

the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5), which requires that an exchange have rules designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and in general to protect investors and the public interest.<sup>6</sup> By incorporating the requirements of Regulation SHO and the Short Sale Rule, the proposed rule will contribute to a coordinated regulatory effort to prevent short sale fraud and manipulation and, in so doing, will protect investors.

#### *Acceleration*

The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of notice of filing thereof in the **Federal Register**. The proposal incorporates the provisions of Regulation SHO and the Short Sale Rule and will be necessary for the ISE to trade non-option equity securities on the ISE Stock Exchange. The Exchange's adoption of a rule incorporating the provisions of Regulation SHO and the Short Sale Rule in order to trade non-option equity securities benefits the investing public. The Commission does not believe that ISE's proposal raises any novel regulatory issues. Accordingly, the Commission believes good cause exists, consistent with Sections 6(b)(5) and 19(b) of the Exchange Act, 15 U.S.C. 78f(b)(5) and 78s(b), to approve the proposed rule change on an accelerated basis.

#### **V. Conclusion**

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>7</sup> that the proposed rule change (File No. SR-ISE-2006-42) be and hereby is approved on an accelerated basis.

<sup>6</sup> In approving this rule proposal, the Commission notes that it has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Nancy M. Morris,**  
*Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-54399; File No. SR-ISE-2006-45]**

### **Self-Regulatory Organizations; International Securities Exchange, Inc.; Order Granting Accelerated Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 1 Thereto Relating To Establishing ISE Stock Exchange, LLC as a Facility of the International Securities Exchange, Inc**

September 1, 2006.

#### **I. Introduction**

On July 31, 2006, 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, as amended ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change establishing a facility, ISE Stock Exchange, LLC ("ISE Stock"), that would administer a fully automated trading system for the trading of equity securities by Electronic Access Members, or EAMs, of ISE under the rules of ISE. The proposed rule change was published for comment in the **Federal Register** on August 10, 2006.<sup>3</sup> The Commission received no comments regarding the proposal. On August 31, 2006, ISE filed Amendment No. 1 to the proposed rule change.<sup>4</sup> This order grants accelerated approval to the proposed rule change and Amendment

<sup>8</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 54273 (August 3, 2006), 71 FR 45868.

<sup>4</sup> In Amendment No. 1, ISE made changes to the proposed rule change to reflect changes made in the Second Amendment and Restated Limited Liability Company Agreement ("LLC Agreement") of ISE Stock, and made clarifying changes to the LLC Agreement, in part, to specifically reference ISE in various provisions, to clarify the voting rights of Members who have transferred Units, to clarify the details of the exception from the voting restrictions as they relate to International Securities Exchange Holdings, Inc. ("Holdings"), to clarify that ISE's Board must determine whether any change to the LLC Agreement must be filed with the Commission pursuant to Section 19(b) of the Act, and to apply the call right described in Section 9.8 of the LLC Agreement to all Units.

No. 1 thereto, and solicits comments from interested persons on Amendment No. 1.

## **II. Description of the Proposal**

### *A. Overview*

The Exchange proposes to establish ISE Stock as a facility, as that term is defined in Section 3(a)(2) of the Act,<sup>5</sup> of ISE. ISE Stock would administer a fully automated trading system for the trading of equity securities by Electronic Access Members, or EAMs, of ISE under the rules of ISE. The Exchange submitted to the Commission the Certificate of Formation of ISE Stock and the LLC Agreement. The Certificate of Formation and the LLC Agreement are the source of ISE Stock's governance and operating authority and, therefore, function in a similar manner as articles of incorporation and by-laws function for a corporation.

ISE is a founding and controlling member of ISE Stock. ISE owns all of the Class A Units of ISE Stock, representing 51% of the voting securities of ISE Stock. In addition to its ownership stake in ISE Stock, ISE has entered into a management agreement (the "Management Agreement") with ISE Stock. Pursuant to the Management Agreement, ISE Stock has appointed ISE as ISE Stock's manager ("Manager") to perform certain management, operational, and related services. As described in Section 8.1 of the LLC Agreement, with limited exceptions, ISE, as the Manager, would have the complete and exclusive authority to manage the operations and affairs of ISE Stock. In addition, ISE would have responsibility for all regulatory functions related to the facility (including conducting market surveillance for trading on ISE Stock). ISE Stock would have responsibility for the business operations of the facility to the extent those activities are not inconsistent and do not interfere with the regulatory and oversight functions of ISE.<sup>6</sup>

The Exchange submitted to the Commission the Certificate of Formation and the LLC Agreement of ISE Stock specifically relating to the control and governance of ISE Stock that would ensure that ISE has the authority within ISE Stock to maintain its responsibility for all regulatory functions related to the ISE Stock facility.<sup>7</sup> The LLC Agreement

<sup>5</sup> 15 U.S.C. 78c(a)(2).

<sup>6</sup> See Amendment No. 1 *supra* note 4 and LLC Agreement, Section 6.1(d).

<sup>7</sup> The Board of Directors of ISE would be required to determine if any changes to the LLC Agreement are required to be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b-

would ensure that the Commission and ISE would have regulatory authority over investors and members of the advisory board of ISE Stock (the "Advisory Board").<sup>8</sup>

#### B. Description of LLC Membership Interests in ISE Stock

As a limited liability company, ownership of ISE Stock is represented by limited liability company membership interests in ISE Stock. The holders of such membership interests are referred to as the members (the "Members") of ISE Stock. The membership interests are divided into two classes—Class A and Class B limited liability company membership units (collectively, the "Units"). The Units represent equity interests in ISE Stock and entitle the holders thereof to participate in certain of ISE Stock's allocations and distributions. Each "Class A Unit" represents a limited liability company membership interest in ISE Stock, and as a class, the holders of the Class A Units hold fifty-one percent (51%) of the aggregate voting rights of all Members. Each holder of a Class A Unit has a vote, in respect of each Class A Unit held by such holder of record on each matter on which holders of Units are entitled to vote, equal to the product of (A) 51 and (B) a fraction, whose numerator is the number of Class A Units then held by such holder and whose denominator is the number of Class A Units then held by all holders of Class A Units.<sup>9</sup> Currently, ISE holds all of the Class A Units, making it a fifty-one percent (51%) owner of ISE Stock.

Each "Class B Unit" represents a limited liability company membership interest in ISE Stock. Each holder of a Class B Unit has a vote, in respect of each Class B Unit held by such holder of record on each matter on which holders of Class B Units shall be entitled to vote as specifically required by the LLC Agreement<sup>10</sup> or by the Delaware Limited Liability Company Act ("DLLCA"), equal to the product of (A) 49 and (B) a fraction, whose numerator is the number of Class B Units then held by such holder and whose denominator

is the number of Class B Units then held by all holders of Class B Units.<sup>11</sup> There are 49 Class B Units issued and outstanding, held by 11 Class B Unit holders. ISE represents that currently no Class B Unit holder owns more than 5 units.

