

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58918; File No. SR-ISE-2008-85)

November 7, 2008

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change Relating to Changes to the ISE Stock Exchange Governing Documents in Connection with ISE's Purchase of Equity Interests in Direct Edge Holdings, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 7, 2008, the International Securities Exchange, LLC (the "Exchange" or "ISE") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes, among other things, to merge the ISE Stock Exchange, LLC ("ISE Stock"), a Delaware limited liability company, with and into Maple Merger Sub, LLC ("Maple Merger Sub"), a Delaware limited liability company and a wholly owned subsidiary of Direct Edge Holdings LLC ("Direct Edge"), with Maple Merger Sub being the surviving entity. As part of the same transaction, International Securities Exchange Holdings, Inc. ("ISE Holdings") will purchase equity interests in Direct Edge such that after the transactions contemplated by the merger and purchase, ISE Holdings will have a 31.54% equity interest in Direct Edge. Currently, ISE Stock operates a marketplace for the trading of U.S. cash equities

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

by Equity Electronic Access Members (“Equity EAMs”) of ISE under the rules of ISE, as a facility, as that term is defined in Section 3(a)(2) of the Securities Exchange Act of 1934 (“Exchange Act”)³ of ISE (the “Facility”). ISE proposes that, following the closing of the transaction and the merger of ISE Stock into Maple Merger Sub, Maple Merger Sub will operate the Facility.⁴ Maple Merger Sub will be wholly-owned by Direct Edge, a Delaware limited liability company.

ISE is a registered national securities exchange under Section 6 of the Exchange Act and a self-regulatory organization (“SRO”). As a facility of ISE, the Facility is subject to regulation by ISE and oversight by the Commission. ISE represents that following the transactions described above, it will continue to have adequate funds to discharge all regulatory functions related to the Facility.⁵ ISE will also enter into a Regulatory Services Agreement with Maple Merger Sub. In this filing, the Exchange is submitting to the SEC: (i) the Certificate of Formation and the Limited Liability Company Agreement of Maple Merger Sub (“LLC Agreement”) which specifically relates to the control and governance of Maple Merger Sub and helps to ensure that ISE has the authority over Maple Merger Sub to maintain ISE’s responsibility for all regulatory functions related to the Facility; (ii) the Third Amended and Restated Limited Liability Company Operating Agreement of Direct Edge Holdings LLC (“DE

³ 15 U.S.C. 78c(a)(2).

⁴ Direct Edge is planning to file two Form 1 Applications to own and operate two national securities exchanges. If the Commission approves the Form 1 Applications, the Facility will cease operations.

⁵ Maple Merger Sub will not be entitled to any revenue generated in connection with penalties, fines, and regulatory fees that may be assessed by ISE against Equity EAMs in connection with trading on ISE Stock. Rather, all regulatory fines, penalties and fees assessed against and paid by ISE members to ISE in connection with trading on ISE Stock shall remain with ISE.

Operating Agreement”); (iii) amendments to the ISE Holdings Certificate of Incorporation and Bylaws; and (iv) amendments to ISE Rules 312 and 2108. As the primary purpose of this rule filing is to focus on those provisions that are directly related to ISE’s ability to perform its regulatory responsibility with respect to the Facility following the transactions described above, the Exchange’s discussion in this filing will be limited to those relevant provisions of the LLC Agreement and the DE Operating Agreement. The text of the proposed rule change is available on the Exchange’s Web site www.ise.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the 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 self-regulatory organization 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 Exchange proposes, among other things, to merge ISE Stock with and into Maple Merger Sub, a wholly owned subsidiary of Direct Edge, with Maple Merger Sub being the surviving entity. As part of the same transaction, ISE Holdings will purchase equity interests in Direct Edge such that after the transactions contemplated by the merger and purchase, ISE Holdings will have a 31.54% equity interest in Direct Edge. Currently, ISE Stock operates the

Facility, however, ISE proposes that, following the closing of the transaction and the merger of ISE Stock into Maple Merger Sub, Maple Merger Sub will operate the Facility.

