

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56733; File No. SR-ISE-2007-101)

November 1, 2007

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change 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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 1, 2007, the International Securities Exchange, LLC (“Exchange” or “ISE”) 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 prepared substantially by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Under the proposed rule change, the ISE is proposing a corporate transaction (“Transaction”) in which its parent, International Securities Exchange Holdings, Inc. (“Holdings” or “Corporation”), will become a wholly-owned indirect subsidiary of Eurex Frankfurt AG (“Eurex Frankfurt”), which operates a derivatives exchange. Article FOURTH, Section III of Holdings’ Certificate of Incorporation (“Certificate”) imposes certain ownership and voting restrictions (“Restrictions”) that, in effect, require approval of the Transaction by the Commission. Specifically, the Certificate provides that Holdings’ board of directors (“Board of Directors”) may waive the Restrictions in an amendment to the Bylaws of the Holdings (“Bylaws”) if the Board of Directors makes certain findings and the amendment to the Bylaws is

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

approved by the Commission. Acting pursuant to this waiver provision, the Board of Directors has approved the following amendment to the Bylaws:

ARTICLE XI

Waiver Of Limits

Section 1.1 Waiver of Ownership Limits and Voting Limits to Permit Merger.

(a) The Board of Directors hereby waives (i) pursuant to Article FOURTH, Section III(a)(i) of the certificate of incorporation of the Corporation dated November 16, 2004, as amended, (“2004 Certificate”), the restrictions on ownership of capital stock of the Corporation described in Article FOURTH, Section III(a)(i) of the 2004 Certificate, and (ii) pursuant to Article FOURTH, Section III(b)(i) of the 2004 Certificate, the restrictions on voting rights with respect to the capital stock of the Corporation as described in Article FOURTH, Section III(b)(i) of the 2004 Certificate, in each case solely in order to permit the merger and the other transactions contemplated by that certain Agreement and Plan of Merger, dated as of April 30, 2007, by and among Eurex Frankfurt AG, a stock corporation organized under the laws of the Federal Republic of Germany (“Eurex Frankfurt”), Ivan Acquisition Co., a Delaware corporation and a wholly-owned indirect subsidiary of Eurex Frankfurt, and the Corporation, under which the Corporation (A) will become a wholly-owned subsidiary of U.S. Exchange Holdings, Inc., a Delaware corporation that is a wholly-owned subsidiary of Eurex Frankfurt, and (B) will become an indirect subsidiary of Eurex Frankfurt, Eurex Zürich AG (“Eurex Zürich”), a stock

corporation organized under the laws of Switzerland, Deutsche Börse AG (“Deutsche Börse”), a stock corporation organized under the laws of the Federal Republic of Germany, SWX Swiss Exchange (“SWX”), a stock corporation organized under the laws of Switzerland, SWX Group, a stock corporation organized under the laws of Switzerland, and Verein SWX Swiss Exchange, an association organized under the laws of Switzerland. For the purpose of this Article XI, Deutsche Börse, Eurex Frankfurt, Eurex Zürich, SWX, SWX Group, Verein SWX Swiss Exchange, and U.S. Exchange Holdings, Inc. are collectively referred to as the “Upstream Owners.”

(b) In so waiving the applicable Ownership Limits and Voting Limits to allow ownership and voting of the capital stock of the Corporation by the Upstream Owners, the Board of Directors has determined, with respect to each Upstream Owner, that: (i) such waiver will not impair the ability of the Corporation and ISE, LLC to carry out ISE, LLC’s functions and responsibilities as an “exchange” under the Exchange Act and the rules promulgated thereunder; (ii) such waiver is otherwise in the best interests of the Corporation, its stockholders, and ISE, LLC; (iii) such waiver will not impair the ability of the Commission to enforce the Exchange Act; (iv) neither the Upstream Owner nor any of its Related Persons are subject to any applicable “statutory disqualification” (within the meaning of Section 3(a)(39) of the Exchange Act); and (v) neither the Upstream Owner nor any of its Related Persons is an Exchange Member (as such term is defined in the Constitution of ISE, LLC).

The Transaction

Pursuant to the Agreement and Plan of Merger by and among Eurex Frankfurt, Ivan Acquisition Co., a newly-formed, indirect, wholly-owned subsidiary of Eurex Frankfurt (“Acquisition Co.”), and Holdings, dated April 30, 2007 (“Agreement”), Acquisition Co. will merge with and into Holdings,³ which will become a wholly-owned subsidiary of U.S. Exchange Holdings, Inc. (“U.S. Exchange Holdings”), which in turn is a wholly-owned subsidiary of Eurex Frankfurt. Holdings’ stockholders will receive cash in exchange for their shares. Consummation of the Transaction is subject to satisfaction of customary conditions for a transaction of this nature, including the approval of Holdings’ stockholders⁴ and the approval of this rule change by the Commission.

