

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62280)

Order Granting Application for Extension of a Temporary Conditional Exemption Pursuant to Section 36(a) of the Exchange Act by the International Securities Exchange, LLC Relating to the Ownership Interest of International Securities Exchange Holdings, Inc. in an Electronic Communications Network

June 11, 2010

I. Introduction

On December 22, 2008, the Securities and Exchange Commission (“Commission”) approved a proposal filed by the International Securities Exchange, LLC (“ISE” or “Exchange”) in connection with corporate transactions (the “Transactions”) in which, among other things, the parent company of ISE, International Securities Exchange Holdings, Inc. (“ISE Holdings”), purchased a 31.54% ownership interest in Direct Edge Holdings LLC (“Direct Edge”), the owner and operator of Direct Edge ECN (“DECN”), a registered broker-dealer and electronic communications network (“ECN”).¹ Following the closing of the Transactions (the “Closing”), Direct Edge’s wholly-owned subsidiary, Maple Merger Sub LLC (“Merger Sub”) began to operate a marketplace for the trading of U.S. cash equity securities by Equity Electronic Access Members of ISE (the “Facility”), under ISE’s rules and as a “facility,” as defined in Section 3(a)(2) of the Securities Exchange Act of 1934 (“Exchange Act”),² of ISE.³

¹ See Securities Exchange Act Release No. 59135 (December 22, 2008), 73 FR 79954 (December 30, 2008) (order approving File No. SR-ISE-2008-85).

² 15 U.S. C. 78c(a)(2).

³ Under Section 3(a)(2) of the Act, the term “facility,” when used with respect to an exchange, includes “its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.”

DECN, which operates as an ECN and submits its limit orders to the Facility for display and execution, is an affiliate of ISE through ISE Holdings' equity interest in DE Holdings. DECN also is a facility, as defined in Section 3(a)(2) of the Exchange Act, of ISE because it is an affiliate of ISE used for the purpose of effecting and reporting securities transactions. Because DECN is a facility of ISE, ISE, absent exemptive relief, would be obligated under Section 19(b) of the Exchange Act to file with the Commission proposed rules governing the operation of DECN's systems and subscriber fees.

On December 22, 2008, the Commission exercised its authority under Section 36 of the Exchange Act to grant ISE a temporary exemption, subject to certain conditions, from the requirements under Section 19(b) of the Exchange Act with respect to DECN's proposed rules.⁴ On June 19, 2009, the Commission extended this temporary exemption for an additional 180 days, subject to certain conditions.⁵ On December 16, 2009, the Commission further extended the temporary exemption for an additional 180 days, subject to certain conditions.⁶

On May 19, 2010, ISE filed with the Commission, pursuant to Rule 0-12⁷ under the Exchange Act, an application under Section 36(a)(1) of the Exchange Act⁸ to extend the relief

⁴ See Securities Exchange Act Release No. 59133 (December 22, 2008), 73 FR 79940 (December 30, 2008) ("Exemption Order").

⁵ See Securities Exchange Act Release No. 60152 (June 19, 2009), 74 FR 30334 (June 25, 2009) ("June Extension").

⁶ See Securities Exchange Act Release No. 61174 (December 16, 2009), 74 FR 68294 (December 23, 2009) ("December Extension").

⁷ 17 CFR 240.0-12.

⁸ 15 U.S.C. 78mm(a)(1).

granted in the Exemption Order through August 31, 2010.⁹ This order grants ISE's request, subject to the satisfaction of certain conditions, which are outlined below.

II. Application for an Extension of the Temporary Conditional Exemption from the Section 19(b) Rule Filing Requirements

On May 19, 2010, ISE requested that the Commission exercise its authority under Section 36 of the Exchange Act to temporarily extend, subject to certain conditions, the temporary conditional exemption granted in the Exemption Order from the rule filing procedures of Section 19(b) of the Exchange Act in connection with ISE Holdings' equity ownership interest in DE Holdings and the continued operation of DECN as a facility of ISE.¹⁰

In May 2009, EDGA Exchange, Inc., and EDGX Exchange, Inc. (together, the "Exchange Subsidiaries"), two wholly-owned subsidiaries of DE Holdings, filed with the Commission Form 1 applications (the "Form 1 Applications") to register as national securities exchanges under Section 6 of the Exchange Act.¹¹ The Form 1 Applications, which included the proposed rules of the Exchange Subsidiaries, were published for comment on September 17, 2009,¹² and the Commission granted the Exchange Subsidiaries' exchange registration applications on March 12, 2010.¹³

⁹ See letter from Michael J. Simon, General Counsel and Secretary, ISE, to Elizabeth M. Murphy, Secretary, Commission, dated May 19, 2010 ("Extension Request").

