

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51327; File No. SR-ISE-2005-16)

March 7, 2005

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the International Securities Exchange, Inc., Relating to the Nomination of its Class B Directors Pursuant to its Amended and Restated Constitution

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 2, 2005, the International Securities Exchange, Inc. (the “Exchange” or the “ISE”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposed rule change on an accelerated basis.

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

The Exchange is proposing to amend its Amended and Restated Constitution (which also serves as the Exchange’s Bylaws) (the “Amended Constitution”) to provide for earlier notification to ISE of nominations of candidates to serve as Series B-1, Series B-2 and Series B-3 Directors (as defined below).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

The text of the proposed rule change is below. Proposed new language is in *italics*; proposed deletions are in brackets.

AMENDED AND RESTATED CONSTITUTION
OF
INTERNATIONAL SECURITIES EXCHANGE, INC.
(serving also as the Bylaws of the Corporation)

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Section 3.10 Nomination of Directors. (a) (i) Nominees for election of the Series B-1 Directors, Series B-2 Directors and Series B-3 Directors shall be selected by the Nominating Committee as provided in Section 5.3(c) or in this Section 3.10.

(ii) In addition to the nominees for the Series B-1 Directors, Series B-2 Directors and Series B-3 Directors named by the Nominating Committee, persons eligible to serve as such may be nominated for election to the Board by a petition, signed by the holders of not less than five percent (5%) of the outstanding shares of stock of such series or class, as applicable, entitled to elect such person if there are more than eighty (80) shares in the class or series entitled to vote, ten percent (10%) of the outstanding shares of stock of such series or class, as applicable, entitled to elect such person if there are between eighty (80) and forty (40) shares in the class or series entitled to vote, and twenty-five percent (25%) of the outstanding shares of stock of such series or class, as applicable, entitled to elect such person if there are less than forty (40) shares in the class or series entitled to vote. Such petition must be filed with the Secretary at least [one month] 45 days prior to the annual meeting for such year. Petitions submitted must contain, for each nominee, all information relating to such nominee that is required to be disclosed in solicitations of

proxies for the election of directors, or is otherwise required, in each case pursuant to Regulation 14A under the Exchange Act, including such person's written consent to be named in the proxy statement as a nominee and a statement that such nominee complies with the relevant requirements set forth in the Amended and Restated Certificate of Incorporation and this Constitution.

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Section 5.3 Nominating Committee. (a) The Nominating Committee shall not act as a committee of the Board, but rather shall be a committee of the Corporation. The Nominating Committee shall be composed of one (1) Series B-1 Common Stock representative, one (1) Series B-2 Common Stock representative and one (1) Series B-3 Common Stock representative. No officer or employee of the Corporation shall serve on the Nominating Committee. Not less than [30] 60 days, but not more than [45] 75 days, prior to each annual meeting of stockholders, the Nominating Committee shall select nominees for each Class B directorship to be filled. The Board shall appoint the members of the Nominating Committee in accordance with this Section 5.3.

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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 III 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 to amend its Amended Constitution to provide for earlier notification to ISE of nominations of candidates to serve as Series B-1 Directors,³ Series B-2 Directors⁴ and Series B-3 Directors⁵ (collectively, the “Class B Directors”). The Board currently consists of 15 members, 8 of whom are elected by the holders of the Class A Common Stock, including at least 2 of whom are public representatives (the “Non-Industry Directors”), 6 of whom are elected by the holders of the Class B Common Stock (the “Industry Directors”) and the Chief Executive Officer of the Exchange.⁶ Nominees for election to the Board to serve as

³ Pursuant to Section 3.2(b) of the Amended Constitution, the “Series B-1 Directors” are two directors who are officers, directors or partners of Primary Market Makers and are elected by the holders of Class B Common Stock, Series B-1, par value \$.01 per share. Primary Market Makers (“PMMs”) are market makers with significant responsibilities, including overseeing the opening of trading in their assigned options classes, providing continuous quotations in all of their assigned options classes, and handling customer orders that are not automatically executed. See Chapter 8 of the ISE Rules for a discussion of the role of PMMs.

