finds good cause to accelerate approval of these changes prior to the thirtieth day after publication in the **Federal Register**, because they clarify the Exchange's rules, which should facilitate the Exchange's compliance, and the Commission's ability to ensure compliance, with such rules and assist members and investors in understanding the application and scope of the rules.

### B. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1, including whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2007-101 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-ISE-2007-101. 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 inspection and copying 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 ISE. 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-ISE-2007-101 and should be submitted on or before January 9, 2008.

## II. Discussion

The ISE submitted the proposed rule change in connection with a proposed Transaction in which Holdings would become a wholly-owned, indirect subsidiary of Eurex Frankfurt. Pursuant

to the Agreement and Plan of Merger, dated April 30, 2007 ("Agreement"), Holdings would become a wholly-owned subsidiary of U.S. Exchange Holdings, which is a wholly-owned subsidiary of Eurex Frankfurt. Eurex Frankfurt is a wholly-owned subsidiary of Eurex Zürich AG ("Eurex Zürich"), which in turn is jointly owned by Deutsche Börse AG ("Deutsche Börse") and SWX Swiss Exchange ("SWX"). SWX is owned by SWX Group, which in turn is owned by Verein SWX Swiss Exchange.

Pursuant to the Agreement, the stockholders of Holdings will receive cash in exchange for their shares in Holdings. The consummation of the Transaction is subject to satisfaction of certain conditions, including the approval by the Holdings' stockholders of the Transaction<sup>22</sup> and the approval of this rule change by the Commission.

### A. Corporate Structure

The ISE, a national securities exchange and a self-regulatory organization ("SRO"), is organized as a Delaware limited liability company. The ISE will not make any changes to its governance structure in connection with the Transaction. Therefore, the ISE will continue to have a 15-member board of directors, composed of a chief executive officer, 6 industry directors elected by the members, and 8 non-industry directors elected by Holdings as the sole member of the ISE.<sup>23</sup> Further, the ISE currently intends to have its senior management remain in place, subject to the previously-announced retirement of the ISE's chief executive officer, as of January 1, 2008.

The ISE is not proposing any amendments to its trading or regulatory rules. The ISE members, therefore, will continue to own "exchange rights"<sup>24</sup> and have the same trading and voting rights in the ISE.

#### 1. Upstream Owners

Following the Transaction, U.S. Exchange Holdings will directly own all of the common stock of Holdings. U.S. Exchange Holdings is a Delaware corporation and a wholly-owned subsidiary of Eurex Frankfurt. Eurex Frankfurt is a wholly-owned subsidiary of Eurex Zürich, which in turn is jointly

<sup>22</sup> The stockholders of Holdings approved the Transaction at a special meeting of stockholders held on July 27, 2007.

<sup>23</sup> Pursuant to the Agreement, on the closing of the Transaction, all members of the Holdings Board, and all members of the ISE Board who are also on the Holdings Board, will resign. Members of the ISE Board who are elected by the ISE members are not on the Holdings Board and will not resign.

<sup>24</sup> See the ISE's Second Amended and Restated Limited Liability Agreement, Article VI.

<sup>20</sup> 15 U.S.C. 78s.

<sup>21</sup> 15 U.S.C. 78s(b)(2).

owned by Deutsche Börse and SWX. SWX is owned by SWX Group, which in turn is owned by Verein SWX Swiss Exchange. Eurex Frankfurt and Deutsche Börse are stock corporations organized under the laws of the Federal Republic of Germany. Eurex Zürich, SWX, and SWX Group are stock corporations and Verein SWX Swiss Exchange is an association, all organized under the laws of the Swiss Confederation (Eurex Frankfurt, Eurex Zürich, Deutsche Börse, SWX, SWX Group, and Verein SWX Swiss Exchange, collectively referred to herein as “non-U.S. Upstream Owners,” and together with U.S. Exchange Holdings, “Upstream Owners”). Therefore, following the Transaction, the non-U.S. Upstream Owners will indirectly own all of the common stock of Holdings, the sole member of the ISE, through an intermediary holding company, U.S. Exchange Holdings. The Transaction represents the first time that a national securities exchange will be controlled by non-U.S. entities.

Section 19(b) of the Act and Rule 19b-4 thereunder require an SRO to file proposed rule changes with the Commission. Although the Upstream Owners are not SROs, the Resolutions,<sup>25</sup> the U.S. Exchange Holdings Certificate, and the U.S. Exchange Holdings Bylaws are rules of an exchange if they are stated policies, practices, or interpretations (as defined in Rule 19b-4 under the Act) of the exchange, and must therefore be filed with the Commission pursuant to section 19(b)(4) of the Act and Rule 19b-4 thereunder.<sup>26</sup> Accordingly, the Exchange filed the Resolutions, the U.S. Exchange Holdings Certificate, and the U.S. Exchange Bylaws with the Commission.

The Holdings Certificate currently provides that no person, either alone or together with its related persons, may own, directly or indirectly, more than 40% (or 20%, if the person is an Exchange member) of Holdings capital stock that has the right by its terms to vote in the election of the Holdings

Board or on other matters (other than matters affecting the rights, preferences, or privileges of the said capital stock) (“Ownership Limit”). The Holdings Certificate also provides that no person, either alone or together with its related persons, may, directly or indirectly, vote or cause the voting of more than 20% of the Holdings capital stock that has the right by its terms to vote in the election of the Holdings Board or on other matters (other than matters affecting the rights, preferences, or privileges of the said capital stock) (“Voting Limit”).<sup>27</sup> The ISE is not proposing to change Ownership Limit or Voting Limit.