¹⁰ See Extension Request at 3.

¹¹ See Extension Request at 2.

¹² Securities Exchange Act Release No. 60651 (September 11, 2009), 74 FR 47827 ("Form 1 Applications Notice"). See Extension Request at 2 and 3.

¹³ Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) ("Exchange Registration Order"). See Extension Request at 2.

ISE states that the Exchange Subsidiaries expect to begin operating as national securities exchanges in early July 2010.¹⁴ To ensure a smooth transition of trading from DECN to the Exchange Subsidiaries, there will be a two-week pre-launch period during which members will be able to enter mock orders on each Exchange Subsidiary using test symbols.¹⁵ Following the launch date, there will be a two-week phase-in period during which securities currently traded on DECN will be moved from DECN to each Exchange Subsidiary.¹⁶ ISE believes that this process will help to ensure the functionality of the Exchange Subsidiaries and an orderly transition from DECN to the Exchange Subsidiaries.¹⁷ Accordingly, to ensure the launch of the Exchange Subsidiaries, phase-in the trading of all securities on the Exchange Subsidiaries, decommission DECN after the Exchange Subsidiaries are trading all symbols, and incorporate the ability to respond to unanticipated transition issues, ISE requests an additional extension until August 31, 2010, of the relief granted in the Exemption Order.¹⁸ ISE expects that DECN will continue to operate as a facility of ISE for a relatively brief period.¹⁹

ISE believes that it would be unduly burdensome and inefficient to require DECN's operating rules to be separately subject to the Section 19(b) rule filing process because the published rules of the Exchange Subsidiaries "substantially align with DECN's operations in

¹⁴ See Extension Request at 2.

¹⁵ Id.

¹⁶ Id. Once a symbol has migrated from DECN to the Exchange Subsidiaries, it will no longer be available for trading on DECN and will only be available for trading on the Exchange Subsidiaries. See Extension Request at note 6. After all symbols have migrated to the Exchanged Subsidiaries, DECN intends to promptly file a "Cessation of Operations Report" with the Commission and to cease operations as an ECN. See Extension Request at 2.

¹⁷ See Extension Request at 2 and 3.

¹⁸ See Extension Request at 2.

¹⁹ Id. ISE states that it would be impracticable for DECN to display its limit orders other than on the Facility. See Extension Request at 4.

practice and DECN is only operating temporarily as a facility of ISE until all symbols are fully migrated to the Exchange Subsidiaries.”²⁰ ISE believes, further, that the publication of the Exchange Subsidiaries’ rules as part of the Form 1 Applications should help to mitigate any concerns regarding the transparency of the rules under which DECN will continue to operate, temporarily, as a facility of ISE.²¹

ISE has asked the Commission to exercise its authority under Section 36 of the Exchange Act to grant ISE a temporary extension, until August 31, 2010, subject to certain conditions, of the Exemption Order’s relief from the Section 19(b) rule filing requirements that otherwise would apply to DECN as a facility of ISE.²² The extended temporary conditional exemption would commence immediately and would permit the continued operation of DECN until all symbols are fully migrated to the Exchange Subsidiaries, but in no event later than August 31, 2010.²³ ISE believes that the extended temporary conditional exemption will help to ensure an orderly transition from DECN to the Exchange Subsidiaries.²⁴

ISE states, in addition, that the extended exemption will not diminish the Commission’s ability to monitor ISE and DECN.²⁵ In this regard, ISE notes that to the extent that ISE makes changes to its systems, including the Facility, during the extended temporary exemption period, or thereafter, it remains subject to Section 19(b) and thus obligated to file proposed rule changes with the Commission.²⁶ Further, in the Extension Request, ISE commits to satisfying certain

²⁰ See Extension Request at 3.

