TD AMERITRADE
Holding Corporation

January 26, 2009

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: ***SR-ISE-2008-92, Release No. 34-59072*** *International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change as Modified by Amendment No. 1 Thereto Relating to Cancellation Fees*

Dear Ms. Morris,

TD AMERITRADE, Inc.[1] "the firm" appreciates the opportunity to comment on the International Securities Exchange, LLC "ISE" proposed rule change and amendments relating to cancellation fees. With respect to the ISE proposal, the firm feels that the ISE is merely deploying an approach to change behavior while failing to address a much larger issue at hand. The firm feels that ISE fee application serves to benefit the professional market-maker at the expense of the retail consumer. The firm believes that in this way the ISE is mandating a "Robin Hood" approach to its customer base, but in effect robbing from the smallest of retail clients to favor incentives to the biggest of professionals.

Background

The ISE's current cancellation fee of $2.00 applies to Electronic Access Members "EAM' who cancel at least 500 orders in a single month where the order cancellation exceeds the total number of orders an EAM executes. In addition, when making a determination of an EAM's order executions during the month, the ISE examines any order from an EAM executed in the same underlying symbol at the same price executed within a 30 second period as part of the same execution for purposes of the fee. The fee is only charged to orders the ISE classifies as customer orders whereas broker-dealer orders, including non-member market maker orders are excluded from the fee[2]. The proposal looks to amend the current 30 second window to 300 Seconds to address the level of cancellation activity and its effect on system congestion.

1 TD Ameritrade is a wholly owned broker-dealer subsidiary of TD AMERITRADE Holding Corporation ("TD Ameritrade Holding"). TD Ameritrade Holding has a 33-year history of providing financial services to self-directed investors. TD Ameritrade Holding's wholly owned broker-dealer subsidiary, TD Ameritrade serves an investor base comprised of over 4.9 million funded client accounts with approximately $241 billion in assets.

2 The firm notes that its total 7 million retail accounts (4.9 million funded client accounts) are treated as a single retail client in the view of the current and proposed ISE rule.

Exchange Act Compliance

The firm believes that ISE's cancellation fee proposal violates compliance of Section 6(b)(4) and Section 6 (b)(5) of the Exchange Act as orders and cancellations of one set of clients receive more favorable status to those of other clients[3]. Why would a retail client who is entering limit orders be placed at a disadvantage to a Primary Market Maker who has no such restriction? Discrimination among members as proposed by the ISE is particularly troubling as it serves to single out and impose higher costs to the retail investor. The firm feels that at the root of the matter the ISE should strongly consider changes to ISE Rule 713(d) which provides that customer orders at a given price have priority based on the time priority of such orders. Clearly by the ISE's own admission, creating fee structures meant to deter one form of behavior only serves to fuel further unintended consequences to additional behaviors, thus beginning a cycle to correct unintended behavior. The firm believes that providing for an open, fair and transparent market environment would effectively render this proposal obsolete.

Concerns related to market quality and market transparency

The firm draws attention to Rule 610 of Regulation NMS which mandates that a Self Regulatory Organization "SRO" such as the ISE provide fair and non-discriminatory access[4]. TD AMERITRADE believes that the proposal by the ISE serves to discourage the use of limit orders as the fees involved in cancelling those orders serves as a deterrent to the retail investor. Over the last decade the SEC has taken a concerted approach to encourage investor's utilization of limit orders in the equity markets highlighted by the SEC 11Ac 1-4. As the Options markets continue to evolve in a similar direction a like minded approach is needed to ensure investor confidence and transparency of our markets remains high.

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[3] Section 6(b)(4) of the Exchange Act states "The rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. Section 6(b)(5) of the Exchange Act states "The rules of the exchange are 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange."

[4] See SEC 34-51808 at (c) (2) - Rule 610 prohibits a trading center from imposing unfairly discriminatory terms that would prevent or inhibit the access of any person through members, subscribers, or customers of such trading center.

<u>Concerns Related to System Congestion</u>

The ISE feels that by increasing the aggregation timer from 30 seconds to 300 (a 900% increase) that the impact of clients cancelling more than 500 orders per month will serve to reduce the strain placed on ISE's systems. The firm feels this claim is nonsensical and without merit. In both proposals, the ISE fails to discuss any measureable impact caused by the timers. In fact, the firm argues that the accounting required to keep track of the aggregation timer far exceeds any impact caused by the cancellation of retail orders. The firm feels that the Commission should be skeptical of this or any other SRO proposal that explicitly attempts to allocate exchange costs among various users on the basis of capacity utilization. Why?

1. Users already bear these usage costs that scale with their frequency of trading through line connections, order fees, clearing costs, and market data charges.

2. By the ISE's own admission, the aggregation timer creates perverse and non-natural trading behavior that fuels, rather than addresses the issue at hand.

3. It discourages the development of new trading strategies that could benefit investors through the utilization of increased limit orders thus serving to increase liquidity in the market.

The firm continues to advocate that the best market for the retail consumer is an open and transparent market that provides fair access to all. The ISE proposal is counter intuitive to this thought process. The firm respectfully requests that the SEC abrogate the fee proposal by the ISE and require that the ISE provide fair access to all users regardless of class.

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Our firm would be pleased to discuss our comments in greater detail with you and your staff. Please feel free to contact me directly with any questions pertaining to our comments.

Sincerely,

/S/

Christopher Nagy
Managing Director Order Strategy
TD AMERITRADE