To facilitate compliance with Ownership Limit and Voting Limit, the Resolutions of the non-U.S. Upstream Owners provide that each non-U.S. Upstream Owner shall take reasonable steps necessary to cause Holdings to be in compliance with Ownership Limit and Voting Limit.<sup>28</sup> Likewise, the U.S. Exchange Holdings Certificate provides that U.S. Exchange Holdings will take reasonable steps necessary to cause Holdings to be in compliance with Ownership Limit and Voting Limit.<sup>29</sup>

Further, the Resolutions of each of the German Upstream Owners (*i.e.*, Eurex Frankfurt and Deutsche Börse) would require these entities to notify the ISE Board and the Trust (as described below) if any person, either alone or together with its related persons, acquires 20%, 25%, 30%, 50%, or 75% or more of the shares of stock in such company.<sup>30</sup> Similarly, the Resolutions of each of the Swiss Upstream Owners (*i.e.*, Eurex Zürich, SWX, SWX Group, and Verein SWX Swiss Exchange) would require these entities to notify the ISE Board and the Trust if any person, either alone or together with its related persons, acquires 20%, 33⅓%, 45%, 50%, or 66⅔% or more of the shares of stock or membership interest, as applicable, in such company.<sup>31</sup>

Finally, the U.S. Exchange Holdings Certificate provides that U.S. Exchange Holdings will notify the ISE Board and the Trust if any person, either alone or together with its related persons, acquire 10%, 15%, 20%, 25%, 30%, 35%, or 40% or more of the shares in U.S. Exchange Holdings.<sup>32</sup>

The Commission finds the provisions in the Resolutions and the U.S. Exchange Holdings Certificate, requiring each Upstream Owner to take reasonable steps necessary to cause Holdings to be in compliance with Ownership Limit and Voting Limit, consistent with the Act. These provisions should minimize the potential that a person could improperly interfere with, or restrict the ability of, the Commission or the ISE to effectively carry out their regulatory oversight responsibilities under the Act. Further, the provisions in the Resolutions and the U.S. Exchange Holdings Certificate requiring notification to the ISE Board and the Trust upon acquisition of certain ownership percentage of the Upstream Owners should help facilitate the ability of the ISE to comply with its responsibilities under the Act.

## 2. Holdings

Holdings will become a wholly-owned subsidiary of U.S. Exchange Holdings. Thus, following the Transaction, Holdings will no longer be publicly traded.<sup>33</sup> The Transaction, however, will not affect Holdings' ownership of the ISE. After the Transaction, Holdings will continue to be the sole member of the ISE.

Section 19(b) of the Act and Rule 19b-4 thereunder require an SRO to file proposed rule changes with the Commission. Although Holdings is not an SRO, certain provisions of the Holdings Certificate and the Holdings Bylaws are rules of an exchange if they are stated policies, practices, or

<sup>32</sup> U.S. Exchange Holdings Certificate, Article THIRTEENTH.

<sup>33</sup> The ISE proposes to make certain changes to the Holdings Certificate and the Holdings Bylaws. Specifically, the ISE proposes to: (1) *Decrease* the number of authorized shares of Holdings; (2) eliminate classified board structure and remove term limits for directors; (3) eliminate the requirement that there be an executive, finance and audit, corporate governance, and compensation committees; (4) decrease the affirmative vote requirement for the election of chairman and vice chairman; (5) delete the requirement that chief executive officer not engage in any other occupation during incumbency; (6) provide that chief executive officer may be removed by the Holdings Board with or without cause; (7) empower the Holdings Board to change the Holdings Certificate and the Holdings Bylaws without the approval of stockholders; and (8) permit taking of stockholder action without prior notice and by written consent. The Commission finds these changes consistent with the Act.

<sup>25</sup> The enumeration in the Resolutions is identical in all Resolutions. Therefore, unless otherwise specified, reference to certain enumerated resolution referred to herein applies to all Resolutions.

<sup>26</sup> See Section 3(a)(27) of the Act, 15 U.S.C. 78c(a)(27). If each of the Upstream Owners decides to change its Resolutions or governing documents, as applicable, each such Upstream Owner must submit the change to the ISE Board. If the change must be filed with, or filed with and approved by, the Commission under Section 19 of the Act and the rules thereunder, then the change shall not be effective until filed with, or filed with and approved by, the Commission. See Resolution 11, U.S. Exchange Holdings Certificate, Article SIXTEENTH, and U.S. Exchange Holdings Bylaws, Article VI, Section 9.

<sup>27</sup> Holdings Certificate, Article FOURTH, Section III. The Commission previously approved Ownership Limit and Voting Limit. See Securities Exchange Act Release No. 53705 (April 21, 2006) 71 FR 25260 (April 28, 2006) (SR-ISE-2006-04) (reorganization of International Securities Exchange, Inc. into a holding company structure).

<sup>28</sup> Resolution 4.

<sup>29</sup> U.S. Exchange Holdings Certificate, Article THIRTEENTH.

<sup>30</sup> German Resolution 4. The calculation of the percentage of shares would be as determined under Sections 21 and 22 of the German Securities Trading Act.

<sup>31</sup> Swiss Resolution 4. The calculation of the percentage of shares or membership interest, as applicable, would be as determined under Section 20 of the Swiss Federal Act on Stock Exchanges and Securities Trading and Section 9 of the Swiss Federal Banking Commission's Ordinance on Stock Exchanges and Securities Trading.

interpretations (as defined in Rule 19b-4 of the Act) of the exchange, and must be filed with the Commission pursuant to section 19(b)(4) of the Act and Rule 19b-4 thereunder.<sup>34</sup> Accordingly, the ISE filed the proposed changes to the Holdings Certificate and the Holdings Bylaws with the Commission.

