

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59679; File No. SR-ISE-2007-97)

April 1, 2009

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Market Data Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 5, 2007, International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On March 9, 2009, the Exchange filed Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its Schedule of Fees to establish fees for a real-time depth of market data offering. 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 Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the

¹ 15 U.S.C.78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced and superseded the original filing in its entirety.

proposed rule change. The text of those 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 parts of such statements.

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

1. Purpose

ISE currently creates market data that consists of options quotes and orders 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 book.” This “core”⁴ data is formatted according to Options Price Reporting Authority (“OPRA”) specification and sent to OPRA for redistribution to the public.

In addition to the BBO “core” data, the Exchange also produces a “non-core” data feed, the ISE Depth of Market Data Feed (“Depth of Market”), a service that aggregates all quotes and orders at the top five price levels, on both the bid and offer side of the market. The Depth of Market offering consists of non-marketable orders and quotes that a prospective buyer or seller has chosen to display. The purpose of this proposed rule change is to establish fees for the ISE Depth of Market offering. Depth of Market, which is distributed in real time, provides subscribers with a consolidated view of tradable prices beyond the BBO. Further, Depth of Market shows additional liquidity and enhances transparency for ISE traded options that is not currently available through the OPRA feed. The proposed offering is available to members and non-members, and to both professional and non-professional subscribers.

⁴ “Core” data refers to the best-priced quotations and comprehensive last sale reports of all markets that the Commission requires a central processor to consolidate and distribute to the public pursuant to joint-SRO plans. “Non-core” data refers to products other than the consolidated products that markets offer collectively under joint industry plans.

ISE believes that it has consistently supported the broadest, most effective dissemination of market information to public investors. Its multiple filings regarding “non-core” market data have provided market participants with tools to enhance their trading opportunities.⁵

The Exchange proposes to charge distributors⁶ of Depth of Market \$5,000 per month. In addition, the Exchange proposes to charge the distributor a monthly fee per controlled device⁷ of (i) \$50 per controlled device for Professionals at a distributor where the data is for internal use only, (ii) \$50 per controlled device for Professionals who receive the data from a distributor where the data is further redistributed externally, and (iii) \$5 per controlled device for Non-Professionals who receive the data from a distributor. The Exchange proposes to limit for any one month the combined maximum amount of fees payable by a distributor, as follows: (i) \$7,500 for Professionals at a distributor where the data is for internal use only, (ii) \$12,500 for Professionals where the data is further redistributed externally in a controlled device, and (iii) \$10,000 for Non-Professionals who receive the data in a controlled device from a distributor. In an effort to accommodate a distributor’s development effort to integrate the Depth of Market

⁵ 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); 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); 53756 (May 3, 2006), 71 FR 27526 (May 11, 2006) (Order Granting Approval of a Proposed Rule Change Establishing Fees for Enhanced Sentiment Market Data); 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); 56315 (August 24, 2007), 72 FR 50148 (August 30, 2007) (Order Approving a Proposed Rule Change Relating to ISEE Select Market Data Fees).

⁶ ISE proposes that a “distributor” 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. Further, ISE proposes that all distributors execute an ISE distributor agreement. “Redistributors” include market data vendors and connectivity providers such as extranets and private network providers.

⁷ ISE proposes that a “controlled device” be defined as any device that a distributor of the ISE Depth of Market permits to access the information in the Depth of Market offering.

offering, 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.

In differentiating between Professional and Non-Professional subscribers, the Exchange proposes to apply the same criteria for qualification as a Non-Professional subscriber as the Consolidated Tape Association (“CTA”) Plan and Consolidated Quotation System Plan Participants use. Accordingly, a “Non-Professional Subscriber” is an authorized end-user of Depth of Market data who is a natural person and who is neither: (a) registered or qualified with the Securities and Exchange Commission (the “Commission”), the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (b) engaged as an “investment advisor” as that term is defined Section 202(a)(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that act); nor (c) employed by a bank or other organization exempt from registration under Federal and/or state securities laws to perform functions that would require him/her to be so registered or qualified if he/she were to perform such functions for an organization not so exempt. A “Professional Subscriber” is an authorized end-user of Depth of Market that has not qualified as a Non-Professional Subscriber.