⁴ Pursuant to Section 3.2(b) of the Amended Constitution, the “Series B-2 Directors” are two directors who are officers, directors or partners of Competitive Market Makers and are elected by the holders of Class B Common Stock, Series B-2, par value \$.01 per share. Competitive Market Makers (“CMMs”) are market makers that add depth and liquidity to the market and are required to provide continuous quotations in at least 60% of the options classes in their assigned group. See Chapter 8 of the ISE Rules for a discussion of the role of CMMs.

⁵ Pursuant to Section 3.2(b) of the Amended Constitution, the “Series B-3 Directors” are two directors who are officers, directors or partners of Electronic Access Members and are elected by the holders of Class B Common Stock, Series B-3, par value \$.01 per share. Electronic Access Members (“EAMs”) are broker-dealers that represent agency and proprietary orders on ISE, and cannot enter quotations or otherwise engage in market making activities on ISE. See Chapter 8 of the ISE Rules for a discussion of the role of EAMs.

⁶ Amended Constitution, Section 3.2 (b).

Industry Directors are currently selected by the Exchange's Nominating Committee, which is not a committee of the Board, and is comprised of representatives of the holders of Class B Common Stock, Series B-1, par value \$.01 per share (the "Series B-1 Stock"), Class B Common Stock, Series B-2, par value \$.01 per share (the "Series B-2 Stock") and Class B Common Stock, Series B-3, par value \$.01 per share (the "Series B-3 Stock" and together with the Series B-1 Stock and Series B-2 Stock, the "Class B Common Stock") and are elected by the relevant series of holders of Class B Common Stock.⁷ The Amended Constitution currently requires the Nominating Committee to select its nominees for Class B Directors not less than 30, but not more than 45, days prior to each annual meeting of stockholders.⁸ After the Nominating Committee selects its slate of Class B Director nominees, Class B stockholders may also directly nominate Industry Director candidates for election to the Board by petition.⁹ Petitions properly submitted by the Class B stockholders with respect to the nomination of persons eligible to serve as Series B-1, Series B-2 or Series B-3 Directors, as the case may be, must be filed with the Secretary of the Exchange at least one month prior to each annual meeting of stockholders.¹⁰ The Non-Industry Directors are selected by the Corporate Governance Committee, which is a committee of the

⁷ Amended Constitution, Section 5.3(a).

⁸ Amended Constitution, Section 5.3(a).

⁹ Amended Constitution, Section 3.10(a)(ii).

¹⁰ Amended Constitution, Section 3.10(a)(ii). Section 3.10(a)(ii) also requires that any petitions submitted must be signed by the holders of not less than 5% of the outstanding shares of stock of such series or class, as applicable, entitled to elect such nominee if there are more than 80 shares in the class or series entitled to vote, 10% of the outstanding shares of stock of such series or class, as applicable, entitled to elect such nominee if there are between 80 and 40 shares in the class or series entitled to vote, and 25% of the outstanding shares of stock of such series or class, as applicable, entitled to elect such nominee if there are less than 40 shares in the class or series entitled to vote. The Exchange represents that there are currently 10 shares of Series B-1 Stock, 143 shares of Series B-2 Stock and 123 shares of Series B-3 Stock outstanding.

Board, prior to the annual meeting of stockholders and the Non-Industry Directors and the Chief Executive Officer are elected by the holders of shares of Class A Common Stock.¹¹ Under the Exchange's "advance notice" bylaw provision, Class A stockholders may also nominate Non-Industry Directors by petition, though they must do so prior to knowing the Corporate Governance Committee's slate of nominees.¹²

In July 2004, the Exchange filed a registration statement on Form S-1 in connection with its contemplated initial public offering of shares of its Class A common stock, par value \$.01 per share.¹³ Upon becoming a public company with shares listed and traded on a national securities exchange, the Exchange will be required to meet certain reporting and disclosure obligations under the Act, including with respect to the solicitation of proxies in connection with its annual meeting of stockholders for the election of directors and other proper matters. Specifically, the Exchange will be required to file its proxy statement within 120 days after the end of its fiscal year, or the end of April.¹⁴ However, like many public companies, the Exchange has set its annual meeting of stockholders to occur in mid-May, and to ensure proper time to solicit proxies before the annual

¹¹ Amended Constitution, Sections 2.7 and 3.2(b).