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 (Eurex Frankfurt, Eurex Zürich, Deutsche Börse, SWX, SWX Group, Verein SWX Swiss Exchange, and U.S. Exchange Holdings are collectively referred to herein as “Upstream Owners”). The Transaction will not affect Holdings’ ownership of the ISE. After the Transaction, Holdings will continue to be the sole member of the ISE, which is organized as a Delaware limited liability company. The ISE’s members will continue to own “exchange rights,” as that term is defined in the Second Amended and Restated Limited Liability

³ Under the terms of the Agreement, the bylaws of Acquisition Co. will become the bylaws of the surviving corporation of the Transaction, which will be Holdings. The proposed bylaws of Holdings filed as Exhibit 5B to this proposed rule change currently are the bylaws of Acquisition Co. Upon the closing of the Transaction, those bylaws will become the bylaws of Holdings.

⁴ Holdings’ stockholders approved the Transaction at a special meeting of stockholders held on July 27, 2007.

Agreement of the ISE (“LLC Agreement”).⁵ As such, ISE members will continue to have the same trading and voting rights in the ISE as they had prior to the Transaction.

In addition to the amendment to the Bylaws to waive the Restrictions, the ISE is proposing the following changes to its governing documents relating to the Transaction:

- Public Company Related Provisions. Under the proposed rule change, the Certificate and the Bylaws would be amended to remove or revise certain provisions that will no longer be necessary after the consummation of the Transaction in view of the fact that Holdings will cease to be a publicly traded company on the New York Stock Exchange (“NYSE”). Specifically, the proposals are to: (i) decrease the capital stock of Holdings from 150,000,000 shares of common stock to 1,000 shares of common stock and from 100,000 shares of preferred stock to 100 shares of preferred stock; (ii) eliminate the classified board structure and remove term limits for directors; (iii) remove the requirement that the Board of Directors establish an Executive Committee, a Finance & Audit Committee, a Corporate Governance Committee, and a Compensation Committee; (iv) decrease the affirmative vote requirement with respect to the election of the Chairman and Vice Chairman of the Board of Directors; (v) delete the requirement that the Chief Executive Officer of Holdings not engage in any other occupation during his or her incumbency except with the approval of the Board of Directors; (vi) provide that the Chief Executive Officer of the Corporation may be removed by the Board of Directors with or without cause; (vii) empower the Board of Directors to adopt bylaws and from time to time alter, amend, or repeal bylaws without the approval of stockholders; (viii) delete stockholder voting and notice requirements with respect to the adoption, amendment, or repeal of Bylaw provisions; and (ix) delete notice

⁵ See Article VI of the LLC Agreement.

requirements for stockholder action required at any annual or special meeting of stockholders and provide for the taking of stockholder action by written consent.⁶

- Ownership and Voting Restrictions. The Certificate currently provides that, other than persons approved by the Commission through a proposed rule change under Section 19(b) of the Act: (1) no person or group may, directly or indirectly, own more than 40% of the outstanding shares of Holdings; and (2) no person or group may, directly or indirectly, have voting control over more than 20% of the outstanding shares of Holdings.⁷ Under the proposed rule change, the Certificate would be amended to provide further that if a person that is not approved by the Commission directly or indirectly owns more than 40% of the outstanding shares of Holdings, or if a person that is not approved by the Commission directly or indirectly acquires voting control over more than 20% of the outstanding shares of Holdings, then an amount of shares of Holdings sufficient to reduce that person's ownership or voting control to the applicable limit would be transferred to a trust, as described in more detail below.

Each of the Upstream Owners would take appropriate steps to incorporate concepts regarding ownership, jurisdiction, books and records, and other issues related to their control of the ISE. Specifically, the U.S. Upstream Owner (i.e., U.S. Exchange Holdings) would include appropriate provisions in its governing documents to incorporate the above mentioned concepts with respect to itself, as well as its directors, officers, employees, and agents (as applicable).

Each of the non-U.S. Upstream Owners (i.e., Deutsche Börse, Eurex Frankfurt, Eurex Zürich,

⁶ These proposed amendments apply only to Holdings, the current public company. The ISE is not proposing any changes to the organizational documents or governing structure of the ISE, the registered exchange.

⁷ Additionally, the Certificate provides that no ISE member may directly or indirectly own or vote more than 20% of the outstanding shares of Holdings. The proposed rule change

SWX, SWX Group, and Verein SWX Swiss Exchange) would adopt resolutions to incorporate these concepts with respect to itself, as well as its board members, officers, employees, and agents (as applicable).⁸

- Jurisdiction. Under the proposed rule change, each Upstream Owner would adopt either resolutions or appropriate provisions in its governing documents to provide for jurisdiction of the U.S. federal courts and the Commission over the Upstream Owner and its directors or board members, officers, and employees for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws, and the rules or regulations thereunder, arising out of, or relating to, the activities of the ISE. In addition, each Upstream Owner would adopt either resolutions or appropriate provisions in its governing documents to provide that, to the extent the directors or board members, officers, and employees of the Upstream Owners are involved in the activities of the ISE, such directors or board members, officers, and employees would be deemed to be directors or board members, officers, and employees of the ISE.
- Books and Records. Under the proposed rule change, each Upstream Owner would adopt either resolutions or appropriate provisions in its governing documents to provide that the books and records of the Upstream Owner would be deemed to be the books and records of the ISE to the extent the books and records are related to the activities of the ISE and that such books and records will at all times be made available for inspection and copying by the Commission and by the ISE.

would not affect this restriction.

