SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59949; File No. SR-ISE-2007-97)

May 20, 2009

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Relating to Market Data Fees

I. Introduction

On October 5, 2007, International Securities Exchange, LLC (the "Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to establish fees for a real-time depth of market data offering. On March 9, 2009, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on April 7, 2009.[3] The Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

The Exchange currently produces and provides free of charge a data feed that contains the aggregate bid and offer size available at the first five price levels on ISE's limit order book, the ISE Depth of Market Data Feed ("Depth of Market"). The Depth of Market feed includes non-marketable orders and quotes that are displayed, and is distributed in real time.

ISE has proposed to establish fees for its Depth of Market product. ISE will make this product available to members and non-members, and to professional and non-professional

---

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 59679 (April 1, 2009), 74 FR 15795 ("Notice").

subscribers. Specifically, the Exchange proposes to charge distributors of Depth of Market $5,000 per month.[4] In addition, the Exchange proposes to charge each distributor a monthly fee per controlled device[5] of $50 per controlled device for Professionals (for internal use or external redistribution through a controlled device) and $5 per controlled device for Non-Professionals who receive the data from a distributor through a controlled device.[6] ISE proposes to cap the monthly maximum amount of fees payable by a distributor at $7,500 for Professionals where the data is for internal use only; $12,500 for Professionals where the data is redistributed externally; and $10,000 for Non-Professionals who receive the data from a distributor. The Exchange proposes to charge distributors a flat fee of $1,000 for the first month after connectivity has been established between ISE and the distributor. Further, the Exchange proposes to waive all user fees during this one month period.

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[7] In particular, the Commission finds that the proposed rule change is consistent with

4 A "distributor" will be defined as any firm that receives an ISE data feed directly from ISE or indirectly through a "redistributor" and then distributes it either internally or externally. ISE proposes that all distributors execute an ISE distributor agreement. "Redistributors" will include market data vendors and connectivity providers such as extranets and private network providers.

5 A "controlled device" is defined as any device that a distributor of the ISE Depth of Market permits to access the information in the Depth of Market offering.

6 In differentiating between a "Non-Professional Subscriber" and a "Professional Subscriber," ISE will apply the same criteria for qualification as in the Consolidated Tape Association Plan ("CTA Plan") and the Consolidated Quotation Plan ("CQ Plan").

7 In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Section 6(b)(4) of the Act,[8] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,[9] which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, 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 not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that the proposed rule change is consistent with Section 6(b)(8) of the Act[10] in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.[11] In the NYSE Arca Order, the Commission stated that "when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory."[12] It noted that the "existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."[13] If an exchange "was subject to significant competitive forces in setting the terms of a proposal," the

---

8 15 U.S.C. 78f(b)(4).

9 15 U.S.C. 78f(b)(5).

10 15 U.S.C. 78f(b)(8).

11 See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) ("NYSE Arca Order").

12 Id. at 74771.

13 Id. at 74782.

Commission will approve a proposal unless it determines that "there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder."[14]

As noted in the NYSE Arca Order, the standards in Section 6 of the Act do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data.[15] All U.S. options exchanges are required pursuant to the OPRA Plan to provide "core data" -- the best-priced quotations and comprehensive last sale reports -- to OPRA, which data is then distributed to the public pursuant to the OPRA Plan.[16] In contrast, individual exchanges and other market participants distribute non-core data voluntarily.[17] The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.[18] Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. The Commission therefore is able to rely on competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of Section 6.[19]

Because ISE's instant proposal relates to the distribution of non-core data, the Commission will apply the market-based approach set forth in the NYSE Arca Order. Pursuant to this approach, the first step is to determine whether ISE was subject to significant competitive forces in setting the terms of its non-core market data proposal, including the level of any fees.

---

14 Id. at 74781.

15 Id. at 74779.

16 See Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA Plan"), Sections V(a)-(c).

17 See NYSE Arca Order, supra, note 11, at 74779.

18 Id.

19 Id.

As in the Commission's NYSE Arca Order, in determining whether ISE was subject to significant competitive forces in setting the terms of its proposal, the Commission has analyzed ISE's compelling need to attract order flow from market participants, and the availability to market participants of alternatives to purchasing ISE's non-core market data.

The Commission believes that the options industry currently is subject to significant competitive forces. It is generally accepted that the start of wide-spread multiple listing of options across exchanges in August 1999 greatly enhanced competition among the exchanges.[20] The launch of three new options exchanges since that time, numerous market structure innovations, and the start of the options penny pilot[21] have all further intensified intermarket competition for order flow.

