

Exhibit 5

Text of the Proposed Rule Change

**EXHIBIT 5A – Holdings’ Certificate of Incorporation**

Underlining indicates additions; [brackets] indicate deletions

**CERTIFICATE OF INCORPORATION**

**OF**

**INTERNATIONAL SECURITIES EXCHANGE HOLDINGS, INC.**

**[•], 2007**

[The undersigned, for the purpose of organizing a corporation under the General Corporation Law of the State of Delaware, certifies:]International Securities Exchange Holdings, Inc., a corporation organized and existing under the General Corporation Law of the State of Delaware, as amended from time to time (the “DGCL”), does hereby certify as follows:

**FIRST:** The name of the corporation is International Securities Exchange Holdings, Inc. ([hereinafter referred to as ]the “**Corporation**”).

**SECOND:** The address of the Corporation’s registered office in the State of Delaware is 9 East Loockerman Street, Suite 1B, in the City of Dover, County of Kent, Delaware 19901. The name of its registered agent at such address is National Registered Agents, Inc.

**THIRD:** The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the DGCL[General Corporation Law of the State of Delaware (hereinafter referred to as (the “GCL”)].

**FOURTH:** The total number of shares of all classes of capital stock which the Corporation shall have authority to issue is one hundred [and fifty million ]one[ hundred] thousand (101,000 [150,100,000]) shares, which shall be divided as follows: one [hundred fifty million (150,000)]thousand (1,000) shares of Common Stock, par value \$.01 per share (the “**Common Stock**”) and one hundred thousand (100,000) shares of preferred stock, par value \$.01 per share (hereinafter referred to as the “**Preferred Stock**”). The powers, designations, preferences and relative, participating, optional or other special rights (and the qualifications, limitations or restrictions thereof) of the Common Stock and the Preferred Stock are as follows:

**I. Preferred Stock**

The Board of Directors of the Corporation (hereinafter referred to as the “**Board of Directors**”) is hereby expressly authorized at any time, and from time to time, to create and provide for the issuance of shares of Preferred Stock in one or more series and, by filing a

certificate pursuant to the [GCL]DGCL (hereinafter referred to as a “**Preferred Stock Designation**”), to establish the number of shares to be included in each such series, and to fix the designations, preferences and relative, participating, optional or other special rights of the shares of each such series and the qualifications, limitations or restrictions thereof, as shall be stated and expressed in the resolution or resolutions providing for the issue thereof adopted by the Board of Directors, including, but not limited to, the following:

(a) the designation of and the number of shares constituting such series, which number the Board of Directors may thereafter (except as otherwise provided in the Preferred Stock Designation) increase or decrease (but not below the number of shares of such series then outstanding);

(b) the dividend rate for the payment of dividends on such series, if any, the conditions and dates upon which such dividends shall be payable, the preference or relation which such dividends, if any, shall bear to the dividends payable on any other class or classes of or any other series of capital stock, the conditions and dates upon which such dividends, if any, shall be payable, and whether such dividends, if any, shall be cumulative or non-cumulative;

(c) whether the shares of such series shall be subject to redemption by the Corporation, and, if made subject to such redemption, the times, prices and other terms and conditions of such redemption;

(d) the terms and amount of any sinking fund provided for the purchase or redemption of the shares of such series;

(e) whether or not the shares of such series shall be convertible into or exchangeable for shares of any other class or classes of, any other series of any class or classes of capital stock of, or any other security of, the Corporation or any other corporation, and, if provision be made for any such conversion or exchange, the times, prices, rates, adjustments and any other terms and conditions of such conversion or exchange;

(f) the extent, if any, to which the holders of the shares of such series shall be entitled to vote as a class or otherwise with respect to the election of directors or otherwise;

(g) the restrictions, if any, on the issue or reissue of shares of the same series or of any other class or series;

(h) the amounts payable on and the preferences, if any, of the shares of such series in the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation; and

(i) any other relative rights, preferences and limitations of that series.

## II. Common Stock

The Common Stock shall be subject to the express terms of any series of Preferred Stock set forth in the Preferred Stock Designation relating thereto.

(a) **Voting Rights.** Subject to the limitations set forth in Section III of this Article FOURTH, [E]each holder of Common Stock shall have one vote in respect of each share of Common Stock held by such holder of record on the books of the Corporation on each matter on which the holders of Common Stock shall be entitled to vote.

[The voting rights of each holder of Common Stock are subject to the limitations thereon provided in subdivision III of Article FOURTH.]

(b) **Dividend Rights.** The holders of shares of Common Stock shall be entitled to receive, when and if declared by the Board of Directors, out of the assets of the Corporation which are by law available therefor, dividends payable either in cash, in stock or otherwise.

(c) **Liquidation Rights.** Upon the liquidation, dissolution or winding up of the Corporation, holders of Common Stock shall be entitled to receive any amounts available for distribution after the payment of, or provision for, obligations of the Corporation and any preferential amounts payable to holders of any outstanding shares of Preferred Stock.

