

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-51948; File No. SR-ISE-2005-28)

June 30, 2005

Self-Regulatory Organizations; International Securities Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Fee Changes for Transactions in Options on the Standard & Poor's Depository Receipts® on a Retroactive Basis

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 20, 2005, the International Securities Exchange, Inc. ("Exchange" or "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 Exchange. On June 15, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The ISE proposes to amend its Schedule of Fees to adopt a \$.10 per contract surcharge for certain transactions in options based on the Standard & Poor's Depository Receipts®, or SPDRs® ("SPDRs") to become effective retroactively as of January 10, 2005.<sup>4</sup> The text of the

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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> In Amendment No. 1, the Exchange made non-substantive changes to clarify the purpose for the fee change.

<sup>4</sup> The Exchange filed with the Commission an identical proposed revision to its Schedule of Fees on May 20, 2005 (SR-ISE-2005-06), which was immediately effective as of that date under Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(2) thereunder. The Exchange filed Amendment No. 1 thereto on June 15, 2005. That proposal was published in Exchange Act Release No. 51901 (June 22, 2005), 70 FR 37455 (June 29, 2005). Because the Exchange seeks to apply the surcharge to its Schedule of Fees on a retroactive basis as of January 10, 2005, the Exchange is submitting this proposal to the Commission under Section 19(b)(2) of the Act, to be published for notice and comment.

proposed rule change, as amended, is available on the Exchange's Internet Web site (<http://www.iseoptions.com>), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

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 Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange proposes to amend its Schedule of Fees to retroactively establish, as of January 10, 2005, a \$.10 per contract surcharge fee for certain transactions in options on SPDRs<sup>5</sup> that became effective on May 20, 2005 pursuant to a previous proposed rule change submitted by the Exchange.<sup>6</sup>

The Exchange's Schedule of Fees currently has in place a surcharge fee item that calls for a \$.10 per contract fee for transactions in certain licensed products. The Exchange entered into a license agreement with Standard and Poor's, a unit of McGraw-Hill Companies, Inc., authorizing the Exchange to list SPDR options. The Exchange is adopting this fee for transactions in SPDR options to defray the licensing costs. The Exchange believes that charging

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<sup>5</sup> The Exchange represents that these fees will be charged only to Exchange members.

<sup>6</sup> See supra note 4.

the participants that trade these instruments is the most equitable means of recovering the costs of the license. However, because competitive pressures in the industry have resulted in the waiver of transaction fees for Public Customers,<sup>7</sup> the Exchange proposes to exclude Public Customer Orders<sup>8</sup> from this surcharge fee. Accordingly, this surcharge fee will only be charged to Exchange members with respect to non-Public Customer Orders (e.g., Market Maker and Firm Proprietary orders) and shall apply to Linkage Orders under a pilot program that is set to expire on July 31, 2005.<sup>9</sup>

Additionally, if it is concluded by the courts, after all avenues of appeal, that no license from Standard and Poor's was required by the Exchange to list SPDR options, then upon any refund by Standard and Poor's, the Exchange shall submit a rule filing to the Commission providing for a reimbursement of the surcharge fees paid by members to the Exchange as a result of this surcharge fee.

The Exchange now proposes to extend this surcharge fee retroactively to all applicable transactions occurring since January 10, 2005.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>10</sup> in general, and furthers the objectives of 6(b)(4) of the Act<sup>11</sup> in particular, in that it

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<sup>7</sup> Public Customer is defined in ISE Rule 100(a)(32) as a person that is not a broker or dealer in securities.

<sup>8</sup> Public Customer Order is defined in ISE Rule 100(a)(33) as an order for the account of a Public Customer.

<sup>9</sup> See ISE Rule 1900(10) (defining Linkage Orders). The surcharge fee will apply to the following Linkage Orders: Principal Acting as Agent Orders and Principal Orders.

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(4).

provides for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

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 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 with respect to this proposed rule change.

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 Exchange consents, the Commission will:

- (A) by order approve such proposed rule change, as amended, or
- (B) institute proceedings to determine whether the proposed rule change, as amended, 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, as amended, 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 Number SR-ISE-2005-28 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-ISE-2005-28. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions.

You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2005-28 and should be submitted on or before [insert date 21 days from the date of publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

Margaret H. McFarland  
Deputy Secretary

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