#### C. Management of ISE Stock

As the Manager of ISE Stock, ISE would have the authority to make all decisions regarding the business of ISE Stock and matters concerning the Units, including whether or not to authorize distributions.<sup>12</sup> In certain limited circumstances, the Manager would need the approval of two-thirds of the disinterested members of the Advisory Board prior to taking certain actions.<sup>13</sup> The Manager would be responsible for the control and management of the business of ISE Stock, and must exercise good faith and integrity in handling its affairs.

Under Section 7.1 of the LLC Agreement, other than as set forth in the LLC Agreement or required by the DLLCA or by the Commission, the Members do not participate in the management or control of ISE Stock's business, they do not transact any business for ISE Stock, and they do not have the power to act for or bind ISE Stock. All of those powers are vested solely and exclusively in the Manager. Specifically, under Section 8.1 of the LLC Agreement, subject to the limitations provided in the LLC Agreement<sup>14</sup> and except as specifically provided therein, the Manager has exclusive and complete authority and discretion to manage the operations and affairs of ISE Stock and to make all decisions regarding the business of ISE Stock and has the power to act for or bind ISE Stock. Any action taken by the Manager constitutes the act of and serves to bind ISE Stock. Further, except as otherwise specifically provided in the LLC Agreement, the Manager has all rights and powers of a "manager" under the DLLCA, and has all authority, rights and powers in the management of ISE Stock business to do any and all other

acts and things necessary, proper, convenient or advisable to effectuate the purposes of the LLC Agreement. Lastly, under Section 8.13 of the LLC Agreement, any replacement and appointment of the Manager, and any assignment of the rights and obligations of the Manager under the Management Agreement, is subject to the rule filing process pursuant to Section 19 of the Act.

#### D. Governance of ISE Stock

Section 8.2(d)(i) of the LLC Agreement establishes the Advisory Board of ISE Stock as a general advisory board and provides that the Advisory Board will have no power or authority to act for ISE Stock or to otherwise participate in the ISE Stock's management, except for certain limited matters.<sup>15</sup> Other than the matters for which approval of the Advisory Board is specifically required by the LLC Agreement, any actions taken by the Advisory Board are advisory only, and neither the Manager nor any of its Related Persons are required or otherwise bound to act in accordance with any decision, action or comments of the Advisory Board. The Advisory Board has no power or authority to act for ISE Stock or to otherwise participate in ISE Stock management. All decisions, including responsibility for the management of ISE Stock, rest with the Manager, and in no event will a member of the Advisory Board be considered a "manager" of ISE Stock.

Section 8.2(d)(ii) of the LLC Agreement provides that the purpose of the Advisory Board is to: (1) Review and assess any potential conflicts of interest that may arise between ISE Stock, on the one hand, and the Manager, any Member and/or any of their respective Related Persons,<sup>16</sup> on the other hand

<sup>15</sup> See LLC Agreement, Section 8.2(d) and 8.7.

<sup>16</sup> "Related Person" means (i) With respect to any Person, any executive officer (as defined under Rule 3b-7 under the Act), director, general partner, manager or managing member, as applicable, and all "affiliates" and "associates" of such Person (as such terms are defined in Rule 12b-2 under the Act); (ii) with respect to any Person constituting an "Exchange Member" (as such term is defined in the Constitution of ISE), any broker or dealer with which such "Exchange Member" is associated; (iii) with respect to any Person that is an executive officer (as defined under Rule 3b-7 under the Act), director, general partner, manager or managing member of a company, corporation or similar entity, such company, corporation or entity, as applicable; and (iv) any two or more Persons that have any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of Units of ISE Stock. LLC Agreement, Section 2.1 "Definitions."

"Person" means any individual, partnership, limited liability company, association, corporation,

4 thereunder. See Amendment No. 1 *supra* note 4 and LLC Agreement, Section 12.1.

<sup>8</sup> The Advisory Board consists of seven members, three of which must be officers, directors, or partners of holders of the Class A Units, and four of which must be officers, directors, or partners of holders of the Class B Units. See LLC Agreement, Section 8.2(d)(iii).

<sup>9</sup> LLC Agreement, Section 3.2(a).

<sup>10</sup> The LLC Agreement provides holders of Class B Units the right to vote for Class B Advisory Board Members and to vote on certain amendments to the LLC Agreement. See LLC Agreement, Sections 3.2(b), 8.2(d)(iii), and 12.1.

<sup>11</sup> LLC Agreement, Section 3.2(b).

<sup>12</sup> LLC Agreement, Section 8.1 and 8.12.

<sup>13</sup> LLC Agreement, Section 8.7.

<sup>14</sup> The following actions by the Manager require the consent of two thirds of the disinterested members of the Advisory Board: Taking an act that would make it impossible to carry on the ordinary business of ISE Stock; possessing ISE Stock property for purposes other than ISE Stock business purposes; making loans to any Member or its Related Persons; taking an act that would subject a Member to personal liability; or engaging in transactions with the Manager or any Member or any Related Person of the Manager or any other Member on terms that are not reflective of an "arms-length" transaction. See LLC Agreement, Section 8.7; see also Schedule A of the LLC Agreement.

(including without limitation conflicts with respect to the receipt by the Manager, or its Related Persons, of fees for services rendered to ISE Stock); and (2) generally to consult with the Manager on ISE Stock's progress in achieving its business objectives.

Section 8.2(d)(iii) of the LLC Agreement provides that the Advisory Board consists of seven members. Each Member of ISE Stock may nominate a candidate for election to serve on the Advisory Board. Three members of the Advisory Board would be officers, directors, or partners of holders of the Class A Units, and are to be elected annually by a plurality of the holders of the Class A Units voting together as a class (each a "Class A Advisory Board Member"). Each Class A Advisory Board member would serve for a term of one year. Four members of the Advisory Board would be officers, directors, or partners of holders of the Class B Units, and, except as provided below, would be elected annually by a plurality of the holders of the Class B Units voting together as a class (each a "Class B Advisory Board Member"). In any situation where an Advisory Board Member's job status changes, either upon a significant change in the employment status at the same employer or upon a change of employer, or if the Member employing the Advisory Board member ceases to be a holder of Class B Units, the Advisory Board member must tender his or her resignation to the Manager, which the Manager, in consultation with the Advisory Board, may, but need not, accept. Notwithstanding any of the foregoing, no Member, other than ISE, would have more than one representative elected to the Advisory Board during any term. The initial Class B Advisory Board Members would serve staggered terms with (x) two of such Class B Advisory Board Members serving two consecutive one-year terms, and (y) the other two of such Class B Advisory Board Members serving three consecutive one-year terms. Thereafter, each Class B Advisory Board Member would serve for a term of one year. In no event would any Class B Advisory Board Member serve more than three consecutive one-year terms. Each Class B Advisory Board Member would serve until the conclusion of its one-year term, and until such Class B Advisory Board Member's successor has been elected, or re-elected as permitted under the LLC Agreement, by a plurality of the holders of the Class B Units voting together as a class, except in the event

of such Class B Advisory Board Member's earlier death, resignation, or termination.

