

These comments are in addition to two previous comments I have submitted regarding the ISE proposed rule change: File No. SR-ISE-2006-26. These are additional reasons to deny the rule change.

First, because the ISE is now a public company, yet still regulated by the SEC, a hybrid situation is arising which allows a public company potentially to hide behind a regulatory ruling to insulate themselves from a public right of action that might otherwise deter an action taken by an unregulated company. In other words, the ISE can seek regulatory approval for a rule change, incur almost a perfunctory approval from the SEC, then assert the SEC approval as a defense in a lawsuit brought by a public customer alleging harm resulting from the rule change. To obviate this problem, the SEC either needs to require much greater scrutiny of the rule or private causes of action should be allowed even though the rule was approved by the SEC. Obviously, here I believe this rule is discriminatory and collusive, as it requires the cooperation of other competing exchanges, and it is over burdensome as it requires expensive technology to track the number of trades entered and the exchange on which the trades were executed.

Also, the rule is so sloppily written as to be vague and unenforceable. For example, the new rule defines a Priority Customer Order on page 4 (ii): as a person or entity that “does not place more than 390 orders in listed options per day on average during a calendar month for its beneficial account(s)”. Two major problems: Firstly, footnote 11, page 6 justifies the number of orders (390) because it “equals the number of orders a person would place in a day if that person entered one order every minute from open to close.” The justification for the 390 limit is based on per person orders; the implementation is against “persons or entities”. Secondly, there is no definition of beneficial accounts as proposed in the rule. They are employing a misleading criteria and characterization to engage in a much broader application of the rule. What is the status all of the firms that employ numerous people in the context of hedge funds, private equity, etc who represent numerous private individuals: individuals who would be protected by the rule if acting alone, but are now subject to the rule because they seek representation in a very complex corner of the market? Is a firm of 50 traders subjected to the rule even though no single trader alone exceeds 390 trades per day? And again, I fail to see how the ISE can request trading information from a person or entity trading from another exchange, particularly when other exchanges have business models that promote order entry: the exact behavior the ISE is attempting to punish with its rule.

Allowing this rule change will set the stage for a slippery slope of endless rule changes, designed not to protect the public, but to tweak the ISE business model while hiding behind SEC approval, all at the expense of the public customer. Common sense tells you that an exchange that wants to penalize high volume customers has a suspect agenda.

Thank you, Charles Cox