

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69396; File No. SR-ISE-2013-18)

April 18, 2013

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Granting Approval of Proposed Rule Change to Address Order Handling under the Options Order Protection and Locked/Crossed Market Plan, the Authority of the Exchange to Cancel Orders When a Technical or Systems Issue Occurs, and to Describe the Operation of Linkage Handler Error Accounts

I. Introduction

On March 7, 2013, the International Securities Exchange, LLC (“Exchange” or “ISE”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to address: (i) order handling under the Options Order Protection and Locked/Crossed Market Plan; (ii) the authority of the Exchange to cancel orders (or release routing-related orders) when a technical or systems issue occurs; and (iii) describe the operation of Linkage Handler (defined below) error account(s), which may be used to liquidate unmatched executions that may occur in the provision of the Exchange’s routing service. The proposed rule change was published for comment in the Federal Register on March 18, 2013.³ The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 69114 (March 12, 2013), 78 FR 16733 (March 18, 2013) (SR-ISE-2013-18) (“Notice”).

II. Description of the Proposal

New Supplementary Material .02 to ISE Rule 1901 (Order Protection) and New ISE Rule 1903 (Order Routing to Other Exchanges)

In its proposal, the Exchange states that, under the Options Order Protection and Locked/Crossed Market Plan (“Plan”),⁴ it cannot execute orders at a price that is inferior to the national best bid or offer (“NBBO”), nor can ISE place an order on its book that would cause the Exchange best bid or offer to lock or cross another exchange’s quote.⁵ The Exchange states that, in compliance with this requirement, incoming orders are not automatically executed at a price inferior to another exchange’s protected bid or protected offer, nor placed on the limit order book if they would lock or cross an away market. “Non-Customer Orders” (orders for the account of a broker or dealer)⁶ are rejected in these circumstances, while “Public Customer Orders” (orders for the account of a person that is not a broker-dealer)⁷ are handled by the Primary Market Maker.⁸ Currently, Primary Market Makers⁹ have the responsibility of either executing the

⁴ The Commission notes that the Plan is a national market system plan proposed by the options exchanges and approved by the Commission. See Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4-546). ISE is a participant in the Plan. Among other things, the Plan requires each participant in the Plan to adopt rules that are reasonably designed to prevent trade-throughs and establish, maintain and enforce written rules that require its members to reasonably avoid displaying locked and crossed markets. See Sections 5 and 6 of the Plan.

⁵ See Notice, 78 FR at 16733; see also, ISE Rules 1901 and 1902. The Commission notes that ISE Rules 1901 and 1902 were designed to implement certain of the Plan’s requirements with respect to trade-throughs and locked and crossed markets. See Securities Exchange Act Release No. 60559 (August 21, 2009), 74 FR 44425 (August 28, 2009) (SR-ISE-2009-27).

⁶ ISE Rule 100(a)(28).

⁷ ISE Rule 100(a)(39).

⁸ ISE Rule 714(a).

⁹ In addition to the obligations for market makers generally, a “Primary Market Maker” has

Public Customer Order at a price that at least matches the NBBO or obtaining better prices from the away market(s) by sending one or more intermarket sweep orders (“ISOs”) on the Public Customer’s behalf.¹⁰ The Exchange proposes to amend its rules to remove the requirement that Primary Market Makers handle Public Customer Orders in the circumstances described above,¹¹ and to instead provide a centralized process for sending ISOs to other exchanges on behalf of Public Customer Orders. The Exchange proposes that it will contract with one or more unaffiliated brokers to route orders to other exchanges when necessary to comply with the linkage rules (“Linkage Handlers”). Specifically, in circumstances where marketable Public Customer Orders are received when the ISE is not at the NBBO or orders are received that would lock or cross another market, they will be exposed to ISE members for up to one second.¹² Under the proposed rules if, after a Public Customer Order is exposed, such order cannot be executed in full on the Exchange at the then-current NBBO or better and is marketable, the lesser of the full displayed size of the Protected Bid(s) or Protected Offer(s) that are priced better than the ISE’s quote or the balance of the order will be sent to the Linkage Handler, and any additional balance of the order that is not marketable against the then-current NBBO will be placed on the ISE book.¹³

certain responsibilities for options classes to which it is appointed as a Primary Market Maker. See ISE Rule 803(c).

¹⁰ See Notice, 78 FR at 16734; and ISE Rule 803(c)(2).

¹¹ The Exchange proposes to eliminate Rule 803(c)(1) – (3) and Supplementary Material .02 to Rule 803, which addresses Primary Market Makers’ obligations in handling Public Customer Orders.

¹² The current process for exposure is being moved from Supplementary Material .02 to Rule 803 to Supplementary Material .02 to Rule 1901.

