

Underlining indicates additions; [brackets] indicate deletions. Marked to show cumulative additions and deletions from ISE's current Certificate of Incorporation and Constitution and Rule 303.

**AMENDED AND RESTATED**  
**CERTIFICATE OF INCORPORATION**  
**OF**  
**INTERNATIONAL SECURITIES EXCHANGE, INC.**

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International Securities Exchange, Inc. (the "Corporation"), a corporation duly organized and existing under the laws of the State of Delaware, hereby certifies as follows:

The date of the filing of the Corporation's original Certificate of Incorporation with the Secretary of the State of Delaware was December 13, 2001 (the "Original Certificate of Incorporation"). The Original Certificate of Incorporation was amended by Certificates of Amendment that were filed on April 5, 2002, February 21, 2003 and February 12, 2004.

This Amended and Restated Certificate of Incorporation has been duly proposed by resolutions adopted and declared advisable by the Board of Directors of the Corporation on July 22, 2004 and November 18, 2004, duly adopted by the stockholders of the Corporation on August 16, 2004 and December 13, 2004 and duly acknowledged and executed by an authorized officer of the Corporation in accordance with the provisions of Sections 103, 228, 242 and 245 of the General Corporation Law of the State of Delaware (the "GCL") and, upon filing with the Secretary of the State of Delaware in accordance with Section 103 of the GCL, shall thenceforth supersede the Original Certificate of Incorporation and the April 5, 2002, February 21, 2003 and

February 12, 2004 amendments thereto and shall, as it may thereafter be amended in accordance with its terms and the law, be the Amended and Restated Certificate of Incorporation of the Corporation.

[The undersigned, for the purpose of organizing a corporation under the General Corporation Law of the State of Delaware, certifies:]

The text of the Certificate of Incorporation of the Corporation is hereby amended and restated to read in its entirety as follows:

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

SECOND: The address of the Corporation’s registered office in the State of Delaware is The Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801, County of New Castle. The name of its registered agent at such address is The Corporation Trust Company.

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

FOURTH: The total number of shares of all classes of capital stock which the Corporation shall have authority to issue is [five]one hundred fifty million, one hundred and six thousand ([5,106,000]150,106,000) shares, which shall be divided into three classes as follows: [five]one hundred and fifty million ([5,000,000]150,000,000) shares of Class A Common Stock, par value \$.01 per share (the “Class A Common Stock”), six thousand (6,000) shares of Class B Common Stock, par value \$.01 per share (the “Class B Common Stock”, and together with the Class A Common Stock, 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 (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) Class A Common Stock.

(i) Voting Rights. Each holder of Class A Common Stock shall have one vote in respect of each share of Class A 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 (excluding those matters specified below as to which such holder shall have no voting rights).

[The] Subject to the right of the Board of Directors to fill any vacancies as provided in Article NINTH and in the Constitution of the Corporation, the holders of shares of Class A Common Stock shall have the sole right to elect the Non-Industry Directors (as defined below) and the Chief Executive Officer of the Corporation as a director. The holders of Class A Common Stock shall have no voting rights with respect to any increase in the number of authorized shares of the Series B-1 Stock or the Series B-2 Stock (the “Core Rights”), the definition herein of the term “Core Rights” or the election of the Series B-1 Directors, the Series B-2 Directors or the Series B-3 Directors (as those terms are defined in Article [Fifth]FIFTH). The voting rights of each holder of Class A Common Stock are subject to the limitations thereon provided in [subparagraph (iv)] subdivision III of this [paragraph II(a),] Article FOURTH.

(ii) Dividend Rights. The holders of shares of Class A 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.

(iii) Liquidation Rights. Upon the liquidation, dissolution or winding up of the Corporation, holders of Class A Common Stock shall be entitled to receive any amounts

available for distribution [to holders of Class A Common Stock] 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 and an amount equal to the par value of each share of Class B Common Stock payable to the holders of any outstanding shares of Class B Common Stock.

[(iv) Concentration Limits. (A) In the event that a holder of Class A Common Stock, together with any affiliate as defined in the Corporation's Constitution (an "Affiliate"), owns more than twenty percent (20%) of the Class A Common Stock (shares owned in excess of twenty percent (20%) being referred to as "Excess Shares"), such holder shall have no voting rights nor give any proxy in relation to a vote of the stockholders of the Corporation with respect to the Excess Shares held by such person; provided, however, that whether or not such person otherwise participates in a meeting in person or by proxy, such person's Excess Shares shall be counted for quorum purposes and shall be voted by the inspector of elections or other person presiding over quorum and vote matters in the same proportion as the shares of Class A Common Stock held by stockholders other than such person are voted (including any abstentions from voting). In applying this paragraph:

- (1) The Board of Directors may approve an exemption to this paragraph for any person other than: (1) a Member of the Corporation as defined in the Corporation's Constitution (a "Member"); (2) an Affiliate of such Member; or (3) a person that is subject to a statutory disqualification under Section 3(a)(3) of the Securities Exchange Act of 1934, as amended; and
- (2) In granting an exemption pursuant to paragraph II(a)(iv)(A)(1) above, the Board of Directors must determine that such exemption: (1) would not

reasonably be expected to diminish the quality of, or public confidence in, the Corporation; (2) would not impair the ability of the Corporation to prevent fraudulent and manipulative acts and practices; and (3) would provide 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 and would assist in the removal of impediments to the perfection of the mechanisms for a free and open market and a national market system.

(B) Founders (as defined in the Corporation's Constitution) shall have a temporary exemption, not to extend past May 26, 2010, from the voting limitation on excess shares contained in paragraph II(a)(iv)(A) above, but only with respect to any vote regarding any merger, consolidation or dissolution of the Corporation or any sale of all or substantially all of the assets of the Corporation.]

(b) Class B Common Stock.

(i) Designation and Number of Shares Constituting Series. (A) Shares of [the] Class B Common Stock shall be issued in series having the designations and constituting the number of shares set forth below:

10 shares designated as [“]Class B Common Stock, Series B-1 (the “Series B-1 Stock”),

160 shares designated as [“]Class B Common Stock, Series B-2[“] (the “Series B-2 Stock”), and

5,000 shares designated as [“]Class B Common Stock, Series B-3[“] (the “Series B-3 Stock”).

(B) 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 Class B Common Stock in one or more new series and, by filing a certificate pursuant to the GCL (hereinafter referred to as a “Class B Common 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:

- (1) 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 Class B Common Stock Designation) increase or decrease (but not below the number of shares of such series then outstanding);
- (2) 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;
- (3) 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;

(4) 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;

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

(6) 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

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

Notwithstanding the foregoing, no new series of Class B Common Stock shall be issued in connection with the grant of trading rights for equity options or index options in the United States on the exchange facilities of the Corporation.

(ii) Trading Rights.

(A) Series B-1 Stock. Ownership of a share of Series B-1 Stock shall be a predicate to obtaining the trading rights and privileges of each such share of Series B-1 Stock as set forth in the Corporation's Constitution [and Rules]as the same may be amended from time to time (the "Constitution") and Rules as the same may be amended from time to time (the "Rules") for its Primary Market Makers, as such term is defined in the Constitution. A holder of Series B-1 Stock shall (A) exercise the trading rights and privileges associated with a share of Series B-1 Stock if such holder is approved as a Primary Market Maker under the Corporation's Constitution and Rules, or (B) lease the trading rights and privileges to an entity that is approved

as a Primary Market Maker under the Corporation's Constitution and Rules. The approved holder of each share of Series B-1 Stock shall have the right to transfer its share(s) if such transfer is approved in accordance with the Constitution and the Rules of the Corporation.

(B) Series B-2 Stock. Ownership of a share of Series B-2 Stock shall be a predicate to obtaining the trading rights and privileges of each such share of Series B-2 Stock as set forth in the Corporation's Constitution and Rules for its Competitive Market Makers, as such term is defined in the Constitution. A holder of Series B-2 Stock shall (A) exercise the trading rights and privileges associated with a share of Series B-2 Stock if such holder is approved as a Competitive Market Maker under the Corporation's Constitution and Rules, or (B) lease the trading rights and privileges to an entity that is approved as a Competitive Market Maker under the Corporation's Constitution and Rules. The approved holder of each share of Series B-2 Stock shall have the right to transfer its share(s) if such transfer is approved in accordance with the Constitution and the Rules of the Corporation.

(C) Series B-3 Stock. Ownership of a share of Series B-3 Stock shall be a predicate to obtaining the trading rights and privileges of each such share of the Series B-3 Stock as set forth in the Corporation's Constitution and Rules for its Electronic Access Members, as such term is defined in the Constitution. Each holder of a share of Series B-3 Stock must be approved as an Electronic Access Member under the Corporation's Constitution and Rules. The approved holder of Series B-3 Stock shall have no rights to transfer its shares of Series B-3 Stock.

(iii) Dividend Rights. The holders of the Class B Common Stock shall not be entitled to receive any dividends declared by the Board of Directors.

(iv) Liquidation [Preferences]Rights. Upon the liquidation, dissolution or winding up of the Corporation, holders of each series of Class B Common Stock shall be entitled to receive an amount equal to the par value of each share of Class B Common Stock 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.

(v) Voting Rights. [Each]Except as set forth in subdivision III of this Article FOURTH, each holder of Class B Common Stock (or a series thereof) shall have one vote in respect of each share thereof held by such holder of record on the books of the Corporation on each matter for which the vote of the holders thereof are required. The authorized number of shares of Class B Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the stock of the corporation entitled to vote thereon irrespective of subsection (b)(2) of Section 242 of the GCL; provided that any such amendment shall require the approval of the holders of a majority of the outstanding shares of Series B-1 Stock and Series B-2 Stock voting together as a single class and, to the extent required by clause (B) of this section (v), the approval of the holders of Series B-1 Stock, voting as a separate class, and Series B-2 Stock, voting as a separate class, in accordance with such clause. Holders of shares of Class B Common Stock shall have the following voting rights and no other voting rights:

(A) Election of Class B Directors. The holders of Class B Common Stock shall have the following rights with respect to election of directors. Holders of shares of Series B-1 Stock shall have the sole right to elect the Series B-1 Directors. Holders of shares of Series B-2 Stock shall have the sole right to elect the Series B-2 Directors. Holders of shares of Series B-3 Stock shall have the sole right to elect the Series B-3 Directors. The Board of Directors

shall have the right to fill any vacancies as provided in Article NINTH and in the Constitution of the Corporation.

(B) Series B-1 and Series B-2 Core Rights. Any change in or amendment or modification of the Core Rights or the definition herein of the term “Core Rights” shall be submitted to a vote of the holders of Series B-1 Stock and Series B-2 Stock for their consideration and approval. Any such action must receive an affirmative vote of the holders of at least a majority of the [aggregate votes cast by the holders of the] then outstanding shares of Series B-1 Stock, voting as a class, and an affirmative vote of the holders of at least a majority of the [aggregate votes cast by the holders of the] then outstanding shares of Series B-2 Stock, voting as a class, in order to be approved.