*a. Transfer of Capital Stock to Trust.*

As stated above, the Holdings Certificate currently provides that no person, either alone or together with its related persons, may exceed Ownership Limit or Voting Limit.<sup>35</sup> The ISE does not propose to change Ownership Limit or Voting Limit, but does propose to add a provision in the Holdings Certificate to provide that, if a person exceeds Ownership Limit or Voting Limit, then a majority of capital stock of Holdings that have the right by its terms to vote in the election of the Holdings Board or on other matters (other than matters affecting the rights, preferences, or privileges of the said capital stock) would automatically be transferred to the Trust,<sup>36</sup> as discussed below.<sup>37</sup>

The Commission finds these changes to the Holdings Certificate consistent with the Act. The proposed changes to the Holdings Certificate should minimize the potential that a person could improperly interfere with or restrict the ability of the Commission and the Exchange to effectively carry out their regulatory oversight responsibilities under the Act.

*b. Ownership of Holdings by Upstream Owners.* Additionally, the ISE proposes to amend the Holdings Bylaws to allow the Upstream Owners to wholly own and vote all of the common stock of Holdings.<sup>38</sup> Currently, the Holdings

Certificate provides that the Holdings Board may waive Ownership Limit and Voting Limit pursuant to an amendment to the Holdings Bylaws.<sup>39</sup> In connection with the adoption of such amendment, the Holdings Board must adopt a resolution determining that the amendment will not impair the ability of Holdings and the ISE to discharge the ISE's responsibilities under the Act and the rules and regulations thereunder, is in the best interests of Holdings, its stockholders, and the ISE, and will not impair the Commission's ability to enforce the Act.<sup>40</sup> Further, the Holdings Board must determine that in waiving a person's Ownership Limit or Voting Limit such person and its related persons are not subject to any "statutory disqualification"<sup>41</sup> and are not Exchange members.

Pursuant to the Holdings Certificate, the Holdings Board approved an amendment to the Holdings Bylaws to allow ownership and voting of all of the common stock of Holdings by the Upstream Owners. The Holdings Board determined that waiver of Ownership Limit and Voting Limit with respect to the Upstream Owners will not impair the ability of Holdings and the ISE to discharge the ISE's responsibilities under the Act and the rules and regulations thereunder, that such waiver is in the best interests of Holdings, its stockholders, and the ISE, and will not impair the Commission's ability to enforce the Act, and that neither the Upstream Owners nor any of its related persons are subject to any statutory disqualification or is an Exchange member. Therefore, the Exchange proposes that the Upstream Owners wholly own and vote all of the common stock of Holdings upon the consummation of the Transaction.

The Commission believes it is consistent with the Act to allow the Upstream Owners to wholly own and vote all of the common stock of Holdings. The Exchange represents that neither the Upstream Owners nor any of its related persons is subject to any statutory disqualification or is an Exchange member. Moreover, each of the Upstream Owners has provided that it will take reasonable steps necessary to cause Holdings to be in compliance with Ownership Limit and Voting Limit. As discussed below, each of the

Upstream Owners will adopt certain provisions designed to maintain the independence of the ISE's self-regulatory functions in its Resolutions or governing documents, as applicable. Accordingly, the Commission believes that the acquisition of ownership and exercise of voting control of Holdings by the Upstream Owners will not impair the ability of the Commission or the ISE to discharge their respective responsibilities under the Act.

*B. Relationship of Upstream Owners and the ISE; Jurisdiction Over Upstream Owners*

Although the Upstream Owners will not carry out regulatory functions, the activities of each of the Upstream Owners with respect to the operation of the ISE must be consistent with, and not interfere with, the ISE's self-regulatory obligations. The Resolutions, the U.S. Exchange Holdings Certificate, and the U.S. Exchange Holdings Bylaws include certain provisions that are designed to maintain the independence of the ISE's self-regulatory functions, enable the ISE to operate in a manner that complies with the U.S. federal securities laws, including the objectives and requirements of sections 6(b) and 19(g) of the Act,<sup>42</sup> and facilitate the ability of the ISE and the Commission to fulfill their regulatory and oversight obligations under the Act.

For example, the Upstream Owners provide that each such Upstream Owners will comply with the U.S. federal securities laws and the rules and regulations thereunder and shall cooperate with the Commission and the ISE.<sup>43</sup> Also, each board member, officer, and employee of the Upstream Owners, in discharging his or her responsibilities, shall comply with the U.S. federal securities laws and the rules and regulations thereunder, cooperate with the Commission, and cooperate with the ISE.<sup>44</sup> In discharging his or her responsibilities as a board member of the Upstream Owners, each such member must, to the fullest extent permitted by applicable law, take into consideration the effect that the actions of the Upstream Owners would have on the ability of the ISE to carry out its

<sup>34</sup> See Section 3(a)(27) of the Act, 15 U.S.C. 78c(a)(27). As under the current Holdings Certificate and Holdings Bylaws any change to Holdings Certificate or Holdings Bylaws must be submitted to the ISE Board. If the change must be filed with, or filed with and approved by, the Commission under Section 19 of the Act and the rules thereunder, then the change shall not be effective until filed with, or filed with and approved by, the Commission. This requirement to submit changes to the ISE Board continues for so long as Holdings controls, directly or indirectly, the ISE. See current Holdings Certificate, Article SIXTEENTH, current Holdings Bylaws, Section 10.1, proposed Holdings Certificate, Article FOURTEENTH, and proposed Holdings Bylaws, Section 10.1.

<sup>35</sup> See *supra* note 27 and accompanying text.