### **III. Limitations on [Transfer/Concentration]Ownership and Voting[ Limits]**

As used in this Certificate of Incorporation, 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; the term “**Related Persons**” shall mean (1) with respect to any Person, any executive officer (as such term is defined [under]in Rule 3b-7 under the Securities Exchange Act of 1934 (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); (2) with respect to any Person constituting an Exchange Member (as such term is defined in the Constitution of International Securities Exchange, LLC, a copy of which will be provided to any stockholder of the Corporation upon written request therefor), any broker or dealer with which such Exchange Member is associated; (3) with respect to any Person that is an executive officer (as such term is defined [under]in 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 (4) 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 shares of the capital stock of the Corporation; and the term “**beneficially owned**”[ and], including all derivative or similar words, shall have the meaning set forth in Regulation 13D-G under the Exchange Act.

(a) **Ownership Limits.** For so long as the Corporation shall control, directly or indirectly, International Securities Exchange, LLC, a Delaware limited liability company and wholly-owned subsidiary of the Corporation (“**ISE, LLC**”):

[(i) No Person, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially shares of the capital stock (whether common

or preferred stock) of the Corporation constituting more than forty percent (40%) of the outstanding shares of any class or series of capital stock of the Corporation.]

(i) [(A) Notwithstanding the foregoing and subject to clause (C) below, such restriction shall not apply in the case of any class of preferred stock which shall not]~~(x) No Person, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, shares of the capital stock (whether Common Stock or Preferred Stock) of the Corporation that have the right by [its]their terms to vote in the election of members of the Board of Directors or on other matters which may require the approval of the holders of voting shares of the Corporation (other than matters affecting the rights, preferences or privileges of [said class of preferred stock]a particular class of capital stock) (the “Voting Shares”) constituting more than forty percent (40%) of the then-outstanding Voting Shares and (y) no Person who is an Exchange Member, either alone or together with its Related Persons, may own, directly or indirectly, of record or beneficially, Voting Shares constituting more than twenty percent (20%) of the then-outstanding Voting Shares ((x) and (y) each an “Ownership Limit,” and (x) and (y) together, the “Ownership Limits”).~~

(A) [(B) ]Notwithstanding the foregoing and subject to clause [(C)] B below, [such restriction]the Ownership Limit described in Section III(a)(i)(x) of this Article FOURTH may be waived by the Board of Directors pursuant to an amendment to the bylaws of the Corporation (the “Bylaws”) adopted by the Board of Directors, if, in connection with the adoption of such amendment, the Board of Directors in its sole discretion adopts a resolution stating that it is the determination of [such]the Board of Directors that such amendment (1) will not impair the ability of any of the Corporation and ISE, LLC to carry out ISE, LLC’s functions and responsibilities as an “exchange” under the [Securities ]Exchange Act[ of 1934, as amended,] and the rules promulgated thereunder[ (the “Exchange Act”)]; (2) is otherwise in the best interests of the Corporation and its stockholders and ISE, LLC; and (3) will not impair the ability of the United States Securities and Exchange Commission (the “Commission”) to enforce the Exchange Act[, and]. [s]Such amendment shall not be effective un[ti]less approved by the Commission.

(B) [(C) ]Notwithstanding clause[s] (A)[ and (B),] above, in any case where a Person[ either alone or together with its Related Persons would own more than the above percentage limitation]’s Ownership Percentage (as defined below) will exceed the Ownership Limits upon consummation of any proposed sale, assignment or transfer of the Corporation’s capital stock, the Board of Directors shall have determined that such Person and its Related Persons are not subject to any applicable “statutory disqualification” (within the meaning of Section 3(a)(39) of the Exchange Act).

(C) [(D)] In making the determinations referred to in clauses [(B)A] and [(C)B] above, the Board of Directors 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.

(D) [(E)] Any Person (and its Related Persons[ owning any capital stock of the Corporation) which proposes to own, directly or indirectly, of record or beneficially shares of the capital stock (whether common or preferred stock) of the Corporation constituting more than forty percent (40%) of the then outstanding shares of any class or series of capital stock of the Corporation,]) that proposes to acquire an Ownership Percentage in excess of the Ownership Limit described in Section III(a)(i)(x) of this Article FOURTH shall have delivered to the Board of Directors a notice in writing, not less than forty-five (45) days (or any shorter period to which [said]the Board of Directors shall expressly consent) before the proposed acquisition of shares of capital stock (whether common or preferred) that would result in such Person [holding more than forty percent (40%) of the then outstanding shares of any class or series of capital stock of the Corporation]exceeding the Ownership Limit described in Section III(a)(i)(x) of this Article FOURTH.

(E) [(ii) No Person, either alone or together with its Related Persons, who is an Exchange Member, may own,] For purposes of this Section III of this Article FOURTH, “Ownership Percentage” means, with respect to any Person, an amount (expressed as a percentage) equal to the quotient of (1) the aggregate number of Voting Shares owned directly or indirectly, of record or beneficially[ shares constituting more than twenty percent (20%) of the then outstanding shares of any class or series of capital stock of the Corporation], by such Person and its Related Persons, divided by (2) the total number of Voting Shares then outstanding.