Under Section 8.2(e) of the LLC Agreement, ISE Stock also has advisory committees (the "Advisory Committees"), each consisting of up to ten individuals who consult with ISE Stock and assist with the development of: (i) Agency broker trading; (ii) institutional trading; (iii) technology; and (iv) bulk quoting. As with the Advisory Board, the Advisory Committees have no power or authority to act for ISE Stock or to otherwise participate in management.

These limitations on the powers of the Advisory Board and Advisory Committees of ISE Stock will enable ISE to have complete authority over the actions of ISE Stock, especially as they relate to regulatory responsibilities.

Under Section 8.2(d)(vii) of the LLC Agreement, in discharging his or her responsibilities as a member of the Advisory Board, such member must take into consideration the effect that ISE Stock's actions would have on the ability of ISE Stock and ISE<sup>17</sup> to carry out their respective responsibilities under the Act and whether or not his or her actions as a member of the Advisory Board would cause ISE Stock and ISE to engage in conduct that fosters and does not interfere with ISE Stock's and ISE's ability to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanisms of a free and open market and a national market system; and, in general, to protect investors and the public interest.<sup>18</sup> Furthermore, in discharging his or her responsibilities as a member of the Advisory Board, each member must comply with the federal securities laws and the rules and regulations thereunder and cooperate with ISE and the Commission pursuant to their respective regulatory authority and the provisions of the LLC Agreement.

Under Section 8.2(d)(viii) of the LLC Agreement, the Manager, in its sole discretion, may, after appropriate notice and opportunity for hearing, terminate an Advisory Board member: (i) In the event such Advisory Board member has violated any provision of the LLC Agreement or any federal or state securities law; or (ii) if the Manager

determines that such action is necessary or appropriate in the public interest or for the protection of investors.

These provisions would require all members of ISE Stock's Advisory Board, regardless of their association with ISE, to adhere to regulatory responsibilities, in that they must comply with federal securities laws and the rules and regulations promulgated thereunder, and cooperate with the Commission and ISE pursuant to their regulatory authority. In addition, all members of the Advisory Board would be required to take into consideration ISE's responsibility to comply with the requirements under Section 6(b)(5) of the Act.<sup>19</sup> Members of the Advisory Board that do not adhere to these requirements face termination from the ISE Stock Advisory Board and possible sanctions by regulatory authorities.

#### *E. Voting Limitations of Members*

Under Section 7.11 of the LLC Agreement, no Person (other than ISE), either alone or together with its Related Persons, as of any record date for the determination of members entitled to vote on any matter, would be entitled to: (i) Vote or cause the voting of Units beneficially owned by such Person or its Related Persons, in person or by proxy or through any voting agreement, plan, or arrangement, to the extent that such Units represent in the aggregate more than twenty percent (20%) of voting power of the then-issued and outstanding Units (such threshold being hereinafter referred to as the "Voting Limitation"); or (ii) enter into any voting agreement, plan, or arrangement that would result in Units beneficially owned by such Person or its Related Persons, subject to such voting agreement, plan, or arrangement not being voted on a matter, or any proxy relating thereto being withheld, where the effect of that voting agreement, plan, or arrangement would be to enable any Person, alone or together with its Related Persons, to exceed the Voting Limitation. ISE Stock must disregard any such votes purported to be cast in excess of the Voting Limitation.

The limitations imposed by Section 7.11 of the LLC Agreement may be waived by the Manager, if in its sole discretion, it consented to expressly permit such waiver of the Voting Limitation; and such waiver was filed with, and approved by, the Commission under Section 19(b) of the Act and shall have become effective thereunder. In granting a waiver, the Manager must have determined that: (i) The exercise of such voting rights or the entering of

trust or other entity. LLC Agreement, Section 2.1 "Definitions."

<sup>17</sup> See Amendment No. 1 *supra*, note 4.

<sup>18</sup> *Id.*

<sup>19</sup> See Amendment No. 1 *supra*, note 4.

such agreement, plan or other arrangement, as applicable, by such Person, either alone or together with its Related Persons, will not impair the ability of ISE Stock and ISE, as the manager, to carry out its functions and responsibilities, including, but not limited to, under the Act, is otherwise in the best interests of ISE Stock and its Members; (ii) the exercise of such voting rights or the entering of such agreement, plan or other arrangement, as applicable, by such Person, either alone or together with its Related Persons, will not impair the ability of the Commission to enforce the Act; <sup>20</sup> (iii) neither such Person nor its Related Persons are subject to any applicable "statutory disqualification" (within the meaning of Section 3(a)(39) of the Act); and (iv) neither such Person nor its Related Persons is an "Exchange Member" (as such term is defined in the Constitution of ISE).

#### F. Ownership Limitations of Members and Changes in Ownership

Under Section 9.2(a) of the LLC Agreement, no Person (other than ISE), either alone or together with its Related Persons, at any time, may own, directly or indirectly, of record or beneficially, an aggregate amount of Units which would result in more than a twenty (20) Percentage Interest level <sup>21</sup> in ISE Stock (the "Concentration Limitation"). Any transfer of Units that would result in the acquisition and holding by any Person, alone or together with its Related Persons, of an aggregate Percentage Interest level which crosses the threshold level of twenty percent (20%) is not valid unless a waiver has been granted by the Manager, and such waiver may not be granted unless such waiver is filed and approved pursuant to the rule filing process of Section 19 of the Act.<sup>22</sup>

<sup>20</sup> See Amendment No. 1 *supra*, note 4.

<sup>21</sup> "Percentage Interest" shall mean (i) As of any time when the number of outstanding Class B Units does not exceed 49, (x) with respect to the Class B Units one percent (1%) (or fraction thereof) as to each Unit (or fraction thereof) held by such holder of Class B Units and (y) as to the holders of Class A Units, in the aggregate, 100% less the aggregate Percentage Interest of holders of Class B Units as of such time; and as to each holder of a Class A Unit, the product of (x) the aggregate Percentage Interest of all holders of Class A Units and (y) a fraction, whose numerator is the number of Class A Units then held by such holder and whose denominator is the number of Class A Units then held by all holders of Class A Units; and (ii) as of any time when the number of outstanding Class B Units exceeds 49, as to each holder of a Class A Unit or Class B Unit, the percentage equivalent of a fraction whose numerator is the number of Units held by such holder and whose denominator is the aggregate number of Units outstanding. LLC Agreement, Section 2.1 "Definitions."

