

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60382; File No. SR-ISE-2009-45)

July 24, 2009

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by International Securities Exchange, LLC Relating to Changes to Rule 312 in Connection with the Purchase of Equity Interests by International Securities Exchange Holdings, Inc. in Optifreeze, LLC

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 23, 2009, the International Securities Exchange, LLC (the "Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is submitting this proposed rule change (the "Proposed Rule Change") to the Commission to amend ISE Rule 312 (Limitation on Affiliation between the Exchange and Members) in connection with the capital contribution by its parent company, International Securities Exchange Holdings, Inc. ("ISE Holdings"), in Optifreeze LLC, a Delaware Limited Liability Company ("Optifreeze"). The text of the proposed rule change is available on the Exchange's Web site [www.ise.com](http://www.ise.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

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

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

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

1. Purpose

On June 5, 2009, ISE Holdings entered into a Membership Purchase Agreement (“Purchase Agreement”) with Optifreeze. Pursuant to the Purchase Agreement, ISE Holdings contributed cash to the capital of Optifreeze in exchange for membership interests representing on the date of such issuance 8.57% of the aggregate membership interests in Optifreeze (“Purchased Interests”). ISE Holdings and its subsidiaries and affiliates do not have any voting or other “control” arrangements with any of the other members of Optifreeze relating to its investment in Optifreeze. The purchase by ISE Holdings of the Purchased Interests (the “Transaction”) was consummated on June 5, 2009. As a result of such purchase, ISE Holdings became a member of Optifreeze pursuant to the Third Amended and Restated Operating Agreement of Optifreeze dated June 5, 2009, and is entitled to appoint one representative to the Optifreeze Board of Directors. Ballista Securities LLC (“Ballista Securities”), a wholly-owned subsidiary of Optifreeze, is an electronic access member (“EAM”) of the Exchange.

In connection with the capital contribution by ISE Holdings in Optifreeze, the Exchange proposes to amend ISE Rule 312 (Limitation on Affiliation between the Exchange and Members)

to reflect ISE Holdings' ownership interest in Ballista Securities, and to set forth certain limitations and obligations relating to such relationship. In particular, the Exchange proposes that there be an exemption from Rule 312 of the Exchange with respect to the investment by ISE Holdings in Optifreeze. In relevant part, Rule 312 provides that, without prior SEC approval, the Exchange, or any entity with which the Exchange is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member or non-member owner. In addition, the Rule 312 provides that nothing in that rule shall prohibit a member or non-member owner from being or becoming an affiliate of the Exchange, or an affiliate of an affiliate of the Exchange solely by reason of any officer, director or partner of such member becoming an Exchange Director (as defined in the Amended and Restated Constitution of the ISE). As a result of the Transaction, the Exchange, through ISE Holdings, will maintain an ownership interest in an ISE member, Ballista Securities, which, without Commission approval, would be prohibited by Rule 312. The Commission has also has previously noted its concern regarding (1) the potential for conflicts of interest in instances where an exchange is affiliated with one of its members, and (2) the potential for informational advantages that could place an affiliated member of an exchange at a competitive advantage vis-à-vis the other non-affiliated members. The Commission has also noted its concerns about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members. As such, ISE proposes to amend Rule 312 to permit the proposed relationship subject to several conditions and limitations.

Accordingly, the Exchange is proposing to adopt subsection (c) to Rule 312 to require that, for so long as (i) ISE Holdings maintains an ownership interest in Ballista Securities; and (ii) Ballista Securities remains a member of the Exchange: (1) Financial Industry Regulatory

Authority (“FINRA”), a self-regulatory organization unaffiliated with the Exchange or any of its affiliates, will carry out oversight and enforcement responsibilities as the designated examining authority designated by the Commission pursuant to Rule 17d-1 of the Exchange Act with the responsibility for examining Ballista Securities for compliance with applicable financial responsibility rules; (2) the Exchange shall (a) enter into a plan pursuant to Rule 17d-2 under the Exchange Act with a non-affiliated self-regulatory organization (“SRO”) to relieve the Exchange of regulatory responsibilities for Ballista Securities with respect to rules that are common rules between the Exchange and the SRO, and (b) enter into a regulatory services contract with a non-affiliated SRO to perform certain regulatory responsibilities for Ballista Securities for unique Exchange rules<sup>3</sup>; (3) The regulatory services contract shall require the Exchange to provide the non-affiliated SRO with information, in an easily accessible manner, regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively, “Exceptions”) in which Ballista Securities is identified as a participant that has potentially violated Exchange or SEC rules, and shall require that the nonaffiliated SRO provide a report to the Exchange quantifying Exceptions on not less than a quarterly basis; (4) the Exchange, shall establish and maintain procedures and internal controls reasonably designed to ensure that Ballista Securities and its affiliates do not have access to nonpublic information obtained as a result of ISE Holdings’ ownership interest in Ballista Securities, until such information is available generally to similarly situated members of the Exchange in connection with the provision of inbound order routing to the Exchange; and (5) the ownership interest of ISE Holdings, Inc. in Ballista Securities is subject to the conditions set forth above and is granted

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<sup>3</sup> The non-affiliated SRO will perform certain regulatory responsibilities for Ballista Securities other than market surveillance, including, but not limited to, investigative and disciplinary services.

on a temporary basis, for not longer than one year from the date of Commission approval of this filing.

In addition, the Exchange notes that ISE Holdings owns less than 9% of the equity in Optifreeze and therefore does not own a controlling interest in Optifreeze or otherwise have any veto or other special voting rights with respect to the management or operation of Optifreeze. The Exchange acknowledges that if the Exchange or any of its affiliates were to directly or indirectly increase the equity ownership of Optifreeze, such increase would require prior Commission approval. The Exchange believes that the foregoing measures and factors minimize the concerns identified by the Commission regarding potential conflicts of interest.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Exchange Act,<sup>4</sup> in general, and with Sections 6(b)(1) and (b)(5) of the Exchange Act,<sup>5</sup> in particular, in that the proposal enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply with and enforce compliance by members and persons associated with members with provisions of the Exchange Act, the rules and regulations thereunder, and SRO rules, and is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, this rule change will address

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<sup>4</sup> 15 U.S.C. 78f.

<sup>5</sup> 15 U.S.C. 78f(b)(3), (5).

any potential regulatory issues that could arise with ISE Holdings' investment in, and providing capital to, an innovative brokerage operation.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange 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, participants or others.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (a) by order approve such proposed rule change; or
- (b) institute proceedings to determine whether the proposed rule change should

be disapproved.

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's Internet comment form (<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-2009-45 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 No. SR-ISE-2009-45. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of 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 No. SR-ISE-2009-45 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>6</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>6</sup> 17 CFR 200.30-3(a)(12).