ISE is an SRO, and as a facility of ISE, the Facility is subject to regulation by ISE and oversight by the SEC. ISE represents that following the transactions described above, it will continue to have adequate funds to discharge all regulatory functions related to the Facility.⁶ ISE will also enter into a Regulatory Services Agreement with Maple Merger Sub. In this filing, the Exchange is submitting to the Commission: (i) the Certificate of Formation and LLC Agreement which specifically relates to the control and governance of Maple Merger Sub and helps to ensure that ISE has the authority over Maple Merger Sub to maintain ISE's responsibility for all regulatory functions related to the Facility; (ii) the DE Operating Agreement; (iii) amendments to the ISE Holdings Certificate of Incorporation and Bylaws; and (iv) amendments to ISE Rules 312 and 2108. As the primary purpose of this rule filing is to focus on those provisions that are directly related to ISE's ability to perform its regulatory responsibility with respect to the Facility following the transactions described above, the Exchange's discussion in this filing will be limited to those relevant provisions of the LLC Agreement and the DE Operating Agreement.

Maple Merger Sub

As a limited liability company, ownership of Maple Merger Sub is represented by limited liability membership interests in Maple Merger Sub. Maple Merger Sub has only one owner, Direct Edge (the "Sole Member").

Governance of Maple Merger Sub

⁶ Maple Merger Sub will not be entitled to any revenue generated in connection with penalties, fines, and regulatory fees that may be assessed by ISE against Equity EAMs in connection with trading on ISE Stock. Rather, all regulatory fines, penalties and fees assessed against and paid by ISE members to ISE in connection with trading on ISE Stock shall remain with ISE.

Pursuant to Section 4.1 of the LLC Agreement, Maple Merger Sub will be managed by the Sole Member. As noted above, ISE will have regulatory responsibility over Maple Merger Sub and the Facility. Subject to the foregoing and the provisions of Section 1.6 as described below, as the Sole Member, Direct Edge will have the authority to make all decisions regarding the business of Maple Merger Sub. The Sole Member is responsible for the control and management of the business of Maple Merger Sub.

Under Section 4.1 of the LLC Agreement, subject to the limitations provided in the LLC Agreement and except as specifically provided therein, the Sole Member shall have exclusive and complete authority and discretion to manage the operations and affairs of Maple Merger Sub and to make all decisions regarding the business of Maple Merger Sub and shall have the power to act for or bind Maple Merger Sub. Any action taken by the Sole Member shall constitute the act of and serve to bind Maple Merger Sub.

The provisions contained in Section 1.6 of the LLC Agreement ensure that ISE has the information regarding Maple Merger Sub and the Facility necessary to carry out its regulatory responsibilities. Specifically, Section 1.6 provides that, so long as Maple Merger Sub operates the Facility, in the event that ISE, in its sole discretion, reasonably and in good faith, determines that any action, transaction, or aspect of an action or transaction, is necessary or appropriate for, or interferes with, the performance or fulfillment of ISE's regulatory functions or its responsibilities under the Exchange Act or such action, transaction, or aspect of an action or transaction is specifically required by the SEC, (i) no such action, transaction, or aspect of an action or transaction shall be authorized, undertaken or effective, without ISE's prior approval and (ii) ISE shall have the sole and exclusive right to direct that any such necessary or appropriate action, as it may reasonably and in good faith determine in its sole discretion be

taken or transaction be undertaken by or on behalf of Maple Merger Sub without regard to any other party in any capacity.

Additionally, Section 1.6(b) provides that ISE shall receive notice of planned or proposed changes to Maple Merger Sub (but not to include changes relating solely to one or more of the following: marketing, administrative matters, personnel matters, social or team-building events, meetings of members, communications with members, finance, market research, real property, equipment, furnishings, personal property, intellectual property, insurance, contracts unrelated to the operation of the Facility and de minimis items) and the Facility. Any such changes must be affirmatively approved by ISE prior to implementation.

Section 4.1 of the LLC Agreement contains limitations on the authority of the Sole Member. Specifically, Section 4.1 provides that notwithstanding any contrary provision of the LLC Agreement, and subject always to ISE's rights to act under Section 1.6, all actions taken by the Sole Member shall be governed by and subject to Sections 7.3(a)⁷ and 7.7 of the DE Operating Agreement, which are discussed in detail below.

