

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59600; File No. SR-ISE-2009-09)

March 19, 2009

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Rule 623 (Communications to Customers)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 11, 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 and II below, which items have been prepared by the Exchange. ISE has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,³ which renders the proposal effective upon filing with 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 proposes to remove or otherwise amend elements of ISE Rule 623 ("Communications to Customers") that incorporate provisions of the Securities Act of 1933 ("Securities Act")⁴ because options traded on the Exchange consist solely of standardized options issued by the Options Clearing Corporation ("OCC"), a registered

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240 19b-4(f)(6)

⁴ 15 U.S.C. 77a et seq.

clearing agency, that are exempt under Rule 238 of the Securities Act from all provisions of the Securities Act except the antifraud provisions of Section 17. Additionally, the proposed amendments expand the types of communications governed by Rule 623 to include independently prepared reprints and other communications between a member or member organization and a customer. The proposed amendments also exempt certain options communications from the pre-approval requirement by a Registered Options Principal (“ROP”). The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room, and www.ise.com.

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 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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On December 23, 2002, the Commission published final rules that exempt standardized options, as defined in Rule 9b-1⁵ of the Exchange Act, that are issued by a registered clearing agency and traded on a registered national securities exchange or on a registered national securities association, from all provisions of the Securities Act (other

⁵ 17 CFR 240.9b-1.

than the anti-fraud provisions) and the registration requirements of the Exchange Act.⁶ Because the Securities Act and the rules thereunder (other than the anti-fraud provisions) are no longer applicable to such standardized options, the Exchange proposes to remove elements of the Securities Act that are embedded in ISE Rule 623. In particular, ISE proposes to remove all references to a “prospectus” from Rule 623. Prospectuses are no longer required for such standardized options, and the OCC has, in fact, ceased publication of a prospectus.⁷ In addition, the proposed amendments will update and reorganize Rule 623. The proposed amendments are similar to amendments filed with and approved by the Commission by the Financial Industry Regulatory Authority, Inc. and the Chicago Board Options Exchange, and, if adopted, would provide a more uniform approach to communications to customers regarding standardized options.⁸

a. Deletion of Certain Provisions

As noted above, ISE Rule 623 contains a number of references to a prospectus and other Securities Act requirements. The Exchange proposes to delete the following from Rule 623: Rule 623 (a)(4), which references the Securities Act definition of prospectus; Rule 623(e), which incorporates Securities Act principles in that it prohibits

⁶ See Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From the Registration Requirements of the Securities Exchange Act of 1934; Final Rule, Securities Act Release No. 8171 and Exchange Act Release No. 47082 (December 23, 2002), 68 FR 188 (January 2, 2003).

⁷ The options disclosure document ("ODD") prepared in accordance with Rule 9b-1 under the Exchange Act is not deemed to be a prospectus. 17 CFR 230.135b. See, e.g., Securities Act Release No. 8049 (Dec. 21, 2001), 67 FR 228 (Jan. 2, 2002).

⁸ See Exchange Act Release No. 57720 (Apr. 25, 2008), 73 FR 24332 (May 2, 2008) (SR FINRA-2008-13), and Exchange Act Release No. 58823 (October 21, 2008), 73 FR 63747 (October 28, 2008) (SR-CBOE 2007-30).

written material concerning options from being furnished to any person who has not previously or contemporaneously received the ODD; Rule 623(a)(2), which defines the term “Educational Material;”⁹ Rule 623(g), which outlines what is permitted in an “Advertisement;”¹⁰ and Rule 623(h), which concerns educational material.¹¹

b. Redesignation of Rule 623(a) to Proposed Rule 623(d) and Related Amendments

Rule 623(a) currently contains an outline of the “General Rule” for options communications. ISE proposes to redesignate paragraph (a) as paragraph (d), and to incorporate limitations on the use of options communications contained in Rule 623(f) into proposed Rule 623(d). In addition, proposed Rule 623(d)(3) would amend Rule 623(a)(3) by clarifying the types of cautionary statements and caveats that are prohibited. Also, as previously noted, ISE proposes to delete Rule 623(a)(4). Further, current Rule 623(i) sets forth the standards applicable to Sales Literature and (i)(1) sets forth the requirement that Sales Literature shall state that supporting documentation for any claims, comparisons, recommendations, statistics or other technical data, will be supplied upon request. The Exchange proposed to redesignate Rule 623(i)(1) as proposed Rule 623(d)(7).