⁸ Persons who are selected to be board members of the non-U.S. Upstream Owners after consummation of the Transaction would be required to consent to the matters included in the resolutions in order to become a board member.

- Additional Matters. Under the proposed rule change, each Upstream Owner would adopt either resolutions or appropriate provisions in its governing documents regarding notification of certain ownership levels, cooperation with the Commission and the ISE, compliance with the federal securities laws, confidentiality of information regarding the ISE's self-regulatory function, preservation of the independence of the ISE's self-regulatory function, and directors' consideration of the effect of the Upstream Owner's actions on the ISE's ability to carry out its responsibilities under the Act. Further, each non-U.S. Upstream Owner would adopt resolutions regarding taking reasonable steps to cause Holdings to be in compliance with the ownership limits and voting limits.

The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and on the Exchange's Web site (<http://www.ise.com>). The text of Exhibits 5A through 5H of the proposed rule change are also available on the Exchange's Web site and on the Commission's Web site (<http://www.sec.gov/rules/sro/ise.shtml>). This proposed rule change will be effective upon Commission approval and will be operative at the closing of the Transaction.

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 this rule filing is to adopt the rules necessary to permit the Exchange and Holdings to effect the Transaction.

General

Other than as specifically described in this filing, the ISE will not be making any changes to its governance structure in connection with the consummation of the Transaction. Thus, the ISE will continue to have a 15-member board of directors, consisting of the Chief Executive Officer, six industry directors elected by the members, and eight non-industry directors elected by Holdings as the sole LLC member. Moreover, the ISE is not proposing any changes to its trading rules or to any of the rules governing the operation of its markets or regulatory functions. If the ISE determines to make any changes to its regulatory activities in the future, it will seek the approval of the Commission as necessary.

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

Public Company Related Provisions

Holdings' Capital Stock; Board and Management Structure

Following the consummation of the Transaction, Holdings' common stock will no longer be publicly traded on the NYSE, and the registration of Holdings' common stock will be terminated upon application to the Commission. In connection therewith, Holdings will no

longer be subject to the NYSE's listing standards⁹ or to corporate governance requirements applicable to publicly traded companies. As such, the ISE is proposing that provisions relating to the capital stock and the board and management structure of Holdings be amended as follows:

Article FOURTH of the Certificate currently provides that the total number of shares of all classes of capital stock which Holdings has the authority to issue is 150,100,000 shares, which is divided as 150,000,000 shares of common stock, par value \$.01 per share, and 100,000 shares of preferred stock, par value \$.01 per share. In light of the fact that Holdings will no longer be a publicly traded company after the consummation of the Transaction and will no longer need to maintain a public float or reserve shares of common stock for future acquisitions, issuance of stock options, stock purchase, or other equity compensation plans, the ISE proposes that the number of authorized shares of common stock be decreased from 150,000,000 shares to 1,000 shares and that the number of authorized shares of preferred stock be decreased from 100,000 shares to 100 shares.

Article FIFTH of the Certificate and Section 3.2 of the Bylaws currently provide for the number, tenure, and qualifications of directors of Holdings. Under the proposed rule change, the Certificate would be amended to remove Article FIFTH in its entirety and the requirements relating to the number, tenure, and qualifications of directors of Holdings would be addressed in the Bylaws. Specifically, Section 3.2 of the Bylaws would be amended to eliminate the classified board structure and term limitations and provide that each director shall hold office until his or her successor shall be duly elected and qualified or until his or her earlier death, resignation, or removal.

⁹ Section 303A of the NYSE Listed Company Manual.

Section 3.10 of the Bylaws currently requires the establishment of an Executive Committee, a Finance & Audit Committee, a Corporate Governance Committee, and a Compensation Committee. Under the proposed rule change, Section 3.10 of the Bylaws would be amended to delete the requirement that the Board of Directors establish an Executive Committee, a Finance & Audit Committee, a Corporate Governance Committee, and a Compensation Committee and would instead provide that the Board of Directors may establish, by resolution, an Executive Committee and one or more other committees.