Voting Limitations of Members

⁷ Section 7.3(a) of the DE Operating Agreement provides, that subject to Section 7.3(b), the Board may constitute any officer of Direct Edge as the Direct Edge's proxy, with power of substitution, to vote the equity of any subsidiary of Direct Edge and to exercise, on behalf of Direct Edge, any and all rights and powers incident to the ownership of that equity, including the authority to execute and deliver proxies, waivers and consents. Subject to Sections 7.3(b) and 7.7, in the absence of specific action by the Direct Edge Board, the Chief Executive Officer shall have authority to represent Direct Edge and to vote, on behalf of Direct Edge, the equity of other Persons, both domestic and foreign, held by Direct Edge. Subject to Sections 7.3(b) and 7.7, the Chief Executive Officer shall also have the authority to exercise any and all rights incident to the ownership of that equity, including the authority to execute and deliver proxies, waivers and consents.

Under Section 4.4 of the LLC Agreement, no Person⁸ (other than the Sole Member), either alone or together with its Related Persons,⁹ as of any record date for the determination of members entitled to vote on any matter, shall be entitled to: (i) vote or cause the voting of Common Interests, as defined in the LLC Agreement, 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 Common Interests represent in the aggregate more than twenty percent (20%) of voting power of the then-issued and outstanding Common Interests (such threshold being hereinafter referred to as the “Voting Limitation”); or (ii) enter into any voting agreement, plan, or arrangement that would result in Common Interests 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,

⁸ “Person” means any individual, partnership, limited liability company, association, corporation, trust, or other entity. LLC Agreement Section 2.1 “Definitions”.

⁹ “Related Person” means (i) with respect to any Person, any executive officer (as defined under Rule 3b-7 under the Exchange 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 Exchange Act); (ii) with respect to any Person constituting an “Exchange Member” (as such term is defined in the Constitution of the ISE LLC, a copy of which will be provided to any member of Maple Merger Sub upon written request therefore), 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 Exchange 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 Common Interests; and the term “beneficially owned” and derivative or similar words shall have the meaning set forth in Regulation 13D-G under the Exchange Act. LLC Agreement Section 2.1 “Definitions”.

to exceed the Voting Limitation. Maple Merger Sub shall disregard any such votes purported to be cast in excess of the Voting Limitation.

The limitations imposed by Section 4.4 may be waived if both the Sole Member and ISE each consent to expressly permit such waiver of the Voting Limitation; and such waiver shall have been filed with, and approved by, the Commission under Section 19(b) of the Exchange Act and shall have become effective thereunder. In granting a waiver, both the Sole Member and ISE must have determined that: (i) 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 Maple Merger Sub and ISE to carry out its functions and responsibilities, including, but not limited to, under the Exchange Act and is otherwise in the best interests of the Maple Merger Sub, its Members¹⁰ and ISE; (ii) such voting rights by such Person, either alone or together with its Related Persons, will not impair the ability of the Commission to enforce the Exchange 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 Exchange Act); and (iv) neither such Person nor its Related Persons is an “Exchange Member” (as such term is defined in the Constitution of ISE).

By specifically imposing a Voting Limitation on any Person that, either alone or together with its Related Persons, owns Common Interests that represent in the aggregate more than twenty percent (20%) of the voting power then entitled to be cast, ISE is ensuring that it is in all cases able to maintain proper control over the exercise of its regulatory function in relation to Maple Merger Sub, and is not subject to influence that may be adverse to its regulatory responsibilities from any Person that may control a substantial amount of the outstanding votes

¹⁰ “Member(s)” means the Sole Member and all Additional Members admitted pursuant to Section 4.3(a). LLC Agreement Section 2.1 “Definitions”.

entitled to be cast on any matter. This provision and other related provisions relating to notice and rule filing requirements with respect to any Person that acquires certain Percentage Interest¹¹ levels in Maple Merger Sub will serve to protect the integrity of ISE's self-regulatory responsibilities and the SEC's oversight responsibilities.

Ownership Limitations of Members and Changes in Ownership

Under Section 7.2(a) of the LLC Agreement, no Person (other than the Sole Member), either alone or together with its Related Persons, at any time, may own, directly or indirectly, of record or beneficially, an aggregate amount of Common Interests which would result in more than twenty percent (20%) Percentage Interest level in Maple Merger Sub (the "Concentration Limitation").

