

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60598; File No. SR-ISE-2009-45)

September 1, 2009

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to Changes to Rule 312 in Connection with the Purchase by International Securities Exchange Holdings, Inc. of Equity Interests in Optifreeze, LLC

I. Introduction

On July 23, 2009, the International Securities Exchange, LLC (“ISE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) a proposed rule change, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> to amend ISE Rule 312 (Limitation on Affiliation between the Exchange and Members) in connection with the capital contribution by its parent company, International Securities Exchange Holdings, Inc. (“ISE Holdings”), in Optifreeze LLC, a Delaware Limited Liability Company (“Optifreeze”). The proposed rule change was published for comment in the Federal Register on July 30, 2009.<sup>3</sup> The Commission received no comments on the proposal. On August 28, 2009, ISE filed Amendment No. 1 to the proposed rule change.<sup>4</sup> Because

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Securities Exchange Act Release No. 60382 (July 24, 2009), 74 FR 38068 (“Notice”).

<sup>4</sup> In Amendment No. 1, the Exchange made technical corrections to the filing. Specifically, in Amendment No. 1, ISE removed text that is not relevant. As originally proposed, ISE Rule 312(c)(4) would require the Exchange and Ballista Securities LLC to “establish and maintain procedures and internal control reasonably designed to ensure that Ballista Securities LLC and its affiliates do not have access to nonpublic information relating to the Exchange obtained as a result of ISE Holdings’ ownership interest in Ballista Securities LLC, until such information is available generally to similarly situated members of the Exchange in connection with the provision of inbound routing to the Exchange.” Amendment No. 1 deletes the clause “in connection with the provision of

Amendment No. 1 is technical in nature, the Commission is not publishing it for comment. This order approves the proposed rule change, as modified by Amendment No. 1.

## II. Overview

On June 5, 2009, ISE Holdings entered into a Membership Purchase Agreement (“Purchase Agreement”) with Optifreeze. Ballista Securities LLC (“Ballista Securities”), a wholly-owned subsidiary of Optifreeze, is a member of the Exchange. Pursuant to the Purchase Agreement, ISE Holdings contributed cash to the capital of Optifreeze in exchange for membership interests representing 8.57% of the aggregate membership interests in Optifreeze. As a result of the purchase, ISE Holdings became a member of Optifreeze and is entitled to appoint one representative to the Optifreeze Board of Directors, but does not have any voting or other control arrangements with any other members of Optifreeze relating to its investment in Optifreeze.

In connection with the capital contribution by ISE Holdings in Optifreeze, the Exchange proposes to amend ISE Rule 312 (Limitation on Affiliation between the Exchange and Members) to allow for ISE Holdings’ ownership interest in Ballista Securities on a one year pilot basis, and to set forth certain limitations and obligations regarding that relationship. ISE Rule 312 provides, in part, that, without prior Commission approval, the Exchange, or any entity with which the Exchange is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member or non-member owner. As a result of the transaction, an affiliate

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inbound routing to the Exchange” from proposed ISE Rule 312(c)(4) and from the related discussion in the filing, as Ballista Securities’ services are not limited to inbound routing to the Exchange.

In Amendment No. 1, ISE also clarified that the proposal is for a one year pilot period.

of the Exchange, ISE Holdings, maintains an indirect ownership interest in an ISE member, Ballista Securities, which, without Commission approval, would violate ISE Rule 312.

### III. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>5</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>6</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and 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.

In the past, the Commission has expressed concern that the affiliation of an exchange, or an affiliate of the exchange, with one of its members raises potential conflicts of interest and the potential for unfair competitive advantage.<sup>7</sup> The proposed relationship raises similar concerns.

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<sup>5</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> See, e.g., Securities Exchange Act Release Nos. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving combination of NYSE and Archipelago Holdings, Inc.); 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-Amex-2008-62) (order approving acquisition of the American Stock Exchange by NYSE Euronext); 59135 (December 22, 2008), 73

ISE Rule 312 provides, in relevant part, that: “Without prior SEC approval, the Exchange, or any facility of the Exchange, or any entity with which the Exchange or any facility of the Exchange is affiliated shall not, directly or indirectly through one or more intermediaries, acquire or maintain an ownership interest in a Member or non-member owner.” As discussed above, the Exchange’s parent, ISE Holdings, now owns 8.57% of the aggregate membership interests in Optifreeze, and thereby maintains an indirect ownership interest in Ballista Securities, an Exchange member. Thus, because of its affiliation with the Exchange, ISE Holdings’ ownership interest in Ballista would violate ISE Rule 312, absent Commission approval.