¹² Amended Constitution, Sections 2.7 and 3.10(b)(ii). In general, petitions by Class A stockholders must be submitted not less than 60 days nor more than 90 days prior to the first anniversary of the preceding year's annual meeting. The Exchange believes that the receipt of Class A stockholders' petitions in the current timeframe will provide adequate time for the inclusion of those nominees in the proxy statement.

¹³ See ISE's Form S-1 (File No. 333-117145). At the time of the filing of this Form 19b-4, ISE's Form S-1 had not yet been declared effective by the Securities and Exchange Commission. See also Securities Exchange Act Release No. 51029 (January 12, 2005), 70 FR 3233 (January 21, 2005) (approving certain amendments to the Certificate of Incorporation, Constitution and Rules of ISE in connection with ISE's proposed initial public offering).

¹⁴ See General Instruction G(3) to Form 10-K under the Act.

stockholders' meeting, the Exchange believes it should mail its proxy statement by mid-April.¹⁵

Under the current timeframe for the nomination of candidates to serve as Class B Directors provided for in the Amended Constitution, it would not be practicable -- given drafting, printing and mailing considerations -- to accommodate the inclusion of the Class B Director nominees in ISE's proxy statement and also ensure adequate time between the mailing of its proxy statement and the annual meeting of stockholders for the proper solicitation of stockholder proxies.

Accordingly, the Exchange proposes to require that the Nominating Committee select its nominees for Class B Directors not less than 60, but not more than 75, days prior to each annual meeting of stockholders and that petitions properly submitted by holders of shares of Class B Common Stock with respect to the nomination of persons eligible to serve as such be filed with the Secretary of the Exchange at least 45 days prior to each annual meeting.¹⁶ To facilitate the

¹⁵ While there are no legal requirements regarding the amount of time the Exchange must provide with respect to the solicitation of proxies prior to its annual stockholders' meeting, the Exchange notes that, upon becoming a public company, its stockholder base will be much larger than it is currently and it is not uncommon for publicly held shares to be held in "street name" (*i.e.*, in the name of a broker on behalf of the beneficial owner of the shares). The Exchange will mail the proxy statement to the record holders of shares. These record holders, many of whom will be "street name" holders, may in turn need time to mail the proxy statements to the ultimate beneficial owners of the shares, after which the beneficial owners will need time to return their proxies. To ensure adequate time for this process, the Exchange believes that it needs at least four weeks between the mailing of the proxy statement and the date of the annual meeting. The Exchange further believes that this four-week period is in line with the current practice among public companies.

¹⁶ The Exchange anticipates that the Board of Directors of ISE will establish May 11, 2005 as the date of the 2005 annual meeting of stockholders of ISE. If so, the Nominating Committee may choose its slate of Industry Directors as soon as February 25, 2005 and no later than March 12, 2005 (because March 12 is not a business day, the Exchange would accept nominations by the Nominating Committee on the next following business day, or March 14, 2005) and petitions may be submitted by Class B stockholders no later than March 27, 2005 (because March 27 is not a business day, the Exchange would accept petitions from Class B stockholders submitted on the next following business day,

inclusion in the proxy statement of Industry Director nominees submitted by petition, the Exchange also proposes to require that the petitions submitted by Class B stockholders contain, for each nominee, all information relating to such nominee that is required to be disclosed in solicitations of proxies for the election of directors, or is otherwise required, in each case pursuant to Regulation 14A under the Exchange Act, including such person's written consent to be named in the proxy statement as a nominee and a statement that such nominee complies with the relevant requirements set forth in the Amended and Restated Certificate of Incorporation and Amended Constitution.¹⁷

The Exchange believes that the proposed rule change would allow adequate time between the mailing of ISE's proxy statement and the solicitation of proxies of the stockholders of ISE, including the holders of Class B Common Stock, with respect to the election of directors and other such matters to be voted on at the annual meeting of stockholders.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with and furthers the objective of Section 6(b)(1) of the Act¹⁸ that an exchange be so organized so as to have the capacity

or March 28). The Exchange represents that it will inform its Class B stockholders of this proposed change in the Nominating Committee and petition process as soon as possible but not later than March 4, 2005, including the changes with respect to the information that must be provided with respect to any nominee nominated by any Class B stockholder, and will note that the proposed changes are subject to Commission approval.