(v) Transfer Restrictions. The shares of Series B-3 Stock shall not be transferable. In the event of a withdrawal by a holder of Series B-3 Stock, the shares of Series B-3 Stock of such holder shall be sold to and purchased by the Corporation as provided for in the Constitution of the Corporation.

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

As used in this Amended and Restated 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, 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 a Member, any broker or dealer with which such Member is associated; and (3) 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 derivative or similar words shall have the meaning set forth in Regulation 13D–G under the Exchange Act.

(a) Ownership Limits.

(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.

(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 have the right by its terms to vote in the election of members of the Board of Directors of the Corporation 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).

(B) Notwithstanding the foregoing and subject to clause (C) below, such restriction may be waived by the Board of Directors of the Corporation pursuant to an amendment to the Constitution 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 Board that such amendment (1) will not impair the ability of the Corporation to carry out its 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 (3) will not impair the ability of the United States Securities and Exchange Commission (the

“Commission”) to enforce the Exchange Act, and such amendment shall not be effective until approved by the Commission.

(C) Notwithstanding clauses (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 upon consummation of any proposed sale, assignment or transfer of the Corporation’s capital stock, the Board of Directors of the Corporation 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).

(D) In making the determinations referred to in clauses (B) and (C), 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.

(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, shall have delivered to the Board of Directors of the Corporation a notice in writing, not less than forty-five (45) days (or any shorter period to which said Board shall expressly consent) before the proposed acquisition of shares of capital stock (whether common or preferred) that 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.

(ii) No Person, either alone or together with its Related Persons, who is a Member (as such term is defined in the Constitution), may own, directly or indirectly, of record

or beneficially shares constituting more than twenty percent (20%) of any class or series of capital stock of the Corporation.

(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 shares of any class or series 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 of the Corporation, shall, immediately upon so owning five percent (5%) or more of the then outstanding shares of such stock, give the Board of Directors written notice of such ownership of five percent (5%) or more of the then outstanding shares of any class or series 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.

(iv) Each Person required to provide written notice pursuant to subparagraph (iii) 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 shares of any class or series of capital stock) in the 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 (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 (at a time when such Person so owned more than such percentages).

(b) Voting Rights. (i) 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, vote or cause the voting of shares of the capital stock (whether such shares be common stock or preferred stock) of the Corporation or give any consent or proxy with respect to 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, 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 shares of capital stock of the Corporation which 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 more than twenty percent (20%) of said voting power; provided, however, that such restriction may be waived by the Board of Directors of the Corporation pursuant to an amendment to the Constitution 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 Board that such amendment will not impair the ability of the Corporation, to carry out its functions and responsibilities as an “exchange” under the Exchange Act, is otherwise in the best interests of the Corporation and its



stockholders, will not impair the ability of the Commission to enforce the Exchange Act, and 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). 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. 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 shall have delivered to the Board of Directors of the Corporation a notice in writing, not less than forty-five (45) days (or any shorter period to which said Board shall expressly consent) before the proposed exercise of said voting rights or the granting of said proxies or consents, of its intention to do so.

(ii) Subparagraph (b) of 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.

(iii) 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) 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.

(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).

(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 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.

(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) for the exclusive benefit of the Charitable Beneficiary or Beneficiaries. Excess Shares so held in trust shall be issued and outstanding shares.

(iii) Excess Shares shall be entitled to dividends or other distributions which shall be paid to the Special Trustee for the exclusive benefit of the 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 Beneficiary.

(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 Trustee, 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 shall 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.

(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.

(vi) Excess Shares shall not be transferable except in a transfer to which the Special Trustee is a party. Within twenty (20) days of receiving notice from the Corporation that

shares have been transferred to a Charitable Trust, the Special Trustee shall sell the shares held in Charitable Trust to a person or persons, designated by the Special Trustee or in market transactions, whose ownership of shares is not expected to violate the ownership limitations in this subdivision III of Article FOURTH. Upon such sale, the interest of the Charitable Beneficiary in the shares sold shall so terminate and the Special Trustee shall distribute the net proceeds of the sale to the purported transferee or holder and to the Charitable 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).

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.

(d) Effect of Purported Voting in Violation of this Subdivision. If any stockholder purports to vote, grant any proxy or enter into any other agreement for the voting of shares that would violate the provisions of this subdivision III of Article FOURTH, then the Corporation shall not honor such vote, 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[ initial] Board of Directors shall consist of fifteen (15) directors as follows:

(i) Two directors, who meet the qualifications set forth in the Constitution, shall be elected by plurality vote of the holders of Series B-1 Stock, voting together as a single class (the “Series B-1 Directors”);

(ii) Two directors, who meet the qualifications set forth in the Constitution, shall be elected by plurality vote of the holders of Series B-2 Stock, voting together as a single class (the “Series B-2 Directors”);

(iii) Two directors, who meet the qualifications set forth in the Constitution, shall be elected by plurality vote of the holders of Series B-3 Stock, voting together as a single class (the “Series B-3 Directors”);

(iv) Eight (8) directors, who meet the qualifications set forth in the Constitution, shall be elected by plurality vote of the holders of Class A Common Stock (the “Non-Industry Directors”), voting together as a single class; and

(v) One (1) director, who shall be [such] the person currently holding the office of Chief Executive Officer of the Corporation, shall be elected by plurality vote of the holders of Class A Common Stock.

(b) Each director, other than the Chief Executive Officer, shall hold office for a term of two (2) years[, with one half of each class of directors being elected at each annual meeting of the stockholders; provided, however, that one-half of each class of directors shall hold office for a term of one year for the initial year]. 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. The directors, other than the Chief Executive Officer, shall be divided into two (2) classes, designated as Class I and Class II. To the extent possible, each of Class I and Class II shall be comprised of half of the Non-Industry Directors and half of each of the Series B-1 Directors, Series B-2 Directors and Series B-3 Directors. Members of each class shall hold office until their successors are elected and qualified. 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. No director elected by the holders of any



Series of Class B Common Stock may serve on the Board of Directors for more than three (3)

consecutive terms. After having served for three (3) consecutive terms, any such director may be eligible for election following a two-year hiatus from the Board of Directors. Any director may be removed from office at any time, but only for cause [and only by the affirmative vote of at least two-thirds of the total number of directors which the Corporation would at the time have if there were no vacancies (the "Whole Board")] by the stockholders to the extent permitted under applicable law.

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 [Securities and Exchange] 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:

(i) to adopt, amend or repeal the Constitution of the Corporation, which shall serve as the Bylaws of the Corporation; provided, however, that any provision of the Constitution 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 [two-thirds]a majority of the voting power with respect thereto of the then outstanding Class A Common Stock; and

(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 Class A 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]SEVENTH or ([ii]iv) Section 2.2, 2.4, 2.5, 2.7 or [2.9]2.10 of Article II, Section 3.2, 3.3 or 3.5 of Article III or Article XI of the Constitution 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 Constitution 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”), including no less than fifty percent (50%) of the Non-Industry Directors.

NINTH: (a) Unless and except to the extent that the Constitution 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 Constitution 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 Constitution 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 they have 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.

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 or (iv) for any transaction from which the director derived an improper personal benefit. No amendment or repeal of this Article [Tenth]TENTH 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.

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]ELEVENTH, 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.

TWELFTH: The business and affairs of the Corporation shall be managed by and under the direction of the Board of Directors. The Directors shall, in managing the business and affairs of the Corporation, consider applicable requirements for registration and operation as a national securities exchange under the Exchange Act, including, without limitation, the requirements that (a) the rules of the Corporation shall be designed to protect investors and the public interest, and (b) the Corporation shall be so organized and have the capacity to carry out the purposes of the Exchange Act and (subject to such exceptions as are set forth in the Exchange Act or the rules and regulations thereunder) to enforce compliance by its members and persons associated with its members with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Corporation. The foregoing provision shall not be construed to create the basis for any cause of action against any Director, and no Director shall be liable, by virtue of such provision, for such Director's consideration or failure to consider the matters referred to therein.

THIRTEENTH: All confidential information pertaining to the self-regulatory function of the Corporation (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of the Corporation shall: (a) not be made available to any persons (other than as provided in the next sentences) other than to those officers, directors, employees and agents of the Corporation that have a reasonable need to know the contents thereof; (b) be retained in confidence by the Corporation and the officers, directors, employees and agents of the Corporation; and (c) 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 to access and examine such confidential information pursuant to the federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of the Corporation to disclose such confidential information to the Commission.

IN WITNESS WHEREOF, the Corporation has caused this Amended and Restated Certificate of Incorporation to be executed by its President and attested by its Secretary thereunto duly authorized, who acknowledge and affirm under penalties of perjury that this certificate is the act and deed of the Corporation and that the facts herein are true this [ ] day of [ ], 2004.

INTERNATIONAL SECURITIES EXCHANGE, INC.

By: \_\_\_\_\_

Name: David Krell

Title: President

[TWELFTH: The name and mailing address of the incorporator is Robin C. Stephan, c/o Milbank, Tweed, Hadley & McCloy LLP, One Chase Manhattan Plaza, New York, New York 10005.]

ATTEST:

[Witness my signature this 13<sup>th</sup> day of December, 2001.]

\_\_\_\_\_  
Name: Michael Simon

Title: Secretary

[/s/ ROBIN C. STEPHAN

Sole Incorporator]

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



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AMENDED AND RESTATED CONSTITUTION

OF

INTERNATIONAL SECURITIES EXCHANGE, INC.

\* \* \* \* \*

ARTICLE I

Office and Records

Section 1.1. Delaware Office. The principal office of the Corporation in the State of Delaware shall be located in the City of Wilmington, County of New Castle, and the name and address of its registered agent is The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware.

Section 1.2. Other Offices. The Corporation may have such other offices, either within or without the State of Delaware, as the Board of Directors may designate or as the business of the Corporation may from time to time require.

Section 1.3. Books and Records. The books and records of the Corporation may be kept at the Corporation's principal executive offices in New York, New York, or at such other locations within or without the State of Delaware as may from time to time be designated by the Board of Directors, provided the books and records shall always be kept within the United States.

ARTICLE II

Stockholders

Section 2.1. Annual Meeting. The annual meeting of stockholders of the Corporation shall be held on such date and at such time as may be designated by the Board of

Directors at the principal executive offices of the Corporation, or at such other place within or without the State of Delaware as may be fixed by the Board of Directors.

