

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-71832; File No. SR-ISE-2014-18)

March 31, 2014

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend ISE Rule 623 (“Options Communications”) to Conform with the Rules of the Financial Industry Regulatory Authority Inc.

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 March 20, 2014, the International Securities Exchange, LLC (“Exchange” or “ISE”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which items have been substantially prepared by the Exchange. ISE has designated the proposed rule change as constituting a “non-controversial” rule change under Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6)<sup>4</sup> thereunder, which renders the proposal effective upon receipt of this filing by the Commission. 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 proposing to update ISE Rule 623 (Options Communications) to conform with the rules of the Financial Industry Regulatory Authority, Inc. (“FINRA”) for purposes of an agreement between the Exchange and FINRA pursuant to Exchange Act Rule 17d-2.<sup>5</sup> The text of the proposed rule change is available on the Exchange’s website at

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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> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> 17 CFR 240.17d-2.

<http://www.ise.com>, at the Exchange's principal office, 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

Pursuant to Exchange Act Rule 17d-2,<sup>6</sup> the Exchange and FINRA entered into an agreement to allocate regulatory responsibility for common rules ("17d-2 Agreement"). The 17d-2 Agreement covers common members of the Exchange and FINRA ("Common Members") and allocates to FINRA regulatory responsibility, with respect to Common Members, for the following: (i) examination of Common Members for compliance with federal securities laws, rules and regulations and rules of the Exchange that the Exchange has certified as identical or substantially similar to FINRA rules; (ii) investigation of Common Members for violations of federal securities laws, rules and regulations, and the rules of the Exchange that the Exchange has certified as identical or substantially identical to FINRA rules; and (iii) enforcement of compliance by Common Members with the federal securities laws, rules and regulations, and the

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<sup>6</sup> Id.

rules of the Exchange that the Exchange has certified as identical or substantially similar to FINRA rules.

The 17d-2 Agreement included a certification by the Exchange that states that the requirements contained in certain Exchange rules are identical to, or substantially similar to, certain FINRA rules that have been identified as comparable. To conform with comparable FINRA rules for purposes of the 17d-2 Agreement, the Exchange is proposing to amend ISE Rule 623 to conform with changes made by FINRA to its corresponding rule, Rule 2220.<sup>7</sup>

First, the Exchange proposes to amend Rule 623(a) to reduce the number of defined categories of communication from six (in the current rule) to three: “retail communications,” “correspondence,” and “institutional communications.” Current definitions of “sales literature,” “advertisement,” and “independently prepared reprint” would be combined into a single category of “retail communications.” Specifically, the proposal would define “retail communication” to mean “any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period.” The Exchange would also update the current definition of “correspondence” to mean “any written (including electronic) communication distributed or made to 25 or fewer retail customers within any 30 calendar-day period.” Finally, the Exchange would define “institutional communication” to include written (including electronic) communications that are distributed or made available only to institutional investors. The Exchange believes the proposed changes to the definitions in Rule 623(a) would create a more concise and descriptive rule, and clarify the terms for ISE members.

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<sup>7</sup> See Exchange Act Release No. 68650 (Jan. 14, 2013), 78 FR 4182 (Jan. 18, 2013) (Approving, among other things, amendments to FINRA Rule 2220 (Options Communications) to update cross-references to FINRA Rule 2210 (Communications with the Public)); see also Exchange Act Release No. 66681 (Mar. 29, 2012), 77 FR 20452 (Apr. 4, 2012) (Approving, among other things, amendments to FINRA Rule 2210).

Second, the Exchange is proposing to amend Rule 623(b), “Approval by Registered Options Principal.” More specifically, the Exchange is proposing to replace the phrase “advertisements, sales literature . . . and independently prepared reprints” in Rule 623(b)(1) with the new term, “retail communications.” The Exchange believes that this change would make the rule more coherent with the other proposed changes.

In addition, the proposal would amend Rule 623(b)(2) to delete the requirement for prior approval by a Registered Options Principal of correspondence (as currently defined) that is distributed to 25 or more existing retail customers within a 30 calendar-day period that makes any financial or investment recommendation or otherwise promotes the product or service of a member. Under the proposal, such communications would be considered retail communications and therefore subject to the principal approval requirement of amended Rule 623(b)(1). Under the proposal, correspondence (as amended) would continue to be excluded from the requirement to be approved by a Registered Options Principal prior to use but would still be subject to the supervision and review requirements of Rule 609. As such, ISE believes that the proposed change would not substantively change the scope of options communications that would require principal approval.