Section 7.2(b) states that the Concentration Limitation shall apply to each Person (other than the Sole Member) unless and until: (i) such Person shall have delivered to the Sole Member and ISE a notice in writing, not less than 45 days (or such shorter period as the Sole Member and ISE shall expressly consent to) prior to the acquisition of any Common Interests that would cause such Person (either alone or together with its Related Persons) to exceed the Concentration Limitation, of such Person's intention to acquire such ownership; (ii) the Sole Member and ISE shall each have consented to expressly permit such ownership; and (iii) such waiver shall have been filed with, and approved by, the SEC under Section 19(b) of the Exchange Act and shall have become effective thereunder.

Section 7.2(c) states that in exercising their discretion under Section 7.2(b), the Sole Member and ISE shall have determined that (i) such beneficial ownership of Common Interests

¹¹ "Percentage Interest" shall mean, with respect to any Member, the ratio of the number of Common Interests held by such Member to the total of all of the issued and outstanding Common Interests, expressed as a percentage. LLC Agreement Section 2.1 "Definitions".

by such Person, either alone or together with its Related Persons, will not impair the ability of the Maple Merger Sub and ISE to carry out its functions and responsibilities, including but not limited to, under the Exchange Act and is otherwise in the best interests of the Maple Merger Sub, its Members and ISE; (ii) such beneficial ownership of Common Interests by such Person, either alone or together with its Related Persons, will not impair the ability of the SEC to enforce the Exchange 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 Exchange Act); and (iv) neither such Person nor its Related Persons is an “Exchange Member” (as such term is defined in the Constitution of the ISE). In making the determinations referred to in the immediately preceding sentence, the Sole Member and ISE may impose such conditions and restrictions on such Person and its Related Persons owning any Common Interests entitled to vote on any matter as the Sole Member and ISE may each deem necessary, appropriate or desirable in furtherance of the objectives of the Exchange Act and the governance of Maple Merger Sub.

Beginning after Commission approval of this proposed rule change, Maple Merger Sub shall provide the Commission with written notice ten (10) days prior to the closing date of any transaction that results in a Person’s Percentage Interest, alone or together with any Related Persons, meeting or crossing the threshold level of 5% or the successive 5% Percentage Interest levels of 10% and 15%.

ISE believes that these provisions provide the Commission with the authority to review and subject to public comment any substantial transfer of ownership that may have the potential to affect ISE’s regulatory responsibilities regarding the Facility.

ISE believes that these transfer restrictions, together with the Voting Limitation and Concentration Limitation, are adequately designed to prohibit any Person, either alone or with its Related Persons, from having the power to control a substantial number of outstanding votes entitled to be cast on any matter, and more importantly, that may be adverse to ISE's regulatory oversight responsibilities. Moreover, ISE believes that these provisions serve to protect the integrity of ISE's and the Commission's regulatory oversight responsibilities and allows the Commission to review the acquisition of substantial ownership or voting power by any Person.

Regulatory Jurisdiction Over Sole Member

ISE will regulate Maple Merger Sub as an operator of a facility of the Exchange. ISE has responsibility under the Exchange Act for the Facility. The Sole Member of Maple Merger Sub, as owner and operator of the Facility, will also be subject to the SEC's jurisdiction. In this regard, Section 10.2 of the LLC Agreement provides that the Sole Member acknowledges that to the extent that they are related to the business of Maple Merger Sub or the Facility, the books, records, premises, officers, directors, agents and employees of the Sole Member shall be deemed to be the books, records, premises, officers, directors, agents and employees of ISE for purposes of and subject to oversight pursuant to the Exchange Act. Furthermore, the books, records, premises, officers, directors, agents and employees of Maple Merger Sub shall be deemed to be the books, records, premises, officers, directors, agents and employees of the ISE for purposes of and subject to oversight pursuant to the Exchange Act. In addition, the books and records of Maple Merger Sub will be kept within the U.S.¹²

Section 10.3(a) requires that confidential information pertaining to Maple Merger Sub, the Facility or the self-regulatory function of ISE (including but not limited to disciplinary

¹² LLC Agreement, Section 10.2(a).