<sup>22</sup> See LLC Agreement, Section 9.2(b).

The limitations imposed by Sections 9.2(a) of the LLC Agreement may be waived by the Manager, if in its sole discretion, it consented to expressly permit such waiver of the Concentration Limitation; and such waiver shall have been filed with, and approved by, the Commission under Section 19(b) of the Act and shall have become effective thereunder. In granting a waiver, the Manager must have determined that: (i) Such beneficial ownership of Units by such Person, either alone or together with its Related Persons, will not impair the ability of ISE Stock and the Manager to carry out its functions and responsibilities, including but not limited to, under the Act, is otherwise in the best interests of ISE Stock and its Members; (ii) such beneficial ownership of Units by such Person, either alone or together with its Related Persons, will not impair the ability of the Commission to enforce the Act; (iii) neither such Person nor its Related Persons are subject to any applicable "statutory disqualification" (within the meaning of Section 3(a)(39) of the Act); and (iv) neither such Person nor its Related Persons is an "Exchange Member" (as such term is defined in the Constitution of ISE).

Under Section 9.1 of the LLC Agreement, no Member may sell, assign, pledge or in any manner dispose of or create or suffer the creation of a security interest in or any encumbrance on all or a portion of its Units (the commission of any such act being referred to as a "Transfer", any person who effects a Transfer being referred to as a "Transferor" and any person to whom a Transfer is effected being referred to as a "Transferee") except in accordance with the terms and conditions set forth in Article 9 of the LLC Agreement. Any Transfer or purported Transfer of a Unit in ISE Stock not made in accordance with the LLC Agreement shall be null and void and of no force or effect whatsoever. Furthermore, any transfer of Units that results in a reduction of ISE's Percentage Interest level of Class A Units or Percentage Interest level in ISE Stock below the twenty percent (20%) threshold is subject to the rule filing process pursuant to Section 19 of the Act.<sup>23</sup>

Section 9.3 of the LLC Agreement provides that a Member may not Transfer all or any portion of its Units in ISE Stock to any Person without the consent of the Manager, which consent may be given or withheld in the manager's sole discretion; provided, that, subject to Section 9.10 of the LLC Agreement, a Member may transfer all

<sup>23</sup> See LLC Agreement, Section 9.2(d).

or a portion of its Units in ISE Stock to one or more of its Permitted Transferees <sup>24</sup> without the consent of the Manager or any other Member as long as such transfer does not otherwise violate the LLC Agreement.<sup>25</sup>

Under Section 9.11 of the LLC Agreement, unless a Transferee of a Member's Units becomes a Substituted Member,<sup>26</sup> such Transferee shall have no right to obtain or require any information or account of ISE Stock transactions, or to inspect ISE Stock's books or to vote on ISE Stock matters.<sup>27</sup> Furthermore, any successor or Transferee under the LLC Agreement shall be subject to and bound by the LLC Agreement as if originally a party to the LLC Agreement.

#### G. Regulatory Jurisdiction Over Members

Under Section 6.1(b) of the LLC Agreement, each Member acknowledges that to the extent that they relate to the business of ISE Stock, the books, records, premises, officers, directors, agents and employees of Members shall be deemed to be the books, records, premises, officers, directors, agents and employees of ISE Stock for purposes of and subject to oversight pursuant to the Act. Furthermore, the books, records, premises, officers, directors, agents and employees of ISE Stock shall be deemed

<sup>24</sup> "Permitted Transferee" means, with respect to another Person, (i) Any Person directly or indirectly owning, controlling or holding with power to vote 80% or more of the outstanding voting securities of and equity or beneficial interests in such other Person, (ii) any Person 80% or more of whose outstanding voting securities and equity or beneficial interests are directly or indirectly owned, controlled or held with power to vote by such other Person, (iii) any Person 80% or more of whose outstanding voting securities and equity or other beneficial interests are directly or indirectly owned, controlled or held with power to vote by a Person directly or indirectly owning, controlling or holding with power to vote 80% or more of the outstanding voting securities and equity or other beneficial interests of such other Person with whom affiliate status is being tested, (iv) any Family Members or Family Trusts of such Person and (v) any Member. LLC Agreement, Section 2.1 "Definitions."

"Family Members" means, with respect to any natural Person, such Person's spouse, children, parents and lineal descendants of such Person's parents. LLC Agreement, Section 2.1 "Definitions."

"Family Trusts" means, with respect to any natural Person, a trust benefiting solely such Person or the Family Members of such Person. LLC Agreement, Section 2.1 "Definitions."

<sup>25</sup> If a Member transfers all of its Units, whether or not the transfer is to a Permitted Transferee, such transfer must first be approved by the Manager. See Amendment No. 1 *supra*, note 4 and LLC Agreement, Section 9.3(c).

<sup>26</sup> "Substituted Member" means any Person admitted to the Company as a substituted Member pursuant to the provisions of Article 9. LLC Agreement, Section 2.1 "Definitions."

<sup>27</sup> The Member retains the right to vote the Units. See Amendment No. 1 *supra*, note 4 and LLC Agreement, Section 9.3(b).

to be the books, records, premises, officers, directors, agents and employees of ISE for purposes of and subject to oversight pursuant to the Act. In addition, the books and records of ISE Stock will be kept within the U.S.<sup>28</sup>

Section 13.1(a) of the LLC Agreement generally provides that a Member may not disclose any confidential information of ISE Stock or of any other Members to any persons, except as expressly provided by the LLC Agreement. However, Section 13.1(a) provides exceptions for, among other things, disclosure required by the federal securities laws and any other applicable self-regulatory organization, or in response to a request by the Commission pursuant to the Act or by ISE. In addition, confidential information pertaining to the self-regulatory function of ISE (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of ISE Stock shall: (i) Not be made available to any persons (other than as provided in the next sentence) other than to those officers, directors, employees, and agents of ISE Stock that have a reasonable need to know the contents thereof; (ii) be retained in confidence by ISE Stock and the officers, directors, employees and agents of ISE Stock; and (iii) not be used for any commercial purposes.<sup>29</sup> Nothing in the LLC Agreement may be interpreted as to limit or impede the rights of the Commission or ISE to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any Member or any officers, directors, employees or agents of ISE Stock or any Member to disclose such confidential information to the Commission or ISE.<sup>30</sup>

Under Section 6.1(c) of the LLC Agreement, ISE Stock, its Members, and officers, directors, agents, and employees of ISE Stock and its Members irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission and ISE, for the purposes of any suit, action or proceeding pursuant to the U.S. federal securities laws, the rules or regulations thereunder, directly arising out of, or relating to, ISE Stock activities or Section 6.1 of the LLC Agreement (except that such jurisdiction also includes Delaware for any such matter relating to the organizational or internal affairs of ISE Stock), and waive, and agree not to assert by way of motion, as

a defense or otherwise in any such suit, action or proceeding, any claims that it is not personally subject to the jurisdiction of the Commission, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter of the LLC Agreement may not be enforced in or by such courts or agency.

