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Dated: February 7, 2006.

Nancy M. Morris,

Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53271; File No. SR-ISE-2005-46]

### Self-Regulatory Organizations; International Securities Exchange, Inc.; Order Approving a Proposed Rule Change Relating to the Operation of Primary Market Maker Memberships

February 10, 2006.

#### I. Introduction

On September 27, 2005, the International Securities Exchange, Inc. ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend its rules to increase the maximum number of Primary Market Maker ("PMM") memberships that an ISE member may operate from two PMM memberships to three PMM memberships. The proposed rule change was published for comment in the *Federal Register* on December 6, 2005.<sup>3</sup> The Commission received no comment letters regarding the proposal. This order approves the proposed rule change.

#### II. Description of Proposed Rule

The Exchange proposes to amend ISE Rule 303(b) to increase from two to three the maximum number of PMM memberships that an ISE member may operate. According to ISE's Certificate of Incorporation ("Certificate")<sup>4</sup> and ISE's Amended and Restated Constitution ("Constitution"),<sup>5</sup> each PMM membership is represented by a single share of ISE Class B Common Stock,

Series B-1, of which there are 10 shares authorized and outstanding.<sup>6</sup> ISE represents that it currently has seven PMMs operating the ten PMM memberships; three PMMs each operate two PMM memberships, and the remaining four PMMs each operate one PMM membership. ISE's Certificate prohibits an ISE member from owning or voting the shares representing more than 20% of any class or series of ISE capital stock.<sup>7</sup> Current ISE Rule 303(b) prohibits an ISE member from exercising the trading privileges associated with (*i.e.*, operating) more than one PMM membership, but permits the ISE Board of Directors ("ISE Board") to waive this restriction and allow an ISE member (together with its affiliates) to exercise the trading privileges associated with 20% of the outstanding PMM memberships. To waive this restriction, the ISE Board must make a finding of "good cause."<sup>8</sup> Taken together, ISE's Certificate and ISE Rule 303(b) currently prohibit an ISE member from owning, voting, or operating more than 20% of the outstanding PMM memberships.<sup>9</sup>

The proposed rule change would amend ISE Rule 303(b) to increase the maximum number of PMM memberships an ISE member may operate, upon the ISE Board's approval, from 20% of the outstanding PMM memberships (two PMM memberships) to 30% of the outstanding PMM memberships (three PMM memberships). The proposed rule change also would add proposed Supplementary Material .02 to ISE Rule 303, which would prohibit the ISE Board from approving any such arrangement in which a PMM would gain ownership or voting rights in excess of those permitted under ISE's Certificate or Constitution. Because the proposal would not alter the 20% ownership and voting limits currently set forth in ISE's Certificate that apply

<sup>6</sup> See Article Fourth, Section II(b)(i) of the Certificate.

<sup>7</sup> See Article Fourth, Sections III(a)(ii) and (b)(i) of the Certificate.

<sup>8</sup> Supplementary Material .01 to ISE Rule 303 provides that the ISE Board, when making its determination of whether good cause has been shown, the ISE Board must consider whether an operational, business or regulatory need to operate more than one PMM membership has been demonstrated. It further provides that the ISE Board is only allowed to approve the operation of additional PMM memberships when, in its judgment, such action is in the best interest of the Exchange.

<sup>9</sup> The Commission notes that ISE recently filed a proposed rule change that would restructure the Exchange but would retain its existing 20% ownership and voting limitations applicable to ISE members as part of the proposed reorganization. See File No. SR-ISE-2006-04.

to ISE members, the proposal would allow a member to operate up to 30% of the outstanding PMM memberships, upon receiving Board approval, but only in the event that such member did not own or vote more than 20% of such PMM memberships.

#### III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>10</sup> In particular, the Commission believes that the proposal is consistent with the requirements of Section 6(b)(5) of the Act,<sup>11</sup> which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade and to remove impediments to and perfect the mechanisms of a free and open market and a national market system.

The Commission notes that the proposed change to ISE Rule 303(b) would increase the maximum number of PMM memberships that an ISE member could operate from two to three PMM memberships. The provisions of ISE's Certificate that currently prohibit an ISE member from owning, directly or indirectly, or voting more than 20% of the outstanding shares of any class or series of ISE capital stock would not be altered by this proposal. Rather, in proposed Supplementary Material .02 to ISE Rule 303, the ISE Board would be prohibited from allowing a member to operate a third PMM membership if such an arrangement would violate any ownership and voting limits contained in ISE's Certificate or Constitution. In essence, the proposal would permit the Board to approve an ISE member to acquire the trading privileges to operate a third PMM membership through a leasing arrangement with an unaffiliated person or entity, where the lessor retains all of the ownership and voting rights associated with that PMM membership.