(ii) [(iii)] Any Person, either alone or together with its Related Persons, that at any time owns (whether by acquisition or by a change in the number of shares outstanding) of record or beneficially, whether directly or indirectly, five percent (5%) or more of the then-outstanding Voting [s]Shares [of capital stock of the Corporation, that has the right by its terms to vote in the election of members of the Board of Directors,] shall, immediately upon so owning five percent (5%) or more of the then-outstanding Voting [s]Shares [of such stock] give the Board of Directors written notice of such ownership of five percent (5%) or more of the then-outstanding Voting [s]Shares [of such stock], which notice shall state: (1) such Person’s full legal name; (2) such Person’s title or status and the date on which such title or status was acquired; (3) such Person’s approximate ownership interest in the Corporation; and (4) whether such Person has the power, directly or indirectly, to direct the management or policies of the Corporation, whether through ownership of securities, by contract or otherwise.

The Board of Directors shall deliver to the ISE Trust (as defined below) a copy of any written notice provided pursuant to this Section III(a)(ii) of this Article FOURTH.

~~(iii)~~ [(iv)] Each Person required to provide written notice pursuant to [subparagraph (iii)]Section III(a)(ii) of this [ subdivision III of] Article FOURTH shall update such notice promptly after any change therein; *provided*, that no such updated notice shall be required to be provided to the Board of Directors in the event of an increase or decrease of less than one percent (1%) (of the then – outstanding Voting [s]Shares) [of any class or series of capital stock] in the ownership percentage] in such Person's Ownership Percentage so reported (such increase or decrease to be measured cumulatively from the amount shown on the last such report) unless any increase or decrease of less than one percent (1%) results in such Person [so ]owning more than twenty percent (20%) or more than forty percent (40%) of the [shares of any class or series of capital stock then outstanding]then-outstanding Voting Shares (at a time when such Person so owned less than such percentages) or such Person so owning less than twenty percent (20%) or less than forty percent (40%) of the [shares of any class or series of capital stock then outstanding]then-outstanding Voting Shares (at a time when such Person so owned more than such percentages). The Board of Directors shall deliver to the ISE Trust a copy of any update provided pursuant to this Section III(a)(iii) of this Article FOURTH.

(b) **Voting [Rights]Limits.** (i) For so long as the Corporation shall control, directly or indirectly, ISE, LLC, no Person, either alone or together with its Related Persons, at any time, [may, ]directly, indirectly or pursuant to any voting trust, agreement, plan or other arrangement, (A) may be entitled to vote or cause the voting of Voting [s]Shares [of the capital stock (whether such shares be common stock or preferred stock) of the Corporation or] representing more than twenty percent (20%) of the voting power of the then-outstanding Voting Shares, (B) may be entitled to give any consent or proxy with respect to Voting [s]Shares representing more than twenty percent (20%) of the voting power of [any class or series of the then issued and outstanding capital stock of the Corporation, nor may any Person, either alone or together with its Related Persons,]the then-outstanding Voting Shares, or (C) enter into any agreement, plan or other arrangement with any other Person, either alone or together with its Related Persons, under circumstances which would result in the Voting [s]Shares [of capital stock of the Corporation which]that shall be subject to such agreement, plan or other arrangement not being voted on any matter or matters or the withholding of any proxy relating thereto, where the effect of such agreement, plan or other arrangement would be to enable any Person, either alone or together with its Related Persons, to vote, possess the right to vote or cause the voting of [shares of the capital stock of the Corporation which would, as a result thereof, represent]Voting Shares representing more than twenty percent (20%) of [said voting power]the then-outstanding Voting Shares (assuming, for purposes of this Section III(b)(i)(C) of this Article FOURTH, that all Voting Shares that are subject to such agreement, plan or other arrangement are not then-outstanding Voting Shares) ((A), (B), and (C) each a "**Voting Limit**" and (A), (B) and (C) collectively, the "**Voting Limits**"); *provided, however*, that [such restriction]a Voting Limit may be waived by the Board of Directors pursuant to an amendment to

the Bylaws adopted by the Board of Directors, if, in connection with the adoption of such amendment, the Board of Directors in its sole discretion adopts a resolution stating that it is the determination of [such]the Board of Directors that (1) such amendment will not impair the ability of any of the Corporation and ISE, LLC to carry out ISE, LLC's functions and responsibilities as an "exchange" under the Exchange Act, (2) such amendment is otherwise in the best interests of the Corporation and its stockholders and ISE, LLC, (3) such amendment will not impair the ability of the Commission to enforce the Exchange Act, [and that](4) such Person and its Related Persons are not subject to any applicable "statutory disqualification" (within the meaning of Section 3(a)(39) of the Exchange Act), and (5) neither such Person nor any of its Related Persons is an Exchange Member. In making the determinations referred to in the immediately preceding sentence, the Board of Directors 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. Such amendment shall not be effective until approved by the Commission. Any Person [(and its Related Persons owning any capital stock of the Corporation) which proposes to exercise voting rights, or grant any proxies or consents with respect to any shares exceeding such twenty percent (20%) limitation]that proposes to acquire a Voting Control Percentage (as defined below) in excess of a Voting Limit shall have delivered to the Board of Directors a notice in writing, not less than forty-five (45) days (or any shorter period to which [said]the Board of Directors shall expressly consent) before the [proposed exercise of said voting rights or the granting of said proxies or consents]date on which such Person acquires a Voting Control Percentage in excess of a Voting Limit, of its intention to do so. The Board of Directors shall deliver to the ISE Trust a copy of any written notice provided pursuant to this Section III(b) of this Article FOURTH.