The ISE is also proposing to make the following amendments to the Bylaws: (i) decrease the affirmative vote requirement in Sections 3.11 and 3.12 with respect to the election of the Chairman and Vice Chairman of the Board of Directors, respectively, from a two-thirds vote to a majority vote of the directors then in office; (ii) delete in Section 4.5(a), the requirement that the Chief Executive Officer of Holdings not engage in any other occupation during his or her incumbency except with the approval of the Board of Directors; and (iii) amend Section 4.5 to provide that the Chief Executive Officer of the Corporation may be removed by the Board of Directors with or without cause.

Holdings' Stockholder Rights

Following the consummation of the Transaction, certain provisions in the Certificate and the Bylaws relating to the rights of Holdings' stockholders will no longer be applicable due to the fact that U.S. Exchange Holdings, a wholly-owned subsidiary of Eurex Frankfurt, will be the sole stockholder with ownership of 100% of Holdings' common stock. As such, the ISE is proposing that such provisions relating to stockholder rights be amended as follows:

Article SEVENTH of the Certificate and Section 10.1 of the Bylaws currently provide for certain stockholder rights with respect to voting and notice requirements for the adoption,

amendment, or repeal of provisions in the Certificate and the Bylaws and the inspection of the accounts and books of Holdings. The ISE proposes that Article SEVENTH be deleted in its entirety and replaced by a provision that provides that the Board of Directors be empowered to make bylaws and from time to time alter, amend, or repeal bylaws and that Section 10.1 of the Bylaws be amended to delete the stockholder voting and notice requirements with respect to the adoption, amendment, or repeal of bylaw provisions.

In addition, Articles EIGHTH and NINTH of the Certificate and Sections 2.7 and 2.10 of the Bylaws currently provide for certain notice requirements for stockholder action required at any annual or special meeting of stockholders and prohibit the taking of stockholder action by written consent. The ISE proposes that Article EIGHTH and subsections (b) and (c) of Article NINTH of the Certificate and Section 2.7 of the Bylaws be deleted in their entirety.

Furthermore, the ISE proposes that Section 2.10 of the Bylaws be amended to allow for the taking of stockholder action without prior notice and by written consent.

Holdings' Current Ownership and Voting Limitations

Article FOURTH, Section III of the Certificate contains the Restrictions, which provide in general that: (1) no person, acting alone or with others, may own, directly or indirectly, more than 40% of any class of Holdings' outstanding capital stock; (2) no ISE member, acting alone or with others, may own, directly or indirectly, more than 20% of any class of Holdings' outstanding capital stock; and (3) no person, acting alone or with others, may control, directly or indirectly, the vote of more than 20% of any class of Holdings' outstanding capital stock.

The Board of Directors may waive certain of the Restrictions if it makes the following three findings: (1) the waiver will not impair the ability of the ISE to carry out its functions and responsibilities as an exchange under the Act and the rules thereunder; (2) the waiver is

otherwise in the best interests of Holdings, its stockholders, and the ISE; and (3) the waiver will not impair the ability of the Commission to enforce the Act. However, the Board of Directors may not waive the Restrictions as they apply to ISE members. In addition, the Board of Directors may not waive any Restriction that would result in a person subject to a “statutory disqualification”¹⁰ owning or voting shares above the stated thresholds. Any waiver of the Restrictions must be by way of an amendment to the Bylaws approved by the Board of Directors, which amendment must be approved by the Commission.

The Board of Directors has considered the Transaction, and it has made the three necessary findings with respect to each of the Upstream Owners. None of the Upstream Owners is a member of the ISE or is subject to a statutory disqualification. In making the findings, the Board of Directors determined that ownership of Holdings by the Upstream Owners would not impair the ISE’s ability to carry out its functions and responsibilities as an exchange and self-regulatory organization. The ISE will continue to operate its market and regulate its market and members exactly as it has done prior to the Transaction. As noted, the ISE is not proposing any amendments to its trading or regulatory rules. The current governance of the Exchange will remain unchanged, and it is the current intention of the ISE’s senior management to remain in place, subject to the previously-announced retirement of the ISE’s Chief Executive Officer, as of January 1, 2008.

The Board of Directors also determined that ownership of Holdings by the Upstream Owners is in the best interests of Holdings, its stockholders, and the ISE. With respect to Holdings and its stockholders, Eurex Frankfurt has offered to purchase 100% of Holdings’ stock for \$67.50 a share, significantly above the closing price of \$45.72 on the last public trading date

¹⁰ See Section 3(a)(39) of the Act. 15 U.S.C. 78c(a)(39).

before the rumor of a possible business transaction was publicly reported by The Wall Street Journal Online. Once Eurex Frankfurt completes its purchase of the Corporation's stock, Holdings' current stockholders will have no continuing interest in Holdings or the ISE. With respect to the interests of the ISE, the Exchange notes the continuing consolidation and internationalization of the securities markets. In particular, the boards of Holdings and the ISE note the recent merger of NYSE Group, Inc. and Euronext N.V. to create a large transatlantic exchange complex offering derivatives markets in both North America and Europe.¹¹ In order to remain competitive in this increasingly global market, the ISE believes it is imperative to align with strong international partners such as Eurex Frankfurt and its parents, Deutsche Börse and SWX.