<sup>36</sup> Proposed Holdings Certificate, Article FOURTH, Sections III(c). If a person were to obtain an ownership or voting interest in Holdings in excess of the Ownership Limit or Voting Limit, Holdings capital stock would be transferred to the Trust automatically by operation of law. See Section 202(c)(4) of the Delaware General Corporation Law.

<sup>37</sup> See *infra* notes 70 to 114 and accompanying text.

<sup>38</sup> Proposed Holdings Bylaws, Section 11.1.

<sup>39</sup> Holdings Certificate, Article FOURTH, Sections III(a)(i) and III(b)(i). Such amendment to Holdings Bylaws must be filed with and approved by the Commission under Section 19(b) of the Act and become effective thereunder.

<sup>40</sup> Holdings Certificate, Article FOURTH, Sections III(a)(i)(B) and III(b)(i).

<sup>41</sup> See Section 3(a)(39) of the Act, 15 U.S.C. 78c(a)(39).

<sup>42</sup> 15 U.S.C. 78f(b) and 15 U.S.C. 78s(g).

<sup>43</sup> Resolution 1 and U.S. Exchange Holdings Certificate, Article ELEVENTH.

<sup>44</sup> Resolutions 7(a) and 8(a) and U.S. Exchange Holdings Certificate, Article TENTH. The Resolutions also provide that each non-U.S. Upstream Owner will take reasonable steps necessary to cause each person who becomes a board member of the non-U.S. Upstream Owner after consummation of the Transaction to agree in writing to certain matters included in the Resolutions. See Resolution 7.

responsibilities under the Act.<sup>45</sup> In addition, each of the Upstream Owners, its board members, officers and employees shall give due regard to the preservation of the independence of the self-regulatory function of the ISE.<sup>46</sup>

Further, the non-U.S. Upstream Owners (along with their respective board members, officers, and employees) and U.S. Exchange Holdings agree to keep confidential, to the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of the ISE, including, but not limited to, confidential information regarding disciplinary matters, trading data, trading practices, and audit information, contained in the books and records of the ISE and not use such information for any commercial<sup>47</sup> purposes.<sup>48</sup> In addition, books and records of the non-U.S. Upstream Owners related to the activities of the ISE will at all times be made available for, and books and records of U.S. Exchange Holdings will be subject at all times to, inspection and copying by the Commission and the ISE.<sup>49</sup> Books and records of U.S. Exchange Holdings related to the activities of the ISE will be maintained within the U.S.<sup>50</sup> Moreover, for so long as each of the Upstream Owners directly or indirectly controls the ISE, the books, records, officers, directors (or equivalent), and employees of each of the Upstream Owners shall be deemed to be the books, records, officers, directors, and employees of the ISE.<sup>51</sup> Finally, for so long as U.S. Exchange Holdings directly or indirectly controls the ISE, premises of U.S. Exchange Holdings will be deemed premises of the ISE.<sup>52</sup>

To the extent involved in the activities of the ISE, each of the non-U.S. Upstream Owners, its board members, officers, and employees irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for purposes of any action arising out of, or relating to, the

activities of the ISE.<sup>53</sup> Likewise, U.S. Exchange Holdings, its officers and directors, and employees whose principal place of business and residence is outside of the U.S., to the extent such directors, officers, or employees are involved in the activities of the ISE, irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for purposes of any action arising out of, or relating to, the activities of the ISE.<sup>54</sup>

Each of the Upstream Owners and Holdings acknowledges that it is responsible for referring possible violations of the Act, the rules and regulations thereunder, and ISE rules to the ISE. In addition, the ISE represents that there will be an explicit agreement among the Upstream Owners, Holdings, and the ISE to provide adequate funding for the ISE's regulatory responsibilities.

Finally, the Resolutions, the U.S. Exchange Holdings Certificate, and the U.S. Exchange Holdings Bylaws require that any change to the Resolutions (including any action by the non-U.S. Upstream Owners that would have the effect of changing the Resolutions), the U.S. Exchange Holdings Certificate, or the U.S. Exchange Holdings Bylaws must be submitted to the ISE Board. If such change must be filed with, or filed with and approved by, the Commission under Section 19 of the Act<sup>55</sup> and the rules thereunder, then such change shall not be effective until filed with, or filed with and approved by, the Commission.<sup>56</sup> This requirement to submit changes to the ISE Board continues for so long as the non-U.S. Upstream Owners or U.S. Exchange Holdings, as applicable, directly or indirectly, control the ISE.

With respect to Swiss Upstream Owners, each Swiss Resolutions provides that, where necessitated by Swiss law, the Swiss Upstream Owner will provide information related to the activities of the ISE, including books and records of such owner related to the activities of the ISE, to the Commission promptly through the Swiss Federal Banking Commission ("SFBC"). Moreover, oral exchanges between each Swiss Upstream Owner and the Commission related to the activities of the ISE will include the participation of the SFBC.<sup>57</sup>

Swiss law designed to protect Swiss sovereignty raises concerns about the

ability of the Swiss Upstream Owners to provide the Commission with direct access to information, including books and records, related to the activities of the ISE.<sup>58</sup> In order not to run afoul of Swiss law and to facilitate the Transaction, the Commission and the SFBC have developed a procedure ("Procedure") under which the SFBC undertakes to serve as a conduit for unfiltered delivery of books and records of the Swiss Upstream Owners related to the activities of the ISE.<sup>59</sup>

Pursuant to the Procedure, where necessitated by Swiss law, if the Commission or the staff makes a request to any of the Swiss Upstream Owners for information related to the activities of the ISE, including books and records related to the activities of the ISE, the SFBC shall deliver to the Commission or the staff, without delay, any responsive information provided to the SFBC by the Swiss Upstream Owners. Written requests for information, including book and records, related to the activities of the ISE shall be made by the Commission or the staff directly to the Swiss Upstream Owners, and the SFBC will be copied on any such requests. Moreover, an SFBC staff member shall participate in any oral exchanges between the Commission or the staff and any of the Swiss Upstream Owners.<sup>60</sup> Notwithstanding this Procedure, the Swiss Upstream Owners would remain fully responsible for meeting all of their obligations as owners of a U.S. securities exchange.