(ii) [Subparagraph] Section III(b)(i) of this [subdivision III of ]Article FOURTH shall not apply to any solicitation of any revocable proxy from any stockholder of the Corporation by the Corporation, [ or by any stockholder of the Corporation that is conducted pursuant to, and in accordance with, Regulation 14A promulgated pursuant to the Exchange Act; provided, however, that subparagraph (b)(i) of this subdivision III of Article FOURTH shall apply to any such solicitation that is conducted pursuant to Rule 14a-2(b)(2) of Regulation 14A.

(ii) Notwithstanding any other provisions contained in this Certificate of Incorporation, to the fullest extent permitted by applicable law, any shares of capital stock of the Corporation (whether such shares be common stock or preferred stock) not entitled to be voted due to the restrictions set forth in subparagraph (b)(i) of subdivision III of Article FOURTH (and not waived by the Board of Directors and approved by the Commission pursuant to subparagraph (b)(i) of subdivision III of Article FOURTH above) shall not be deemed to be outstanding for purposes of determining a quorum or a minimum vote required for the transaction of any business at any meeting of stockholders of the Corporation, including, without limitation, when specified business is to be voted on by a class or a series voting as a class.]

(iii) For purposes of this Section III of this Article FOURTH, "Voting Control Percentage" means, with respect to any Person, an amount (expressed as

a percentage) equal to the quotient of (A) the aggregate number of Voting Shares (1) the Person is entitled to vote or cause to be voted or (2) with respect to which a consent or proxy may be given, in each case by such Person and its Related Persons, directly, indirectly or pursuant to any voting trust, agreement, plan or other arrangement, *divided by* (B) the total number of Voting Shares then outstanding (assuming that any Voting Shares subject to an agreement, plan or other arrangement described in Section III(b)(i)(C) of this Article FOURTH are not outstanding Voting Shares for purposes of this calculation).

(c) [Effect of Purported Transfers of Shares and Other Events in Violation of this Subdivision. If, notwithstanding the other provisions contained in this subdivision III of Article FOURTH, at any time, there is a purported transfer or other event such that any Person, either alone or together with its Related Persons, would beneficially own shares in excess of any of the relevant ownership limitations set forth in this subdivision III of Article FOURTH, then, except as otherwise provided herein, such shares in excess of the relevant ownership limitations shall constitute “Excess Shares” and shall be treated as provided in this section. Such designation and treatment shall be effective as of the close of business on the business day prior to the date of the purported transfer or other event. Where such Person beneficially owns shares together with one or more Related Persons and the shares held by such Related Persons are designated as Excess Shares, the designation of shares held by such Person and such Related Persons as Excess Shares shall be pro rata in accordance with the number of shares held by each. If the Corporation accepts any offer pursuant to Article FOURTH, Subdivision III(c)(vii) below, the Corporation shall forthwith determine the additional number of shares, if any, that become Excess Shares by reason of the reduction in outstanding shares caused by the Corporation’s purchase of Excess Shares (whether any Person, either alone or together with its Related Persons, holds such Excess Shares in connection with a purported transfer or is deemed to hold such Excess Shares as the result of the Corporation’s purchase of Excess Shares) and shall take all action reasonably necessary to ensure that such additional Excess Shares are added to the initial number of Excess Shares subject to the provisions of this Article FOURTH, Subdivision III(c).] **Violations of any Ownership Limit or Voting Limit; Excess Shares.** Notwithstanding any other provisions contained in this Section III of this Article FOURTH, if at any time any Person’s Ownership Percentage or Voting Control Percentage exceeds an Ownership Limit or a Voting Limit, the Board of Directors shall so notify the ISE Trust and such Ownership Percentage or Voting Control Percentage shall result in the automatic transfer to the ISE Trust of a majority of the Voting Shares then outstanding *pro rata* from the holders thereof (the “Excess Shares”).

[(i) Any sale, transfer, assignment or pledge that, if effective would result in any Person, either alone or together with its Related Persons, owning shares in excess of any of the ownership limits set forth in this subdivision III of Article FOURTH shall be void ab initio as to such Excess Shares, and the intended transferee shall acquire no rights in such Excess Shares. Any Person, either alone or together with its Related Persons, owning shares in excess of any of the ownership limits set forth in this subdivision III of Article FOURTH as a result of any event other than a sale, transfer, assignment or pledge shall forthwith cease to have any rights in such Excess Shares.]