With respect to the ability of the Commission to enforce the Act as it applies to the ISE after the Transaction closes, the ISE will operate in the same manner following the Transaction in which it operates today. Thus, the Commission will continue to have plenary regulatory authority over the ISE, as is the case currently with the ISE being a wholly-owned subsidiary of a public company. As described in the following sections of this filing, the ISE is proposing a series of amendments to Holdings' governing documents, as well as resolutions and governing documents of the Upstream Owners, that will create an ownership structure and will provide the Commission with appropriate oversight tools to ensure that the Commission will have the ability to enforce the Act with respect to the ISE, the Upstream Owners, and their respective directors, officers, employees, and agents to the extent that they are involved in the activities of the ISE.

¹¹ See Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120).

Ownership and Voting Restrictions After the Transaction

As discussed above, the Restrictions currently limit ownership and voting of Holdings' capital stock. The ISE initially adopted certain voting and ownership restrictions prior to its initial public offering as part of a package of rule changes that provide protections against inappropriate persons acquiring direct or indirect control of the ISE.¹² Holdings adopted the Restrictions, in connection with the ISE's reorganization into a holding company structure.¹³ The Restrictions will remain in effect at Holdings after the closing of the Transaction. In addition, the proposed rule change would add provisions to the Certificate to provide for an automatic transfer of Holdings' shares to a trust ("ISE Trust") if a person¹⁴ were to obtain an ownership or voting interest in Holdings in excess of the Restrictions through ownership of one or more of the Upstream Owners without obtaining the approval of the Commission.¹⁵ Under the proposed rule change, each of the Upstream Owners would adopt resolutions or governing document provisions requiring notification to the board of directors of the ISE and the ISE Trust if any person acquired 10% or more of the U.S. Upstream Owner or 20% or more of the non-U.S. Upstream Owners. The Certificate would be amended to provide that Holdings would deliver notice to the ISE Trust. In addition, each of the non-U.S. Upstream Owners would adopt

¹² See Securities Exchange Act Release No. 51029 (January 12, 2005), 70 FR 3233 (January 21, 2005) (SR-ISE-2004-29).

¹³ See Securities Exchange Act Release No. 53705 (April 21, 2006), 71 FR 25260 (April 28, 2006) (SR-ISE-2006-04).

¹⁴ The Certificate currently provides, and will continue to provide, that the term "person" shall mean an individual, partnership (general or limited), joint stock company, corporation, limited liability company, trust, or unincorporated organization or any governmental entity or agency or political subdivision thereof.

¹⁵ If a person were to obtain an indirect ownership or voting interest in Holdings in excess of the Restrictions through ownership of one or more of the Upstream Owners without the approval of the Commission, shares of Holdings would be transferred to the ISE Trust automatically by operation of law. See Section 202(c)(4) of the Delaware General

resolutions requiring the non-U.S. Upstream Owner to take reasonable steps necessary to cause Holdings to be in compliance with the Restrictions.

Under the proposed rule change, the Certificate would be amended to provide that, if a person or group that the Commission had not approved through a proposed rule change under Section 19(b) of the Act (an “Unapproved Person”) were to directly or indirectly own more than 40% (or 20%, if the Unapproved Person is an ISE member) of the outstanding shares of Holdings, or if an Unapproved Person directly or indirectly acquired voting control over more than 20% of the outstanding shares of Holdings, then an amount of Holdings’ shares (“Excess Shares”) sufficient to reduce the Unapproved Person’s ownership of Holdings to 40% (or 20% with respect to ISE members) or below, or sufficient to reduce the Unapproved Person’s voting control over outstanding shares of Holdings to 20% or below, would be transferred to the ISE Trust.¹⁶

ISE Trust Agreement

The ISE Trust will operate pursuant to a trust agreement (“Trust Agreement”) among Holdings, U.S. Exchange Holdings, the trustees of the ISE Trust (“Trustees”), and a Delaware trustee. The Trustees will be persons who are independent of the Upstream Owners, Holdings, the ISE, and their affiliates; are not subject to any statutory disqualification (as defined in Section 3(a)(39) of the Act); 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

Corporation Law.

¹⁶ The factors used to determine the extent of an Unapproved Person’s ownership or voting interest in Holdings would include, among other things, the amount of the Unapproved Person’s ownership or voting interest in a particular Upstream Owner, the amount of that Upstream Owner’s direct or indirect ownership or voting interest in Holdings, and the board composition of Holdings and the applicable Upstream Owners.

that they can be entrusted to resist undue pressures; and are not unacceptable to the Commission staff.