Section 2.2. Special Meetings. Subject to the rights of the holders of any series of preferred stock, par value \$.01 per share, of the Corporation (the "Preferred Stock"), or any other series or class of stock [as set forth in the] of the Corporation, to elect additional directors under circumstances specified in the Amended and Restated Certificate of Incorporation[ of the Corporation], as the same may be amended from time to time (the "Certificate of Incorporation") [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 only by the Chairman of the Board of the Corporation or a majority of the Board of Directors for any purpose or purposes, 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"), including no less than fifty percent (50%) of the Non-Industry Directors. [A special meeting shall also be called by the Secretary of the Corporation if five stockholders of a class or series of stockholders or more than thirty percent (30%) of a class or series of stockholders, whichever is greater, request such a meeting, unless otherwise prescribed by law]. The Board of Directors may designate the place of meeting for any special meeting of the stockholders, and if no such designation is made, the place of meeting shall be the principal executive offices of the Corporation.

Section 2.3. Notice of Meetings. Whenever stockholders are required or permitted to take any action at a meeting, unless notice is waived as provided in Section 9.1 of this Constitution, a written notice of the meeting shall be given which shall state the place, date

and hour of the meeting, and, in the case of a special meeting, the purpose or purposes for which the meeting is called.

Unless otherwise provided by law, and except as to any stockholder duly waiving notice, the written notice of any meeting shall be given personally or by mail, not less than ten (10) nor more than sixty (60) days before the date of the meeting to each stockholder entitled to vote at such meeting. If mailed, notice shall be deemed given when deposited in the mail, postage prepaid, directed to the stockholder at his address as it appears on the records of the Corporation. Any previously scheduled meeting of the stockholders may be postponed by resolution of the Board of Directors upon public notice given by press release prior to the time previously scheduled for such meeting of stockholders.

When a meeting is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjourned meeting the Corporation may transact any business which might have been transacted at the original meeting. If, however, the adjournment is for more than thirty (30) days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting.

Section 2.4. Quorum. Except as otherwise provided by law or by the Certificate of Incorporation or by this Constitution, at any meeting of stockholders the holders of a majority of the voting power of the outstanding shares of the Corporation entitled to vote generally in the election of directors (the “Voting Stock”), either present in person or represented by proxy, shall constitute a quorum for the transaction of any business at such meeting, except that, when specified business is to be voted on by a class or series voting as a

class, the holders of a majority of the [shares] voting power of such class or series entitled to vote shall constitute a quorum for the transaction of such business. To the fullest extent permitted by applicable law, [T]the chairman of the meeting or a majority of the voting power of the shares of Voting Stock so represented may adjourn the meeting from time to time, whether or not there is such a quorum (or in the case of specified business to be voted on as a class or series, the chairman or a majority of the shares of such class or series entitled to vote which are so represented may adjourn the meeting with respect to such specified business). No notice of the time and place of adjourned meetings need be given except as provided in the last paragraph of Section 2.3 of this Constitution. The stockholders present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of [enough]a sufficient number of stockholders to [leave]result in less than a quorum.

Section 2.5. Voting. Except as otherwise set forth in the Certificate of Incorporation with respect to the right of any holder of any series of Preferred Stock or any other series or class of stock to elect additional directors under specified circumstances, whenever directors are to be elected at a meeting, they shall be elected by a plurality of the votes cast at the meeting by the holders of stock entitled to vote thereon. Whenever any corporate action, other than the election of directors, is to be taken by vote of stockholders at a meeting, such corporate action shall, except as otherwise required by law or by the Certificate of Incorporation or by this Constitution, be authorized by the affirmative vote of the holders of a majority of the shares of stock present or represented by proxy and entitled to vote with respect to such corporate action.

Except as otherwise provided by law, or by the Certificate of Incorporation, each holder of record of stock of the Corporation entitled to vote on any matter at any meeting of stockholders shall be entitled to one vote for each share of such stock standing in the name of

such holder on the stock ledger of the Corporation on the record date for the determination of the stockholders entitled to vote at the meeting.

Upon the demand of any stockholder entitled to vote, the vote for directors or the vote on any other matter at a meeting shall be by written ballot, but otherwise the method of voting and the manner in which votes are counted shall be discretionary with the presiding officer at the meeting.

Section 2.6. Proxies. Each stockholder entitled to vote at a meeting of stockholders may authorize another person or persons to act for him by proxy, but no such proxy shall be voted or acted upon after eleven (11) months from its date, unless the proxy provides for a longer period. Every proxy shall be signed by the stockholder or by his duly authorized attorney. Such proxy must be filed with the Secretary of the Corporation or his representative at or before the time of the meeting.

Section 2.7. [Record Date] Notice of Stockholder Business and Non-Industry Director Nominations. [In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, or entitled to receive payment of any dividend or other distribution or allotment of any rights, or entitled to exercise any rights in respect of any change, conversion or exchange of stock, or for the purpose of any other lawful action, the Board of Directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board of directors, and which shall not be more than sixty nor less than ten (10) days before the date of such meeting, nor more than sixty (60) days prior to any other action.]

The provisions of this Section 2.7 relating to the nomination of persons for election to the Board of Directors apply only to the nomination of persons to serve as Non-



Industry Directors, as defined in Section 3.2(b)(iv), and shall not apply to those persons nominated pursuant to Section 3.10(a) or 5.3(c) to serve as Series B-1, B-2 or B-3 Directors.

(a) Annual Meeting of Stockholders. (i) Nominations of persons for election to the Board of Directors of the Corporation and the proposal of business to be considered by the stockholders may be made at an annual meeting of stockholders (1) by or at the direction of the Chairman of the Board or the Board of Directors pursuant to a resolution adopted by a majority of the Whole Board (or a committee as designated by the Board of Directors) and (2) by stockholders of the Corporation who (A) are entitled to vote at the meeting with respect to the election of directors or the business to be proposed by such stockholders, as the case may be, (B) comply with the notice procedures set forth in clauses (ii) and (iii) of paragraph (a) of this Section 2.7, (C) are stockholders of record at the time such notice is delivered to the Secretary of the Corporation as provided below and (D) in the case of nomination of persons for election to the Board of Directors, constitute the requisite percentage of stockholders as provided in clause (ii) of paragraph (b) of Section 3.10.

(ii) For nominations or other business to be properly brought before an annual meeting by a stockholder pursuant to clause (2) of paragraph (a)(i) of this Section 2.7, the stockholder must have given timely notice thereof in writing to the Secretary of the Corporation and such business must be a proper subject for stockholder action under the GCL. To be timely, a stockholder's notice shall be delivered to the Secretary of the Corporation at the principal executive offices of the Corporation not less than sixty (60) days nor more than ninety (90) days prior to the first anniversary of the preceding year's annual meeting; provided, however, that in the event that the date of the annual meeting is advanced by more than thirty (30) days, or delayed by more than sixty

(60) days, from such anniversary date, notice by the stockholder to be timely must be so delivered not earlier than the ninetieth (90th) day prior to such annual meeting and not later than the close of business on the later of the sixtieth (60th) day prior to such annual meeting or the tenth (10th) day following the day on which public announcement of the date of such meeting is first made. Such stockholder's notice shall set forth (1) as to each person whom the stockholder proposes to nominate for election or reelection as a director all information relating to such person that is required to be disclosed in solicitations of proxies for 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 being named in the proxy statement as a nominee and to serving as a director if elected and a statement that such nominee complies with the requirements set forth in the Certificate of Incorporation; (2) as to any other business that the stockholder proposes to bring before the meeting, a brief description of the business desired to be brought before the meeting, the reasons for conducting such business at the meeting and any material interest in such business of such stockholder and the beneficial owner, if any, on whose behalf the proposal is made; and (3) as to the stockholder giving the notice and the beneficial owner, if any, on whose behalf the nomination or proposal is made (i) the name and address of such stockholder, as they appear on the Corporation's books, and of such beneficial owner and (ii) the class and number of shares of the Corporation which are owned beneficially and of record by such stockholder and such beneficial owner.

(iii) Notwithstanding anything in the second sentence of paragraph (a)(ii) of this Section 2.7 to the contrary, in the event that the number of directors to be elected to the Board of Directors is increased and there is no public

announcement naming all of the nominees for director or specifying the size of the increased Board of Directors made by the Corporation at least eighty (80) days prior to the first anniversary of the preceding year's annual meeting, a stockholder's notice required by paragraph (a)(ii) of this Section 2.7 shall also be considered timely, but only with respect to nominees for any new positions created by such increase, if it shall be delivered to the Secretary of the Corporation at the principal executive offices of the Corporation not later than the close of business on the tenth (10th) day following the day on which such public announcement is first made by the Corporation.

(b) Special Meeting of Stockholders. Nominations of persons for election to the Board of Directors may be made at a special meeting of stockholders called in accordance with Section 2.2, at which directors are to be elected, (1) by or at the direction of the Chairman of the Board or the Board of Directors pursuant to a resolution adopted by a majority of the Whole Board (or a committee as designated by the Board of Directors) and (2) by stockholders of the Corporation who are (A) entitled to vote at the meeting with respect to the election of directors (B) comply with the notice procedures set forth in this paragraph (b), (C) are stockholders of record at the time such notice is delivered to the Secretary of the Corporation as provided below and (D) constitute the requisite percentage of stockholders as provided in clause (ii) of paragraph (b) of Section 3.10. Nominations by stockholders of persons for election to the Board of Directors may be made at such a special meeting of stockholders if the stockholder's notice as required by paragraph (a)(ii) of this Section 2.7 shall be delivered to the Secretary of the Corporation at the principal executive offices of the Corporation not earlier than the ninetieth (90th) day prior to such special meeting and not later than the close of business on the later of the sixtieth (60th) day prior to such special meeting or the tenth (10th) day following

the day on which public announcement is first made of the date of the special meeting and of the nominees proposed by the Board of Directors to be elected at such meeting.

(c) General. (i) Only persons who are nominated in accordance with the procedures set forth in this Section 2.7 shall be eligible to serve as directors and only such business shall be conducted at a meeting of stockholders as shall have been brought before the meeting in accordance with the procedures set forth in this Section 2.7.

[If no record date is fixed by the Board of Directors, (1) the record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be at the close of business on the day next preceding the date on which notice is given, or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held, and (2) the record date for determining stockholders for any other purpose shall be at the close of business on the day on which the Board of Directors adopts the resolution relating thereto.]

(ii) Except as otherwise provided by law, the Certificate of Incorporation or this Section 2.7, the chairman of the meeting shall have the power and duty to determine whether a nomination or any business proposed to be brought before the meeting was made in accordance with the procedures set forth in this Section 2.7 and, if any proposed nomination or business is not in compliance with this Section 2.7, to declare that such defective nomination or proposal shall be disregarded.

[A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.]

(iii) For purposes of this Section 2.7, “public announcement” shall mean disclosure in a press release reported by the Dow Jones News Service, Associated

Press or comparable national news service or in a document publicly filed by the Corporation with the Commission pursuant to Section 13, 14 or 15(d) of the Exchange Act.