(i) [(ii) Upon any purported transfer or other event that results in Excess Shares, such Excess Shares shall be deemed to have been transferred to the Corporation (or to an entity appointed by the Corporation that is unaffiliated with the Corporation and any Person or its Related Persons owning such Excess Shares), as Special Trustee (as defined below) of the Charitable Trust (as defined below) ]All Excess Shares transferred to the ISE Trust shall be held for the exclusive benefit of the [Charitable Beneficiary or Beneficiaries. Excess Shares so held in trust shall]Trust Beneficiary (as defined below). Notwithstanding any other provision of this Certificate of Incorporation, or any provision of the Bylaws, to the contrary, Excess Shares held by the ISE Trust shall be or continue to be issued and outstanding [shares]Voting Shares.

(ii) [(iii) ]Excess Shares shall be entitled to dividends or other distributions, which shall be paid to the [Special]ISE Trust[ee] for the exclusive benefit of the Trust [Charitable ]Beneficiary. [Any dividend or other distribution paid prior to the discovery by the Corporation that the shares had become Excess Shares shall be repaid to the Special Trustee and held for the exclusive benefit of the Charitable Beneficiary. Any dividend declared and unpaid shall be void ab initio as to the purported transferee or holder and shall be paid to the Special Trustee for the exclusive benefit of the Charitable]The Trustees (as defined below) shall promptly distribute such dividends and other distributions received in respect of the Excess Shares to the Trust Beneficiary.

(iii) [(iv) ]Subject to the rights of the holders of any series of Preferred Stock, in the event of any voluntary or involuntary liquidation, dissolution or winding up of, or any other distribution of all or substantially all of the assets of the Corporation, the [Special]ISE Trust[ee], as the holder of Excess Shares, shall be entitled to receive ratably with each holder of the same class or series of stock, a portion of the assets of the Corporation available for distribution to the stockholders. The [Special Trustee]Trustees shall promptly distribute any such assets received in respect of the Excess Shares in any liquidation, dissolution or winding up of, or any distribution of the assets of the Corporation [in accordance with the priorities and limitations set forth herein and as if such assets were the proceeds from the disposition of the Excess Shares with respect to which the distribution is received]to the Trust Beneficiary.

[(v) To the fullest extent permitted by applicable law, the holder of Excess Shares shall not be entitled to vote such Excess Shares on any matter, and the Special Trustee shall have the authority (A) to rescind as void any votes cast by a purported transferee or holder prior to the discovery that such shares should be transferred to the Special Trustee and (B) to recast such vote in accordance with the desires of the Special Trustee acting for the benefit of the Corporation; provided however, that if the Corporation has already taken irreversible action, then the Special Trustee shall not have the authority to rescind and recast such vote. The Special Trustee shall be deemed to have been given an irrevocable proxy by such holder of Excess Shares to vote the shares for the benefit of the Charitable Beneficiary. Notwithstanding the

provisions of this section, until the Corporation has received notification that shares have been transferred into a Charitable Trust, the Corporation shall be entitled to rely on its share transfer and other records for purposes of preparing lists of stockholders entitled to vote at meetings, determining the validity and authority of proxies and otherwise conducting stockholder votes.]

(iv) To the fullest extent permitted by applicable law, the Trust Beneficiary shall not be entitled to vote such Excess Shares on any matter.

(v) [(vi)] Excess Shares shall not be transferable except in a transfer to which the ISE [Special ]Trust[ee] is a party. Upon receipt of written instructions from the Trust Beneficiary, the Trustees shall promptly use their commercially reasonable efforts to sell the Excess [Within twenty (20) days of receiving notice from the Corporation that s]Shares [have been transferred to a Charitable Trust, the Special Trustee shall sell the shares held in Charitable Trust ]to a [p]Person or [p]Persons, designated by the [Special ]Trustees, whose ownership of Voting Shares will not violate any of the Ownership Limits or Voting Limits,[ or] in market transactions, [whose ownership of shares is not expected to violate the ownership limitations in this subdivision III of Article FOURTH ]by public offering or otherwise, in each case, at a time or times and in a manner so as to maximize the return on the Excess Shares. Upon any such sale, the interest of the [Charitable]Trust Beneficiary in the Voting [s]Shares sold shall so terminate and the [Special] Trustees shall promptly distribute the net proceeds of the sale to the [purported transferee or holder and to the Charitable]Trust Beneficiary as provided herein.[ The purported transferee or holder will receive the lesser of (A) the price per share received by the Corporation from the transfer of the Excess Shares, (B) the price per share such purported transferee or holder paid for the shares in the purported transfer or other event that resulted in the Excess Shares, or (C) if the purported transferee or holder did not give value for such Excess Shares in the event resulting in the Excess Shares, a price per share equal to the Market Price (as defined below) for the Excess Shares on the date of the purported transfer or other event that resulted in the Excess Shares; provided, that in the case of a purported holder holding Excess Shares solely as the result of an action or event by the Corporation (such as an action resulting in a reduction in the number of outstanding shares), such purported holder will receive the greater of (A) or (C) above.

Any proceeds in excess of the amount payable to the purported transferee or holder shall be payable to the Charitable Beneficiary. If, prior to the discovery by the Corporation that shares should be transferred to a Charitable Trust, such shares are sold by a purported transferee or holder, then (A) such shares shall be deemed to have been sold on behalf of the Charitable Trust and (B) to the extent that the purported transferee or holder received an amount for such shares that exceeds the amount that such purported transferee or holder was entitled to receive pursuant to this section, such excess shall be paid to the Special Trustee of the Charitable Trust upon demand.

