

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61086; File No. SR-ISE-2009-103)

December 1, 2009

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change Relating to Market Data Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 25, 2009, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. 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 ISE is proposing to amend its Schedule of Fees to 1) increase the annual subscription rate for the ISE Open/Close Trade Profile, 2) adopt subscription fees for the sale of three new market data offerings, all of which are based on the ISE Open/Close Trade Profile, and 3) increase the annual subscription and ad-hoc request rates for ISE's Historical Options Tick Data. The text of the proposed rule change is available on the Exchange's Web site (<http://www.ise.com>), at the principal office of the Exchange, 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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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

ISE proposes to amend its Schedule of Fees to 1) increase the annual subscription rate for the ISE Open/Close Trade Profile, 2) adopt subscription fees for the sale of three new market data offerings, all of which are based on the ISE Open/Close Trade Profile, and 3) increase the annual subscription and ad-hoc request rates for ISE's Historical Options Tick Data. These proposed fee changes will be operative on January 4, 2010.

ISE Open/Close Trade Profile

ISE currently sells a market data offering comprised of the entire opening and closing trade data of ISE listed options of both customers and firms, referred to by the Exchange as the ISE Open/Close Trade Profile.³ The ISE Open/Close Trade Profile offering is subdivided by origin code (i.e., customer or firm) and the customer data is then further subdivided by order size. The volume data is summarized by day and series (i.e., symbol, expiration date, strike price, call or put). The ISE Open/Close Trade Profile enables subscribers to create their own proprietary put/call calculations. The data is compiled and formatted by ISE as an end of day file. This market data offering is currently available to both members and non-members on annual [sic] subscription basis. The current subscription rate for both members and non-members is \$600 per month. Over the course of the last two years, ISE has added numerous

³ See Securities Exchange Act Release No. 56254 (August 15, 2007), 72 FR 47104 (August 22, 2007) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to ISE Open/Close Trade Profile Fees) (SR-ISE-2007-70).

additional fields to this offering. As a result, ISE's costs of gathering and storing the voluminous data underlying the ISE Open/Close Trade Profile have increased. As a result, ISE proposes to increase the subscription rate for both members and non-members to \$750 per month, effective January 1, 2010. [sic]⁴

ISE also sells historical ISE Open/Close Trade Profile, a market data offering comprised of the entire opening and closing trade data of both customers and firms that dates back to May 2005, to both members and non-members, on an ad-hoc basis or as a complete set that dates back to May 2005. Ad-hoc subscribers can purchase this data for any number of months, beginning from May 2005 through the current month. Alternatively, subscribers can purchase the entire set of this data, beginning from May 2005 through the current month. The historical ISE Open/Close Trade Profile is compiled and formatted by ISE and sold as a zipped file. ISE charges ad-hoc subscribers \$600 per request for each month of data and a discounted fee of \$500 per request per month for subscribers that want the complete set, i.e., from May 2005 to the present month. ISE is not proposing any changes to the fee for historical ISE Open/Close Trade Profile.

ISE Open/Close Trade Profile Intraday

The Exchange now proposes to expand its suite of ISE Open/Close Trade Profile market data offerings with three new products.

1. ISE Open/Close Trade Profile Intraday

The ISE Open/Close Trade Profile Intraday offering uses the same process as that used for the ISE Open/Close Trade Profile. The ISE Open/Close Trade Profile Intraday has the same trade-related fields contained in the ISE Open/Close Trade Profile. The ISE Open/Close Trade

⁴ ISE intends to implement the new fees on January 4, 2010. See supra the first paragraph of Section II.A.1.

Profile Intraday file contains data that is updated at 10-minute intervals throughout the trading day. ISE proposes to charge both members and non-members \$2,000 per month on an annual subscription basis.

2. Historical ISE Open/Close Trade Profile Intraday

The Historical ISE Open/Close Trade Profile Intraday offering is a compilation of the ISE Open/Close Trade Profile Intraday files. The Exchange has received numerous requests for this type of data, especially from proprietary trading firms and hedge funds that use this type of data for their quantitative models. ISE proposes to sell Historical ISE Open/Close Trade Profile Intraday on an ad-hoc basis. An ad-hoc request can be for any number of months, quarters or years for which the data is available. Members and non-members will be able to purchase this data by paying a one-time fee of \$1,000 per month, \$2,000 per quarter or \$8,000 per year. For example, a subscriber that wants to purchase data for August 2009 will pay \$1,000; a subscriber that wants to purchase data for July, August and September of 2009 will pay \$2,000; a subscriber that wants to purchase data for all twelve months of 2009 will pay \$8,000.