matters, trading data, trading practices and audit information) contained in the books and records of Maple Merger Sub 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 the Maple Merger Sub that have a reasonable need to know the contents thereof; (ii) be retained in confidence by the Maple Merger Sub and the officers, directors, employees and agents of the Maple Merger Sub; and (iii) not be used for any commercial purposes. Nothing in the LLC Agreement shall be interpreted as to limit or impede the rights of the Commission 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 officers, directors, employees or agents of Maple Merger Sub to disclose such confidential information to the Commission.¹³

ISE believes that these provisions would help to ensure the Sole Member and Maple Merger Sub's books and records by the Commission and, to the extent the Sole Member and Maple Merger Sub's books and records relate to the operation or administration of the Facility would help enable the Commission to carry out its regulatory responsibilities regarding Maple Merger Sub.

Under Section 10.2(c) of the LLC Agreement, Maple Merger Sub, its Members, the Facility and officers, directors, agents, and employees of Maple Merger Sub 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, Maple Merger Sub or the Facility activities or Section 10.2 of the LLC Agreement (except that such jurisdictions shall also include Delaware for any such matter relating to the organizational or internal affairs of Maple Merger Sub), and waives, and agrees not to assert by way of motion, as a defense or otherwise in any

¹³ LLC Agreement, Section 10.3.

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 hereof may not be enforced in or by such courts or agency.

Under Section 10.2(d) of the LLC Agreement, Maple Merger Sub, its Members, the Facility and officers, directors, agents, and employees of Maple Merger Sub and its Members agree to comply with the federal securities laws and the rules and regulations thereunder and shall cooperate with ISE pursuant to its regulatory authority and the provisions of the LLC Agreement and the Commission; and to engage in conduct that fosters and does not interfere with 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.

Section 10.2(e) provides that Maple Merger Sub and each Member shall take such action as is necessary to ensure that Maple Merger Sub's and such Member's officers, directors and employees consent in writing to the application to them of the applicable provisions of Section 10.2(b), (c) and (d), as applicable, with respect to their Maple Merger Sub-related activities. The Exchange believes that these provisions will serve as notice to the Sole Member and Maple Merger Sub that they will be subject to the jurisdiction of the U.S. federal courts, the Commission and the ISE. It is imperative that regulatory cooperation is assured from the Sole Member, Maple Merger Sub and the Facility, regardless of their business location, country of domicile or other circumstance which the Commission may deem to have the potential to be

adverse to the regulatory responsibilities and interests of the ISE, the Commission, or the U.S. federal courts. Accordingly, these provisions ensure that, should an occasion arise that requires regulatory cooperation or jurisdictional submission from the Sole Member or Maple Merger Sub; such party's cooperation will be forthcoming and uncontested.

Fair Representation of Trading Participants, or EAMs

ISE believes that the Maple Merger Sub company structure assures the fair representation of ISE Members, its trading participants, in the selection of its directors and administration of its affairs, and satisfies Commission requirements in that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.

In order to exercise trading privileges on ISE Stock, 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 ISE Stock. When an applicant is approved under ISE rules as an EAM, the member is issued an EAM Exchange Right. Under the ISE Constitution, holders of EAM Exchange Rights, or EAMs, have the right to elect two members (the "EAM Directors") of the Board of Directors of ISE (the "ISE Board"). Nominees for election to the ISE Board to serve as Industry Directors, including EAM 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 EAM Exchange Right. ISE Members also may nominate Industry Director candidates for election to the ISE Board by petition. Accordingly, since trading participants on ISE Stock must be EAMs, and since EAMs have the right to elect EAM Directors of the ISE Board, the ISE believes that ISE Stock trading participants are fairly represented on the ISE Board.

DE Operating Agreement

As discussed above, Direct Edge will be the sole owner of Maple Merger Sub, and Maple Merger Sub will operate the Facility as a facility of ISE. Because the Facility will be a facility of ISE, ISE will have regulatory responsibility under the Exchange Act for the Facility. Because Direct Edge is the sole owner of the operator of the ISE's Facility, the DE Operating Agreement will include certain provisions that are designed to preserve the independence of the ISE's self-regulatory function with respect to the Facility, enable the Facility to operate in a manner that complies with the federal securities laws, including the objectives of Section 6(b) and 19(g) of the Exchange Act and facilitate the ability of the Exchange and the Commission to fulfill their regulatory and oversight obligations over the Facility under the Exchange Act.