[Only such stockholders as shall be stockholders of record on the date so fixed shall be entitled to notice of, and to vote at, such meeting and any adjournment thereof, or to receive payment of such dividend or other distribution, or to exercise such rights in respect of any such change, conversion or exchange of stock, or to participate in such action, as the case may be, notwithstanding any transfer of any stock on the books of the Corporation after any record date so fixed.]

(iv) Notwithstanding the foregoing provisions of this Section 2.7, a stockholder shall also comply with all applicable requirements of the Exchange Act and the rules and regulations thereunder with respect to the matters set forth in this Section 2.7. Nothing in this Section 2.7 shall be deemed to affect any rights (1) of stockholders to request inclusion of proposals in the Corporation's proxy materials with respect to a meeting of stockholders pursuant to Rule 14a-8 under Exchange Act or (2) of the holders of any series of Preferred Stock or any other series or class of stock as set forth in the Certificate of Incorporation to elect directors under specified circumstances or to exercise voting rights in connection with specific actions taken by the Corporation.

Section 2.8. Inspectors of Elections; Opening and Closing the Polls.(a) The Board of Directors by resolution shall appoint one or more inspectors, which inspector or inspectors may include individuals who serve the Corporation in other capacities, including, without limitation, as officers, employees, agents or representatives of the Corporation, to act at the meeting and make a written report thereof. One or more persons may be designated as

alternate inspectors to replace any inspector who fails to act. If no inspector or alternate has been appointed to act, or if all inspectors or alternates who have been appointed are unable to act, at a meeting of stockholders, the chairman of the meeting shall appoint one or more inspectors to act at the meeting. Each inspector, before discharging his or her duties, shall take and sign an oath faithfully to execute the duties of inspector to the best of his or her ability. The inspectors shall have the duties prescribed by the GCL.

(b) The chairman of the meeting shall fix and announce at the meeting the time of the opening and the closing of the polls for each matter upon which the stockholders will vote at a meeting.

Section [2.8] 2.9 List of Stockholders. The officer who has charge of the stock ledger of the Corporation shall prepare and make, at least ten (10) days before every meeting of stockholders, a complete list of the stockholders entitled to vote at the meeting, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting, [during ordinary business hours,] for a period of at least ten (10) days prior to the meeting, either [at a place within the city where the meeting is to be held, which place shall be specified in] on a reasonably accessible electronic network, provided that information required to gain access to such list is provided with the notice of the meeting, or[, if not so specified, at the place where the meeting is to be held. The] during ordinary business hours, at the principal place of business of the Corporation. In the event that the Corporation determines to make the list available on an electronic network, the Corporation may take reasonable steps to ensure that such information is available only to stockholders of the Corporation. If the meeting is to be held at a place, then the list shall also be produced and kept

at the time and place of the meeting during the whole time thereof, and may be inspected by any stockholder who is present. If the meeting is to be held solely by means of remote communication, then the list shall also be open to the examination of any stockholder during the whole time of the meeting on a reasonably accessible electronic network, and the information required to access such list shall be provided with the notice of the meeting. Nothing in this Section shall require the Corporation to include electronic mail addresses or other electronic contact information on such list.

The stock ledger shall be the only evidence as to who are the stockholders entitled to examine the stock ledger, the list required by this Section or the books of the Corporation, or to vote in person or by proxy at any meeting of stockholders.

Section [2.9]2.10 No Stockholder Action by Written Consent.

Subject to the rights of the holders of any series of Preferred Stock or any other series or class of stock as set forth in the Certificate of Incorporation 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 taken at an annual or special meeting of the stockholders and may not be taken by any consent in writing by such stockholders.

### ARTICLE III

#### Directors

Section 3.1. General Powers. The business and affairs of the Corporation shall be managed by or under the direction of its Board of Directors. In addition to the powers and authorities by this Constitution expressly conferred upon it, the Board of Directors may exercise all such powers of the Corporation and do all such lawful acts and things as are not by

law or by the Certificate of Incorporation or by this Constitution required to be exercised or done by the stockholders.

Section 3.2. Number, Tenure, Qualifications and Voting. (a) Subject to the rights of the holders of any series of Preferred Stock or any other series or class of stock as set forth in the Certificate of Incorporation to elect directors under specified circumstances, the number of directors shall be fixed at fifteen (15) and may be changed only with the approval of the requisite vote of the stockholders.

(b) The Board shall be composed as follows:

(i) Two (2) directors shall be officers, directors or partners of Primary Market Makers and shall be elected by the holders of Class B Common Stock, Series B-1, par value \$.01 per share (the "Series B-1 Stock"), in the manner set forth in the Certificate of Incorporation (the "Series B-1 Directors"),

(ii) Two (2) directors shall be officers, directors or partners of Competitive Market Makers and shall be elected by the holders of Class B Common Stock, Series B-2, par value \$.01 per share (the "Series B-2 Stock"), in the manner set forth in the Certificate of Incorporation (the "Series B-2 Directors"),

(iii) Two (2) directors shall be officers, directors or partners of Electronic Access Members and shall be elected by the holders of Class B Common Stock, Series B-3, par value \$.01 per share (the "Series B-3 Stock"), in the manner set forth in the Certificate of Incorporation (the "Series B-3 Directors"),



(iv) Eight (8) directors shall be non-industry representatives and shall be elected by the holders of Class A Common Stock, par value \$.01 per share (the “Class A Common Stock”), in the manner set forth in the Certificate of Incorporation (the “Non-Industry Directors”), at least two (2) of whom shall be public representatives (the “Public Directors”), and

(v) One (1) director shall be such person currently holding the office of Chief Executive Officer of the Corporation and shall be elected by the holders of Class A Common Stock.

(c) Each director, other than the Chief Executive Officer, shall hold office for a term of two (2) years. The Chief Executive Officer shall hold office for a term of one (1) year, or such earlier time as such person no longer serves as Chief Executive Officer of the Corporation. The directors elected by each series of Class B Common Stock, the Non-Industry Directors and the Public Directors shall be divided into two classes, and designated as Class I or Class II directors. [Class I directors shall be initially elected for a term expiring at the 2002 annual meeting of stockholders and Class II directors shall be initially elected for a term expiring at the 2003 annual meeting of stockholders.] Subject to the provisions of the Certificate of Incorporation, at each annual meeting of stockholders, the stockholders shall elect, pursuant to the Certificate of Incorporation, the successors to the directors whose terms are expiring. Members of each class shall hold office until their successors shall have been duly elected and qualified. At each succeeding annual meeting of 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.

(d) Qualifications and other Requirements.

(i) No Member shall have more than one representative elected to the Board during any term.

(ii) The Chief Executive Officer shall serve on the Board until removed pursuant hereto.

(iii) No [Director, other than the Chief Executive Officer,] director elected by any series of Class B Common Stock may serve on the Board of Directors for more than three (3) consecutive terms. Any such [Director] director may be eligible for election following a two-year hiatus from the Board of Directors.

Section 3.3. Vacancies and Newly Created Directorships. Subject to the rights of the holders of any series of Preferred Stock or any other series or class of stock as set forth in the Certificate of Incorporation to elect additional directors under specified circumstances, in the event that a director position becomes available, whether through vacancies resulting from death, resignation, retirement, disqualification, removal from office or other cause, or newly created directorships resulting from any increase in the authorized number of directors, the Nominating Committee, in the case of a vacancy for a Class B Directorship, and the [Non-Industry Directors] Corporate Governance Committee, in the case of a vacancy for a Non-Industry Directorship, shall nominate, and the Board of Directors shall elect, by the affirmative vote of a majority of the remaining directors, though less than a quorum of the Board of Directors, a person satisfying the qualifications for the class of directors in which there is a vacancy, and any director 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 [they have] 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.

Section 3.4. Resignation. Any director may resign at any time upon written notice to the Corporation. Any such resignation shall take effect at the time specified therein or, if the time be not specified, upon receipt thereof, and the acceptance of such resignation, unless required by the terms thereof, shall not be necessary to make such resignation effective.

Section 3.5. Removal. Subject to the rights of the holders of any series of Preferred Stock or any other series or class of stock as set forth in the Certificate of Incorporation to elect additional directors under specified circumstances, any director may be removed from office in the manner set forth in the Certificate of Incorporation.

Section 3.6. Meetings. Meetings of the Board of Directors, regular or special, may be held at any place within or without the State of Delaware. Members of the Board of Directors, or of any committee designated by the Board of Directors, may participate in a meeting of the Board of Directors or such committee by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting by such means shall constitute presence in person at such meeting. An annual meeting of the Board of Directors shall be held [at the same place and immediately] as soon as practicable following each annual meeting of stockholders [, and no further notice thereof need be given other than this Bylaw]. The Board of Directors may fix times and places for such annual and additional regular meetings of the Board of Directors and no further notice of such meetings need be given. A special meeting of the Board of Directors shall be held whenever called by the Chairman of the Board or by the Secretary if one

(1) Series B-1 Director and one (1) Series B-2 Director shall request such a meeting, or if a majority of the Non-Industry Directors shall request such a meeting, at such time and place as shall be specified in the notice or waiver thereof. The person or persons authorized to call a special meeting of the Board of Directors may fix the place and time of the meetings. Notice of any special meeting shall be given to each director at his business or residence[ orally, by e-mail, mail or any other means, at least one (1) hour before the time of] in writing, by electronic mail or by telegram or by telephone communication. If mailed, such notice shall be deemed adequately delivered when deposited in the United States mails so addressed, with postage thereon prepaid, at least five (5) days before such meeting. If by electronic mail, such notice shall be deemed adequately delivered when the electronic mail is sent at least twenty-four hours before the meeting. If by telegram, such notice shall be deemed adequately delivered when the telegram is delivered to the telegraph company at least twenty-four hours before such meeting. If by facsimile transmission, such notice shall be transmitted at least twenty-four hours before such meeting. If by telephone, the notice shall be given at least twelve hours prior to the time set for the meeting. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the Board of Directors need be specified in the notice of such meeting, except for amendments to this Constitution as provided under Section 11.1 of this Constitution.

Section 3.7. Quorum and Voting. A number of directors equal to at least a majority of the Whole Board, including no less than fifty percent (50%) of the Non-Industry Directors, provided that such requirement shall be deemed satisfied if at least fifty percent (50%) of the Non-Industry Directors are (i) present at or (ii) have waived their attendance for a meeting after receiving an agenda prior to such meeting, shall constitute a quorum for the transaction of business at any meeting of the Board of Directors, but if there be less than a quorum, a majority

of the directors present may adjourn the meeting from time to time, and no further notice thereof need be given other than announcement at the meeting which shall be so adjourned. Except as otherwise provided by law, by the Certificate of Incorporation, or by this Constitution, the vote of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.

Section 3.8. Written Consent of Directors in Lieu of a Meeting. Any action required or permitted to be taken at any meeting of the Board of Directors or of any committee thereof may be taken without a meeting if all members of the Board of Directors or of such committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the Board of Directors or of such committee.