(vii) Excess Shares shall be deemed to have been offered for sale to the Corporation on the date of the transaction or event resulting in such Excess Shares (including any shares deemed to be Excess Shares pursuant to Article FOURTH, Subdivision III(c) above) at a price per share equal to the lesser of (A) the price per share such purported transferee or holder paid for the shares in the purported transfer or other event that resulted in the Excess Shares (or in the case of an event not involving any payment, the Market Price at the time of such transfer or other event) and (B) the Market Price of the shares on the date the Corporation accepts such offer. The Corporation shall have the right to accept such offer, in whole or in part, until the Special Trustee has sold the shares held in the Charitable Trust pursuant to Article FOURTH, Subdivision III(c)(vi).]

(vi) The Trust Beneficiary shall have the right to reacquire the Excess Shares from the Trust if and when (A) a Person's Ownership Percentage or Voting Control Percentage no longer exceeds any Ownership Limit or Voting Limit, or (B) a Person's Ownership Percentage or Voting Control Percentage in excess of any Ownership Limit or Voting Limit is waived by the Board of Directors and approved by the Commission in accordance with Sections III(a)(i)(A) and III(b)(i) of this Article FOURTH.

For purposes of this [subsection, "Charitable Beneficiary" shall mean one or more organizations described in Sections 170(b)(1)(A) or 170(c) of the Internal Revenue Code of 1986, as amended from time to time; the term "Charitable Trust" shall mean the trust established for the benefit of the Charitable Beneficiary pursuant to this section for which the Corporation is the trustee; the term "Market Price" shall mean, the last reported sale price of, or the average of the closing bid and asked prices for, the shares, on the trading day immediately preceding the relevant date as reported in any exchange or quotation system over which the shares may be traded, or if not then traded over any exchange or quotation system, then the fair market value of the shares on the relevant date as determined in good faith by the Corporation; the term "Special Trustee" shall mean the Corporation, in its capacity as trustee for the Charitable Trust, any entity appointed by the Corporation that is unaffiliated with the Corporation and any Person or its Related Persons owning such Excess Shares, and any successor trustee appointed by the Corporation.]Section III of this Article FOURTH, the term "ISE Trust" shall mean the Delaware statutory trust established for the benefit of the Trust Beneficiary pursuant to that certain Trust Agreement (the "Trust Agreement") to be entered into among the Corporation, the Trustees, and the Trust Beneficiary; the term "Trustees" shall mean the trustees initially appointed pursuant to the Trust Agreement, and any successor trustees appointed in accordance with the Trust Agreement; the term "Trust Beneficiary" shall mean U.S. Exchange Holdings, Inc.

(d) **Effect of Purported Voting in Violation of this [Subdivision]Section III of this Article FOURTH.** If any stockholder purports to vote or cause the voting of Voting Shares, grant any consent or proxy with respect to the Voting Shares, or enter into any [other

agreement, plan, or other arrangement for the voting of Voting [s]Shares that would violate[ the provisions of this subdivision III of], or cause the violation of, any Voting Limit under this Section III of this Article FOURTH, then the Corporation shall not honor such vote[, ]or proxy[ or agreement] to the extent that such provisions would be violated, and any shares subject thereto shall not be entitled to be voted to the extent of such violation.

(e) Priority of National Securities Exchange or Association Transactions. Notwithstanding anything in this subdivision III of Article FOURTH to the contrary, nothing herein shall preclude the settlement of a transaction entered into through the facilities of any national securities exchange or national securities association. The fact that the settlement of any transaction occurs shall not negate the effect of any other provision of this subdivision III of Article FOURTH and any transferee in such a transaction shall be subject to all of the provisions and limitations set forth in this subdivision III of Article FOURTH.

**FIFTH:** (a) The number of directors of the Corporation, one (1) of which shall be such person who is currently holding the office of Chief Executive Officer of the Corporation, shall be fixed, and may be increased or decreased from time to time, in such a manner as may be prescribed by the Bylaws of the Corporation.

(b) The directors, other than the Chief Executive Officer or those who may be elected by the holders of any series of Preferred Stock or any other series or class of stock as set forth in this Certificate of Incorporation, shall be divided into two classes, designated as Class I and Class II. Class I directors shall be initially appointed for a term expiring at the first annual meeting of stockholders and Class II directors shall be initially appointed for a term expiring at the second annual meeting of stockholders. Members of each class shall hold office until their successors are elected and qualified. Thereafter, at each succeeding annual meeting of the stockholders of the Corporation, the successors of the class of directors whose term expires at that meeting shall be elected to hold office for a term expiring at the annual meeting of stockholders held in the second year following the year of their election, and until their successors are elected and qualified. The Chief Executive Officer shall serve as a director for a term of one (1) year or until such earlier time as such person no longer serves as Chief Executive Officer of the Corporation. Any director may be removed from office at any time, but only for cause by the stockholders to the extent permitted under applicable law.]