¹⁷ For example, Regulation 14A under the Exchange Act requires, among other things, with respect to each nominee, the disclosure of items required by Item 401 (Management and Certain Security Holders – Directors, Executive Officers, Promoters and Control Persons), Item 404(a) - (c) (Management and Certain Security Holders – Certain Relationships and Related Transactions) and Item 405 (Management and Certain Security Holders – Compliance with Section 16(a) of the Exchange Act) of Regulation S-K under the Act. See also Item 7 of Schedule 14A. 17 CFR 240.14a-101.

¹⁸ 15 U.S.C. 78f(b)(1).

to be able to carry out the purposes of the Act and to comply, and (subject to any rule or order of the Commission pursuant to Section 17(d)¹⁹ or 19(g)(2) of the Act²⁰) to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder and the rules of the exchange. The Exchange also believes that the proposed rule change furthers the objective of Section 6(b)(3) of the Act²¹ that an exchange have rules that, among other things, assure fair representation of its members in the selection of its directors and administration of its affairs.

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

The Exchange believes that the proposed rule change does not impose any burden on competition.

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. 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:

¹⁹ 15 U.S.C. 78q(d).

²⁰ 15 U.S.C. 78s(g)(2).

²¹ 15 U.S.C. 78f(b)(3).

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 No. SR-ISE-2005-16 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-ISE-2005-16. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the 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-2005-16 and should be submitted by [insert date 21 days from the date of publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission has considered the ISE's proposed rule change, and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²² In particular, the Commission finds that the proposal is consistent with Section 6(b)(3) of the Act,²³ which requires that the rules of a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs and provide 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.²⁴ The Commission believes that the proposal should enable the Exchange to include the relevant information regarding Class B Director nominees in its proxy statement, which should enable the Exchange to fulfill its obligation to assure the fair representation of its members in the selection of Class B directors.

Pursuant to Section 19(b)(2) of the Act,²⁵ the Commission may not approve any proposed rule change prior to the thirtieth day after the date of publication of the notice of filing thereof, unless the Commission finds good cause for so finding. The Commission hereby finds good cause for approving the proposed rule change prior to the thirtieth day after publishing notice thereof in the Federal Register. The Commission notes that the Exchange has filed with the Commission a registration statement on Form S-1 in connection with its contemplated initial

²² In approving this proposal, the Commission has considered the impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

²³ 15 U.S.C. 78f(b)(3).

²⁴ 15 U.S.C. 78s(b)(3).

²⁵ 15 U.S.C. 78s(b)(2).

public offering of its Class A common stock. When it becomes a public company, the Exchange will be required to comply with reporting and disclosure obligations under the Act. The Commission believes that the proposed rule change is necessary to enable the Exchange to include in the proxy statement for its 2005 annual meeting of stockholders, which is currently scheduled for mid-May, information regarding its Class B Director nominees that is required to be disclosed in solicitations of proxies for the election of directors, or is otherwise required, in each case pursuant to Regulation 14A under the Act. By revising the timeframe for the nomination of candidates to serve as Class B Directors, the Exchange would be able to include the Class B Director nominees in its proxy statement and also should have adequate time between the mailing of its proxy statement and the scheduled annual meeting of shareholders for the proper solicitation of shareholder proxies.²⁶

The Commission believes that the proposed rule change would facilitate the orderly inclusion of nominees of Class B Directors in the Exchange's proxy statement in a timely fashion, and thereby enable the Exchange to fulfill its obligation to assure the fair representation of its members on the ISE's Board. In the Commission's view, accelerating the effectiveness of this proposed rule change is necessary and appropriate in order to enable the Exchange to include the Class B Director nominees in the Exchange's proxy statement this year. Therefore, the Commission finds good cause exists to accelerate approval of the proposal pursuant to Section 19(b)(2) of the Act.²⁷

²⁶ The Commission notes that the Exchange has represented that it would inform its Class B stockholders by March 4, 2005, of the proposed changes in the nomination process as they relate to nominees for Class B Directors and indicate that the proposed changes are subject to Commission approval.

²⁷ 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFOR ORDERED, pursuant to Section 19(b)(2) of the Act,²⁸ that the proposed rule change (SR-ISE-2005-16) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁹

Margaret H. McFarland
Deputy Secretary

²⁸ 15 U.S.C. 78s(b)(2).

²⁹ 17 CFR 200.30-3(a)(12).