The ISE Trust would serve two general purposes. First, as described above, the ISE Trust would hold Excess Shares in the event that a person obtained direct or indirect ownership or voting interest in Holdings in excess of the Restrictions without obtaining the approval of the Commission. In the event that Excess Shares are transferred to the ISE Trust:

- The Trustees would be required under the terms of the Trust Agreement to vote any Excess Shares held by the ISE Trust consistent with the public interests of the markets operated by the ISE.
- While the shares are held by the ISE Trust, U.S. Exchange Holdings, as the trust beneficiary, would continue to receive the economic benefit of the Excess Shares (e.g., dividends and other distributions).
- U.S. Exchange Holdings would have the right to reacquire the Excess Shares from the ISE Trust if the Unapproved Person's direct or indirect ownership of Holdings no longer exceeds the Restrictions (e.g., if the Commission approved the Unapproved Person or if the Unapproved Person sold its interest such that the Unapproved Person no longer exceeds the Restrictions).
- If directed by U.S. Exchange Holdings, the ISE Trust would sell the Excess Shares, in one or more transactions, in market transactions, by public offering, or otherwise, at a time or times and in a manner so as to maximize the return on the Excess Shares to any person or persons designated by the Trustees whose ownership or voting would not violate the Restrictions, and that is not a non-U.S. Upstream Owner with respect to which a Material Compliance Event (as described below) has occurred and is continuing.

- Upon a sale of the Excess Shares, the net proceeds of the sale (plus any accrued dividends and less any administrative fees incurred by the Trustees in administering the ISE Trust) would be paid to U.S. Exchange Holdings.

Second, the ISE Trust would hold a call option over Holdings' shares ("Call Option") that could be exercised after the occurrence of a Material Compliance Event. Under the Trust Agreement, the term "Material Compliance Event" would be defined, with respect to a non-U.S. Upstream Owner, 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 their respective commitments under the resolutions in any material respect.¹⁷ Under the proposed rule change, the Trust Agreement would provide generally that, if a Material Compliance Event had occurred and continued to be in effect, then the ISE Trust would exercise the Call Option.

However, the Trust Agreement also would provide for certain steps to be carried out prior to any exercise of the Call Option. Specifically, 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 to make a determination of whether or not a Material Compliance Event had occurred, within five (5) business days of that meeting. After making a determination that a Material Compliance Event had 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 sixty (60) calendar days in which to address the Material Compliance Event ("Cure Period").

¹⁷ 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.

The Trust Agreement would provide further that, during the Cure Period, the Trustees would consult with the boards of directors (or equivalent) of the ISE, ISE Holdings, and the non-U.S. Upstream Owners, and with the Commission, to consider alternatives to the exercise of the Call Option to address the Material Compliance Event. After such consultation, if the Trustees determine that the Material Compliance Event had 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 that the exercise of the Call Option is necessary to address the effects of the Material Compliance Event.

If the ISE 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 ISE Trust had determined to exercise the Call Option in accordance with the terms of the Trust Agreement. Subsequently, Holdings and U.S. Exchange Holdings would be required to promptly transfer to the ISE Trust the minimum number of Holdings' shares necessary, in the reasonable opinion of the Trustees, to address the Material Compliance Event ("Deposited Shares").

Under the Trust Agreement, the Trustees would transfer the Deposited Shares from the ISE Trust to U.S. Exchange Holdings in the event that: (a) no Material Compliance Event is continuing; or (b) notwithstanding the continuation of a Material Compliance Event, the Trustees determine that the retention of the Deposited Shares by the ISE Trust could not reasonably be expected to address any continuing Material Compliance Event (in this specific case, any 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).

As would be the case with Excess Shares, while Deposited Shares are held by the ISE Trust, U.S. Exchange Holdings would continue to receive the economic benefit of the Deposited Shares (e.g., dividends and other distributions). Additionally, if directed by U.S. Exchange Holdings, the ISE Trust would sell the Deposited Shares, in one or more transactions, in market transactions, by public offering or otherwise, at a time or times and in a manner so as to maximize the return on the Deposited Shares to any person or persons designated by the Trustees whose ownership or voting would not violate the Restrictions, and that is not a non-U.S. Upstream Owner with respect to which a Material Compliance Event has occurred and is continuing. Upon a sale of the Deposited Shares, the net proceeds of the sale (plus any accrued dividends and less any administrative fees incurred by the Trustees in administering the ISE Trust) would be paid to U.S. Exchange Holdings.

Jurisdiction over Individuals

Article FOURTEENTH of the Certificate currently provides that, as long as Holdings controls the ISE, the directors, officers, and employees of Holdings shall be deemed to be directors, officers, and employees of the ISE for purposes of, and subject to oversight pursuant to, the Act but only to the extent that such directors, officers, and employees of Holdings relate to the exchange business of the ISE. In addition, Section 1.4 of the Bylaws currently provides that Holdings and its directors, officers, and employees are deemed to irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws, and the rules or regulations thereunder, arising out of, or relating to, the activities of the ISE.