Under Section 6.1(d) of the LLC Agreement, ISE Stock, its Members, the officers, directors, agents, and employees of ISE Stock and its Members agree to comply with the federal securities laws and the rules and regulations thereunder and cooperate with ISE and the Commission pursuant to their respective regulatory authority and the provisions of the LLC Agreement; and to engage in conduct that fosters and does not interfere with ISE Stock's and ISE's<sup>31</sup> ability to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanisms of a free and open market and a national market system; and, in general, to protect investors and the public interest.

Section 6.1(e) of the LLC Agreement provides that ISE Stock and each Member shall take such action as is necessary to ensure that its respective officers, directors, agents, and employees consent in writing to the application to them of the applicable provisions of Section 6.1 with respect to their ISE Stock-related activities.

Under Section 7.1(b) of the LLC Agreement, the Manager may, after appropriate notice and opportunity for hearing, suspend or terminate a Member's voting privilege or membership: (i) In the event such Member has violated a provision of this Agreement or any federal or state securities law; (ii) such Member or its Related Persons are subject to any applicable "statutory disqualification" (within the meaning of Section 3(a)(39) of the Act); or (iii) if the Manager determines that such action is necessary or appropriate in the public interest or for the protection of investors.

ISE believes that this provision would require Members, regardless of the nature of their association with ISE, to adhere to regulatory responsibilities in that they must comply with federal securities laws and the rules and regulations thereunder, and cooperate

with the Commission and ISE pursuant to their regulatory authority or face severe consequences such as termination of voting rights or ownership. In addition, Members would be required to take into consideration and facilitate ISE's and ISE Stock's ability to comply with the requirements under Section 6(b)(5) of the Act.<sup>32</sup>

#### *H. Fair Representation of Trading Participants*

Members of (or holders of Units in) ISE Stock are not automatically entitled to trading privileges on the ISE Stock trading system, nor is the purchase of Units a pre-requisite for exercising trading privileges on the ISE Stock trading system. Rather, in order to exercise trading privileges on the ISE Stock trading system, a broker-dealer must be an approved EAM of ISE. There is only one type of EAM membership for both options trading on ISE and equities trading on the ISE Stock trading system. When an applicant is approved under ISE rules as an EAM, the member is issued one share of Class B Common Stock, Series B-3 (a "B-3 Share"). Under the ISE Constitution, holders of B-3 Shares, or EAMs, have the right to elect two members (the "B-3 Directors") of the Board of Directors of ISE (the "ISE Board"). Nominees for election to the ISE Board to serve as Industry Directors, including B-3 Directors, are currently made by the Exchange's Nominating Committee, which is not a committee of the ISE Board, and is comprised of representatives of the holders of each series of Class B Common Stock. Stockholders also may nominate Industry Director candidates for election to the ISE Board by petition. Accordingly, since trading participants on the ISE Stock trading system must be EAMs, and since EAMs have the right to elect B-3 Directors of the ISE Board, the Exchange believes that ISE Stock trading system trading participants are fairly represented on the ISE Board. Additionally, as a result of ISE's stated strategy of selling Units to entities that will support trading on the ISE Stock trading system, trading participants will have representation via the ISE Stock Advisory Board.

The Exchange proposes to modify the language in ISE Rule 312 (Limitation on Affiliation between the Exchange and Members) to clarify that this provision covers not only the Exchange, but ISE Stock as a facility of ISE, as well.

<sup>28</sup> LLC Agreement, Section 6.1(a).

<sup>29</sup> LLC Agreement, Section 13.1(b).

<sup>30</sup> LLC Agreement, Section 13.1(c).

<sup>31</sup> See Amendment No. 1 *supra*, note 4.

<sup>32</sup> See Amendment No. 1 *supra*, note 4 and LLC Agreement, Section 6.1(d).

### *I. Reorganization Into a Holding Company Structure*

According to the Exchange, it intends to reorganize into a holding company structure on September 1, 2006, in the manner described in Securities Exchange Act Release No. 53705 (April 21, 2006) (the "Reorganization").<sup>33</sup> Upon the Reorganization, International Securities Exchange, LLC will become the registered "national securities exchange" under Section 6 of the Act, the self-regulatory organization ("SRO") and continue to act as Manager of ISE Stock. ISE Holdings shall become the holder of the Class A Units of ISE Stock. Prior to the Reorganization, the provisions relating to, among other things, ownership and voting limitations (and exceptions therefrom) are applicable to ISE, as the holder of the Class A Units. Upon the Reorganization, those same provisions are applicable to ISE Holdings, as the holder of the Class A Units.

### **III. Discussion, Commission Findings, and Accelerated Approval of the Proposed Rule Change and Amendment No. 1 Thereto**

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>34</sup> In particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(1) of the Act,<sup>35</sup> which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules or regulations thereunder, and the rules of the exchange. The Commission also finds that the proposed rule change, as amended, is consistent with Section 6(b)(3) of the Act,<sup>36</sup> which, among other things, requires that the rules of an exchange ensure fair representation of its members in the selection of its directors and administration of its affairs.

In addition, the Commission finds that the proposed rule change, as amended, is consistent with Section

6(b)(5) of the Act,<sup>37</sup> which requires that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest.