**FIFTH:** ~~**SIXTH:**~~ ]The Board of Directors is hereby authorized to create and issue, whether or not in connection with the issuance and sale of any of its stock or other securities or property, rights entitling the holders thereof to purchase from the Corporation shares of stock or other securities of the Corporation or any other corporation, recognizing that, under certain circumstances, the creation and issuance of such rights could have the effect of discouraging third parties from seeking, or impairing their ability to seek, to acquire a significant portion of the outstanding securities of the Corporation, to engage in any transaction which might result in a change of control of the Corporation or to enter into any agreement, arrangement or understanding with another party to accomplish the foregoing or for the purpose of acquiring, holding, voting or disposing of any securities of the Corporation. The creation and issuance of any such rights shall be subject to the prior approval of the Commission. Subject thereto, the times at which and the terms upon which such rights are to be issued will be determined by the

Board of Directors and set forth in the contracts or instruments that evidence such rights. The authority of the Board of Directors with respect to such rights shall include, but not be limited to, determination of the following:

- (a) the initial purchase price per share or other unit of the stock or other securities or property to be purchased upon exercise of such rights;
- (b) provisions relating to the times at which and the circumstances under which such rights may be exercised or sold or otherwise transferred, either together with or separately from, any other stock or other securities of the Corporation;
- (c) provisions which adjust the number or exercise price of such rights or amount or nature of the stock or other securities or property receivable upon exercise of such rights in the event of a combination, split or recapitalization of any stock of the Corporation, a change in ownership of the Corporation's stock or other securities or a reorganization, merger, consolidation, sale of assets or other occurrence relating to the Corporation or any stock of the Corporation, and provisions restricting the ability of the Corporation to enter into any such transaction absent an assumption by the other party or parties thereto of the obligations of the Corporation under such rights;
- (d) provisions which deny the holder of a specified percentage of the outstanding stock or other securities of the Corporation the right to exercise such rights and/or cause the rights held by such holder to become void;
- (e) provisions which permit the Corporation to redeem or exchange such rights, which redemption or exchange may be within the sole discretion of the Board of Directors, if the Board of Directors reserves such right to itself; and
- (f) the appointment of a rights agent with respect to such rights.

**[SEVENTH:** (a) In furtherance, and not in limitation, of the powers conferred by law, the Board of Directors is expressly authorized and empowered:]

**SIXTH:** [(i) to adopt, amend or repeal the Bylaws of the Corporation; provided, however, that any provision of the Bylaws adopted by the Board of Directors under the powers hereby conferred may be amended or repealed by the Board of Directors or by the affirmative vote of at least a majority of the voting power with respect thereto of the then outstanding shares of Common Stock; and ]The Bylaws may be amended, added to, rescinded or repealed at any meeting of the Board of Directors or meeting of the stockholders.

[(ii) from time to time to determine whether and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the Corporation, or any of them, shall be open to inspection of stockholders; and, except as so determined, or as expressly provided in this Certificate of Incorporation or in any Preferred Stock Designation, no stockholder shall have any right to inspect any account, book or document of the Corporation other than such rights as may be conferred by law.

(b) Notwithstanding anything contained in this Certificate of Incorporation to the contrary, the affirmative vote of the holders of at least two-thirds of the voting power of the then outstanding shares of Common Stock shall be required to amend, repeal or adopt any provision inconsistent with (i) subdivision III of Article FOURTH, (ii) Article SIXTH, (iii) this Article SEVENTH or (iv) Section 2.2, 2.4, 2.5, 2.7 or 2.10 of Article II, Section 3.2, 3.3 or 3.5 of Article III or Article X of the Bylaws of the Corporation.

**EIGHTH:** (a) Subject to the rights of the holders of any series of Preferred Stock or any other series or class of stock to elect additional directors under specified circumstances or to consent to specific actions taken by the Corporation, any action required or permitted to be taken by the stockholders of the Corporation must be effected at a duly called annual or special meeting of stockholders of the Corporation and may not be effected by any consent in writing in lieu of a meeting of such stockholders.

(b) Subject to the rights of the holders of any series of Preferred Stock or any other series or class of stock to elect additional directors under specified circumstances, a special meeting of the holders of stock of the Corporation entitled to vote on any business to be considered at any such meeting may be called by the Chairman of the Board of the Corporation, or as otherwise set forth in the Bylaws of the Corporation, and shall be called by the Secretary of the Corporation at the request of the Board of Directors pursuant to a resolution adopted by a majority of the total number of directors which the Corporation would at the time have if there were no vacancies (the "Whole Board").]

**SEVENTH:** [**NINTH:** (a) ]Unless and except to the extent that the Bylaws of the Corporation shall so require, the election of directors of the Corporation need not be by written ballot.

[(b) Advance notice of stockholder nominations for the election of directors shall be given in the manner provided in the Bylaws of the Corporation.