Next, the Exchange is proposing to amend Rule 623(b)(3) to modify the required approvals of Institutional communications. Specifically, the Exchange is proposing to add that its members shall “establish written procedures that are appropriate to its business, size, structure, and customers for review by a Registered Options Principal of institutional communications used by the member.” The Exchange believes this would better align ISE Rule 623 with FINRA Rule 2220.

Third, the Exchange is proposing to amend Rule 623(c) to replace the phrase “advertisements, sales literature, and independently prepared reprints” with the new proposed term, “retail communications.” The Exchange is also proposing to exempt options disclosure documents and prospectuses from Exchange review and approval as these documents have other further requirements under the Securities Act of 1933 (“Securities Act”). The Exchange believes these changes would better align Exchange Rule 623 with FINRA Rule 2220.

Fourth, the Exchange is proposing to amend Rule 623(d) to specify that its members may not use any options communications that would constitute a prospectus (as defined in the Securities Act) unless it would meet the requirements of Securities Act Section 10.<sup>8</sup> The Exchange believes this change would put its members on notice that all documents that may constitute a prospectus would be required to comply with the Securities Act.

In addition, the Exchange is proposing to modify Rule 623(d) to provide that any statement made referring to potential opportunities or advantages presented by options must be accompanied by a statement identifying the potential risks posed as well. The Exchange believes that moving this language to the end of paragraph (d) would help alert the public of potential risks associated with options, as well as the advantages, which would create more awareness of the potential harms that may arise in the participation of such securities. The Exchange believes that this would help ensure that investors are protected from potentially false or misleading communications distributed by its members. The Exchange also believes this would better align ISE Rule 623 with FINRA Rule 2220 and provide greater clarity to its members and the public regarding the Exchange’s rules.

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<sup>8</sup> 15 U.S.C. 78j.

In sum, the Exchange believes the proposed changes would alert its members to their requirements with respect to Options Communications while further regulating all communications for compliance with Exchange rules, and the Act and rules promulgated thereunder. In addition, the Exchange believes that the proposed rule change would help ensure that investors are protected from potentially false or misleading communications with the public distributed by its members.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>9</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) requirements that the rules of an exchange be 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.<sup>10</sup> Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) requirement that the rules of an exchange are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.<sup>11</sup>

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<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> Id.

In particular, the Exchange believes the proposed rule changes would provide greater clarity to its members and the public regarding the Exchange's rules and provide greater harmonization between the Exchange and FINRA rules of similar purpose, resulting in greater uniformity and less burdensome and more efficient regulatory compliance. In addition, the Exchange believes that the proposed rule change would help ensure that investors are protected from potentially false or misleading communications with the public distributed by its members.

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 not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that the proposed rule change will merely bring clarity and consistency to Exchange rules. The Exchange does not believe the proposed rule change will impose any burden on any intramarket competition as it applies to its members. In addition, the Exchange does not believe the proposed rule filing will bring any unnecessary burden on intermarket competition as it is consistent with FINRA Rule 2220 (Options Communications).

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest,

it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. Pursuant to Rule 19b-4(f)(6)(iii), however, the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.<sup>14</sup> The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to immediately conform its rules to corresponding FINRA rules. This will help ensure that such ISE rules will continue to be covered by the existing 17d-2 Agreement between the Exchange and FINRA and reduce duplicative regulation of Common Members.<sup>15</sup>

At any time within sixty (60) days of the filing the proposed rule change, the Commission summarily may temporarily suspend 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.

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<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(6). Rule 19b-4(f)(6) also requires the Exchange to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange satisfied this requirement.

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>15</sup> For purposes of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).



#### 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-2014-18 on the subject line.

##### Paper Comments:

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

All submissions should refer to File Number SR-ISE-2014-18. 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 website (<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 website viewing and printing 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 Number SR-ISE-2014-18 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 Trading and Markets, pursuant to delegated authority.<sup>16</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(12).