Under the proposed rule change, each Upstream Owner would adopt resolutions or appropriate provisions in its governing documents to include jurisdictional provisions tailored to

the proposed ISE-Eurex ownership structure. Specifically, the resolutions or governing documents of the Upstream Owners would provide that, to the extent the directors, officers, and employees of any Upstream Owner are involved in the activities of the ISE, such directors, officers, and employees would be deemed to be directors, officers, and employees of the ISE for purposes of, and subject to oversight pursuant to, the Act.

In addition, the resolutions or governing documents of the Upstream Owners would provide that the Upstream Owners, and the directors, officers, and employees of the Upstream Owners, would irrevocably submit to the jurisdiction of the U.S. federal courts and the Commission for the purposes of any suit, action, or proceeding pursuant to the U.S. federal securities laws, and the rules and regulations thereunder, commenced or initiated by the Commission arising out of, or relating to, the activities of the ISE to the extent such Upstream Owner or such Upstream Owner's directors, officers, and employees are involved in the activities of the ISE. The resolutions or governing documents of the Upstream Owners also would provide that, with respect to any such suit, action, or proceeding brought by the Commission, the Upstream Owners and their respective directors, officers, and employees would, to the extent they are involved in the activities of the ISE: (1) agree that Holdings (or, in the case of U.S. Exchange Holdings, U.S. Exchange Holdings) may serve as U.S. agent for purposes of service of process in such suit, action, or proceeding; and (2) waive, and agree not to assert by way of motion, as a defense or otherwise, in any such suit, action, or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that the suit, action, or proceeding is an inconvenient forum or that the venue of the suit, action, or proceeding is improper, or that the subject matter thereof may not be enforced in or by the U.S. federal courts or the Commission. The board members of the non-U.S. Upstream Owners would

consent to the applicability to them of the jurisdictional provisions and the resolutions of the non-U.S. Upstream Owners would provide that the non-U.S. Upstream Owners would take reasonable steps to cause their officers and employees to so consent, all to the extent that such non-U.S. Upstream Owners and their board members, officers, and employees are involved in the activities of the ISE.¹⁸ Likewise, the governing documents of the U.S. Upstream Owner would provide that such U.S. Upstream Owner would take reasonable steps to cause its directors, officers, and employees involved in the activities of the ISE to consent to these provisions.

The ISE anticipates that these functions and activities generally will be carried out by the officers and directors of the Exchange itself, over whom the Commission has direct authority under Section 19(h)(4) of the Act. In addition, however, the ISE acknowledges that the conditions under which the Commission might assert jurisdiction over Upstream Owners or their directors, officers, or employees would depend on the particular circumstances.

Access to Books and Records

As discussed above, Article FOURTEENTH of the Certificate provides that Holdings' books and records are deemed to be the books and records of the ISE to the extent that they relate to the activities of the ISE. Under the proposed rule change, each Upstream Owner would adopt resolutions or provisions in its governing documents to provide that the books and records of the Upstream Owners are deemed to be the books and records of the ISE for purposes of, and subject to oversight pursuant to, the Act to the extent that such books and records are related to the activities of the ISE. In addition, the resolutions or governing documents of each Upstream Owners would provide that the Upstream Owner's books and records related to the activities of

¹⁸ As noted above, persons who become board members of the non-U.S. Upstream Owners after consummation of the Transaction would be required to consent to the matters included in the resolutions in order to become a board member.

the ISE shall at all times be made available for inspection and copying by the Commission and the ISE.¹⁹

Additional Matters

Holdings' current governing documents include provisions relating to cooperation with the Commission and the ISE,²⁰ confidentiality of information regarding the ISE's self-regulatory function,²¹ preservation of the independence of the self-regulatory function of the ISE,²² and directors' consideration of the effect of Holdings' actions on the ISE's ability to carry out its responsibilities under the Act.²³ Under the proposed rule change, each Upstream Owner would adopt either resolutions or provisions in its governing documents to incorporate these concepts.

Specifically, the resolutions or governing documents of each Upstream Owner would provide that such Upstream Owner shall comply with the U.S. federal securities laws and the rules and regulations thereunder and shall cooperate with the Commission and with the ISE.²⁴ In addition, the resolutions of the non-U.S. Upstream Owners would provide that the board members would so consent to comply and cooperate and that each non-U.S. Upstream Owner would take reasonable steps to cause its officers and employees to also comply and cooperate.

¹⁹ With respect to Eurex Zürich, SWX, SWX Group, and Verein SWX Swiss Exchange, the resolutions would provide that, where necessitated by Swiss law, information related to the activities of the ISE, including books and records of the Swiss Upstream Owners related to the activities of the ISE, will be provided to the Commission promptly, through the Swiss Federal Banking Commission ("SFBC"), and that oral exchanges between the entities and the Commission related to the activities of the ISE will include the participation of the SFBC, where necessitated by Swiss law.

²⁰ Article FIFTEENTH of the Certificate.

