

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-62117; File No. SR-ISE-2010-34)

May 18, 2010

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change Relating to Fees for the ISE Order Feed

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 11, 2010, 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 adopt subscription fees for the sale of a new market data offering called the ISE Order Feed. 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 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.

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

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

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 adopt subscription fees for the sale of the ISE Order Feed. These proposed fee changes will be operative on July 1, 2010, pending regulatory approval.

The ISE Order Feed provides real-time updates every time a new limit order that is not immediately executable at the best bid/offer (BBO) is placed on the ISE order book. This feed does not include market orders, immediate or cancel (IOC) orders, quotes or any non-displayed interest.

While the Options Price Reporting Authority (OPRA) feed provides aggregated ISE BBO order information, the ISE Order Feed provides each individual order. The information included on the ISE Order Feed includes the order type (buy/sell), the order price, the order size, and customer indicator (which reflects whether the order is a customer order), as well as details for each instrument series, including the symbols (series and underlying security), put or call indicator, the expiration and the strike price of the series.

The ISE BBO on the OPRA feed includes all quotes provided by ISE market makers and all orders provided by members which are then aggregated at the BBO. The ISE Order Feed, on the other hand, includes each individual limit order rather than only the aggregated volume of all orders. The ISE Order Feed does not include quote traffic, which will result in much less data for subscribers to process and less bandwidth than feeds that provide aggregated quotes and orders.

The Exchange currently does not charge fees for the ISE Order Feed. This market data offering will be made available to both members and non-members on a subscription basis. The

Exchange proposes to charge distributors<sup>3</sup> of the ISE Order Feed (i) \$2,000 per month and will not charge distributors a monthly fee per controlled device<sup>4</sup> as long the ISE Order Feed is for internal use only, (ii) \$2,000 per month and \$10 per external controlled device per month a) if the ISE Order Feed is redistributed externally by a subscriber, or b) if the ISE Order Feed is redistributed internally and externally. For subscribers who redistribute the ISE Order Feed externally, or redistribute the ISE Order Feed internally and externally, the Exchange proposes to limit for any one month the combined maximum amount of fees payable to \$2,500. For example, a firm that subscribes to the ISE Order Feed and then redistributes it to 40 clients will pay \$2,400 per month (\$2,000 for the feed and \$400 for the controlled device (\$10 x 40)). If that same firm redistributes the data to 100 clients, the fee for that firm will be capped at \$2,500, resulting in a savings of \$500.

## 2. Statutory Basis

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 product will provide market participants with an opportunity to obtain additional data in furtherance of their investment decisions.

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<sup>3</sup> A “distributor” is any firm that receives the ISE Order Feed directly from ISE or indirectly through a “redistributor” and then distributes it either internally or externally. All distributors will be required by the Exchange to execute an ISE distributor agreement. “Redistributors” include market data vendors and connectivity providers such as extranets and private network providers.

<sup>4</sup> A “controlled device” is as any device that a distributor of the ISE Order Feed permits to access the information in the ISE Order Feed.

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>5</sup> in general, and with Sections 6(b)(4) of the Act,<sup>6</sup> 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,<sup>7</sup> 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 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 Act<sup>8</sup> 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.

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<sup>5</sup> 15 U.S.C. 78f.

<sup>6</sup> 15 U.S.C. 78f(b)(4).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> 15 U.S.C. 78f(b)(8).

The Commission has recently issued an order firmly establishing that in reviewing non-core data products such as the ISE Order Feed, 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.<sup>9</sup> 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 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.<sup>10</sup>

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.<sup>11</sup>

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

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<sup>9</sup> See Securities Exchange Act Release No. 57917 (Dec. 2, 2008) (“NetCoalition Order” resolving File No. SR-NYSEArca-2006-21).

<sup>10</sup> Id. at 48 – 49.

<sup>11</sup> Id. at 4.

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.<sup>12</sup>

The market data provided in the ISE Order Feed 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 rules require ISE or any other exchange to offer this data; nor are vendors required to purchase or display this data.

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.

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<sup>12</sup> Id. at 51 – 65. The Commission then spent an additional 36 pages (65 – 101) analyzing and refuting comments challenging the Commission's competition analysis.

Second, the Exchange is constrained in pricing the ISE Order Feed 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. Other exchanges, including some who may enjoy greater market share than ISE, are potential competitors as they too sell similar market data offerings that market participants may choose to purchase instead. For example, NASDAQ OMX PHLX ("PHLX") has filed a proposed rule change to adopt fees for a market data product that includes a data feed that is similar to the ISE Order Feed.<sup>13</sup> The PHLX' Specialized Order Feed, which PHLX has proposed to integrate into its TOPO Plus Orders market data offering, includes "real-time information to keep track of single order book(s)."<sup>14</sup> Further, the NetCoalition Order notes that one of the principal market data reforms adopted by the Commission was to authorize the independent distribution of data by broker/dealers. If one or more broker/dealers determine that the cost of subscribing to the ISE Order Feed is too high, they are entitled to independently distribute their own order data and may do so with or without charging a fee.<sup>15</sup>

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 Order Feed and

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<sup>13</sup> See Securities Exchange Act Release No. 61878 (April 8, 2010), 75 FR 20023 (April 16, 2010) (SR-PHLX-2010-48).

<sup>14</sup> Id.

<sup>15</sup> NetCoalition Order at 63.

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](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2010-34 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-2010-34. 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,<sup>16</sup> 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 Web site viewing and printing 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 the 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

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<sup>16</sup> The text of the proposed rule change is available on the Commission's Web site at <http://www.sec.gov/rules/sro.shtml>.

make available publicly. All submissions should refer to File Number SR-ISE-2010-34 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.<sup>17</sup>

Florence E. Harmon  
Deputy Secretary

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