The Commission finds that these provisions of the Resolutions, the U.S. Exchange Holdings Certificate, and the U.S. Exchange Holdings Bylaws are consistent with the Act. These provisions are intended to assist the ISE

<sup>58</sup> See Art. 271 of Swiss penal code, "Prohibited acts for a foreign state," which states, in part: "Whoever, without being authorized, performs acts for a foreign state on Swiss territory that are reserved to an authority or an official, whoever performs such acts for a foreign party or another foreign organization, whoever aids and abets such acts, shall be punished with imprisonment and, in serious cases, sentenced to the penitentiary."

<sup>59</sup> Application of the Procedure would be limited to issues arising in the context of the Transaction and the Commission's oversight of the ISE. Information-sharing and cooperation between the Commission and the SFBC in securities enforcement matters will continue to be governed by the letters of cooperation between the Commission and the SFBC.

<sup>60</sup> The Procedure is designed to ensure that the delivery of books and records to the Commission is not delayed. Therefore, the Commission's requests for books and records would be sent directly to the Swiss Upstream Owners and would not be subject to filtering or substantive review by the SFBC. In addition, the SFBC has agreed to pass to the Commission without delay and without substantive review materials provided by the Swiss Upstream Owners that are responsive to the Commission's requests for information.

<sup>45</sup> Resolution 7(f) and U.S. Exchange Holdings Certificate, Article TENTH.

<sup>46</sup> Resolutions 5, 7(d), and 8(d) and U.S. Exchange Holdings Certificate, Article TWELFTH.

<sup>47</sup> The Commission believes that any non-regulatory use of such information would be for a commercial purpose.

<sup>48</sup> Resolutions 6, 7(e), and 8(e) and U.S. Exchange Holdings Certificate, Article FOURTEENTH.

<sup>49</sup> Resolution 3 and U.S. Exchange Holdings Certificate, Article FIFTEENTH.

<sup>50</sup> U.S. Exchange Holdings Certificate, Article FIFTEENTH.

<sup>51</sup> Resolutions 3 and 8(c) and U.S. Exchange Holdings Certificate, Article FIFTEENTH.

<sup>52</sup> U.S. Exchange Holdings Certificate, Article FIFTEENTH.

<sup>53</sup> Resolutions 2, 7(b), and 8(b).

<sup>54</sup> U.S. Exchange Holdings Bylaws, Section 16.

<sup>55</sup> 15 U.S.C. 78s.

<sup>56</sup> Resolution 11, U.S. Exchange Holdings Certificate, Article SIXTEENTH, and U.S. Exchange Bylaws, Section 9.

<sup>57</sup> Swiss Resolutions 1, 3(b), 6, 7(a), 7(e), 8(a), 8(e), and 9.

in fulfilling its self-regulatory obligations and in administering and complying with the requirements of the Act.

The Commission notes that while the Resolutions do not provide that books and records of non-U.S. Upstream Owners related to the activities of the ISE will be maintained within the U.S., such books and records are deemed to be the books and records of the ISE, and the non-U.S. Upstream Owners have committed in the Resolutions to make available, at all times, such books and records for inspection and copying by the Commission and the ISE.<sup>61</sup> As discussed below,<sup>62</sup> the failure of a non-U.S. Upstream Owner to adhere to this commitment would be a Material Compliance Event under the Trust, which would require the Trustees to take certain actions, including (after a Cure Period) the exercise of a Call Option for the transfer of a majority of capital stock of Holdings that have the right by its terms to vote in the election of the Holdings Board or on other matters (other than matters affecting the rights, preferences, or privileges of the said capital stock). Because the non-U.S. Upstream Owners lose control over the ISE if one or more of them fails to make its books and records available to the Commission and the ISE, there is a strong incentive for them to do so. Moreover, if a non-U.S. Upstream Owner fails to make its books and records available to the Commission, the Commission could bring an action under, among other provisions, section 17 of the Act<sup>63</sup> and Rule 17a-1(b) thereunder<sup>64</sup> against the ISE pursuant to section 19(h) of the Act.<sup>65</sup> The Commission believes that the non-U.S. Upstream Owners' representations and commitments, together with the Trustees' and the Commission's authority, will allow the ISE to meet its obligations under section 17 of the Act and the rules thereunder.

The Commission also notes that, for the Swiss Upstream Owners, the SFBC will serve as a conduit for the delivery of information related to the activities of the ISE. The Commission's usual practice is to have direct access to books and records related to the activities of a U.S. securities exchange. However, subject to the condition that the Swiss Upstream Owners will promptly deliver such information to the Commission,

coupled with the fact that under ISE rules all trading records of the ISE are required to be maintained in the U.S.,<sup>66</sup> the Commission believes that the provisions of the Swiss Resolutions related to the Commission's access to books and records through the SFBC should not result in a level of access materially different from that agreed to by other entities that control U.S. securities exchanges.