²¹ Article THIRTEENTH of the Certificate.

²² Section 1.5 of the Bylaws.

²³ Article TWELFTH of the Certificate.

²⁴ With respect to the non-U.S. Upstream Owners, these provisions would apply in connection with such Upstream Owners' involvement in the activities of the ISE.

Likewise, the governing documents of the U.S. Upstream Owner would provide that it would take reasonable steps to cause its directors, officers, and employees to consent to comply with the U.S. federal securities laws and the rules and regulations thereunder and to cooperate with the Commission and with the ISE.

The resolutions or governing documents of each Upstream Owner also would provide that, to the fullest extent permitted by applicable law, all confidential information that shall come into the possession of such Upstream Owner pertaining to the self-regulatory function of the ISE shall: (a) not be made available to any persons other than to those officers, directors (or equivalent), employees and agents of the Upstream Owner that have a reasonable need to know the contents thereof; (b) be retained in confidence by the Upstream Owner and the officers, directors (or equivalent), employees, and agents of the Upstream Owner; and (c) not be used for any commercial purposes. In addition, the resolutions and governing documents would provide that the terms regarding such confidential information shall not be interpreted so as to limit or impede: (i) 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 (ii) the ability of any officers, directors, employees, or agents of the Upstream Owners to disclose such confidential information to the Commission or the ISE. The resolutions of the non-U.S. Owners would also provide that the board members consent to these requirements regarding confidential information and that each non-U.S. Upstream Owner would take reasonable steps to cause its officers, employees, and agents to agree to the requirements. The U.S. Upstream Owner would also take reasonable steps to cause its directors, officers, employees, and agents to so agree.

Additionally, the resolutions or governing documents of each Upstream Owner would provide that such Upstream Owner shall, to the extent it is involved in the activities of the ISE, give due regard to the preservation of the independence of the self-regulatory function of the ISE and to its obligations to investors and the general public, and shall not take any actions that would interfere with the effectuation of any decisions by the board of directors of the ISE relating to its regulatory responsibilities (including enforcement and disciplinary matters) or that would interfere with the ability of the ISE to carry out its responsibilities under the Act. The resolutions of each non-U.S. Upstream Owner also would provide that the board members would consent to the requirements and that such non-U.S. Upstream Owner would take reasonable steps to cause its officers and employees to agree to the requirements. Similarly, the U.S. Upstream Owner would take reasonable steps to cause its directors, officers, employees, and agents to so agree.

Finally, the resolutions or governing documents of each Upstream Owner would provide that the board members or directors of such Upstream Owners would, in discharging his or her responsibilities, to the extent such board member or director is involved in the activities of the ISE and to the fullest extent permitted by applicable law, take into consideration the effect that such Upstream Owner's actions would have on the ability of: (a) the ISE to carry out its responsibilities under the Act; and (b) the ISE and such Upstream Owner: (i) to engage in conduct that fosters and does not interfere with the ability of the ISE and such Upstream Owner to prevent fraudulent and manipulative acts and practices in the securities markets; (ii) to promote just and equitable principles of trade in the securities markets; (iii) to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; (iv) to remove impediments to and perfect

the mechanisms of a free and open market in securities and a U.S. national securities market system; and (v) in general, to protect investors and the public interest.

Amendments to Upstream Owners' Resolutions and Governing Documents

Currently, Article SIXTEENTH of the Certificate and Section 10.1 of the Bylaws provide that, before any amendment or repeal of any provision of Holdings' governing documents may become effective, the amendment or repeal must be submitted to the ISE's board of directors, which then determines whether the amendment or repeal must be filed with, or filed with and approved by, the Commission under Section 19 of the Act. Under the proposed rule change, each Upstream Owner would adopt either resolutions or provisions in its governing documents to incorporate these concepts regarding amendments and repeals. The resolutions or governing documents of each Upstream Owner would provide that, before any amendment to or repeal of any provision of any of the resolutions or governing documents became effective, the same shall be submitted to the board of directors of the ISE and if said board shall determine that the same must be filed with, or filed with and approved by, the Commission before the same may be effective under Section 19 of the Act and the rules promulgated thereunder then the same shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be. In addition, the resolutions of each non-U.S. Upstream Owner would apply these requirements to any action by such Upstream Owner that would have the effect of amending or repealing any provision of the resolutions.

2. Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) of the Act²⁵ that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove

impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the proposal will permit the ISE to enter into the Transaction with Eurex Frankfurt, a leading international derivatives exchange, providing the ISE with strong ownership to be competitive in an increasingly global market.

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

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (a) by order approve such proposed rule change; or
- (b) institute proceedings to determine whether the proposed rule change should be disapproved.

²⁵ 15 U.S.C. 78f(b)(5).

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. 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 10:00 am and 3:00 pm. 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 [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁶

Florence E. Harmon
Deputy Secretary

²⁶ 17 CFR 200.30-3(a)(12).