As the Commission has stated previously, a regulatory concern can arise if a member's interest in an exchange becomes so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.<sup>12</sup> For example, a

<sup>10</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> See Securities Exchange Act Release Nos. 53128 (January 13, 2006), 71 FR 3550 (January 23,

<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. 52856 (November 30, 2005), 70 FR 72684 (December 6, 2005) ("Notice").

<sup>4</sup> See Article Fourth, Section II(b)(ii)(A) of the Certificate.

<sup>5</sup> See Article XIII, Section 13.1 of the Constitution.

member that directly or indirectly controls an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from diligently monitoring and surveiling the member's conduct or diligently enforcing its rules and the federal securities laws with respect to conduct by the member that violates such provisions.

The Commission believes that the proposal would not give rise to concerns about the Exchange's ability to effectively carry out its regulatory responsibilities under the Act because the proposed rule change preserves existing ownership and voting limitations.

In light of the foregoing, the Commission believes that the Exchange's proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> that the proposed rule change (File No. SR-ISE-2005-46) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

Nancy M. Morris,  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53275; File No. SR-NYSE-2006-02]

### Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Extension of Two Crossing Sessions in the Exchange's Off-Hours Trading Facility

February 13, 2006.

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 January 25, 2006, the New York Stock Exchange,

2006); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR-CHX-2004-26); 49718 (May 17, 2004), 69 FR 29611 (May 24, 2004) (SR-PCX-2004-08); 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003-73); and 49067 (January 13, 2004), 69 FR 2761 (January 20, 2004) (SR-BSE-2003-19).

<sup>13</sup> 15 U.S.C. 78s(b)(2).

<sup>14</sup> 17 CFR 200.30-3(a)(12).

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

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

Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder, which renders it effective upon filing with the Commission.<sup>4</sup> 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

The NYSE proposes to extend until February 1, 2007 the following pilot programs ("Pilots"): Crossing Session III, for the execution of guaranteed price coupled orders by member organizations to fill the balance of customer orders at a price that was guaranteed to a customer prior to the close of the Exchange's 9:30 a.m. to 4 p.m. trading session ("Crossing Session III"); and Crossing Session IV, whereby an unfilled balance of an order may be filled at a price such that the entire order is filled at no worse price than the Volume Weighted Average Price ("VWAP") for the subject security ("Crossing Session IV"). The text of the proposed rule change is available on the NYSE's Web site (<http://www.nyse.com>), at the NYSE's Office of Secretary, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the NYSE 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 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

In SR-NYSE-2002-40,<sup>5</sup> the Commission approved an order establishing two new crossing sessions

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

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> See Securities Exchange Act Release No. 48857 (December 1, 2003), 68 FR 68440 (December 8, 2003).

(Crossing Sessions III and IV) in the Exchange's Off-Hours Trading Facility ("OHTF") as pilot programs that expired on December 1, 2004. Subsequently, the Commission published a notice of filing and immediate effectiveness of a proposed rule change extending the Pilots until February 1, 2006.<sup>6</sup> This proposal extends the Pilots until February 1, 2007.<sup>7</sup> Crossing Sessions III and IV are described below.

#### Background

The purpose of SR-NYSE-2002-40 was to add two additional "Crossing Sessions" (Crossing Sessions III and IV) to the Exchange's OHTF. Before SR-NYSE-2002-40, the OHTF consisted of Crossing Sessions I and II. Crossing Session I permits the execution, at the Exchange's closing price, of single-stock, single-sided closing price orders and crosses of single-stock, closing price buy and sell orders. Crossing Session II permits the execution of crosses of multiple-stock ("basket") aggregate priced buy and sell orders. For Crossing Session II, trade reporting is accomplished by reporting to the Consolidated Tape the total number of shares and the total market value of the aggregate-price trades. There is no indication of the individual component stocks involved in the aggregate-price transactions.

#### Crossing Session III

In the instant proposed rule change, the Exchange is proposing to extend until February 1, 2007, the Pilot in Crossing Session III. Crossing Session III is described in NYSE Rule 907. This Pilot would continue to allow for the execution on the NYSE of "guaranteed price coupled orders" whereby member organizations could fill the unfilled balance of a customer order at a price which was guaranteed to the customer prior to the close of the Exchange's 9:30 a.m. to 4 p.m. trading session.

#### The Granting of "Upstairs Stops"

In serving their institutional customers, member firms may offer them a guarantee that a large size order will receive no worse than a particular price. Such a practice is usually referred to as an "upstairs stop," meaning that

<sup>6</sup> See Securities Exchange Act Release No. 51091 (January 28, 2005), 70 FR 6484 (February 7, 2005) (SR-NYSE-2005-01).

<sup>7</sup> The NYSE confirmed that the Pilots will continue to function in the same manner that they operated prior to the one-year extension. Telephone conversation between Donald Siemer, Director, Market Surveillance, NYSE, Joseph P. Morra, Special Counsel, Division of Market Regulation ("Division"), Commission and Johnna B. Dumler, Attorney, Division, Commission on February 10, 2006.