3. ISE Open/Close Trade Profile and ISE Open/Close Trade Profile Intraday

As noted above, the Exchange already sells the ISE Open/Close Trade Profile end of day data. The Exchange believes that current subscribers to the ISE Open/Close Trade Profile are likely to subscribe to the ISE Open/Close Trade Profile Intraday offering. However, to further incentivize current subscribers of ISE Open/Close Trade Profile to also subscribe to the ISE Open/Close Trade Profile Intraday offering, the Exchange proposes to offer a discounted subscription rate. Subscribers to both the ISE Open/Close Trade Profile and the ISE Open/Close

Trade Profile Intraday will pay an annual subscription rate of \$2,500.⁵

All of the ISE Open/Close Trade Profile market data offerings, including the new products proposed herein are compiled and formatted by ISE and sold as a zipped file.

Historical Options Tick Data

ISE currently creates market data that consists of options quotes and orders that are generated by our members and all trades that are executed on the Exchange. ISE also produces a Best Bid/Offer, or BBO, with the aggregate size from all outstanding quotes and orders at the top price level, or the “top of the book.” This data is formatted according to Options Price Reporting Authority (“OPRA”) specification and sent to OPRA for redistribution. OPRA processes ISE data along with the same data sets from the other six options exchanges and creates a National BBO, or “NBBO,” from all seven options exchanges.

ISE also captures the OPRA tick data⁶ and makes it available as an “end of day” file⁷ or as a “historical” file⁸ for ISE members and non-ISE members alike. ISE has data available from June 2005 through the present month. ISE currently charges all subscribers of Historical Options Tick Data \$1,500 per month per firm on an annual subscription basis. For ad-hoc requests, ISE charges \$85 per day, with a minimum order size of \$1,000 plus a processing fee to pay for hard drives and shipping. ISE also currently charges a processing fee of \$499 per order for up to 400

⁵ The Commission notes that this proposed annual subscription rate would be \$2,500 per month (see Exhibit 5 to the Form 19b-4).

⁶ The Exchange collects this data throughout each trading day and at the end of each trading day, the Exchange compresses the data and uploads it onto a server. Once the data is loaded onto the server, it is then made available to subscribers.

⁷ An end of day file refers to OPRA tick data for a trading day that is distributed prior to the opening of the next trading day. An end of day file is made available to subscribers as soon as practicable at the end of each trading day on an on-going basis pursuant to an annual subscription or through an ad-hoc request.

⁸ An end of day file that is distributed after the start of the next trading day is called a historical file. A historical file is available to customers for a pre-determined date range by ad-hoc requests only.

Giga Bytes (GB). An order that exceeds 400 GB is currently charged an additional \$399 for up to another 400 GB.⁹

The Exchange now proposes to increase the annual subscription rate to \$2,000 per month per firm. For ad-hoc requests, the Exchange proposes to increase the rate to \$120 per day. The minimum order size of \$1,000 will remain unchanged as will the processing fees of \$499 and \$399. As the size of the data has increased since the Exchange first introduced this product, the Exchange is also increasing the size allowance for ad-hoc requests from 400 Giga Bytes to 1.5 Terabytes (TB). Pursuant to this proposed rule change, for ad-hoc requests, the Exchange will charge a processing fee of \$499 per order for up to 1.5 TB. An order that exceeds 1.5 TB will be charged an additional \$399 for up to another 1.5 TB. These fee changes will be made effective by the Exchange on January 1, 2010. [sic]¹⁰

The Exchange's market research indicates that OPRA tick data is primarily used by market participants in the financial services industry for back-testing trading models, post-trade analysis, compliance purposes and analyzing time and sales information. This market data offering provides both ISE members and non-members with a choice to subscribe to a service that provides a daily file on an on-going basis (end of day file), or simply request data on an ad-hoc basis for a pre-determined date range (historical file).

2. Statutory Basis

⁹ See Securities Exchange Act Release Nos. 53212 (February 2, 2006), 71 FR 6803 (February 9, 2006) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Establishing Fees for Historical Options Tick Market Data) (SR-ISE-2006-07); and 53390 (February 28, 2006), 71 FR 11457 (March 7, 2006) (Order Granting Accelerated Approval of a Proposed Rule Change Establishing Fees for Historical Options Tick Market Data for Non-Members) (SR-ISE-2006-08).

¹⁰ ISE plans to implement the new fees on January 4, 2010. See *supra* the first paragraph of Section II.A.1.

The basis under the Securities Exchange Act of 1934 (the "Exchange Act") for this proposed rule change is the requirement under Section 6(b)(4), that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange believes introduction of the new products, all of which are based on the ISE Open/Close Trade Profile, will provide market participants with an opportunity to obtain additional data in furtherance of their investment decisions. The ISE Open/Close Trade Profile and the Historical Options Tick Data offerings, which have been available for a number of years, have provided subscribers with valuable market data since they were first introduced. The Exchange has made numerous enhancements to both these market data offerings and believes the proposed fee change is reasonable and equitable in that the fee increase is nominal in light of the increased costs borne by the Exchange for the enhancements.