Section 3.9. Compensation. Directors may receive compensation for services to the Corporation in their capacities as directors or otherwise in such manner and in such amounts as may be fixed from time to time by the Board of Directors.

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 [described] provided in Section 5.3([a]c) or [as provided] 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 prior to the annual meeting for such year.

(b) (i) Nominees for election of the Non-Industry Directors, including the Public Directors, shall be selected by the [Non-Industry Directors, including the Public Directors, currently on the Board] Corporate Governance Committee or by the holders of Class A Common Stock in the manner set forth in subparagraph (ii) below. In the event any nominee named by the [Non-Industry Directors]Corporate Governance Committee withdraws or becomes ineligible, the [current Non-Industry Directors] Corporate Governance Committee may select an additional nominee to replace the withdrawn or ineligible nominee. In making nominations, such committee shall give due consideration to a member's longevity of service on the Board of Directors and the benefits of rotation of the Non-Industry Directors serving on the Board of Directors.

(ii) In addition to the nominees named by the [current Non-Industry Directors]Corporate Governance Committee, persons may be nominated for election to the Board as Non-Industry Directors by a [petition,]notice that complies with Section 2.7 and is signed by the holders of not less than twenty percent (20%) of the outstanding shares of Class A Common Stock. [Such petition must be filed with the Secretary at least one month prior to the annual meeting for such year. ]

(c) Nominees for Director shall provide the Secretary such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as a Non-Industry Director, a Public Director or a Series B-1, B-2 or B-3 Director.

Section 3.11. Interested Directors. (a) No director shall directly or indirectly participate as a member of the Board of Directors or of any committee in any matter which would substantially affect his interest or the interests of any person in whom he is directly or indirectly interested, although interested Directors may be counted in determining the presence of a quorum at the meeting of the Board of Directors or of a committee which authorizes actions with respect to such matter.

(b) An interested director shall disqualify himself or shall be disqualified by a vote of the Board of Directors or the chairman of any committee.

(c) For purposes of this Section, a Director is not personally interested by reason of being or having been a member of a committee which has made prior inquiry, examination or investigation of the subject under consideration, nor in the determination of matters that may affect the stockholders as a whole or certain classes or series of stockholders, and Series B-1, Series B-2 and Series B-3 Directors shall not be prohibited from participating in such determination by reason of their participation in the normal course of [conducting]the conduct of Exchange business.

Section 3.12. Chairman of the Board. The Chairman of the Board shall be a Non-Industry Director who is appointed[,] by the affirmative vote of at least two-thirds of the directors then in office[; provided that after May 26, 2002, the Chairman of the Board shall be appointed from among the Non-Industry Directors]. The Chairman of the Board shall serve as such for a term of one (1) year. The Chairman of the Board shall have the authority provided in

this Constitution and the Rules, but shall not be an officer of the Corporation. The Chairman of the Board shall preside at all meetings of stockholders and of the Board of Directors.

Section 3.13. Vice Chairman of the Board. The Vice Chairman of the Board shall be appointed from among the directors by the affirmative vote of at least two-thirds of the directors then in office. The Vice Chairman of the Board shall serve as such for a term of one (1) year. In the case of the absence or inability of the Chairman of the Board to act, or a vacancy in the office of the Chairman of the Board, the Vice Chairman of the Board shall exercise the powers and discharge the duties of the Chairman of the Board, unless determined otherwise by the Board of Directors. The Vice Chairman of the Board shall have the authority provided in this Constitution and the Rules, but shall not be an officer of the Corporation.

#### ARTICLE IV

##### Officers

Section 4.1. [Appointed]Officers. The [Chief Executive Officer may appoint, with approval of the] Board of Directors[,] shall elect a President, a Secretary and a Treasurer, and one or more Vice Presidents, one or more Assistant Secretaries and one or more Assistant Treasurers. The President shall be the Chief Executive Officer of the Corporation. All officers [chosen]elected by the [Chief Executive Officer and] Board of Directors shall [each] have such powers and duties as generally pertain to their respective offices, subject to the specific provisions of this Article IV, together with such other powers and duties as from time to time may be conferred by [the Chief Executive Officer or] the Board of Directors or any committee thereof. Any number of such offices may be held by the same person, but no officer shall execute, acknowledge or verify any instrument in more than one capacity. The Board of Directors may appoint, and may delegate power to appoint, such other officers, agents and



employees as it may deem necessary or proper, who shall hold their offices or positions for such terms, have such authority and perform such duties as may from time to time be determined by or pursuant to authorization of the Board of Directors.

Section 4.2. [Appointment]Election and Term of Office. The officers of the Corporation shall be [appointed]elected annually by the [Chief Executive Officer and approved by the ]Board of Directors at the regular meeting of the Board of Directors held after each annual meeting of the stockholders. If the election of officers shall not be [held]accomplished at such meeting, such election shall be [held]accomplished as soon thereafter as convenient. Subject to Section 4.3 of this Constitution, each officer shall hold office until his successor shall have been duly elected and shall have qualified or until his death or until such officer shall resign.

Section 4.3. Resignation and Removal. Any officer may resign at any time upon written notice to the Corporation. [The Chief Executive Officer may remove, with the approval of the Board of Directors, any officer]Any elected officer may be removed by a majority of the members of the Whole Board, with or without cause, at any time. [The Board of Directors may delegate such power of removal as to officers, agents and employees.] Such removal shall be without prejudice to a person's contract rights, if any, but the appointment of any person as an officer, agent or employee of the Corporation shall not [of] itself create contract rights.

Section 4.4. Compensation and Bond. The compensation of the officers of the Corporation shall be fixed by the Board of Directors, but this power may be delegated to any officer in respect of other officers under his control. The Corporation may secure the fidelity of any or all of its officers, agents or employees by bond or otherwise.

Section 4.5. Qualification. [Except as provided herein, the]The officers of the Corporation shall not be holders of Class B Common Stock nor affiliated with a Member. [If an officer of the Corporation owns shares of Class B Common Stock he must (i) abstain from exercising any voting rights associated with such shares, and (ii) lease the trading privileges associated with such shares. The terms of any lease of trading privileges by an officer must be reasonable and approved by a majority of the Non-Industry Directors. Except in the case where more than one (1) officer is also a Founder, the Board of Directors shall permit only one (1) officer to be an owner of shares of Class B Common Stock.]

Section 4.6. Chief Executive Officer. (a) The Chief Executive Officer shall be appointed by the Board of Directors pursuant to Section 4.1 and shall be nominated for a directorship by virtue of his office.

(b) The Chief Executive Officer shall manage the affairs of the Exchange and shall be the representative of the Corporation in all public matters.

(c) The Chief Executive Officer shall not engage in any other occupation during his incumbency except with the approval of the Board of Directors.

(d) The Chief Executive Officer may be removed by a vote of two-thirds of the Directors then in office, exclusive of the Chief Executive Officer, in the event that he refuses, fails, neglects or is unable to discharge his duties or for any cause affecting the best interests of the Corporation.

(e) In the case of temporary absence or inability to act, the Chief Executive Officer may designate any other officer to assume all the functions and discharge all the duties of the Chief Executive Officer. Upon his failure to do so, or if the office of Chief Executive Officer

is vacant, any officer [appointed]so designated by the Board of Directors shall perform the functions and duties of the Chief Executive Officer.

[(f) The Chief Executive Officer shall appoint, with the approval of the Board of Directors, a President, one or more Vice Presidents, a Secretary and a Treasurer of the Corporation, and shall have the authority to remove any officer so appointed with or without cause and shall remove an officer if so directed by the Board of Directors. Except as provided otherwise in this Article, the President, Vice Presidents, the Secretary and the Treasurer shall serve for the tenure prescribed by the Chief Executive Officer with the approval of the Board.]

Section 4.7. President. The President shall have such powers and perform such duties as the Board of Directors [or Chief Executive Officer ]may from time to time prescribe.

Section 4.8. Vice Presidents. Each Vice President shall have such powers and perform such duties as the Board of Directors[ or the Chief Executive Officer] may from time to time prescribe.

Section 4.9. Treasurer. The Treasurer shall have charge of all funds and securities of the Corporation, shall endorse the same for deposit or collection when necessary and deposit the same to the credit of the Corporation in such banks or depositories as the Board of Directors may authorize. He may endorse all commercial documents requiring endorsements for or on behalf of the Corporation, may sign all receipts and vouchers for payments made to the Corporation and may disburse funds in accordance with the Rules or as directed by the Board of Directors. He shall have all such further powers and duties as generally are incident to the position of Treasurer or as may be assigned to him by [the Chief Executive Officer or] the Board of Directors.

Section 4.10. Secretary. The Secretary shall record all the proceedings of the meetings of the stockholders and directors in a book to be kept for that purpose and shall also record therein all action taken by written consent of directors in lieu of a meeting. He shall determine whether a nominee for either Director or a prospective committee member meets the required qualifications for such a position and shall review the qualifications of such persons at least annually. He shall attend to the giving and serving of all notices of the Corporation. He shall have custody of the seal of the Corporation and shall attest the same by his signature whenever required. He shall have charge of the stock ledger and such other books and papers as the Board of Directors may direct, but he may delegate responsibility for maintaining the stock ledger to any transfer agent appointed by the Board of Directors. He shall have all such further powers and duties as generally are incident to the position of Secretary or as may be assigned to him by the [Chief Executive Officer or the] Board of Directors.

Section 4.11. Assistant Treasurers. In the absence or inability to act of the Treasurer, any Assistant Treasurer may perform all the duties and exercise all the powers of the Treasurer. An Assistant Treasurer shall also perform such other duties as the Treasurer or the Board of Directors may assign to him.

Section 4.12. Assistant Secretaries. In the absence or inability to act of the Secretary, any Assistant Secretary may perform all the duties and exercise all the powers of the Secretary. An Assistant Secretary shall also perform such other duties as the Secretary or the Board of Directors may assign to him.

Section 4.13. Delegation of Duties. In case of the absence of any officer of the Corporation, or for any other reason that the Board of Directors may deem sufficient, the

Board of Directors may confer for the time being the powers or duties, or any of them, of such officer upon any other officer or upon any director.

## ARTICLE V

### Committees

Section 5.1. Designation of Committees of the Board of Directors. (a) The Board of Directors may from time to time designate one or more committees of the Board of Directors (the "Board Committees"). The Board of Directors may designate one or more directors as alternate members of any Board Committee, who may replace any absent or disqualified member at any meeting of the Board Committee. The resolution of the Board of Directors may, in addition or alternatively, provide that in the absence or disqualification of a member of a Board Committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he, or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in the place of any such absent or disqualified member. Any such Board Committee, to the extent provided in the resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation to be affixed to all papers which may require it, except with respect to those matters referred to in Section 5.2(c) of this Constitution and as otherwise provided by law. Unless the resolution of the Board of Directors expressly so provides, no such Board Committee shall have the power or authority to declare a dividend or to authorize the issuance of stock. Any such Board Committee may adopt rules governing the method of calling and time and place of holding its meetings. Unless otherwise set forth herein or as provided by the Board of Directors, a majority of any such Board Committee (or the member thereof, if only

one) shall constitute a quorum for the transaction of business, and the vote of a majority of the members of such Board Committee present at a meeting at which a quorum is present shall be the act of such Board Committee. Any or all members of any such Board Committee may be removed, with or without cause, by resolution of the Board of Directors.