#### *A. ISE Stock as a Facility of the Exchange*

The Commission believes that the proposed rule change is consistent with Section 6(b)(1) of the Act<sup>38</sup> in that upon establishing ISE Stock as an Exchange facility and serving as manager of ISE Stock as described above, ISE will remain so organized, and have the capacity to be able, to carry out the purposes of the Act. The Commission further believes that ISE's proposal for ISE to operate ISE Stock as a facility of ISE is properly filed under Section 19(b) of the Act and Rule 19b-4 thereunder, and that ISE Stock is not required, separate from ISE, to apply for registration as a national securities exchange pursuant to Section 6(a) of the Act.<sup>39</sup> In addition, the Commission previously approved a similar structure with respect to the operation of the Boston Stock Exchange, Inc.<sup>40</sup>

Although ISE has contracted to undertake the fulfillment of SRO responsibilities under the Act and other regulatory compliance services for ISE Stock,<sup>41</sup> ISE Stock is, however, still responsible for assuring that its activities are consistent with the Act. Under Section 6.1(d) of the LLC Agreement, each ISE Stock Member, its officers, directors, agents, and employees, agree to comply with federal securities law; to cooperate with the Commission and ISE pursuant to their regulatory authority and the provisions of the LLC Agreement; and to engage in conduct that fosters and does not interfere with ISE Stock or ISE's ability to prevent fraudulent and manipulative acts and practices; promote just and equitable principles of trade; foster cooperation and coordination with

persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, protect investors and the public interest. Section 8.2(d)(vii) of the LLC Agreement also requires each ISE Stock Advisory Board Member to cooperate with the Commission and ISE pursuant to the respective authority of the Commission and ISE. These provisions reinforce the notion that ISE Stock, as a facility of an Exchange, is not solely a commercial enterprise; it is an integral part of an SRO registered pursuant to the Act and, as such, is subject to obligations imposed by the Act.

These obligations endure as long as ISE Stock is a facility of the Exchange, regardless of the size of ISE's ownership interest in ISE Stock. ISE currently, and in the future Holdings, owns a controlling interest in ISE Stock and, in the future, if ISE Holdings wishes to reduce its Percentage Interest in ISE Stock to below 20 percent,<sup>42</sup> pursuant to Section 9.2(d) of the LLC Agreement the Exchange would be required to file a proposed rule change with the Commission under Section 19(b) of the Act. Additionally, under Section 8.13(c) of the LLC Agreement, any replacement and appointment of the Manager, and any assignment of the rights and obligations of the Manager under the Management Agreement, must, prior to becoming effective, have been filed with, and approved by, the Commission. The Commission believes that these measures would alert the Commission to a significant reduction of ISE's interest in ISE Stock or control over the operations of ISE Stock. Such a reduction in ownership or control could warrant additional review of the LLC Agreement to ensure that ISE's responsibilities as the SRO of the ISE Stock facility are not compromised.

The LLC Agreement includes additional provisions that make special accommodations for ISE as the SRO of the ISE Stock facility. For example, except for several limited exceptions,<sup>43</sup> Section 8.1 of the LLC Agreement provides that ISE as the manager will have "exclusive and complete authority and discretion to manage the operations and affairs" of ISE Stock. ISE has complete access to information through provisions such as Sections 13.1(c) of the LLC Agreement, which allows ISE Stock, Members, their officers, directors,

<sup>33</sup> See Securities Exchange Act Release No. 53705 (April 21, 2006), 71 FR 25260 (April 28, 2006) (SR-ISE-2006-04).

<sup>34</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>35</sup> 15 U.S.C. 78f(b)(1).

<sup>36</sup> 15 U.S.C. 78f(b)(3).

<sup>37</sup> 15 U.S.C. 78f(b)(5).

<sup>38</sup> 15 U.S.C. 78f(b)(1).

<sup>39</sup> 15 U.S.C. 78f(a).

<sup>40</sup> See Securities Exchange Act Release No. 54364 (August 25, 2006), 71 FR 52185 (September 1, 2006) (SR-BSE-2006-20).

<sup>41</sup> See Item 10 of Exhibit 5(c) describing certain services to be performed under the Management Agreement.

<sup>42</sup> In this instance, interest refers to interest in ISE Stock Class A Units or overall interest in ISE Stock.

<sup>43</sup> See LLC Agreement, Section 8.7 for limitations.

agents, and employees, to disclose to the Commission or ISE confidential information. Furthermore, Section 7.2 of the LLC Agreement, subject to certain exceptions, gives all of the voting rights to Class A Units, of which ISE, and subsequently Holdings, owns 100 percent. In addition, Section 8.2(d)(iii) of the LLC Agreement provides that the holder of Class A Units is entitled to three of the seven seats on the ISE Stock Advisory Board.

Because ISE has proposed to operate ISE Stock as its facility, ISE's obligations under the Act extend to its members' activities on ISE Stock, as well as to the operation and administration of ISE Stock. The Commission believes that Section 19 of the Act affords the Commission the ability to determine whether ISE's proposal is consistent with the Act, as would a separate application by ISE Stock to register as a national securities exchange. More specifically, the Commission believes that these provisions, described above, are consistent with the Act and enhance the ability of ISE to carry out its self-regulatory responsibilities with respect to its ISE Stock facility.

#### B. Changes in Control of ISE

The Commission believes that the restrictions in the LLC Agreement on changes in control of ISE Stock and the restrictions on the change in Manager (the entity that controls the operations of ISE Stock) are sufficient to enable ISE to carry out its self-regulatory responsibilities and should permit the Commission to fulfill its responsibilities under the Act.

Schedule A of the LLC Agreement lists all ISE Stock Members, the number of units each holds, and the percentage of ownership in ISE Stock that such units represent. A change to this schedule, which is part of the LLC Agreement (as is the case with any other change to the LLC Agreement), would need to be filed with the Commission if the Board of ISE determines that it is required under Section 19(b) of the Act and Rule 19b-4 thereunder.<sup>44</sup> In addition, Section 9.2(a) and (b) of the LLC Agreement provides that no person (other than ISE or Holdings)<sup>45</sup> may cross the 20 percent ownership threshold without a waiver from ISE, as manager, and such approval could not be granted without the filing and approval of a proposed rule change with

the Commission pursuant to Section 19(b) of the Act.<sup>46</sup>

As noted, ISE, and in the future Holdings, currently owns all of the Class A Units, and Section 7.2 of the LLC Agreement, subject to certain exceptions, gives all of the voting rights to Class A Units. In addition, Section 8.2(d)(iii) of the LLC Agreement provides that the holder of Class A Units is entitled to three of the seven seats on the ISE Stock Advisory Board. If ISE, or in the future Holdings, wishes to reduce its interest in ISE Stock to below 20 percent,<sup>47</sup> pursuant to Section 9.2(d) of the LLC Agreement, it would be required to file a proposed rule change under Section 19(b) of the Act.

As noted in the Voting Limitations section *supra*, under Section 7.11 of the LLC Agreement, no Person (other than ISE), either alone or together with its Related Persons, may exceed the Voting Limitation or enter into any voting agreement that would result in Units beneficially owned by such Person or its Related Persons not being voted where the effect would be to enable any Person, alone or together with its Related Persons, to exceed the Voting Limitation. The limitations imposed by Section 7.11 of the LLC Agreement may be waived by the Manager after such waiver is filed with, and approved by, the Commission under Section 19(b) of the Act. However, such a waiver may not be granted to Persons or Related Persons subject to "statutory disqualification" (within the meaning of Section 3(a)(39) of the Act) or Exchange Members (as such term is defined in the Constitution of ISE).<sup>48</sup>

Additionally, as noted, Section 8.1 of the LLC Agreement, with limited exceptions, grants exclusive and complete authority over the operations and affairs of ISE Stock to ISE as the Manager. Under Section 8.13(c) of the LLC Agreement, any replacement and appointment of the Manager, and any assignment of the rights and obligations of the Manager under the Management Agreement, must, prior to becoming effective, have been filed with, and approved by, the Commission.