For example, Section 7.7 of the DE Operating Agreement which contains provisions requiring supermajority and majority votes of the Board of Directors of Direct Edge in connection with certain activities that could apply to the ISE as the entity with regulatory responsibility for the Facility, provides that nothing in Section 7.7 will be applicable where the application of the provision would interfere with the effectuation of any decisions by the ISE Board relating to its regulatory functions (including disciplinary matters) or the structure of the market ISE regulates or would interfere with the ability of ISE to carry out its responsibilities under the Exchange Act as determined by the ISE Board, which functions or responsibilities include the ability of the ISE as a self-regulatory organization 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. In addition, Section 7.7(i) provides that a member of Direct Edge may transfer its ownership interest without the approval of the Direct Edge Board or any members of Direct Edge if such transfer is required to comply with the requirements of a governmental entity or any self-regulatory organization.

The DE Operating Agreement also includes ownership and voting limitations. For example, Section 12.1 of the DE Operating Agreement relates to ownership and voting concentration limitations and provides that no Person, either alone or together with its Related Persons (as defined in the DE Operating Agreement): (i) may own, directly or indirectly, of record or beneficially, equity units of the Sole Member representing in the aggregate a percentage interest of more than 40%; (ii) may, if they are a holder of EAM Rights (as defined in the LLC Agreement), own, directly or indirectly, of record or beneficially, equity units of the Sole Member representing in the aggregate a percentage interest of more than 20%; and (iii) may, directly, indirectly or pursuant to any voting trust, agreement, plan or other arrangement, vote or cause the voting of equity units or give any consent or proxy with respect to equity units of the Sole Member representing a percentage interest of more than 20%, nor may they enter into any agreement, plan or other arrangement with any other Person, either alone or together with Related Persons, under circumstances that would result in the equity units that are subject to such agreement, plan or other arrangement not being voted on any matter or matters or any proxy relating thereto being withheld, where the effect of such agreement, plan or other arrangement would be to enable any Person, either alone or together with their Related Persons, to vote, possess the right to vote or cause the voting of equity units of the Sole Member that would represent a percentage interest of more than 20%. The concentration limitations set forth in Section 12.1 of the DE Operating Agreement do not apply to ISE Holdings for so long as ISE is

a wholly owned subsidiary of ISE Holdings. The limitations set forth in (i) and (iii) above may be waived by the board of managers of the Sole Member by amendment to the DE Operating Agreement adopted by the board of managers if, in connection with the adoption of such amendment, the board adopts a resolution stating that that the board has determined that the amendment: (i) will not impair the ability of ISE to carry out its functions and responsibilities under the Exchange Act and the rules and regulations thereunder, (ii) is otherwise in the best interests of the Sole Member and its members and the Maple Merger Sub; and (iii) will not impair the ability of the SEC to enforce the Exchange Act and the rules and regulations thereunder. Such amendment shall not be effective unless it is filed with and approved by the SEC. In making the determinations referred to in Section 12.1(b), the board of managers of the Sole Member may impose on the Person in question and its Related Persons such conditions and restrictions as it may in its sole discretion deem necessary, appropriate or desirable in furtherance of the objectives of the Exchange Act, and the rules under the Exchange Act, and the governance of the Maple Merger Sub.

The DE Operating Agreement contains a number of provisions designed to ensure that ISE has sufficient access to the books and records of the Sole Member. For example, Section 11.2 of the DE Operating Agreement relates to access to and preservation of confidentiality of the books and records and other confidential information and provides that the books, records, premises, officers, managers, agents and employees of the Sole Member shall be deemed to be the books, records, premises, officers, managers, agents and employees of ISE to the extent that they are related to the operation or administration of Maple Merger Sub for purposes of and subject to oversight pursuant to the Exchange Act. Furthermore, for as long as the Sole Member controls, directly or indirectly, Maple Merger Sub, the books and records, as well as any

confidential information of the Maple Merger Sub relating to the self regulatory function of the ISE, shall be subject at all times to inspection and copying by the SEC and ISE provided that such books and records are related to the operation or administration of Maple Merger Sub. Section 11.2 of the DE Operating Agreement also provides for the confidentiality of all books and records of the Maple Merger Sub that reflect confidential information pertaining to the self regulatory function of ISE and that such books and records shall not be used for any non-regulatory purposes.