(b) A committee or subcommittee, other than a Board Committee, may consist of industry and non-industry representatives that are not directors. Such committee members may be appointed by the Board of Directors or the Board of Directors may delegate such authority. Each prospective committee member who is not a director shall, upon request, provide the Secretary of the Corporation with such information as is reasonably requested in order to verify that the prospective committee member meets any specified qualifications.

(c) Members of any committee, including a Board Committee, appointed to such committee by the Board of Directors, may only be removed by the Board of Directors.

Section 5.2. Executive Committee. (a) The Executive Committee shall consist of six (6) directors, including the Chairman of the Board, the Vice Chairman of the Board and the Chief Executive Officer. At least three (3) of the members of the Executive Committee shall be Non-Industry Directors, at least one (1) of whom shall be a Public Director. The Board shall appoint the members of the Executive Committee in accordance with this Section 5.2.

(b) The Chairman of the Executive Committee shall be the Chief Executive Officer of the Corporation.

(c) The Executive Committee shall have and may exercise all the powers and authority of the Board of Directors except that the Executive Committee shall not have the powers of the Board of Directors with respect to approving any merger, consolidation, sale of substantially all of the assets or dissolution of the Corporation.

(d) At all meetings of the Executive Committee, a quorum for the transaction of business shall consist of a majority of the Executive Committee [, including at least one (1) of the non-industry committee members. The requirement that at least one (1) of the non-industry committee members be present to constitute a quorum shall be deemed satisfied if all of the non-industry committee members have waived their attendance for a meeting after receiving an agenda prior to such meeting].

(e) When a quorum is present at a meeting of the Executive Committee, a majority of such Committee members shall have the power to decide any question that may come before such meeting.

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 days, but not more than 45 days, prior to each [Annual Meeting of Stockholders]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.

(b) A member of the Nominating Committee may not simultaneously serve on the Board of Directors, unless such member is in the final year of his term as Director and does not stand for reelection to the Board of Directors until such time as he is no longer a member of the Nominating Committee.

(c) The Nominating Committee shall nominate persons for election to the Board of Directors as the Series B-1 Directors, Series B-2 Directors and Series B-3 Directors by the stockholders during the annual election meeting pursuant to the following:

(1) The Nominating Committee shall meet on such dates and at such times as determined by the Committee for the purpose of selecting not less than one (1) nominee for each expiring term and vacancy on the Board of Directors for the Series B-1 Directors, Series B-2 Directors and Series B-3 Directors.

(2) The Nominating Committee will accept recommendations of nominations for an expiring term or vacancy of a Series B [Director] -1 Director, Series B-2 Director or Series B-3 Director from the stockholders entitled to elect such person as provided for in Section 3.10(a).

(3) In the event any nominee named by the Nominating Committee withdraws or becomes ineligible, the Nominating Committee may select an additional nominee to replace the withdrawn or ineligible nominee.

(d) At all meetings, a quorum for the transaction of business shall consist of a majority of the members of the Nominating Committee. In the absence of a quorum, a majority of the committee members present may adjourn the meeting until a quorum is present.

Section 5.4. [Audit Committee]Corporate Governance Committee. [The Board of Directors shall appoint an Audit Committee consisting of three (3) to five (5) directors, none of whom shall be officers or employees of the Corporation. Each member of the Audit Committee shall be a Non-Industry Director, and at least one (1) of the Non-Industry Directors shall be a Public Director who shall serve as Chair of the Audit Committee. Members of the Audit Committee shall serve for one (1) year terms. The Board shall appoint the



members of the Audit Committee in accordance with this Section 5.4.] The Corporate Governance Committee shall consist of three (3), and no more than eight (8), Non-Industry Directors, each of whom shall meet the requirements established in the Corporate Governance Committee charter. The Board of Directors shall adopt a charter setting forth the responsibilities of the Corporate Governance Committee.

[(a) The Audit Committee shall annually recommend to the Board of Directors independent public accountants for appointment as auditors of the books, records and accounts of the Corporation. The Audit Committee shall have the responsibility to annually review with the independent accountants the scope of their examination and the cost thereof. The Audit Committee shall review the annual “management letter” and other reports submitted by the independent accountants and take such action with respect thereto as it may deem appropriate. It also shall periodically review with the independent accountants and the internal auditor the Corporation’s internal controls and the adequacy of the internal audit program.]

Section 5.5. Finance & Audit Committee. (a) The Finance & Audit Committee shall consist of three (3), and no more than five (5), Non-Industry Directors, each of whom shall meet the requirements established in the Finance & Audit Committee charter. The Board of Directors shall adopt a charter setting forth the responsibilities of the Finance & Audit Committee.

(b) At all meetings of the Finance & Audit Committee, a quorum for the transaction of business shall consist of a majority of the Finance & Audit Committee. In the absence of a quorum, a majority of the Committee members present may adjourn the meeting until [a] quorum is present.

Section [5.5]5.6 Compensation Committee. The Compensation Committee shall consist of three (3), and no more than five (5), Non-Industry Directors, each of whom shall meet the requirements established in the Compensation Committee charter. The Board of Directors shall adopt a charter setting forth the responsibilities of the Compensation Committee.

Section [5.6]5.7 Conduct of Proceedings. Except as otherwise provided in this Constitution, the Rules or by resolution of the Board of Directors, each Committee may determine the manner in which its proceedings shall be conducted.

## ARTICLE VI

### Indemnification and Insurance

Section 6.1. Right to Indemnification. Each person who was or is made a party or is threatened to be made a party to or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (hereinafter a “proceeding”), by reason of the fact that he or a person of whom he is the legal representative is or was a director or an officer of the Corporation or is or was serving at the request of the Corporation as a director, officer, employee or agent of any other corporation or of a partnership, joint venture, trust or other enterprise, including service with respect to any employee benefit plan (hereinafter an “indemnitee”), whether the basis of such proceeding is alleged action in an official capacity as a director, officer, employee or agent or in any other capacity while serving as a director, officer, employee or agent, shall be indemnified and held harmless by the Corporation to the fullest extent authorized by the [General Corporation Law of the State of Delaware (the “GCL”)] GCL, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the Corporation to provide broader indemnification rights than said law permitted the Corporation to provide prior to such amendment), against all

expense, liability and loss (including, without limitation, attorneys' fees, judgments, fines, excise taxes or penalties under the Employee Retirement Income Security Act of 1974, as amended, and amounts paid or to be paid in settlement) reasonably incurred by such indemnitee in connection therewith; provided, however, that except as provided in Section 6.3 with respect to proceedings seeking to enforce rights to indemnification, the Corporation shall indemnify any such indemnitee seeking indemnification in connection with a proceeding (or part thereof) initiated by such indemnitee only if such proceeding (or part thereof) was authorized by the Board of Directors.

Section 6.2. Right to Advancement of Expenses. The right to indemnification conferred in Section 6.1 shall include the right to be paid by the Corporation the expenses (including attorneys' fees) incurred in defending any such proceeding in advance of its final disposition (hereinafter an "advancement of expenses"); provided, however, that, if the GCL requires, an advancement of expenses incurred by an indemnitee in his capacity as a director or officer (and not in any other capacity in which service was or is rendered by such indemnitee, including, without limitation, service to an employee benefit plan) shall be made only upon delivery to the Corporation of an undertaking (hereinafter an "undertaking"), by or on behalf of such indemnitee, to repay all amounts so advanced if it shall ultimately be determined by final judicial decision from which there is no further right to appeal (hereinafter a "final adjudication") that such indemnitee is not entitled to be indemnified for such expenses under this Section 6.2 or otherwise.

Section 6.3. Right of Indemnitee to Bring Suit. If a claim under Section 6.1 or Section 6.2 is not paid in full by the Corporation within thirty (30) days after a written claim has been received by the Corporation, except in the case of a claim for an advancement of expenses,

in which case the applicable period shall be twenty (20) days, the indemnitee may at any time thereafter bring suit against the Corporation to recover the unpaid amount of the claim. If successful in whole or in part in any such suit, or in a suit brought by the Corporation to recover an advancement of expenses pursuant to the terms of an undertaking, the indemnitee shall be entitled to be paid also the expense of prosecuting or defending such suit. In (i) any suit brought by the indemnitee to enforce a right to indemnification hereunder (but not in a suit brought by the indemnitee to enforce a right of an advancement of expenses) it shall be a defense that, and (ii) in any suit brought by the Corporation to recover an advancement of expenses pursuant to the terms of an undertaking, the Corporation shall be entitled to recover such expenses upon a final adjudication that, the indemnitee has not met any applicable standard for indemnification set forth in the GCL. Neither the failure of the Corporation (including its Board of Directors, independent legal counsel or stockholders) to have made a determination prior to the commencement of such action that indemnification of the indemnitee is proper in the circumstances because the indemnitee has met the applicable standard of conduct set forth in the GCL, nor an actual determination by the Corporation (including its Board of Directors, independent legal counsel or stockholders) that the indemnitee has not met such applicable standard of conduct, shall create a presumption that the indemnitee has not met the applicable standard of conduct or, in the case of such a suit brought by the indemnitee, be a defense to such suit. In any suit brought by the indemnitee to enforce a right to indemnification or to an advancement of expenses hereunder, or brought by the Corporation to recover an advancement of expenses pursuant to the terms of an undertaking, the burden of proving that the indemnitee is not entitled to be indemnified, or to such advancement of expenses, under this Article VI or otherwise shall be on the Corporation.

Section 6.4. Non-Exclusivity of Rights. The right to indemnification and the advancement of expenses conferred in this Article VI shall not be exclusive of any other right which any person may have or hereafter acquire under any statute, provision of the Certificate of Incorporation, provision of this Constitution, agreement, vote of stockholders or disinterested directors or otherwise.

Section 6.5. Insurance. The Corporation may maintain insurance, at its expense, to protect itself and any director, officer, employee or agent of the Corporation or another corporation, partnership, joint venture, trust or other enterprise against any expense, liability or loss, whether or not the Corporation would have the power to indemnify such person against such expense, liability or loss under the GCL.

Section 6.6. Indemnification of Employees and Agents of the Corporation. The Corporation may, to the extent authorized from time to time by the Board of Directors, grant rights to indemnification, and rights to the advancement of expenses, to any employee or agent of the Corporation to the fullest extent of the provisions of this Article VI with respect to the indemnification and advancement of expenses of directors and officers of the Corporation.