In conclusion, the Commission believes that Sections 7.2, 8.1, 8.4(a) and (b), 8.13(c), 9.2(a), (b), and (d), and 12.1 of the LLC Agreement, together with the requirements of Section 19(b) of the Act

and Rule 19b-4 thereunder, provide the Commission with sufficient authority over changes in control of ISE to enable the Commission to carry out its regulatory oversight responsibilities with respect to ISE and the ISE Stock facility.

#### C. Regulatory Jurisdiction Over ISE Stock and Its Members

The Commission believes that the terms of the LLC Agreement provide the Commission and ISE with sufficient regulatory jurisdiction over the controlling parties and Members to carry out their respective responsibilities under the Act. In Section 6.1(b) of the LLC Agreement, each Member acknowledges that, to the extent that they are related to the business of ISE Stock, the books, records, premises, officers, directors, agents, and employees of the Member are deemed to be the books, records, premises, officers, directors, agents, and employees of ISE for the purpose of and subject to oversight pursuant to the Act. Furthermore, the books, records, premises, officers, directors, agents, and employees of ISE Stock are deemed to be the books, records, premises, officers, directors, agents, and employees of ISE. This provision would enable the Commission to exercise its authority under Section 19(h)(4)<sup>49</sup> of the Act with respect to the officers, directors, agents, and employees of all Members, since all such officers, directors, agents, and employees, and officers, directors, agents, and employees of ISE Stock, to the extent that they are acting in matters related to ISE Stock activities, would be deemed to be the officers, directors, agents, and employees of ISE itself. Furthermore, the books and records of any ISE Member, to the extent that they are related to ISE Stock activities, are subject to the Commission's examination authority under Section 17(b)(1) of the Act,<sup>50</sup> as these records would be deemed to be the records of ISE itself.

In addition, in Section 6.1(c) of the LLC Agreement, ISE Stock, its Members, its officers, directors, agents, and employees, and the officers, directors,

<sup>49</sup> 15 U.S.C. 78s(h)(4). Section 19(h)(4) authorizes the Commission, by order, to remove from office or censure any officer or director of a national securities exchange if it finds, after notice and an opportunity for hearing, that such officer or director has: (i) Willfully violated any provision of the Act or the rules and regulations thereunder, or the rules of a national securities exchange; (ii) willfully abused his or her authority; or (iii) without reasonable justification or excuse, failed to enforce compliance with any such provision by a member or person associated with a member of the national securities exchange.

<sup>50</sup> 15 U.S.C. 78q(b)(1).

<sup>44</sup> See LLC Agreement, Section 12.1.

<sup>45</sup> This exception for Holdings only applies as long as the concentration limitation provision found in Article Fourth, Subdivision III(a) of the ISE, Inc. Certificate of Incorporation is in place and as long as ISE is a wholly-owned subsidiary of Holdings.

<sup>46</sup> Such a waiver may not be granted to Persons or Related Persons subject to "statutory disqualification" (within the meaning of Section 3(a)(39) of the Act) or Exchange Members (as such term is defined in the Constitution of ISE). See LLC Agreement, Section 9.2(c).

<sup>47</sup> In this instance, interest refers to interest in ISE Class A Units or overall interest in ISE Stock.

<sup>48</sup> See LLC Agreement, Section 7.11(c).

agents, and employees of its Members irrevocably submit to the jurisdiction of the Commission, for the purposes of any suit, action or proceeding pursuant to the U.S. federal securities laws and the rules or regulations thereunder, arising out of or relating to ISE Stock activities. In addition, ISE Stock, its Members, and each officer, director, agent, and employee of ISE and its Members, must waive as a defense or otherwise in any such suit, action, or proceeding, any claim that it is not personally subject to the jurisdiction of the Commission; that the suit, action or proceeding is an inconvenient forum; that the venue is improper; or that the subject matter of the suit, action, or proceeding may not be enforced by such courts or agency.<sup>51</sup> Moreover, pursuant to Section 6.1(e) of the LLC Agreement, ISE Stock and each Member are required to take such action as is necessary to ensure that ISE Stock and its Member's officers, directors, agents, and employees consent to the application of these requirements with respect to their ISE Stock-related activities. Finally, under Section 6.1(d) of the LLC Agreement, ISE Stock, and its Members, officers, directors, agents, and employees, and the officer, directors, agents, and employees of its Members agrees to cooperate with the Commission and ISE pursuant to their respective regulatory authority.

The Commission also notes that, even in the absence of these provisions of the LLC Agreement, Section 20(a) of the Act<sup>52</sup> provides that any person with a controlling interest in ISE Stock would be jointly and severally liable with and to the same extent that ISE Stock 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.<sup>54</sup>

The Commission believes that, together, these provisions grant the Commission sufficient jurisdictional authority over ISE Stock and its Members. Moreover, ISE is required to enforce compliance with these provisions because they are "rules of the exchange" within the meaning of Section 3(a)(27) of the Act.<sup>53</sup> A failure on the part of ISE to enforce its rules could result in suspension or revocation of registration under Section 19(h)(1) of the Act.<sup>54</sup>

#### *D. Restrictions on ISE Stock Members*

The Commission believes that the restriction on voting trust agreements in Section 7.11(a) of the LLC Agreement is reasonable and consistent with the Act. In the absence of such a provision, unaffiliated parties could act in concert and evade the LLC Agreement's provisions regarding changes in control of ISE Stock. In addition, the LLC Agreement treats as belonging to a single person any ISE Stock Units held by affiliated parties of the person.<sup>55</sup> A voting trust agreement would not necessarily be inconsistent with the Act, but any Members (other than ISE or, in the future, Holdings) wishing to establish a voting trust agreement first would need the consent of the Manager,<sup>56</sup> a consent that may not be given unless the Manager files a proposed rule change, thus affording the Commission an opportunity to review the matter.