The DE Operating Agreement contains a number of provisions specifically related to the SRO function. For example, Section 14.1 of the DE Operating Agreement provides that the managers, officers, employees and agents of the Sole Member shall not take any actions that would interfere with the effectuation of any decisions by ISE in its capacity as an SRO relating to its regulatory functions (including disciplinary matters) or which would interfere with the ability of ISE in its capacity as an SRO to carry out its responsibilities under the Exchange Act. Section 14.2 of the DE Operating Agreement provides that the Sole Member shall cooperate with the SEC and ISE, as applicable, pursuant to and to the extent of their respective regulatory authority. The officers, managers, employees and agents of the Sole Member additionally are deemed to agree to: (i) comply with the U.S. federal securities laws and the rules and regulations thereunder and (ii) cooperate with the SEC and ISE in respect of the SEC's oversight responsibilities regarding Maple Merger Sub and ISE and the self-regulatory functions and responsibilities of ISE. Section 14.3 of the DE Operating Agreement provides that the Sole Member and its officers, managers, employees and agents, by virtue of their acceptance of such position, shall be deemed to irrevocably submit to the jurisdiction of the United States federal courts, the SEC and ISE, as applicable, for the purposes of any suit, action or proceeding

pursuant to the U.S. federal securities laws and the rules and regulations thereunder arising out of, or relating to, the activities of Maple Merger Sub, and by virtue of their acceptance of any such position, shall be deemed to 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 United States federal courts, the SEC or ISE 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 that suit, action or proceeding may not be enforced in or by such courts or agency. The Sole Member and its officers, managers, employees and agents also agree that they will maintain an agent, in the United States, for the service of process of a claim arising out of, or relating to, the activities of Maple Merger Sub, and agree to notify the other parties hereto of the name and address of such agent.

Finally, the DE Operating Agreement contains provisions designed to ensure that any changes to the DE Operating Agreement be first reviewed by ISE to determine whether such change must be filed with the SEC. For example, Section 15.2 of the DE Operating Agreement provides that before any amendment to any provision of the DE Operating Agreement shall be effective, such amendment shall be submitted to ISE and if ISE determines that such amendment must be filed with, or filed with and approved by, the SEC before the amendment may be effective under Section 19 of the Exchange Act and the rules promulgated under the Exchange Act or otherwise, then the proposed amendment to the DE Operating Agreement shall not be effective until filed with, or filed with and approved by, the SEC, as the case may be.

ISE Holding's Certificate of Incorporation and Bylaws

The Exchange proposes to amend certain provisions of the Certificate of Incorporation and Bylaws (together the "Corporate Documents") of ISE Holdings in connection with the

contemplated ownership and operation of two (2) national securities exchanges by Direct Edge. As a result of ISE Holdings owning a 31.54% equity interest in Direct Edge and possessing certain contractual rights and obligations with respect to Direct Edge, ISE Holdings may, in the future, control, indirectly subsidiary exchanges of Direct Edge. Accordingly, the Exchange proposes to broaden certain references that are currently limited to ISE (the sole registered national securities exchange controlled by ISE Holdings) to cover these two contemplated Direct Edge subsidiary exchanges. Thus, the Exchange proposes to replace certain references to ISE with each “Controlled National Securities Exchange.” These references appear in the ownership and voting limitations sections of the Corporate Documents, as well as other miscellaneous sections, including, but not limited to, the confidentiality section, the books and records section, the compliance with laws section and the amendments section.

ISE Rules

The Exchange proposes to amend the language in Rule 312 (Limitation on Affiliation between the Exchange and Members) to reflect that this provision now covers Maple Merger Sub, as an operator of the Facility.