²¹ Id.

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id.

conditions, as outlined below, which are identical to the conditions in the Exemption Order, the June Extension, and the December Extension.²⁷ For example, as a condition to the extended temporary exemption, ISE will be required to submit proposed rule changes with respect to any material changes to DECN's functions during the exemption period.²⁸ ISE notes, however, that neither ISE nor DECN anticipates any material changes to DECN's functionality during the extended temporary exemption period.²⁹

III. Order Granting Extension of Temporary Conditional Section 36 Exemption

In 1996, Congress gave the Commission greater flexibility to regulate trading systems, such as DECN, by granting the Commission broad authority to exempt any person from any of the provisions of the Exchange Act and to impose appropriate conditions on their operation.³⁰ Specifically, NSMIA added Section 36(a)(1) to the Exchange Act, which provides that “the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”³¹ In enacting Section 36, Congress indicated that it expected that “the Commission will use this authority to promote efficiency, competition and

²⁷ See Extension Request at note 9 and accompanying text. ISE also represents that it has complied with the conditions in the Exemption Order, the June Extension, and the December Extension, and that it will continue to comply with these conditions during any extension of the relief granted in the Exemption Order. See Extension Request at 4.

²⁸ See Extension Request at 3.

²⁹ See Extension Request at note 8.

³⁰ 15 U.S.C. 78mm(a). Section 36 of the Exchange Act was enacted as part of the National Securities Markets Improvements Act 1996, Pub. L. No. 104-290 (“NSMIA”).

³¹ 15 U.S.C. 78mm(a)(1).

capital formation.”³² It particularly intended to give the Commission sufficient flexibility to respond to changing market and competitive conditions:

The Committee recognizes that the rapidly changing marketplace dictates that effective regulation requires a certain amount of flexibility. Accordingly, the bill grants the SEC general exemptive authority under both the Securities Act and the Securities Exchange Act. This exemptive authority will allow the Commission the flexibility to explore and adopt new approaches to registration and disclosure. It will also enable the Commission to address issues relating to the securities markets more generally. For example, the SEC could deal with the regulatory concerns raised by the recent proliferation of electronic trading systems, which do not fit neatly into the existing regulatory framework.³³

As noted above, on December 22, 2008, the Commission exercised its Section 36 exemptive authority to grant ISE a temporary exemption, subject to certain conditions, from the 19(b) rule filing requirements in connection with the Transaction.³⁴ The Commission granted temporary extensions of this exemptive relief, subject to certain conditions, on June 19, 2009,³⁵ and December 16, 2009.³⁶ In addition, the Commission previously granted similar exemptive relief in connection with Nasdaq’s acquisition of Brut, LLC, the operator of the Brut ECN.³⁷

Section 19(b)(1) of the Exchange Act requires a self-regulatory organization (“self-regulatory organization” or “SRO”), including ISE, to file with the Commission its proposed rule changes accompanied by a concise general statement of the basis and purpose of the proposed

³² H.R. Rep. No. 104-622, 104th Cong., 2^d Sess. 38 (1996).

³³ S. Rep. No. 104-293, 104th Cong., 2^d Sess. 15 (1996).

³⁴ See Exemption Order, supra note 4.

³⁵ See June Extension, supra note 5.

³⁶ See December Extension, supra note 6.

³⁷ See Securities Exchange Act Release No. 50311 (September 3, 2004), 69 FR 54818 (September 10, 2004). Although granting the ISE’s Extension Request would result in a temporary exemption longer than the exemption granted in connection with Nasdaq’s acquisition of Brut, LLC, the Commission believes that it is appropriate to provide the Exchange Subsidiaries with a further extension to help facilitate an orderly transition from DECN to the Exchange Subsidiaries.

rule change. Once a proposed rule change has been filed with the Commission, the Commission is required to publish notice of it and provide an opportunity for public comment. The proposed rule change may not take effect unless approved by the Commission by order, unless the rule change is within the class of rule changes that are effective upon filing pursuant to Section 19(b)(3)(A) of the Act³⁸ or put into effect summarily pursuant to Section 19(b)(3)(B) of the Act.³⁹