Finally, the Commission notes that under section 20(a) of the Act,<sup>67</sup> any person with a controlling interest in the ISE shall be jointly and severally liable with and to the same extent that the ISE is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, section 20(e) of the Act<sup>68</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, section 21C of the Act<sup>69</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been "a cause of" a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation. These provisions are applicable to the dealings of the Upstream Owners with the ISE.

### C. Trust

The ISE proposes to implement a Delaware statutory trust ("Trust"), pursuant to a Trust Agreement ("Trust Agreement") among Holdings, U.S. Exchange Holdings, trustees ("Trustees"), and a Delaware trustee. The Trust would serve two general purposes.<sup>70</sup> First, as described above,<sup>71</sup> the ISE proposes that the Trust would hold capital stock of Holdings in the event that a person obtains ownership or voting interest in Holdings in excess of Ownership Limit or Voting Limit.<sup>72</sup> Second, the ISE proposes to implement the Trust to hold capital stock of Holdings in the event of a Material Compliance Event.<sup>73</sup> A "Material Compliance Event" is defined under the

Trust Agreement as any state of facts, development, event, circumstance, condition, occurrence, or effect that results in the failure of any of the non-U.S. Upstream Owners to adhere to its respective commitments under the Resolutions in any material respect.<sup>74</sup> The Trust holds a call option ("Call Option") over Holdings capital stock, which may be exercised if a Material Compliance Event has occurred and continues to be in effect.

The Trustees shall have exclusive and complete authority to carry out the Trust purpose.<sup>75</sup> The Trustees will be persons who are independent of the Upstream Owners, Holdings, the ISE, and their affiliates,<sup>76</sup> are not subject to any statutory disqualification,<sup>77</sup> are of high repute and have experience and expertise in, or knowledge of, the securities industry, regulation and/or corporate governance, are independent to such a degree that they can be entrusted to resist undue pressures, and are not unacceptable to the Commission staff.<sup>78</sup> The Trustees would be required under the terms of the Trust Agreement to vote any capital stock of Holdings held by the Trust consistent with the public interests of the markets operated by the ISE.<sup>79</sup>

As discussed above, section 19(b) of the Act and Rule 19b-4 thereunder require an SRO to file a proposed rule change with the Commission. Although the Trust is not an SRO, certain provisions of the Trust Agreement are rules of an exchange if they are stated policies, practice, or interpretations, as defined in Rule 19b-4 under the Act,<sup>80</sup> and must therefore be filed with the Commission pursuant to section 19(b)(4) of the Act<sup>81</sup> and Rule 19b-4 thereunder. Accordingly, the Exchange has filed the Trust Agreement with the Commission.

### 1. Operation of the Trust

The Trust will operate pursuant to the Trust Agreement. The ISE proposes that, pursuant to the Trust Agreement, if a person exceeds Ownership Limit or Voting Limit then a majority of capital stock of Holdings that have the right by its terms to vote in the election of the

<sup>61</sup> See *supra* notes 49 and 51 and accompanying text.

<sup>62</sup> See *infra* notes 73 to 74 and 83 to 94 and accompanying text.

<sup>63</sup> 15 U.S.C. 78q.

<sup>64</sup> 17 CFR 240.17a-1(b).

<sup>65</sup> 15 U.S.C. 78s(h). See also *infra* notes 67 to 69 and accompanying text.

<sup>66</sup> ISE Second Amended and Restated Limited Liability Agreement, Article IV, Section 4.1.

<sup>67</sup> 15 U.S.C. 78t(a).

<sup>68</sup> 15 U.S.C. 78t(e).

<sup>69</sup> 15 U.S.C. 78u-3.

<sup>70</sup> The term of the Trust is perpetual, provided that Holdings controls, directly or indirectly, the ISE. See Trust Agreement, Article II, Section 2.6.

<sup>71</sup> See *supra* notes 35 to 37 and accompanying text.

<sup>72</sup> Trust Agreement, Article IV, Section 4.1.

<sup>73</sup> Trust Agreement, Article IV, Section 4.2.

<sup>74</sup> Trust Agreement, Article I, Section 1.1. The Trust Agreement also would provide that the term Material Compliance Event would apply with respect to the Resolutions of any future upstream owner of Holdings. See Trust Agreement, Article I, Section 1.1, definition of "Affected Affiliate."

<sup>75</sup> Trust Agreement, Article III, Section 3.2(a).

<sup>76</sup> For a more complete list of the independence requirement, see Trust Agreement, Article III, Section 3.2(a).

<sup>77</sup> See *supra* note 41.

<sup>78</sup> Trust Agreement, Article III, Section 3.2(a).

<sup>79</sup> Trust Agreement, Article II, Section 2.3(b).

<sup>80</sup> 17 CFR 240.19b-4.

<sup>81</sup> 15 U.S.C. 78s(b).

Holdings Board or on other matters (other than matters affecting the rights, preferences, or privileges of the said capital stock) would automatically be transferred to the Trust.<sup>82</sup>

Further, the Trust Agreement provides that upon becoming aware of facts, developments, events, circumstances, conditions, occurrences, or effects that could reasonably be expected to result in the occurrence of a Material Compliance Event, the Trustees would be required to meet promptly and, within 5 business days of that meeting, make a determination of whether or not a Material Compliance Event has occurred.<sup>83</sup> After making a determination that a Material Compliance Event has occurred, and prior to any exercise of the Call Option, the Trustees would provide written notice to the non-U.S. Upstream Owners and to the Commission of the occurrence of the Material Compliance Event, which notice would provide for 60 calendar days in which to address the Material Compliance Event ("Cure Period").<sup>84</sup>