ISE currently competes with six other options exchanges for order flow.[22] Attracting order flow is an essential part of ISE's competitive success.[23] If ISE cannot attract order flow to

---

20 See generally Concept Release: Competitive Developments in the Options Markets, Securities Exchange Act Release No. 49175 (February 3, 2004), 69 FR 6124 (February 9, 2004); see also Battalio, Robert, Hatch, Brian, and Jennings, Robert, Toward a National Market System for U.S. Exchange-listed Equity Options, The Journal of Finance 59 (933-961); De Fontnouvelle, Patrick, Fishe, Raymond P., and Harris, Jeffrey H., The Behavior of Bid-Ask Spreads and Volume in Options Markets During the Competition for Listings in 1999, The Journal of Finance 58 (2437-2463); and Mayhew, Stewart, Competition, Market Structure, and Bid-Ask Spreads in Stock Option Markets, The Journal of Finance 57 (931-958).

21 See, e.g., Securities Exchange Act Release Nos. 55162 (January 24, 2007), 72 FR 4738 (February 1, 2007) (SR-Amex-2006-106); 55073 (January 9, 2007), 72 FR 4741 (February 1, 2007) (SR-BSE-2006-48); 55154 (January 23, 2007), 72 FR 4743 (February 1, 2007) (SR-CBOE-2006-92); 55161 (January 24, 2007), 72 FR 4754 (February 1, 2007) (SR-ISE-2006-62); 55156 (January 23, 2007), 72 FR 4759 (February 1, 2007) (SR-NYSEArca-2006-73); and 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR-Phlx-2006-74).

22 In its filing, ISE states that "the options exchanges compete vigorously for order flow," and that "ISE currently competes with six other options exchanges for order flow and "the competition is fierce"." See Notice, supra note 3, at 15797.

23 ISE states in its filing that "[i]n order for ISE to maintain its market share, it must

its market, it will not be able to execute transactions. If ISE cannot execute transactions on its market, it will not generate transaction revenue. If ISE cannot attract orders or execute transactions on its market, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue and thus not be competitive with other exchanges that have this ability. In its filing, ISE provided market share data for the seven options exchanges over a two year period from 2006 through 2008:[24]

QUARTERLY MARKET SHARE BASED ON AVERAGE DAILY VOLUME														
PERIOD	**ISE**		**AMEX**		**BOX**		**CBOE**		**NYSEArca**		**PHLX**		**NSDQ**	
Q1 06	**30.46%**		10.05%	▼	5.04%	▼	**31.79%**		9.98%	▼	12.68%	▼	n/a	
Q2 06	29.05%	▼	9.62%	▼	4.92%	▼	**35.25%**		8.46%	▼	**12.70%**		n/a	
Q3 06	**29.59%**		**9.66%**		4.64%	▼	33.81%	▼	**9.29%**		**13.01%**		n/a	
Q4 06	27.86%	▼	9.56%	▼	4.07%	▼	32.24%	▼	**10.96%**		**15.30%**		n/a	
Q1 07	27.76%	▼	**9.60%**		**4.08%**		**33.73%**		**11.40%**		13.42%	▼	n/a	
Q2 07	**28.20%**		8.88%	▼	**4.32%**		**33.92%**		10.81%	▼	**13.88%**		n/a	
Q3 07	28.11%	▼	8.02%	▼	**4.88%**		**34.05%**		10.60%	▼	**14.34%**		n/a	
Q4 07	**28.25%**		7.49%	▼	4.71%	▼	30.77%	▼	**13.71%**		**15.06%**		n/a	
Q1 08	**29.40%**		6.02%	▼	4.66%	▼	**31.97%**		13.44%	▼	14.50%	▼	n/a	
Q2 08	28.79%	▼	**6.16%**		**5.16%**		**32.28%**		11.37%	▼	**15.61%**		**0.63%**	
Q3 08	27.55%	▼	5.54%	▼	4.87%	▼	**34.04%**		11.27%	▼	15.50%	▼	**1.23%**	
Q4 08	26.81%	▼	5.46%	▼	**5.29%**		**34.88%**		10.45%	▼	**15.51%**		**1.60%**	

The market share percentages in this chart strongly indicate that ISE must compete vigorously for order flow to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on ISE to act reasonably in setting its fees for ISE market data, particularly given that the market participants that will pay such fees often will be the same market participants from whom ISE must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that

compete vigorously for order flow." Id.