ISE has requested that the Commission approve the proposed relationship described above on a temporary basis for a period of one year, subject to certain limitations and conditions set forth in proposed ISE Rule 312(c). Specifically, proposed ISE Rule 312(c) provides that (1) so long as ISE Holdings, or another affiliate of the Exchange, maintains an ownership interest in Ballista Securities; and (2) Ballista Securities remains a member of ISE:

- FINRA, a self-regulatory organization unaffiliated with the Exchange or any of its affiliates (a “non-affiliated SRO”), will carry out oversight and enforcement responsibilities as the designated examining authority designated by the Commission pursuant to Rule 17d-1 under the Act<sup>8</sup> with the responsibility for examining Ballista Securities for compliance with applicable financial responsibility rules;

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FR 79954 (December 30, 2008) (SR-ISE-2009-85) (order approving the purchase by ISE Holdings of an ownership interest in DirectEdge Holdings LLC); and 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (SR-NYSE-2008-120) (order approving a joint venture between NYSE and BIDS Holdings L.P.).

<sup>8</sup>

17 CFR 240.17d-1.

- The Exchange shall enter into a plan pursuant to Rule 17d-2 under the Act<sup>9</sup> with a non-affiliated SRO to relieve the Exchange of regulatory responsibilities for Ballista Securities with respect to rules that are common rules between the Exchange and the SRO;<sup>10</sup>
- With respect to unique ISE rules, ISE shall enter into a regulatory services contract with a non-affiliated SRO to perform certain regulatory responsibilities for Ballista Securities;
- The regulatory services contract with the non-affiliated SRO shall require the Exchange to provide the non-affiliated SRO with information, in an easily accessible manner, regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively, “exceptions”) in which Ballista Securities is identified as a participant that has potentially violated ISE or Commission rules, and shall require that the non-affiliated SRO provide a report to the Exchange quantifying exceptions on not less than a quarterly basis;
- ISE shall establish and maintain procedures and internal controls reasonably designed to ensure that Ballista Securities and its affiliates do not develop or implement changes to its systems on the basis of nonpublic information obtained as a result of ISE Holdings’ ownership interest in Ballista Securities, until such information is available generally to similarly situated members of the Exchange; and
- The ownership interest of ISE Holdings in Ballista Securities is subject to the foregoing conditions and is approved on a temporary basis, for a period not to exceed one year.

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<sup>9</sup> 17 CFR 240.17d-2.

<sup>10</sup> Common rules are ISE rules that are substantially similar to the rules of the non-affiliated SRO.

Additionally, ISE Holdings currently owns less than a 9% equity interest in Optifreeze and does not own a controlling interest in Optifreeze or otherwise have any veto or other special voting rights with respect to the management or operation of Optifreeze. The Exchange has acknowledged that neither it, nor any of its affiliates, may directly or indirectly increase its equity ownership in Optifreeze without prior Commission approval.<sup>11</sup>

The Commission finds the proposed limitations and conditions of Rule 312(c) to be consistent with the Act, particularly Section 6(b)(5) thereunder.<sup>12</sup> Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange, or one of its affiliates, holds an ownership interest in a member, the proposed conditions appear reasonably designed to mitigate concerns about potential conflicts of interest and unfair competitive advantage. The Commission believes that the oversight of Ballista Securities by a non-affiliated SRO,<sup>13</sup> combined with the requirement that ISE provide the non-affiliated SRO with information regarding exceptions relating to Ballista Securities on not less than a quarterly basis, promote robust and independent regulation of Ballista Securities. ISE and Ballista Securities must also establish and maintain procedures and internal controls that are reasonably designed to prevent Ballista Securities and its affiliates from deriving any unfair informational advantage resulting from its relationship with ISE. Finally, the Commission believes that ISE's proposal on a pilot basis will provide ISE and the Commission an opportunity to assess whether there might be any

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<sup>11</sup> See Notice, 74 FR at 38069.

<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> This oversight will be accomplished through a 17d-2 agreement and a regulatory services contract between ISE and a non-affiliated SRO. The Commission notes that ISE has not yet entered into such agreements.

adverse consequences of the exception and whether a permanent exception is warranted. The Commission believes that, taken together, these limitations and conditions are reasonably designed to mitigate potential conflicts between the commercial interests of the Exchange or its parent company in Ballista Securities and the Exchange's regulatory responsibilities with respect to Ballista Securities.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (File No. SR-ISE-2009-45) is hereby approved on a pilot basis through September 1, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>14</sup> 15 U.S.C. 78s(b)(2).

<sup>15</sup> 17 CFR 200.30-3(a)(12).