The Trust Agreement provides that, during the Cure Period, the Trustees would consult with the boards of directors (or equivalent) of the ISE, Holdings, and the non-U.S. Upstream Owners, and with the Commission to consider alternatives to the exercise of the Call Option.<sup>85</sup> After such consultation, if the Trustees determine that the Material Compliance Event has not been addressed, they would provide written notice to the boards of directors (or equivalent) of the ISE, Holdings, and the non-U.S. Upstream Owners that they have determined to exercise the Call Option.<sup>86</sup>

If the Trust were to exercise the Call Option, it would deliver a written notice to Holdings and U.S. Exchange Holdings, promptly after the end of the Cure Period, that the Trust has determined to exercise the Call Option in accordance with the terms of the Trust Agreement.<sup>87</sup> Subsequently, Holdings and U.S. Exchange Holdings would be required to promptly transfer to the Trust a majority of capital stock of Holdings that have the right by its terms to vote in the election of the Holdings Board or on other matters (other than matters affecting the rights,

preferences, or privileges of the said capital stock).<sup>88</sup>

U.S. Exchange Holdings would have the right to reacquire shares of the capital stock of Holdings held by the Trust.<sup>89</sup> If shares were contributed to the Trust because of a violation of Ownership Limit or Voting Limit, U.S. Exchange Holdings would have the right to reacquire such shares if the violation of Ownership Limit or Voting Limit, as applicable, is waived by the Holdings Board and approved by the Commission or if the violation no longer exists.<sup>90</sup> Likewise, if shares were transferred to the Trust because of a Material Compliance Event, U.S. Exchange Holdings would have the right to reacquire such shares if the Material Compliance Event is no longer continuing or, notwithstanding the continuation of a Material Compliance Event, the Trustees determine that the retention of such shares by the Trust could not reasonably be expected to address the continuing Material Compliance Event.<sup>91</sup>

Further, if directed by U.S. Exchange Holdings, the Trust would sell capital stock of Holdings held by the Trust to any person whose ownership or voting would not violate Ownership Limit or Voting Limit and who is not a non-U.S. Upstream Owner with respect to which a Material Compliance Event has occurred and is continuing.<sup>92</sup> Upon a sale of such shares, the net proceeds of the sale would be paid to U.S. Exchange Holdings.<sup>93</sup> Moreover, while any shares of the capital stock of Holdings are held by the Trust, U.S. Exchange Holdings, as the Trust beneficiary, would continue to receive the economic benefit of such shares.<sup>94</sup>

## 2. Relationship of the Trust and the ISE; Jurisdiction Over the Trust

Although the Trust itself will not carry out regulatory functions, its activities must be consistent with, and not interfere with, the ISE's self-regulatory obligations. The Trust

Agreement includes certain provisions that are designed to maintain the independence of the ISE's self-regulatory functions from the Trust, enable the ISE to operate in a manner that complies with the U.S. federal securities laws, including the objectives and requirements of sections 6(b) and 19(g) of the Act, and facilitate the ability of the ISE and the Commission to fulfill their regulatory and oversight obligations under the Act.<sup>95</sup>

For example, under the Trust Agreement, the Trust shall comply with the U.S. federal securities laws and the rules and regulations thereunder, and shall cooperate with the Commission and the ISE.<sup>96</sup> Also, each Trustee, Delaware trustee, officer, and employee of the Trust shall comply with the U.S. federal securities laws and the rules and regulations thereunder, cooperate with the Commission the ISE.<sup>97</sup> In addition, each Trustee, Delaware trustee, officer, and employee of the Trust, to the fullest extent permitted by applicable law, shall take into consideration the effect that the Trust's actions would have on the ability of Holdings and the ISE to discharge their respective responsibilities under the Act.<sup>98</sup> The Trust, Trustees, Delaware trustee, officers, and employees of the Trust shall give due regard to the preservation of the independence of the self-regulatory function of the ISE and shall not take any action that would interfere with the effectuation of any decision by the ISE Board relating to its regulatory responsibilities or that would interfere with the ability of the ISE to carry out its responsibilities under the Act.<sup>99</sup> The Trust, Trustees, Delaware trustee, officers, and employees of the Trust whose principal place of business and residence is outside of the U.S. irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission with respect to activities relating to the ISE.<sup>100</sup>

In addition, the Trust's books and records shall be subject at all times to inspection and copying by the Commission, the ISE (provided that such books and records are related to the operation or administration of the ISE), and Holdings.<sup>101</sup> The Trust's books and records related to the ISE shall be maintained within the U.S.<sup>102</sup> Further, for so long as the Trust directly or

<sup>82</sup> Trust Agreement, Article IV, Section 4.1(c). *See also* proposed Holdings Certificate, Article FOURTH, Sections III(c).

<sup>83</sup> Trust Agreement, Article IV, Section 4.2(b).

<sup>84</sup> Trust Agreement, Article IV, Section 4.2(c).

<sup>85</sup> Trust Agreement, Article IV, Section 4.2(d)(i).

<sup>86</sup> Trust Agreement, Article IV, Section 4.2(d)(ii).

<sup>87</sup> Trust Agreement, Article IV, Section 4.2(g)(i).

<sup>88</sup> Trust Agreement, Article IV, Section 4.2(g)(ii).

<sup>89</sup> Trust Agreement, Article IV, Sections 4.1(f) and 4.2(h).

<sup>90</sup> For example, the violation of Ownership Limit or Voting Limit, as applicable, may no longer exist if the person causing the violation sells his or her interest such that the person no longer exceeds Ownership Limit or Voting Limit.

<sup>91</sup> If the Trustees determine the retention could not reasonably be expected to address any continuing Material Compliance Event, such determination would not be effective unless it is filed with, or filed with and approved by, the Commission under Section 19 of the Act and the rules thereunder. *See* Trust Agreement, Article IV, Section 4.2(h)(ii).