Section 19(b)(1) of the Exchange Act defines the term “proposed rule change” to mean “any proposed rule or rule change in, addition to, or deletion from the rules of [a] self-regulatory organization.” Pursuant to Section 3(a)(27) and 3(a)(28) of the Exchange Act, the term “rules of a self-regulatory organization” means (1) the constitution, articles of incorporation, bylaws and rules, or instruments corresponding to the foregoing, of an SRO, and (2) such stated policies, practices and interpretations of an SRO (other than the Municipal Securities Rulemaking Board) as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules. Rule 19b-4(b) under the Exchange Act,⁴⁰ defines the term “stated policy, practice, or interpretation” to mean generally “any material aspect of the operation of the facilities of the self-regulatory organization or any statement made available to the membership, participants, or specified persons thereof that establishes or changes any standard, limit, or guideline with respect to rights and obligations of specified persons or the meaning, administration, or enforcement of an existing rule.”

The term “facility” is defined in Section 3(a)(2) of the Exchange Act, with respect to an exchange, to include “its premises, tangible or intangible property whether on the premises or

³⁸ 15 U.S.C. 78s(b)(3)(A).

³⁹ 15 U.S.C. 78s(b)(3)(B).

⁴⁰ 17 CFR 240.19b-4(b).

not, any right to use such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.”

ISE acknowledges that Merger Sub has operated the Facility as a facility of ISE since the Closing.⁴¹ Absent an exemption, Section 19(b) of the Exchange Act and Rule 19b-4 thereunder would require ISE to file proposed rules with the Commission to allow ISE to operate DECN as a facility of ISE.

As described more fully above, ISE states that the Exchange Subsidiaries expect to begin operating as national securities exchanges in early July 2010.⁴² To ensure a smooth transition from DECN to the Exchange Subsidiaries, there will be a two-week pre-launch period during which members will be able to enter mock orders on the Exchange Subsidiaries using test symbols.⁴³ Following the launch date of the Exchange Subsidiaries, there will be a two-week phase-in period during which securities currently trading on DECN will be moved from DECN to each Exchange Subsidiary.⁴⁴ ISE requests a temporary extension until August 31, 2010, of the relief granted in the Exemption Order, subject to certain conditions, to allow for the pre-launch testing and phase-in of trading on the Exchange Subsidiaries and to provide an orderly transition from DECN to the Exchange Subsidiaries.⁴⁵ ISE notes that DECN intends to cease

⁴¹ See Extension Request at 1. As discussed above, ISE owns a 31.54% ownership interest in DE Holdings, the sole owner of Merger Sub.

⁴² See Extension Request at 2.

⁴³ Id.

⁴⁴ Id.

⁴⁵ See Extension Request at 2 and 3.

operations as an ECN when all symbols are fully migrated to the Exchange Subsidiaries.⁴⁶

Accordingly, ISE expects that DECN will continue to operate as a facility of ISE for a relatively brief period of time.⁴⁷ ISE represents that it has complied with the conditions in the Exemption Order, the June Extension, and the December Extension, and that it will continue to comply with these conditions during any extension of the relief granted in the Exemption Order.⁴⁸

The Commission believes that it is appropriate to grant a temporary extension of the relief provided in the Exemption Order, subject to the conditions described below, to allow DECN to continue to operate as a facility of ISE without being subject to the rule filing requirements of Section 19(b) of the Exchange Act for a temporary period.⁴⁹ Accordingly, the Commission has determined to grant ISE's request for an extension of the relief granted in the Exemption Order, subject to certain conditions, through the earlier of (1) the completion of the migration of all symbols from DECN to the Exchange Subsidiaries; or (2) August 31, 2010. The Commission finds that the temporary extended conditional exemption from the provisions of Section 19(b) of the Exchange Act is appropriate in the public interest and is consistent with the protection of investors. In particular, the Commission believes that the temporary extended exemption should help to promote efficiency and competition in the market by allowing DECN to continue to operate as an ECN for a limited period of time while the Exchange Subsidiaries test their systems and phase-in the trading of securities on the Exchange Subsidiaries. The Commission notes ISE's belief that it would be unduly burdensome and inefficient to require DECN's operating rules to be separately subjected to the Section 19(b) rule filing and approval

⁴⁶ See Extension Request at 2.