Subsequent to the effectuation of the transactions discussed above, ISE Holdings will have a 31.54% equity interest in Direct Edge, which wholly owns and operates Direct Edge ECN LLC (“DE ECN”) which displays its quotes on ISE. DE ECN currently, and will continue to after the transactions are effected, routes orders into ISE Stock. Due to the combination of ISE Holdings owning a 31.54% equity interest in DE ECN’s parent company, Direct Edge, and DE ECN routing orders into ISE Stock, DE ECN will be deemed to be a facility of ISE, as that term is defined in Section 3(a)(2) of the Exchange Act.

Further, upon closing of the transaction, ISE and Maple Merger Sub will be affiliated with DE ECN, which is a member of ISE and a wholly owned subsidiary of Direct Edge.

Recognizing that the Commission has previously expressed concern regarding (1) the potential for conflicts of interest in instances where an exchange is affiliated with one of its members, and (2) the potential for informational advantages that could place an affiliated member of an exchange at a competitive advantage vis-à-vis the other non-affiliated members, ISE proposes to amend Rule 312 to permit the proposed affiliation subject to several conditions and limitations.

Accordingly, the Exchange is proposing to adopt subsection (b) to Rule 312 to require that for so long as the Exchange is affiliated with DE ECN or DE ECN is a facility of the Exchange:¹⁴ (1) Financial Industry Regulatory Authority (“FINRA”), a self-regulatory organization unaffiliated with the Exchange or any of its affiliates, will carry out oversight and enforcement responsibilities as the designated examining authority designated by the Commission pursuant to Rule 17d-1 of the Exchange Act with the responsibility for examining DE ECN for compliance with applicable financial responsibility rules; (2) the Exchange shall contract with a non-affiliated self-regulatory organization to regulate and oversee the activities of DE ECN, pursuant to Rule 17d-2 under the Exchange Act; (3) the Exchange shall provide said non-affiliated self-regulatory organization with information regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively, “Exceptions”) in which DE ECN is identified as a participant that has potentially violated Exchange or SEC rules, in an easily accessible manner, and said non-affiliated self-

¹⁴ E-mail from Joseph W. Ferraro III, Associated General Counsel, Exchange, to Heidi Pilpel, Attorney, Division of Trading and Markets, Commission, dated November 7, 2008.

regulatory organization shall provide a report to the Exchange quantifying Exceptions on not less than a quarterly basis; (4) the Exchange, on behalf of Direct Edge, shall establish and maintain procedures and internal controls reasonably designed to ensure that DE ECN does not develop or implement changes to its systems on the basis of nonpublic information obtained as a result of its affiliation with the Exchange until such information is available generally to similarly situated members of the Exchange in connection with the provision of inbound order routing to the Exchange; (5) in the event that DE ECN acts as an introducing broker for subscribers of DE ECN who are not members of the Exchange, then DE ECN's role as introducing broker is limited to its role as introducing broker to DE ECN; (6) DE ECN will not engage in any business other than operating as an ECN and other than acting as an introducing broker as described above; (7) the affiliation of DE ECN is subject to the conditions set forth above and is granted on a temporary basis, for not longer than one year from the date of Commission approval of this filing.

The Exchange proposes to adopt subsection (c) of ISE Rule 2108 (Order Routing and Route Out Facility) to expand the scope of the rule to cover DE ECN. Specifically, proposed Rule 2108(c), requires that the books, records, premises, officers, directors, agents, and employees of the DE ECN, as a facility of the Exchange, shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Exchange for purposes of and subject to oversight pursuant to the Exchange Act. The books and records of the DE ECN, as a facility of the Exchange, shall be subject at all times to inspection and copying by the Exchange and the Commission.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Exchange Act,¹⁵ in general, and with Sections 6(b)(1) and (b)(5) of the Exchange Act,¹⁶ in particular, in that the proposal enables the Exchange and the Facility to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply with and enforce compliance by members and persons associated with members with provisions of the Exchange Act, the rules and regulations thereunder, and SRO rules, and is 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.

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 unsolicited 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

¹⁵ 15 U.S.C. 78f.

¹⁶ 15 U.S.C. 78f(b)(1), (5).

such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange 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.

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 (www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-ISE-2008-85 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISE-2008-85. 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 (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 a.m. and 3:00 p.m. Copies of the 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 File Number SR-ISE-2008-85 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Florence E. Harmon
Acting Secretary

¹⁷ 17 CFR 200.30-3(a)(12).