

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59888; File No. SR-ISE-2009-23)

May 7, 2009

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, as Modified by Amendment No. 1, by the International Securities Exchange, LLC Relating to Amending the Direct Edge ECN Fee Schedule to Increase the Super Tier Rebate in Securities Reported to Tape A and Tape C

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 1, 2009, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend Direct Edge ECN's ("DECN") fee schedule for ISE Members<sup>3</sup> to raise the Super Tier Rebates, as defined below, for securities reported to Tape A and Tape C and to make certain other clarifying changes. All of the changes described herein are applicable to ISE Members.

The text of the proposed rule change is available on the Exchange's Internet Web site at <http://www.ise.com>.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> References to ISE Members in this filing refer to DECN Subscribers who are ISE Members.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

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

1. Purpose

DECN, a facility of ISE, operates two trading platforms, EDGX and EDGA. Currently, DECNs' fee schedule includes a per share rebate in securities reported to Tape A and Tape C of \$0.0029 per share for ISE Members that add liquidity on EDGX if the ISE Member satisfies any of the following three criteria on a daily basis, measured monthly: (i) adding 40,000,000 shares or more on either EDGX, EDGA or EDGX and EDGA combined; (ii) adding 20,000,000 shares or more on either EDGX, EDGA or EDGX and EDGA combined and routing 20,000,000 shares or more through EDGA; or (iii) adding 10,000,000 shares or more of liquidity to EDGX, so long as added liquidity on EDGX is at least 5,000,000 shares greater than the previous calendar month. The rebate described above is referred to as a "Super Tier Rebate" on the DECN fee schedule.

The Exchange is now proposing to raise the aforementioned Super Tier Rebate from \$0.0029 to \$0.003 per share. The Exchange is raising this rebate to maintain a competitive rate. This fee change will become operative on May 1, 2009.

In an effort to increase volume on EDGA, DECN currently offers volume discounts for ISE Members who route 20,000,000 shares or more on a daily basis, measured monthly, to Nasdaq through EDGA using order types that are solely eligible for routing to Nasdaq. Such orders are currently charged at \$0.0025 per share with respect to EDGA routed volume. ISE Members routing 30,000,000 shares per day are charged \$0.0024 per share with respect to EDGA routed volume. Recently, Nasdaq has amended its pricing by increasing its fee for orders that remove liquidity by \$0.0004.<sup>4</sup> Accordingly, the Exchange is now proposing to amend the DECN volume discounts that apply to ISE Members by increasing each volume discount fee by \$0.0004, which will change the fee to \$0.0029 per share and \$0.0028 per share, respectively.

On April 1, 2009, the Exchange amended the DECN fee schedule to reduce the rebate from \$0.0035 per share to \$0.003 per share for orders that add liquidity on EDGX in securities priced at or above \$1.00 that are reported to Tape B by ISE Members.<sup>5</sup> In connection with this amendment, a portion of the corresponding footnote on the DECN fee schedule should have been deleted, but such deletion was overlooked at the time of the filing. The relevant portion of the footnote states “In the event that Direct Edge offers a rebate higher than \$0.0029 per share for subscribers who do not meet the criteria for the Super Tier, then those who meet the aforementioned criteria will receive the higher rebate.” The Exchange proposes to delete this language as Direct Edge is no longer offering this incentive.

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<sup>4</sup> See Securities and Exchange Commission Release No. 59843 (April 29, 2009), 74 FR 21046 (May 6, 2009) (SR-NASDAQ-2009-035).

<sup>5</sup> See Securities and Exchange Commission Release Nos. 59692 (April 2, 2009), 74 FR 16024 (April 8, 2009) (SR-ISE-2009-17).

The Exchange is also proposing to make certain clarifying changes to DECN's fee schedule. DECN's fee schedule includes a description of liquidity flags and associated fees. Flag D is appended to orders that are routed to and executed on the New York Stock Exchange ("NYSE"). Such orders are charged a fee on the NYSE because the order is removing liquidity. The fee assessed to this order is then passed back to the ISE Member that originated the order. The Exchange is now proposing to amend the description of Flag D to include, not just orders that are routed to NYSE, but also orders that are re-routed to NYSE. Meaning, the order that originates at DECN may get routed to another market center for execution, but that market center may re-route the order to NYSE, where the order ultimately receives an execution that results in a removal of liquidity. In this circumstance, the fee assessed to the order will still be passed back to the ISE Member that originated the order as if such order was originally routed to NYSE.

Finally, the Exchange is proposing to delete a portion of a footnote on DECN's fee schedule that provides for a lower charge to ISE Memers [sic] whose orders in securities that are reported to Tape A and Tape C first get routed to Nasdaq Stock Market ("Nasdaq") and then get re-routed by Nasdaq. In this circumstance, the ISE Member would be charged a fee of \$0.0026 per share for removing liquidity in Tape A and Tape C securities regardless of where the order ultimately gets executed and regardless of what the executing market center charges Nasdaq. Whereas, orders that get routed to any other market center and then re-routed by that market center get charged a fee of \$0.003 per share when the order removes liquidity. The Exchange is now proposing to delete the portion of the footnote that provides for this exception because Nasdaq has raised their

[sic] fee to \$0.003 per share for all orders that get routed to Nasdaq and then re-routed by Nasdaq.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>6</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>7</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, raising the Super Tier Rebate in Tape A and Tape C securities and offering pricing incentives to market participants who route orders to DECN allows DECN to remain competitive. ISE notes that DECN operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to DECN. Additionally, the Exchange is proposing to make certain clean-up and clarifying changes to the DECN fee schedule to assist ISE Members in understanding the charges that are applicable when using its facilities. ISE believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to those members that opt to direct orders to DECN rather than competing venues.

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<sup>6</sup> 15 U.S.C. 78f.

<sup>7</sup> 15 U.S.C. 78f(b)(4).

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

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

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

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

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

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act<sup>8</sup> and Rule 19b-4(f)(2)<sup>9</sup> thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

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

Electronic comments:

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<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 19b-4(f)(2).

- Use the Commission's Internet comment form <http://www.sec.gov/rules/sro.shtml>); or
- Send an E-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-ISE-2009-23 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-ISE-2009-23. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commissions Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information

that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2009-23 and should be submitted by [insert date 21 days from the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>10</sup> 17 CFR 200.30-3(a)(12).