⁴⁷ Id.

⁴⁸ See Extension Request at 4.

⁴⁹ In granting this relief, the Commission makes no finding regarding whether ISE's operation of DECN as a facility would be consistent with the Exchange Act.

process because DECN will operate only temporarily as a facility of ISE.⁵⁰ In addition, the Commission notes that ISE represents that the rules of the Exchange Subsidiaries, which were published for comment as part of the Form 1 Applications, “substantially align” with DECN’s operations in practice.⁵¹ Accordingly, the Commission believes that the publication of the Form 1 Applications, coupled with the posting of the rules of the Exchange Subsidiaries on Direct Edge’s web site, should help to mitigate any concerns regarding transparency with respect to the rules under which DECN will continue to operate, temporarily, as a facility of ISE.

To provide the Commission with the opportunity to review and act upon any proposal to change DECN’s fees or to make material changes to DECN’s operations as an ECN during the period covered by the extended temporary exemption, as well as to ensure that the Commission’s ability to monitor ISE and DECN is not diminished by the extended temporary exemption, the Commission is imposing the following conditions while the extended temporary exemption is in effect. The Commission believes such conditions are necessary and appropriate in the public interest for the protection of investors. Therefore, the Commission is granting to ISE an extended temporary exemption, until the earlier of (1) the completion of the migration of all symbols from DECN to the Exchange Subsidiaries; or (2) August 31, 2010, pursuant to Section 36 of the Exchange Act, from the rule filing requirements imposed by Section 19(b) of the Exchange Act as set forth above, provided that ISE and DECN comply with the following conditions:

- (1) DECN remains a registered broker-dealer under Section 15 of the Exchange Act⁵² and continues to operate as an ECN;

⁵⁰ See Extension Request at 3.

⁵¹ See Extension Request at 3.

⁵² 15 U.S.C. 78o.

- (2) DECN operates in compliance with the obligations set forth under Regulation ATS;
- (3) DECN and ISE continue to operate as separate legal entities;
- (4) ISE files a proposed rule change under Section 19 of the Exchange Act⁵³ if any material changes are sought to be made to DECN's operations. A material change would include any changes to a stated policy, practice, or interpretation regarding the operation of DECN or any other event or action relating to DECN that would require the filing of a proposed rule change by an SRO or an SRO facility;⁵⁴
- (5) ISE files a proposed rule change under Section 19 of the Exchange Act if DECN's fee schedule is sought to be modified; and
- (6) ISE treats DECN the same as other ECNs that participate in the Facility, and, in particular, ISE does not accord DECN preferential treatment in how DECN submits orders to the Facility or in the way its orders are displayed or executed.⁵⁵

In addition, the Commission notes that the Financial Industry Regulatory Authority is currently the Designated Examining Authority for DECN.

⁵³ 15 U.S.C. 78s.

⁵⁴ See Section 19(b) of the Exchange Act and Rule 19b-4 thereunder. The Commission notes that a material change would include, among other things, changes to DECN's operating platform; the types of securities traded on DECN; DECN's types of subscribers; or the reporting venue for trading that takes place on DECN. The Commission also notes that any rule filings must set forth the operation of the DECN facility sufficiently so that the Commission and the public are able to evaluate the proposed changes.

⁵⁵ See Extension Request at note 9.

For the reasons discussed above, the Commission finds that the extended temporary conditional exemptive relief requested by ISE is appropriate in the public interest and is consistent with the protection of investors.

IT IS ORDERED, pursuant to Section 36 of the Exchange Act,⁵⁶ that the application for an extended temporary conditional exemption is granted through the earlier of (1) the completion of the migration of all symbols from DECN to the Exchange Subsidiaries; or (2) August 31, 2010, effective immediately.

By the Commission.

Elizabeth M. Murphy
Secretary

⁵⁶ 15 U.S.C. 78mm.