c. Redesignation of Rule 623(c) to Proposed Rule 623(b) and Proposed Amendments

ISE proposes to redesignate paragraph (c) as paragraph (b). ISE also proposes to amend this paragraph to include the types of communications proposed to be added to the

⁹ This paragraph essentially incorporates language of Securities Act Rule 134a. While this amendment would eliminate the separate educational material category, as discussed below the Exchange also proposes to revise the definition of Sales Literature to include educational material.

¹⁰ This paragraph essentially incorporates language of Securities Act Rule 134.

¹¹ See note 9, supra.

definition of “Options Communications” in proposed Rule 623(a). Proposed Rules 623(b)(2) and (b)(3) would also amend the current requirements to obtain advance approval by a ROP for most options communications by exempting certain options communications, defined as “Correspondence” and “Institutional Sales Material.” Specifically, proposed Rule 623(b)(2) would exempt correspondence from the pre-approval requirement unless the correspondence is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member. All correspondence would be subject to general supervision and review requirements. Proposed Rule 623(b)(3) would exempt institutional sales material from the pre-approval requirement if the material is distributed to “qualified investors” (as defined in Section 3(a)(54) of the Exchange Act).¹² Pre-approval by a ROP would, however, be required with respect to independently prepared reprints. In addition, Proposed Rule 623(b)(4) would require that firms retain options communications in accordance with the record-keeping requirements of Rule 17a-4 under the Exchange Act.¹³ Proposed Rule 623(b)(4) would also require that firms retain other related documents in the form and for the time periods required for options communications by Rule 17a-4.

¹² 15 U.S.C. 78c(a)(54).

¹³ 17 CFR 240.17a-4. More specifically, Rule 17a-4(b)(4) requires that a broker-dealer retain “originals of all communications received and copies of all communications sent...including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public.”

d. Redesignation of Rule 623(d) to Proposed Rule 623(c) and Related Amendments

ISE proposes to redesignate paragraph (d) as paragraph (c). Rule 623(d) currently requires members to obtain approval for every advertisement and all educational material from the Exchange. This requirement applies regardless of whether the options communications are used before or after the delivery of a current ODD. ISE proposes to amend this provision to require approval by the Exchange only with respect to options communications used prior to the delivery of a current ODD. The Exchange pre-approval requirement for options communications used subsequent to the delivery of the ODD is being eliminated because the ODD should help alert the customer to the characteristics and risks associated with trading in options and because Rule 623(b) requires the Registered Options Principal of a member organization to pre-approve options communications (with certain exceptions for “Correspondence” and “Institutional Sales Material”). This provision would also be amended to include the types of communications added to the definition of “Options Communications” in proposed Rule 623(a).

e. Redesignation of Rule 623(b) to Proposed Rule 623(a) and Related Amendments

Rule 623(b) currently defines terms used in Rule 623. ISE proposes to redesignate paragraph (b) as paragraph (a). ISE also proposes to amend the definition of “Options Communications” in proposed Rule 623(a) to expand the types of communications governed by Rule 623 to include independently prepared reprints and other communications between a member or member organization and a customer. The Exchange proposes to amend the definitions of “Advertisement” and “Sales Literature;” and define “Correspondence,” “Institutional Sales Material,” “Public Appearances,” and

“Independently Prepared Reprints;” to clarify the rule. In addition, as previously noted, ISE proposes to delete the definition of “Educational Material.”

f. Proposed Rule 623(e)