Section 6.7. Contract Rights. The rights to indemnification and to the advancement of expenses conferred in Section 6.1 and Section 6.2 shall be contract rights and such rights shall continue as to an indemnitee who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the indemnitee's heirs, executors and administrators.

## ARTICLE VII

### Common Stock

Section 7.1. Certificates. Certificates for stock of the Corporation shall be in such form as shall be approved by the Board of Directors and shall be signed in the name of the

Corporation by the Chairman of the Board, the Chief Executive Officer, the President or a Vice President, and by the Treasurer or an Assistant Treasurer, or the Secretary or an Assistant Secretary. Such certificates may be sealed with the seal of the Corporation or a facsimile thereof. Any of or all the signatures on a certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the Corporation with the same effect as if he were such officer, transfer agent or registrar at the date of issue. The Board of Directors may provide by resolution or resolutions that all or some of any class or series of stock of the Corporation shall be uncertificated shares. Within a reasonable time following the issuance or transfer of any uncertificated shares, the Corporation shall send to the registered owner thereof any written notice prescribed by the GCL.

Section 7.2. Transfers of Stock. Transfers of stock shall be made only upon the books of the Corporation by the holder, in person or by a duly authorized attorney, and on the surrender of the certificate or certificates for the same number of shares, with an assignment and power of transfer endorsed thereon or attached thereto, duly executed, with such proof of the authenticity of the signature as the Corporation or its agents may reasonably require. The Board of Directors shall have the power to make all such rules and regulations, not inconsistent with the Certificate of Incorporation and this Constitution and the GCL, as the Board of Directors may deem appropriate concerning the issue, transfer and registration of certificates for stock of the Corporation. The Board of Directors may appoint one or more transfer agents or registrars of transfers, or both, and may require all stock certificates to bear the signature of either or both.

Section 7.3. Lost, Stolen or Destroyed Certificates. The Corporation may issue a new stock certificate in the place of any certificate theretofore issued by it, alleged to have been lost, stolen or destroyed, and the Corporation may require the owner of the lost, stolen or destroyed certificate or his legal representative to give the Corporation a bond sufficient to indemnify it against any claim that may be made against it on account of the alleged loss, theft or destruction of any such certificate or the issuance of any such new certificate. The Board of Directors may require such owner to satisfy other reasonable requirements as it deems appropriate under the circumstances.

Section 7.4. Stockholder Record Date. In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, or entitled to receive payment of any dividend or other distribution or allotment of any rights, or entitled to exercise any rights in respect of any change, conversion or exchange of stock, or for the purpose of any other lawful action, the Board of Directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board of Directors, and which shall not be more than sixty (60) nor less than ten (10) days before the date of such meeting, nor more than sixty (60) days prior to any other action.

If no record date is fixed by the Board of Directors, (1) the record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be at the close of business on the day next preceding the date on which notice is given, or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held, and (2) the record date for determining stockholders for any other purpose shall be at the close of business on the day on which the Board of Directors adopts the resolution relating thereto.

A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.

Only such stockholders as shall be stockholders of record on the date so fixed shall be entitled to notice of, and to vote at, such meeting and any adjournment thereof, or to receive payment of such dividend or other distribution, or to exercise such rights in respect of any such change, conversion or exchange of stock, or to participate in such action, as the case may be, notwithstanding any transfer of any stock on the books of the Corporation after any record date so fixed.

## ARTICLE VIII

### Seal

Section 8.1. Seal. The seal of the Corporation shall be circular in form and shall bear, in addition to any other emblem or device approved by the Board of Directors, the name of the Corporation, the year of its incorporation and the words “Corporate Seal” and “Delaware”. The seal may be used by causing it or a facsimile thereof to be impressed or affixed or in any other manner reproduced.

## ARTICLE IX

### Waiver of Notice

Section 9.1. Waiver of Notice. Whenever notice is required to be given to any stockholder or director of the Corporation under any provision of the GCL or the Certificate of Incorporation or this Constitution, a written waiver thereof, signed by the person or persons entitled to notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice. In the case of a stockholder, such waiver of notice may be signed by



such stockholder's attorney or proxy duly appointed in writing. Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the stockholders, directors or members of a committee of directors need be specified in any written waiver of notice.

#### ARTICLE X

##### Checks, Notes, Drafts, Etc.

Section 10.1. Checks, Notes, Drafts, Etc. Checks, notes, drafts, acceptances, bills of exchange and other orders or obligations for the payment of money shall be signed by such officer or officers or person or persons as the Board of Directors or a duly authorized committee thereof may from time to time designate.

#### ARTICLE XI

##### Amendments

Section 11.1. Amendments. This Constitution may be amended, added to, rescinded or repealed at any meeting of the Board of Directors or of the stockholders, provided that notice of the proposed change was given in the notice of the meeting and, in the case of the Board of Directors, in a notice given no less than twenty-four hours prior to the meeting; provided, [further,] however, that, in the case of amendments by stockholders, notwithstanding any other provisions of this Constitution or any provision of law which might otherwise permit a lesser vote or no vote, but in addition to any affirmative vote of the holders of any particular class or series of stock required by law, the Certificate of Incorporation or this Constitution, the affirmative vote of the holders of at least [two-thirds] a majority of the voting power [of each

class of capital stock of the Corporation entitled to vote on such amendment]with respect thereto, either present or represented by proxy, voting together as a single class, shall be required to alter, amend or repeal any provision of this Constitution.

## ARTICLE XII

### Regulation

Section 12.1. Rulemaking. The Board of Directors may, by the affirmative vote of a majority of the entire Board of Directors, which must include the affirmative vote of either (i) at least one (1) Series B-1 Director and at least one (1) Series B-2 Director, or (ii) at least five (5) Non-Industry Directors, adopt, amend or repeal such Rules as it may deem necessary or proper, including, but not limited to, Rules with respect to:

- (a) The trading of securities on the Exchange;
- (b) The access of Members to and the conduct of such Members with the Exchange System and their use of System facilities;
- (c) Insolvency of the Members;
- (d) The partners, officers, directors, stockholders and employees of Members;
- (e) The business conduct of Members;
- (f) The business connections of Members, and their association with or domination by or over corporations or other persons engaged in the securities business;
- (g) Capital requirements for Members;
- (h) The arbitration of disputes, claims and controversies between Members and procedures relating thereto;
- (i) Transfers of shares of Class B Common Stock and disposition of the proceeds of such transfers; and

(j) The conduct and procedure for disciplinary hearings and reviews therefrom.

Section 12.2. Supervision. The Board of Directors shall have general supervision over the examination of Members and associated persons in connection with their conduct of business related to being a Member of the Exchange.

(a) The Board of Directors may examine the business conduct and financial condition of Members and associated persons.

(b) The Board of Directors may adopt Rules with respect to the Exchange's supervision over partnership and corporate arrangements and over officers of Members, as well as with respect to the employment, compensation and duties of such employees as it may deem appropriate.

(c) The Board of Directors shall supervise all matters relating to the collection, dissemination and use of quotations and of reports of prices on the Exchange.

(d) The Board of Directors shall have the power to approve or disapprove any connection or means of communication with the Exchange and may require the discontinuance of any such connection or means of communication.

Section 12.3. Securities. The Board of Directors may approve the admission of securities for trading on the Exchange or may remove the same from trading on the Exchange.

Section 12.4. Penalties. The Board of Directors may prescribe and impose penalties for violations of this Constitution or Rules for neglect or refusal to comply with orders, directions or decisions of the Board of Directors, or for any other offenses against the Exchange.

## ARTICLE XIII

### Provisions Regarding Class B Common Stock, Members and Trading Privileges

Section 13.1. Series B-1 Stock.

(a) Each share of Series B-1 Stock shall have the trading rights and privileges set forth herein and in the Rules for its Primary Market Makers. A holder of Series B-1 Stock shall (i) exercise the trading rights and privileges associated with a share of Series B-1 Stock if such holder is approved as a Primary Market Maker under this Constitution and the Rules, or (ii) lease the trading rights and privileges to an entity that is approved as a Primary Market Maker under this Constitution and the Rules.

(b) Each Primary Market Maker shall be the holder of one or more shares of Series B-1 Stock, or be the lessee of trading rights associated with one or more shares of Series B-1 Stock. Each share of Series B-1 Stock shall entitle a Primary Market Maker, who meets the Corporation's eligibility criteria and is in good standing, to enter quotations and orders into the Exchange's System for such Member's own account and to perform other functions specified in the Rules to facilitate execution and handling of orders placed into the Exchange's System with respect to options classes allocated by the Exchange as provided in the Rules. Each such Member shall also be permitted to effect proprietary transactions in other options classes traded on the Exchange pursuant to the Rules.

(c) A share of Series B-1 Stock and/or the trading privileges associated with a share of Series B-1 Stock shall be transferable by the holder of such share or, in the case of leased trading privileges, with such holder's permission, but only upon the approval of the Exchange as provided in this Constitution and the Rules.

Section 13.2. Series B-2 Stock. (a) Each share of Series B-2 Stock shall have the trading rights and privileges as set forth herein and in the Rules for its Competitive Market Makers. A holder of Series B-2 Stock shall (i) exercise the trading rights and privileges associated with a share of Series B-2 Stock if such holder is approved as a Competitive Market

Maker under this Constitution and the Rules, or (ii) lease the trading rights and privileges to an entity that is approved as a Competitive Market Maker under this Constitution and the Rules.

(b) Each Competitive Market Maker shall be the holder of one or more shares of Series B-2 Stock, or a lessee of the trading rights associated with one or more shares of Series B-2 Stock. Each share of Series B-2 Stock shall entitle a Competitive Market Maker, who meets the Corporation's eligibility criteria and is in good standing, to enter quotations and orders into the Exchange's System for such Member's own account with respect to options classes allocated by the Exchange as provided in the Rules. Each such Member shall also be permitted to effect proprietary transactions in other options classes traded on the Exchange pursuant to the Rules.

(c) A share of Series B-2 Stock and/or the trading privileges associated with a share of Series B-2 Stock shall be transferable by the holder of such share or, in the case of leased trading privileges, with such holder's permission, but only upon the approval of the Exchange as provided in this Constitution and the Rules.

### Section 13.3. Series B-3 Stock.

(a) Each holder of a share of Series B-3 Stock shall be an Electronic Access Member and shall have the trading rights and privileges as set forth herein and in the Rules for its Electronic Access Members so long as it meets the Corporation's eligibility criteria and is in good standing. Each such Member shall be entitled to (i) enter orders into the Exchange's System, and/or (ii) clear Exchange Transactions.

(b) The trading privileges associated with the Series B-3 Stock shall not be transferable. A holder of Series B-3 Stock may withdraw from the Exchange upon the approval of the Exchange, which shall be given upon a determination that the holder of Series B-3 Stock

has satisfied all obligations to the Exchange. Upon such approval, the Corporation shall be required to purchase the shares of Series B-3 Stock from such holder at par value.