Under the proposal, the Exchange would apply one device fee in respect of professional subscribers to Depth of Market and a different, lower device fee in respect of non-professional subscribers. The use of a lower fee for non-professional subscribers than for professional subscribers has a long history. CTA first adopted a non-professional subscriber fee 25 years

ago.⁸ Since then, individual investors have had broadened access to real-time market information. The Exchange believes that a non-professional subscriber fee for Depth of Market will likely lead to greater access by individual investors to Depth of Market information and thereby to further the statutory goals expressed in Section 11A(a)(1)(c) of the Securities Exchange Act of 1934 (the “Exchange Act”).

Further, Section 603(a)(2) of Regulation NMS requires markets to distribute market data “on terms that are not unreasonably discriminatory.” Given the differences in data usage between professional subscribers and non-professional subscribers and the industry’s long acceptance of different fees for professional subscribers and non-professional subscribers, the Exchange believes that the proposed non-professional subscriber fee does not unreasonably discriminate against the professional subscriber fee.

The Exchange believes the proposed fees for Depth of Market comport with the standard that the Commission established for determining whether market data fees relating to non-core market data products are fair and reasonable. In its recent “Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data” (the “NYSE ArcaBook Approval Order”),⁹ the Commission reiterated its position from its release approving Regulation NMS that it should “allow market forces, rather than regulatory requirements, to determine what, if any, additional quotations outside the NBBO are displayed to investors.”¹⁰

⁸ See the Sixth Substantive Amendment and Sixth Charges Amendment to the CTA Plan, File No. S7-433, Release Nos. 34-20002 (July 22, 1983), 34-20239 (September 30, 1983) and 34-20386 (November 17, 1983).

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

¹⁰ See Regulation NMS Release, 70 FR at 37566-37567 (addressing differences in distribution standards between core data and non-core data).

The Commission went on to state that:

The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system. Indeed, competition among multiple markets and market participants trading the same products is the hallmark of the national market system.¹¹

The Commission then articulated the standard that it will apply in assessing the fairness and reasonableness of market data fees for non-core products, as follows:

With respect to non-core data, . . . the Commission has maintained a market-based approach that leaves a much fuller opportunity for competitive forces to work. This market-based approach to non-core data has two parts. 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.¹²

The options industry is subject to significant competitive forces and the introduction of the Depth of Market offering is just one response to that competition. The options Exchanges

¹¹ NYSE ArcaBook Approval Order at pp. 46-47.

¹² Id. at pp. 48-49.

compete intensely for order flow. The primary purpose of any “non-core” data offering by an Exchange is to attract order flow. Attracting order flow is a significant concern of any exchange, be it an equity, options or futures exchange. “If an exchange cannot attract orders, it will not be able to execute transactions. If it cannot execute transactions, it will not generate transaction revenue. If an exchange cannot attract orders or execute transactions, it will not have market data to distribute,”¹³ or to monetize.

ISE currently competes with six other options exchanges for order flow and “the competition is fierce.”¹⁴ The number of registered options exchanges in the United States has increased 75% since ISE itself became an exchange in 2000. Although ISE’s total volume increased in 2008 over 2007, its market share suffered a decline. The table below details market share among the options exchanges in all listed products from 2006 through 2008, showing increases and decreases in market share quarter-by-quarter.

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%

Despite the frequent variations in market share, no single exchange has more than approximately one-third the market share. Given the current competitive pressures in the options

¹³ Id. at p. 51.

¹⁴ Id. at p. 52.

industry, no exchange can take any of its share of trading for granted. “Even the most dominant exchanges are subject to severe pressure in the current market environment.”¹⁵ In order for ISE to maintain its market share, it must compete vigorously for order flow. 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.

Moreover, absent certain exclusively licensed monopolistic products, market participants have the ability to send their order to any of the seven options exchanges since nearly all underlying securities whose options are available for trading are offered at each of the seven exchanges. For example, of the more than 2,000 underlying securities whose options are traded on ISE, only 41 products (two percent) are singly-listed on ISE, which collectively represents 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 products that ISE has non-exclusively licensed from index providers and which are available to other exchanges to license; 10 are Exchange Traded Funds that other exchanges have chosen not to list; and the remaining 11 products are equities 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.

With regards to the 16 proprietary index options, ISE notes that they are traded exclusively on ISE not due to any type of monopoly control, but rather due to lack of interest by other exchanges. ISE further notes that when another exchange has shown interest in trading a proprietary ISE product, the Exchange has licensed the trading in that product to other exchanges. For example, NYSE Arca recently signed a license agreement with ISE to list and

¹⁵ Id. at p. 53.

trade ISE's foreign currency options and that ISE proprietary product is now multiply listed. Although this introduces competition for order flow, ISE believes options that are listed on multiple exchanges provide investors with better markets for execution and lower fees. It also tends to raise overall industry trading volume in the product. We are ready, willing, and able to license our proprietary index products for trading on other exchanges on commercially reasonable terms.