Proposed Rule 623(e) would set forth (i) standards for options communications that are not preceded or accompanied by an ODD and (ii) standards for options communications used prior to delivery of an ODD. These requirements generally would clarify and restate the requirements contained in the current Rule 623(i). Proposed Rule 623(e)(1)(B) would require options communications to contain contact information for obtaining a copy of the ODD. As previously noted, the provisions of Rule 623(g) that outline what is permitted in an advertisement are proposed to be deleted and the provisions relating to standards for options communications used prior to delivery of the ODD are proposed to be incorporated into proposed Rule 623(e)(2).

g. Redesignation of Portions of Rule 623(i) to Proposed Rule 623(g), Proposed Rule 623(h), Proposed Rule 623(i), and Related Amendments

As stated above, the Exchange proposes to redesignate Rule 623(i)(1) as proposed Rule 623(d)(7). Current Rule 623(i)(2) pertains to standards for Sales Literature that contains projected performance figures and current Rule 623(i)(3) pertains to standards for Sales Literature that contains historical performance figures. The Exchange proposes to redesignate Rule 623(i)(2) as proposed Rule 623(g)(1) and Rule 623(i)(3) as proposed Rule 623(h). Rule 623(i) currently requires that a copy of the ODD precede or accompany options related sales literature. The Exchange is proposing to modify the ODD delivery requirement applicable to sales literature to provide that an ODD must precede or accompany any communication that conveys past or projected performance

figures involving options or constitutes a recommendation pertaining to options. A notice providing the name and address of a person from whom the ODD may be obtained would be required in sales literature that does not contain a recommendation or past or projected performance figures. Because ISE is proposing to merge educational material into the sales literature category,¹⁴ this amendment would continue to allow communications that are educational in nature to be disseminated without being preceded or accompanied by a copy of the ODD.

The Exchange proposes to redesignate current Rule 623(i)(4) as proposed Rule 623(i). The Exchange proposes to delete Rules 623(i)(5), (i)(6), and (i)(7). The Exchange believes that (i)(5) and (i)(6) are unnecessary because worksheets are included in the definition of “Sales Literature.” The Exchange believes that (i)(7) is no longer necessary because the Exchange is proposing to clarify the record-keeping requirements applicable to options communications in proposed Rule 623(b)(4).

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,¹⁵ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁶ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to,

¹⁴ See Proposed Rule 623(a)(2).

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(5).

and facilitating transactions in securities, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, this proposed rule change will promote consistency between ISE and other SRO rules and provide the investing public with options communications rules that are designed to provide appropriate safeguards and greater clarity.

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 written comments from members or other interested parties.

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

Because the foregoing rule change: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition and (3) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁷ and Rule 19b-4(f)(6)¹⁸ thereunder.

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f)(6).

A proposed rule change filed under Rule 19b-4(f)(6)¹⁹ does not become operative prior to 30 days after the date of filing or such shorter time as the Commission may designate if such action is consistent with the protection of investors and the public interest. However, Rule 19b-4(f)(6)²⁰ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30 day operative delay period to permit the proposed rule change to be implemented immediately. The Commission notes that the proposed rule change is substantially identical to a proposed rule change that was approved by the Commission after an opportunity for public comment,²¹ and does not raise any new substantive issues. For these reasons, the Commission believes that waiver of the 30-day operative delay²² is consistent with the protection of investors and the public interest and designates the proposal operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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.

¹⁹ 17 CFR 240.19b-4(f)(6).

²⁰ 17 CFR 240.19b-4(f)(6).

²¹ ISE's proposed rule change is substantially identical to a proposed rule change by the Chicago Board Options Exchange ("CBOE") that was recently approved by the Commission. See Exchange Act Release No. 58823 (October 21, 2008), 73 FR 63747 (October 28, 2008) (SR-CBOE 2007-30).

²² For purposes only 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. Please include File No. SR-ISE-2009-09 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-2009-09. 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, 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 the 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-2009-09 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 Market Regulation, pursuant to delegated authority.²³

Florence E. Harmon
Deputy Secretary

²³ 17 CFR 200.30-3(a)(12).