Section 13.4. Lessee Members. (a) A holder of Series B-1 Stock or Series B-2 Stock in good standing may lease the trading rights and privileges associated with such shares to an approved Member of the Exchange as provided in Sections 13.1 and 13.2 hereof, subject to and in accordance with such rules and procedures as may be adopted by the Board of Directors.

(b) Except with respect to the Core Rights, as defined in the Certificate of Incorporation of the Corporation, which such voting rights shall remain with the lessor, under a lease agreement, the lessor may retain voting rights with respect to the shares of Series B-1 Stock or Series B-2 Stock or may transfer such voting rights to the lessee; provided, however, that if the lessor is a Founder, the voting rights associated with shares of Series B-1 Stock and Series B-2 Stock, other than with respect to the Core Rights, shall automatically be transferred to the lessee.

Section 13.5. Approval of Class B Holders. Each holder of a share of Class B Common Stock must be approved by the Exchange with respect to each share held by such holder. Any holder of Class B Common Stock approved by the Exchange shall not be deemed a Member of the Exchange unless such holder has also been approved to exercise trading rights and privileges in accordance with this Constitution and the Rules. The good standing of a holder of Class B Common Stock may be suspended, terminated or otherwise withdrawn, as provided in the Rules, if any of the requirements for approval set forth therein cease to be maintained, or if such holder violates any agreements with the Exchange or any of the provisions of this Constitution or the Rules.

Section 13.6. Eligibility for Trading Privileges; Members. Members of the

Exchange shall be corporations, partnerships or limited liability companies that meet the requirements for approval as stated in this Constitution and the Rules. Except as otherwise provided in this Constitution and the Rules, such Members must have as the principal purpose of their ownership of Class B Common Stock, or lease of the trading rights and privileges associated with the Series B-1 Stock or Series B-2 Stock, the conduct of a public securities business as defined in the Rules. The good standing of a Member may be suspended, terminated or otherwise withdrawn, as provided in the Rules, if any of said conditions for approval cease to be maintained or such Member violates any of its agreements with the Exchange or any of the provisions of [the]this Constitution or the Rules. Unless such a Member is in good standing, the Member shall have no rights or trading privileges except as otherwise provided by law, this Constitution or the Rules, shall not hold itself out for any purpose as a Member of the Exchange, and shall not deal with the Exchange on any basis except as an entity without trading privileges.

Section 13.7. Membership Agreement. No Member shall be entitled to any privileges thereof until such Member has agreed to be bound by this Constitution and the Rules by execution of a Membership Agreement. By such agreement such Member pledges to abide by the same as it has been or shall be from time to time amended.

Section 13.8. Registration of Individual Memberships for Organizations. Every individual holder of Class B Common Stock or applicant who is or intends to become an executive officer, director, principal shareholder or general partner of an organization engaged or proposed to engage in business as a Member on the Exchange may apply to register his shares for such organization. Additional individual holders of Class B Common Stock may register their shares for such an organization in accordance with the Rules. Registration of an individual

holder of Class B Common Stock for an organization may be withdrawn by the Exchange for any reason that would justify withdrawal of the approval of either the individual, as a holder of Class B Common Stock, or the Member in relation to its trading privileges.

Section 13.9. Acquisition and Transfer of Shares of Class B Common Stock. Shares of Class B Common Stock may only be offered for sale and transferred by the owners thereof, or under certain circumstances by the Exchange, as provided in the Rules or in this Constitution.

[ARTICLE XIV  
Concentration Limits]

[Section 14.1 Concentration Limits on Class B Common Stock. (a) A holder of Class B Common Stock, together with any affiliate, may not own more than twenty percent (20%) of Series B-1 Stock or Series B-2 Stock. The Exchange may establish limitations that further limit the number of shares of Class B Common Stock that may be owned by an individual or entity. Founders shall have a temporary exemption, not to extend past May 26, 2010, from the limitation on ownership contained in this paragraph; provided, however, that Founders shall have no voting rights nor give any proxy in relation to a vote of the stockholders of the Corporation, other than a vote related to Core Rights, for any shares in excess of twenty percent (20%) of the Series B-1 Stock or twenty percent (20%) of the Series B-2 Stock; and provided, further, that whether or not a Founder otherwise participates in a meeting in person or by proxy, such Founder's Excess Shares shall be counted for quorum purposes and shall be voted by the inspector of elections or other person presiding over quorum and vote matters in the same proportion as the shares of Series B-1 Stock or Series B-2 Stock, as the case may be, held by stockholders other than such Founder are voted (including any abstentions from voting).



(b) A Member, together with any affiliate, may not be approved to exercise the trading rights associated with more than twenty percent (20%) of the Series B-1 Stock, nor more than twenty (20%) of the Series B-2 Stock. The Exchange may establish further limitations relating to the Exchange's approval of a Member's ability to effect Exchange Transactions.]

[Section 14.2 Concentration Limits on Class A Common Stock. (a) In the event that a holder of Class A Common Stock, together with any affiliate as defined in the Corporation's Constitution (an "Affiliate"), owns more than twenty percent (20%) of the Class A Common Stock (shares owned in excess of twenty percent (20%) being referred to as "Excess Shares"), such holder shall have no voting rights nor give any proxy in relation to a vote of the stockholders of the Corporation with respect to the Excess Shares held by such person; provided, however, that whether or not such person otherwise participates in a meeting in person or by proxy, such person's Excess Shares shall be counted for quorum purposes and shall be voted by the inspector of elections or other person presiding over quorum and vote matters in the same proportion as the shares of Class A Common Stock held by stockholders other than such person are voted (including any abstentions from voting). In applying this paragraph:

(i) The Board may approve an exemption to this paragraph for any person other than: (1) a Member; (2) an Affiliate of such Member; or (3) a person that is subject to a statutory disqualification under Section 3(a)(3) of the Securities Exchange Act of 1934, as amended; and

(ii) In granting an exemption pursuant to paragraph (a)(i) above, the Board must determine that such exemption: (1) would not reasonably be expected to diminish the quality of, or public confidence in, the Corporation; (2) would not impair the ability of the Corporation to prevent fraudulent and manipulative acts and

practices; and (3) would provide 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 and would assist in the removal of impediments to the perfection of the mechanisms for a free and open market and a national market system.

(b) Founders shall have a temporary exemption, not to extend past May 26, 2010, from the voting limitation on Excess Shares contained in paragraph (a) above, but only with respect to any vote regarding any merger, consolidation or dissolution of the Corporation or any sale of all or substantially all of the assets of the Corporation.]

#### ARTICLE [XV] XIV

##### Definition of Terms

Section [15.1] 14.1 Definitions. When used in this Constitution, unless the context otherwise requires:

(a) The term “affiliate” of a person or “affiliated with” another person means a person who, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, another person.

(b) The term “Class B Common Stock” means all series of Class B Common Stock, par value \$.01 per share, of the Corporation.

(c) The term “Competitive Market Maker” means a Member of the Exchange that is approved to exercise trading privileges associated with Series B-2 Stock.

(d) The term “Commission” means the United States Securities and Exchange Commission.

(e) The term “Constitution” means this Amended and Restated Constitution as may be further amended from time to time.

[(d)f] The term “control” means the power to exercise a controlling influence over the management or policies of a person, unless such power is solely the result of an official position with such person. Any person who owns beneficially, directly or indirectly, more than twenty percent (20%) of the voting power in the election of directors of a corporation, or more than twenty-five percent (25%) of the voting power in the election of directors of any other corporation which directly, or through one or more affiliates, owns beneficially more than twenty-five percent (25%) of the voting power in the election of directors of such corporation, shall be presumed to control such corporation.

[(e)g] The term “Electronic Access Member” means a Member that is approved to exercise trading privileges associated with Series B-3 Stock.

[(f)h] The term “Exchange” means the Corporation and, where the context requires, a predecessor of the Corporation.

(i) The term “Exchange Act” means the Securities Exchange Act of 1934, as amended and the rules promulgated thereunder.

[(g)j] The term “Exchange Transaction” means a transaction executed on or through the facilities of the Exchange.

[(h)k] The term “Founder” means a person or entity that purchased the former Class A or Class B Memberships directly from the Exchange on or prior to August 1, 1998, but only with respect to his or its ownership of such memberships.

(l) The term “GCL” means the General Corporation Law of the State of Delaware.

([i]m) The term “good standing” means that a holder of Class B Common Stock is not delinquent respecting Exchange dues, fees or other charges and is not suspended or barred from the Exchange or from association with a holder of Class B Common Stock either by the Exchange or by means of a statutory disqualification.

([j]n) The terms “he”, “him” or “his” shall be deemed to refer to persons of female as well as male gender, and to include organizations, as well as individuals, when the context so requires.

([k]o) The term “industry representative” means a person who is an officer, director or employee of a broker or dealer or who has been employed in any such capacity at any time within the prior three (3) years, as well as a person who has a consulting or employment relationship with or has provided professional services to the Exchange and a person who had any such relationship or provided any such services to the Exchange at any time within the prior three (3) years.

([l]p) The term “Member” means an organization that has been approved to exercise trading rights associated with Class B Common Stock.

([m]q) The term “non-industry representative” means any person that would not be considered an “industry representative,” as well as (i) a person affiliated with a broker or dealer that operates solely to assist the securities-related activities of the business of non-member affiliates, (ii) an employee of an entity that is affiliated with a broker or dealer that does not account for a material portion of the revenues of the consolidated entity, and who is primarily engaged in the business of the non-member entity.

([n]r) The term “person associated with a holder” or an “associated person” means any partner, officer, director, or branch manager of a holder of Class B Common Stock

(or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such holder of Class B Common Stock, or any employee of such holder of Class B Common Stock.

([o]s) The term “Primary Market Maker” means a Member of the Exchange that is approved to exercise the trading privileges associated with Series B-1 Stock.

([p]t) The term “public representative” means a non-industry representative who has no material business relationship with a broker or dealer or the Exchange.

([q]u) The term “Rules” means the rules of the Exchange as adopted or amended from time to time.

([r]v) The “System” means the electronic system operated by the Exchange that receives and disseminates quotes, executes orders and reports transactions.

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## **International Securities Exchange Rules**

### **Rule 303. Approval to Operate Multiple Memberships**

(a) – No change

(b) An applicant or approved Member will be denied approval with respect to a particular Membership if (together with any of its affiliates) approval would result in the applicant or approved Member being approved to [operate] exercise the trading privileges associated with more than one (1) Primary Market Maker Membership or more than ten (10) Competitive Market Maker Memberships[, unless t]This requirement [is] may be waived by the Board for good cause shown, but in no event shall the Board waive this requirement if such waiver would result in the applicant or approved Member (together with any of its affiliates) being approved to exercise trading privileges associated with more than 20% of the outstanding Primary Market Maker Memberships or more than 20% of the outstanding Competitive Market Maker Memberships.”