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹¹ in general, and with Sections 6(b)(4) of the Act,¹² in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which ISE operates or controls.

The Exchange believes that the proposed rule change is also consistent with the provisions of Section 6(b)(5) of the Act,¹³ in that it is designed 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 is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to

¹¹ 15 U.S.C. 78f.

¹² 15 U.S.C. 78f(b)(4).

regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.

The Exchange believes that the proposed rule change is also consistent with Section 6(b)(8) of the Act¹⁴ in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as set forth in more detail below.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

The Commission has recently issued an order firmly establishing that in reviewing non-core data products such as the ISE Open/Close Trade Profile, the ISE Open/Close Trade Profile Intraday and ISE's Historical Options Tick Data, the Commission will utilize a market-based approach that relies primarily on competitive forces to determine the terms on which non-core data is made available to investors.¹⁵ The Commission adopted a two-part test:

The first is to ask whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees. If an exchange was subject to significant competitive forces in setting the terms of a proposal, the Commission will approve the 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. If, however, the exchange was not subject to significant

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ 15 U.S.C. 78f(b)(8).

¹⁵ Securities Exchange Act Release No. 57917 (Dec. 2, 2008) ("NetCoalition Order" resolving File No. SRNYSEArca-2006-21).

competitive forces in setting the terms of a proposal for non-core data, the Commission will require the exchange to provide a substantial basis, other than competitive forces, in its proposed rule change demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.¹⁶

This standard begins from the premise that no Commission rule requires exchanges or market participants either to distribute non-core data to the public or to display non-core data to investors.¹⁷

In its NetCoalition Order the Commission concluded that “at least two broad types of significant competitive forces applied to NYSE Arca in setting the terms of its proposal to distribute the ArcaBook data: (1) NYSE Arca’s compelling need to attract order flow from market participants; and (2) the availability to market participants of alternatives to purchasing the ArcaBook data. The Commission conducted an exhaustive 14-page review of these two competitive forces before concluding that the availability of alternatives, as well as the compelling need to attract order flow, imposed significant competitive pressure on that exchange’s need to act equitably, fairly, and reasonably in setting the terms of the fees for its non-core data product.¹⁸

The market data provided in the ISE Open/Close Trade Profile, the ISE Open/Close Trade Profile Intraday and ISE’s Historical Options Tick Data is non-core data that is governed by the same analysis the Commission set forth in the NetCoalition Order. As with the NYSE Arca depth-of-book product, no rule requires ISE or any other exchange to offer this data; nor are vendors required to purchase or display this data.

¹⁶ Id. at 48 – 49.

¹⁷ Id. at 4.

¹⁸ Id. at 51 – 65. The Commission then spent an additional 36 pages (65 – 101) analyzing and refuting comments challenging the Commission’s competition analysis.

Additionally, ISE is constrained by the same two competitive forces in the options market as the Commission found was present in the NetCoalition Order. First, ISE has a compelling need to attract order flow from market participants in order to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on ISE to act reasonably in setting the fees for its market data offerings, 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 sought to charge unreasonably high market data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.

Second, the Exchange is constrained in pricing the ISE Open/Close Trade Profile, the ISE Open/Close Trade Profile Intraday and Historical Options Tick Data by the availability to market participants of alternatives to purchasing ISE's market data offerings. ISE must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data. For example, although ISE's Historical Options Tick Data is separate from the core data feed available by the Options Price Reporting Authority ("OPRA"), all the information available in this market data offering are included in the core data feed. The core OPRA data is widely distributed thus constraining ISE's ability to price its market data offerings. Additionally, the CBOE, which enjoys greater market share than ISE, is also a potential competitor as it too sells an open/close market data offering that market participants may choose to purchase instead.

In the aftermath of the NetCoalition Order, the Exchange believes that the competition among exchanges for order flow and the competition among exchanges for market data products subject ISE's proposed market data offerings to significant competitive forces. In addition, the Exchange believes that no substantial countervailing basis exists to support a finding that the proposed fees fail to meet the requirement of the Act. In sum, the availability of alternative sources of information impose significant competitive pressures on the ISE Open/Close Trade Profile, the ISE Open/Close Trade Profile Intraday and ISE's Historical Options Tick Data and ISE's compelling need to attract order flow impose significant competitive pressure on the Exchange to act equitably, fairly, and reasonably in setting its fees.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not 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.

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 self-regulatory organization consents, the Commission will:

- (a) by order approve such proposed rule change; or

(b) institute proceedings to determine whether the proposed rule change 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 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. Please include File No. SR-ISE-2009-103 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-ISE-2009-103. 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, 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 the Exchange. 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-2009-103 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.¹⁹

Florence E. Harmon
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).