In addition, the Commission believes that the ownership concentration limit described above, which prohibits a person (other than ISE or in the future Holdings) along with a related person from owning directly or indirectly more than 20 percent of the outstanding units of ISE Stock<sup>57</sup> absent a waiver, and would apply to those persons trading on the ISE Stock trading system, together with the provision that restricts the ability of Members to vote interests in excess of 20 percent, absent a waiver,<sup>58</sup> are reasonable and consistent with the Act.<sup>59</sup> Moreover, Exchange members (as defined in the ISE Constitution) would be prohibited from owning more than 20 percent. It is common for members who trade on an exchange to have ownership interests in the exchange. However, a member's interest could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that

member. A member that is also a controlling shareholder of an exchange or its facility might be tempted to exercise that controlling influence by directing the exchange to refrain from diligently surveilling the member's conduct or from punishing any conduct that violates the rules of the exchange or the federal securities laws. An exchange also might be reluctant to surveil and enforce its rules zealously against a member that controls and has a large economic interest in the Exchange.

#### *E. Accelerated Approval of Proposed Rule Change and Amendment No. 1*

The Commission finds good cause for approving this proposed rule change, and Amendment No. 1 thereto, before the thirtieth day after the publication of notice thereof in the **Federal Register** pursuant to Section 19(b)(2) of the Act.<sup>60</sup> The proposed rule change was published for a full comment period and no comments were received. In addition, the Commission notes that the proposed rule change, as amended, is substantially similar to the structure previously approved by the Commission.<sup>61</sup> That proposal was also published for a full comment period and the Commission received no comments on the proposal. Furthermore, accelerating approval of this proposed rule change, as amended, should benefit investors by permitting ISE to establish, without undue delay, an additional venue for the trading of equity securities for market participants, thereby increasing competition and efficiency. Lastly, the Commission believes that Amendment No. 1 serves to clarify and enhance the proposal. For these reasons, the Commission therefore finds good cause exists to accelerate approval of the proposed rule change, and Amendment No. 1 thereto.<sup>62</sup>

#### **IV. 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:

<sup>60</sup> 15 U.S.C. 78s(b)(2). Pursuant to Section 19(b)(2) of the Act, the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission finds good cause for so doing.

<sup>61</sup> See Securities Exchange Act Release No. 54364 (August 25, 2006), 71 FR 52185 (September 1, 2006) (SR-BSE-2006-20).

<sup>62</sup> 15 U.S.C. 78s(b)(2).

<sup>55</sup> See LLC Agreement, Sections 9.2(a).

<sup>56</sup> Such a waiver may not be granted to any Person or Related Person subject to "statutory disqualification" (within the meaning of Section 3(a)(39) of the Act) or any Person or Related Person who are Exchange Members (as such term is defined in the Constitution of ISE). See LLC Agreement, Sections 7.11(c).

<sup>57</sup> See LLC Agreement, Section 9.2(a).

<sup>58</sup> Neither the voting nor ownership limitation waiver may be granted to any Person or Related Person subject to "statutory disqualification" (within the meaning of Section 3(a)(39) of the Act) or any Person or Related Person who are Exchange Members (as such term is defined in the Constitution of ISE). See LLC Agreement, Sections 9.2(c) and 7.11(c).

<sup>59</sup> The Commission believes that this provision would require ISE Stock to aggregate the interest of Members in ISE Stock and any indirect interest in ISE Stock through Members' interest in Holdings. See LLC Agreement, Section 9.2(a).

<sup>51</sup> See LLC Agreement, Section 6.1(c).

<sup>52</sup> 15 U.S.C. 78t(a).

<sup>53</sup> 15 U.S.C. 78c(a)(27).

<sup>54</sup> 15 U.S.C. 78s(h)(1).

*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-2006-45 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-ISE-2006-45. 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. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to Amendment No. 1 of File Number SR-ISE-2006-45 and should be submitted on or before October 3, 2006.

**V. Conclusion**

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>63</sup> that the proposed rule change (SR-ISE-2006-45) and Amendment No. 1 thereto are approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>64</sup>

**Nancy M. Morris,**  
*Secretary.*

[FR Doc. E6-15054 Filed 9-11-06; 8:45 am]

**BILLING CODE 8010-01-P**

**UNITED STATES SENTENCING COMMISSION****Sentencing Guidelines for United States Courts**

**AGENCY:** United States Sentencing Commission.

**ACTION:** Notice of a temporary, emergency amendment to sentencing guidelines, policy statements, and commentary.

**SUMMARY:** Pursuant to section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Public Law 109-181, the Commission hereby gives notice of a temporary, emergency amendment to the sentencing guidelines, policy statements, and commentary. This notice sets forth the temporary, emergency amendment and the reason for amendment.

**DATE:** The Commission has specified an effective date of September 12, 2006, for the emergency amendment.

**FOR FURTHER INFORMATION CONTACT:** Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

**SUPPLEMENTARY INFORMATION:** The Commission must promulgate a temporary, emergency amendment to implement the directive in section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Public Law 109-181, by September 12, 2006. The statutory deadline for the promulgation of the temporary, emergency amendment, in conjunction with the Commission's public meeting schedule (the promulgation of such amendments must occur in a public meeting), made it impracticable to publish a proposed temporary, emergency amendment in the **Federal Register** in order to provide an opportunity for public comment, and to publish the promulgated amendment not less than 30 days before the effective date. The Commission therefore had good cause not to publish a proposed amendment before the specified effective date and not to publish the promulgated amendment 30 days or more before such date. See 5 U.S.C. 553(b), (d)(3).

The temporary, emergency amendment set forth in this notice also may be accessed through the Commission's Web site at <http://www.ussc.gov>.

**Authority:** 28 U.S.C. 994(a), (o), (p), (x); section 1(c) of Public Law 109-181.

**Ricardo H. Hinojosa,**  
*Chair.*

*Amendment:* The Commentary to § 2B5.3 captioned "Application Notes" is amended in Note 2(A) by adding at the end the following:

(vii) A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the 'infringed item' is the identifiable, genuine good or service.

*Reason for Amendment:* This amendment implements the emergency directive in section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Public Law 109-181. The directive, which requires the Commission to promulgate an amendment under emergency amendment authority by September 12, 2006, instructs the Commission to "review, and if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 2318 or 2320 of title 18, United States Code \* \* \*." The directive further provides that the Commission shall:

determine whether the definition of "infringement amount" set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations in which the defendant has been convicted of one of the offenses [under section 2318 or 2320 of title 18, United States Code,] and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, such as an anti-circumvention device, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as *U.S. v. Sung*, 87 F.3d 194 (7th Cir. 1996).

The emergency amendment adds subdivision (vii) to Application Note 2(A) of § 2B5.3 (Criminal Infringement of Copyright or Trademark) to provide that the infringement amount is based on the retail value of the infringed item in a case under 18 U.S.C. 2318 or 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the

<sup>63</sup> 15 U.S.C. 78s(b)(2).

<sup>64</sup> 17 CFR 200.30-3(a)(12).