24 See id.

sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.[25]

ISE currently trades options on 16 proprietary index products that are not traded on any other exchange. ISE represents that these 16 options currently represent less than 0.02% of ISE's total contract volume.[26] The Commission believes that, given the small percentage of ISE's total contract volume represented by these 16 products, the inclusion of data on these products in ISE's Depth of Market product will not confer market power on ISE to compel market participants to purchase the entire ISE data feed. The Commission therefore believes that the inclusion of depth-of-book data for these products in ISE's Depth of Market product does not undermine the finding that ISE was subject to significant competitive forces in setting the terms

---

25 In its filing, ISE notes that despite frequent variations in market share, no single exchange has more than approximately one-third market share. It further states that, given the current competitive pressures in the option industry, no exchange can take any of its share of trading for granted. ISE states that, in order for it to maintain its market share, it must compete vigorously for order flow, and that given the portability of order flow from one exchange to another, a pricing misstep can easily result in loss of order flow, customers and, ultimately, revenue. See id.

26 See id. ISE represents that as of March 9, 2009, of the more than 2,000 underlying securities whose options are traded on ISE, 41 products are singly listed on ISE, which collectively represent less than .02 percent of ISE's total contract volume. Of those 41 products, 16 are proprietary ISE index options, all of which are available for licensing by ISE to any other exchange, four are index options that ISE has non-exclusively licensed from index providers and that are available to other exchanges to license, 10 are options on Exchange Traded Funds that other exchanges have chosen not to list, and the remaining 11 products are equity options that either the other exchanges have chosen not to list or are in the process of being de-listed and thus are available for closing only transactions on ISE.

ISE further notes that when another exchange has shown an interest in trading a proprietary ISE product, the Exchange has licensed the trading in that product to the other exchange. For example, ISE represents that NYSE Arca recently signed a license agreement with ISE to list and trade ISE's foreign currency options, and that this ISE proprietary product is now multiply listed. ISE states that it is ready, willing, and able to license its proprietary index products for trading on other exchanges on commercially reasonable terms. See id. at 15797 to 15798.

of its proposal.

In addition to the need to attract order flow, the availability of alternatives to ISE's Depth of Market product significantly affect the terms on which ISE can distribute this market data.[27] In setting the fees for its Depth of Market product, ISE must consider the extent to which market participants would choose one or more alternatives instead of purchasing its data.[28] The most basic source of information concerning the depth generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.[29] In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.[30] Further, other options exchanges can produce their own depth of market data products, and thus are sources of potential competition for ISE. In addition, one or more securities firms could act independently and distribute their own order data, with or without a fee.

ISE states in it is filings that of the nearly 200 firms that are members of the Exchange, less than 15 percent currently access the Depth of Market product, which the Exchange has been offering at no cost.[31] The fact that many of ISE's own members did not choose to access the Depth of Market product even when there was no cost for doing so strongly suggests that ISE does not have monopoly pricing power for its Depth of Market product.[32]

---

27 See NYSE Arca Order, supra note 11, at 74784.

28 See id. at 74783.

29 Id.

30 Id. Information on transactions executed on ISE is available through OPRA.

31 See Notice, supra note 3, at 15798.

32 In reaching its conclusion in the NYSE Arca Order, the Commission noted that the fact that 95% of the professional users of Nasdaq core data (where Nasdaq has a substantial market share in Nasdaq-listed stocks) choose not to purchase Nasdaq's depth-of-book market data strongly suggests that no exchange has monopoly pricing for its depth-of-

The Commission believes that there are a number of alternative sources of information that impose significant competitive pressures on ISE in setting the terms for distributing its Depth of Market product. The Commission believes that the availability of those alternatives, as well as ISE's compelling need to attract order flow, imposed significant competitive pressure on ISE to act equitably, fairly, and reasonably in setting the terms of its proposal.[33]

Because ISE was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that the terms of the proposal fail to meet the applicable requirements of the Act or the rules thereunder. The Commission did not receive any comments on the terms of the proposal. Further, an analysis of the proposal does not provide such a basis. The Commission notes that the per controlled device fees as proposed will be the same for all Professional subscribers ($50) and the same for all Non-Professional subscribers ($5). The fees therefore do not unreasonably discriminate among types of subscribers, such as by favoring participants in the ISE market or penalizing participants in other markets.[34]

---

book order data. See NYSE Arca Order, supra note 11, at 74785.

33 The Commission stated in the NYSE Arca Order that broker-dealers are not required to obtain depth-of-book order data to meet their duty of best execution. See id. at 74788 for a more detailed discussion. Likewise, the Commission does not view obtaining depth-of-book data as a necessary prerequisite to broker-dealers satisfying the duty of best execution with respect to the trading of standardized options.

34 The Commission notes that the CTA participants' fees have long provided for a lower fee for non-professional subscribers, and that the fees approved by the Commission in the NYSE Arca Order also provided for lower fees for non-professional subscribers. See NYSE Arca Order, supra note 11, at 74772.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[35] that the proposed rule change, as amended (SR-ISE-2007-97), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[36]

Florence E. Harmon
Deputy Secretary

---

35 15 U.S.C. 78s(b)(2).

36 17 CFR 200.30-3(a)(12).