The Exchange further notes that there are a number of alternative "non-core" products available to investors. The ISE Depth of Market does not provide a complete picture of the full market for options on a security. Rather, an investor has a number of different information sources to choose from in determining which exchange has the best market. The other exchanges, all of whom can produce their own depth of market products, as well independent distribution of order data by securities firms and data vendors, all pose a competitive threat. Moreover, the Exchange believes that the great majority of investors do not believe that it is necessary to purchase a depth-of-book product.

Currently, of nearly 200 firms that are members of the Exchange, less than 15 percent currently access Depth of Market, which the Exchange is offering at no cost, pending approval of this proposed rule change. The lack of committed members affirms the Exchange's view that Depth of Market, while it may serve a beneficial purpose and would be 'nice to have', does not contain information that is so critical that it would adversely impact trading decisions made by investors. Further, while Depth of Market is available to non-professional or "retail" subscribers, the Exchange, despite the low level of subscription by professional subscribers, believes that Depth of Market is primarily a product for market professionals, who have access to other sources of market data and will purchase Depth of Market only if they determine that the

perceived benefits outweigh the costs. The Exchange believes the Commission concurs with this sentiment, when it said in the NYSE ArcaBook Approval Order, “the fact that 95% of the professional users of [Nasdaq] core data choose not to purchase the depth-of-book order data of a major exchange strongly suggests that no exchange has monopoly pricing power for its depth-of-book order data.”¹⁶

In sum, the availability of alternative sources of information coupled with the Exchange’s critical need to attract order flow impose significant competitive pressure on ISE to act equitably, fairly, and reasonably in setting fees for Depth of Market. The introduction of this new market data offering is, in part, a response to that pressure. For the reasons cited above, the Exchange believes that the Depth of Market offering, including the proposed fees, is equitable, fair, reasonable and not unreasonably discriminatory. In addition, the Exchange believes that no substantial countervailing basis exists to support a finding that the proposed terms and fees for Depth of Market fails to meet the requirement of the Exchange Act.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(4),¹⁷ that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities; with Section 6(b)(5)¹⁸ of the Act, which requires, among other things, that the rules of a national securities 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

¹⁶ Id. at p. 64.

¹⁷ 15 U.S.C. 78f(b)(4).

¹⁸ 15 U.S.C. 78f(b)(5).

investors and the public interest; and with Section 6(b)(8)¹⁹ of the Act, which requires that the rules of a national securities exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange developed and conducted a comprehensive survey of a cross-section of participants in the financial services industry regarding their level of interest in a number of proprietary “non-core” market data offerings. Based on the results of that survey, the Exchange developed a business plan to create and offer a number of proprietary market data products targeted to potential user groups, e.g., individual investors, institutional investors, broker-dealers, etc. The Exchange also retained a consultant to validate the business plan and to provide advice on the structure and amount of fees to charge for these products. Based on all of this information, the Exchange established a pricing structure for its Depth of Market offering for professional and non-professional subscribers. The Exchange believes the proposed rule filing provides market participants with added transparency to help improve trading efficiency.

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

¹⁹ 15 U.S.C. 78f(b)(8).

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 the 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. In particular, the Commission notes that unlike the market data fees approved by the Commission in the NYSE ArcaBook Approval Order, ISE's fees would apply to securities that are traded only on ISE. Would the inclusion of data for such products in the ISE Depth of Market feed undermine a finding, consistent with the approach set forth in the NYSE ArcaBook Approval Order, that ISE was subject to significant competitive forces in setting the terms of its fee proposal for non-core data products? Should the Commission evaluate those singly-listed securities for which another exchange would be required to obtain a license to trade differently than singly-listed securities that do not require a license? Does it matter whether any such required license must be obtained from ISE or a third party? ISE represents that it would license its proprietary index products to any other exchange on commercially reasonable terms. How should this representation be factored into the Commission's evaluation? What impact, if any, would the trading volume represented by such singly-listed securities have on the analysis? Are there any factors with respect to singly-listed securities that would impact an analysis of whether ISE's proposed fees are 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 Number SR- ISE-2007-97 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.

All submissions should refer to File Number SR-ISE-2007-97. 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 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-2007-97 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Florence E. Harmon
Deputy Secretary

²⁰ 17 CFR 200.30-3(a)(12).