<sup>92</sup> Trust Agreement, Article IV, Section 4.3(a).

<sup>93</sup> *Id.*

<sup>94</sup> Trust Agreement, Article IV, Section 4.3.

<sup>95</sup> Trust Agreement, Articles V, VI, and VIII.

<sup>96</sup> Trust Agreement, Article V, Section 5.3(a).

<sup>97</sup> Trust Agreement, Article V, Section 5.2(a).

<sup>98</sup> Trust Agreement, Article V, Section 5.1(a).

<sup>99</sup> Trust Agreement, Article V, Section 5.1(b).

<sup>100</sup> Trust Agreement, Article V, Section 5.4.

<sup>101</sup> Trust Agreement, Article VI, Section 6.3.

<sup>102</sup> Trust Agreement, Article VI, Section 6.1(b).



indirectly controls the ISE, the books, records, premises, officers, Trustees, Delaware trustee, and employees of the Trust shall be deemed to be the books, records, premises, officers, Trustees, Delaware trustee, and employees of the ISE for purposes of and subject to oversight pursuant to the Act.<sup>103</sup> The Trust agrees to keep confidential, to the fullest extent permitted by applicable law, all confidential information pertaining to the self-regulatory function of the ISE (including, without limitation, disciplinary matters, trading data, trading practices, and audit information) contained in the books and records of the ISE and not use such information for any commercial<sup>104</sup> purposes.<sup>105</sup>

The Trust Agreement requires that it may only be amended with prior written approval of the Commission, as and to the extent required under the Act.<sup>106</sup> Further, for so long as Holdings or the Trust shall control, directly or indirectly, the ISE, any changes to the Trust must be submitted to the ISE Board. If the change must be filed with, or filed with and approved by, the Commission under section 19 of the Act<sup>107</sup> and the rules thereunder, then the change shall not be effective until filed with, or filed with and approved by, the Commission.<sup>108</sup>

The Commission finds that the Trust Agreement is designed to enable the ISE to operate in a manner that complies with the federal securities laws, including the objectives and requirements of sections 6(b) and 19(g) of the Act,<sup>109</sup> facilitate the ability of the ISE and the Commission to fulfill their regulatory and oversight obligations under the Act,<sup>110</sup> and are consistent with the provisions other entities that directly or indirectly own or control an SRO have instituted and that have been approved by the Commission.<sup>111</sup> The

Commission finds that the Trust's provisions are consistent with the Act and that they are designed to facilitate the Exchange's ability to comply with the requirements of the Act.

Under section 20(a) of the Act,<sup>112</sup> any person with a controlling interest in the ISE shall be jointly and severally liable with and to the same extent that the ISE is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, section 20(e) of the Act<sup>113</sup> creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, section 21C of the Act<sup>114</sup> authorizes the Commission to enter a cease-and-desist order against any person who has been "a cause of" a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation. These provisions are applicable to the Trust and all other entities controlling the ISE.

### III. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>115</sup>

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act<sup>116</sup> that the proposed rule change (SR-ISE-2007-101) is approved, and Amendment No. 1 is approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>117</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E7-24500 Filed 12-18-07; 8:45 am]

**BILLING CODE 8011-01-P**

22, 2007) (SR-NYSE-2006-120) (merger of NYSE Group, Inc. and Euronext N.V.) and 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (merger of New York Stock Exchange, Inc. and Archipelago Holdings, Inc.).

<sup>112</sup> 15 U.S.C. 78t(a).

<sup>113</sup> 15 U.S.C. 78t(e).

<sup>114</sup> 15 U.S.C. 78u-3.

<sup>115</sup> The Commission's approval of the proposed rule change based on the Exchange's representation that the Resolutions will be signed by the Upstream Owners before or at the closing of the Transaction.

<sup>116</sup> 15 U.S.C. 78s(b)(2).

<sup>117</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-56956; File No. SR-ISE-2007-110]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change Relating to the \$1 Strike Pilot Program

December 13, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 14, 2007, the International Securities Exchange, LLC ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared 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

ISE proposes to expand the \$1 Strike Pilot Program ("Pilot Program") and requests permanent approval of the Pilot Program. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://www.ise.com>.

#### 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 and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. 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

The purpose of the proposed rule change is to expand the Pilot Program and to request permanent approval of

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

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

<sup>103</sup> *Id.*

<sup>104</sup> The Commission believes that any non-regulatory use of such information would be for a commercial purpose.

<sup>105</sup> Trust Agreement, Article VI, Section 6.1(a). The Trust Agreement states that none of its provisions shall be interpreted so as to limit or impede (1) the rights of the Commission or the ISE to have access to and examine such confidential information pursuant to the U.S. federal securities laws and the rules and regulations thereunder, or (2) the ability of any Trustees, Delaware trustee, officers, directors, employees, or agents of Holdings or the Trust to disclose such confidential information to the Commission or the ISE. *See* Trust Agreement, Article VI, Section 6.2.

<sup>106</sup> Trust Agreement, Article VIII, Section 8.2.

<sup>107</sup> 15 U.S.C. 78s.

<sup>108</sup> Trust Agreement, Article VIII, Section 8.2.

<sup>109</sup> 15 U.S.C. 78f(b) and 15 U.S.C. 78s(g).

<sup>110</sup> Trust Agreement, Articles V, VI, and VIII.

<sup>111</sup> *See, e.g.*, Securities Exchange Act Release Nos. 55293 (February 14, 2007), 72 FR 8033 (February