(c) Subject to the rights of the holders of any series of Preferred Stock or any other series or class of stock to elect additional directors under specified circumstances, vacancies resulting from death, resignation, retirement, disqualification, removal from office or other cause, and newly created directorships resulting from any increase in the authorized number of directors, may be filled only by the affirmative vote of a majority of the remaining directors, though less than a quorum of the Board of Directors, from such candidates as are selected in accordance with the Bylaws of the Corporation, and directors so chosen shall hold office for a term expiring at the annual meeting of stockholders at which the term of office of the class to which such director has been elected expires and until such director's successor shall have been duly elected and qualified. No decrease in the number of authorized directors constituting the Whole Board shall shorten the term of any incumbent director.]

**EIGHTH:** [**TENTH:** ]A director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional

misconduct or a knowing violation of law, (iii) under Section 174 of the [GCL]DGCL or (iv) for any transaction from which the director derived an improper personal benefit. No amendment or repeal of this Article [TENTH]EIGHTH shall adversely affect any right or protection of a director of the Corporation existing hereunder in respect of any act or omission occurring prior to such amendment or repeal.

**NINTH:** [ELEVENTH:] Except as may be expressly provided in this Certificate of Incorporation, the Corporation reserves the right at any time and from time to time to amend, alter, change or repeal any provision contained in this Certificate of Incorporation or a Preferred Stock Designation, and any other provisions authorized by the laws of the State of Delaware at the time in force may be added or inserted, in the manner now or hereafter prescribed herein or by law, and all powers, preferences and rights of whatsoever nature conferred upon stockholders, directors or any other persons whomsoever by and pursuant to this Certificate of Incorporation or a Preferred Stock Designation, as the same may be amended, are granted subject to the right reserved in this Article [ELEVENTH,]NINTH; *provided, however,* that no Preferred Stock Designation shall be amended after the issuance of any shares of the series of Preferred Stock created thereby, except in accordance with the terms of such Preferred Stock Designation and the requirements of law.

**TENTH:** [TWELFTH:] In discharging his or her responsibilities as a member of the Board of Directors, each director, to the fullest extent permitted by law, shall take into consideration the effect that the Corporation's actions would have on the ability of ISE, LLC to carry out its responsibilities under the Exchange Act and on the ability of ISE, LLC and the Corporation: to engage in conduct that fosters and does not interfere with ISE, LLC's and the Corporation'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. In discharging his or her responsibilities as a member of the Board of Directors or as an officer or employee of the Corporation, each such director, officer or employee shall comply with the federal securities laws and the rules and regulations thereunder and shall cooperate with ISE, LLC and the Commission pursuant to their respective regulatory authority.

**ELEVENTH:** [THIRTEENTH:] All confidential information pertaining to the self-regulatory function of ISE, LLC (including but not limited to confidential information regarding disciplinary matters, trading data, trading practices and audit information) contained in the books and records of ISE, LLC that shall come into the possession of the Corporation shall, to the fullest extent permitted by law: (x) not be made available to any Person (other than as provided in the next sentence) other than to those officers, directors, employees and agents of the Corporation that have a reasonable need to know the contents thereof; (y) be retained in confidence by the Corporation and the officers, directors, employees and agents of the Corporation; and (z) not be used for any commercial purposes. Nothing in this Certificate of Incorporation shall be interpreted as to limit or impede the rights of the Commission or ISE, LLC to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations promulgated thereunder, or to limit or impede the ability of any

officers, directors, employees or agents of the Corporation to disclose such confidential information to the Commission or ISE, LLC.

**TWELFTH: [FOURTEENTH:]** For so long as the Corporation shall control, directly or indirectly, ISE, LLC, the books, records, premises, officers, directors and employees of the Corporation shall be deemed to be the books, records, premises, officers, directors and employees of ISE, LLC for purposes of and subject to oversight pursuant to the Exchange Act, but only to the extent that such books, records[,] and premises[,] are related to, or such officers, directors and employees [of the Corporation relate to the exchange business] are involved in, the activities of ISE, LLC. The books and records related to the [exchange business] activities of ISE, LLC shall be subject at all times to inspection and copying by the Commission and ISE, LLC.

**THIRTEENTH: [FIFTEENTH:]** The Corporation shall comply with the federal securities laws and the rules and regulations thereunder and shall cooperate with ISE, LLC and the Commission pursuant to their respective regulatory authority, and shall take reasonable steps necessary to cause its agents to cooperate with ISE, LLC and the Commission pursuant to their respective regulatory authority with respect to such agents' activities related to ISE, LLC.

**FOURTEENTH: [SIXTEENTH:]** Notwithstanding any other provision of this Certificate of Incorporation, for so long as the Corporation shall control, directly or indirectly, ISE, LLC, before any amendment to or repeal of any provision of th[e]is Certificate of Incorporation of the Corporation shall be effective, the same shall be submitted to the [B]board of [D]directors of ISE, LLC, 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 Exchange 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.

**[SEVENTEENTH:]** The name and mailing address of the incorporator is Miriam Foley, c/o Milbank, Tweed, Hadley & McCloy LLP, One Chase Manhattan Plaza, New York, New York 10005.

WITNESS my signature this 16th day of November, 2004.

/s/ Miriam Foley  
Sole Incorporator]