¹³ See Proposed Supplementary Material .02 to ISE Rule 1901. Any additional balance of

The Exchange proposes to adopt new ISE Rule 1903 (Order Routing to Other Exchanges), which would govern the Exchange’s process for routing ISOs to other markets. As discussed above, the Exchange intends to contract with one or more Linkage Handlers that are not affiliated with the Exchange to route ISOs to other exchanges. The Exchange represents that any such contract will restrict the use of any confidential and proprietary information that the Linkage Handler receives to legitimate business purposes necessary for routing orders at the direction of the Exchange.¹⁴ Routing services would be available to ISE members only and are optional. Members that do not want orders routed can use the “Do Not Route” designation to avoid routing.¹⁵ Also, ISE is not approved to be a designated examining authority.¹⁶

New ISE Rule 1903 also provides that: (1) the Exchange shall establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and the Linkage Handler, and any other entity, including any affiliate of the Linkage Handler, and, if the Linkage Handler or any of its affiliates engages in any other business activities other than providing routing services to the Exchange, between the segment of the Linkage Handler or affiliate that provides the other

the order will be executed on the ISE if it is marketable. Any additional balance of the order that is not marketable against the then-current NBBO will be placed on the ISE book.

¹⁴ See Notice, 78 FR at 16734.

¹⁵ See id.

¹⁶ See Notice, 78 FR at 16734 n.14. The Commission notes that, therefore, ISE is not the designated examining authority for any Linkage Handlers. See also, e-mail from Laura Clare, Assistant General Counsel, ISE, to Theodore S. Venuti, Senior Special Counsel (confirming (i) that neither the Exchange nor any of its affiliates is approved to be a designated examining authority and therefore, neither the Exchange nor any of its affiliates may be a designated examining authority for any of the Linkage Handlers, as defined in .03 of the Supplementary Material to Rule 1901; and (ii) to become a designated examining authority, the Exchange would need Commission approval and would also need to amend its rules governing linkage handling).

business activities and the segment of the Linkage Handler that provides the routing services; (2) the Exchange will provide its routing services in compliance with the provisions of the Act and the rules thereunder, including, but not limited to, the requirements in Section 6(b)(4) and (5) of the Act that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; (3) the Exchange will determine the logic that provides when, how, and where orders are routed away to other exchanges;¹⁷ (4) the Linkage Handler will receive routing instructions from the Exchange, to route orders to other exchanges and report such executions back to the Exchange and the Linkage Handler cannot change the terms of an order or the routing instructions, nor does the Linkage Handler have any discretion about where to route an order; and (5) any bid or offer entered on the Exchange routed to another exchange via a Linkage Handler that results in an execution shall be binding on the Member that entered such bid/offer.¹⁸

¹⁷ The Exchange notes that this provision would not prohibit a Linkage Handler from complying with its obligations under Rule 15c3-5 under the Act. See Notice, 78 FR at 16734 n.15.

¹⁸ Proposed Supplementary Material .01 to Rule 1903 states that the rule does not prohibit a Linkage Handler from designating a preferred market-maker (or equivalent market participant) at the other exchange to which an outbound ISO is being routed. The Exchange states that this proposed provision has no impact on customer orders, and does not disadvantage customers in any way. See Notice, 78 FR at 16734-35. The Exchange will still be making the sole determination as to which exchange an order will be routed, as well as when and how the order will be routed. See id.

Proposed Supplementary Material .02 to Rule 1903 is designed to address how the Exchange will handle orders in the event that there are no operable Linkage Handlers to provide routing services. In such circumstance, the Exchange will cancel orders that, if processed by the Exchange, would violate Rules 1901 (prohibition on trade-throughs) or 1902 (prohibition on locked and crossed markets). See id. at 16735.

New ISE Rule 1904 (Order Cancellation/ Release)

The Exchange is also proposing to adopt Rule 1904 (Order Cancellation/Release) which, the Exchange states, is designed to address the Exchange's authority to cancel orders (or release routing-related orders) when a technical or systems issue occurs. The Exchange states that paragraph (a) of Proposed Rule 1904 is designed to authorize the Exchange to cancel orders as it deems to be necessary to maintain fair and orderly markets if a technical or systems issue occurs at the Exchange,¹⁹ the Linkage Handler, or another exchange to which an Exchange order has been routed. Paragraph (a) also provides that a Linkage Handler may only cancel orders being routed to another exchange based on the Exchange's standing or specific instructions or as otherwise provided in the Exchange rules.²⁰ In addition, paragraph (a) provides that the

¹⁹ The Exchange states that the authority to cancel orders to maintain fair and orderly markets under proposed Rule 1904 would apply to any technical or systems issue at the Exchange and would include any orders at the Exchange (*i.e.*, the authority to cancel orders would apply to any orders that are subject to the Exchange's routing service and any orders that are not subject to the Exchange's routing service). By comparison, the routing service error account provisions under proposed Rule 1905 (discussed below) would apply to original and corresponding orders that are subject to the Exchange routing service. See Notice, 78 FR at 16735.

²⁰ The Exchange states that, in addition to being unaffiliated with the Exchange, the Linkage Handlers are not facilities of the Exchange. For all routing services, the Exchange determines the logic that provides when, how and where orders are routed away to other exchanges. The Linkage Handler receives the routing instructions from the Exchange to route orders to other exchanges and to report executions back to the Exchange. The Linkage Handler cannot change the terms of an order or the routing instructions, nor does the Linkage Handler have any discretion about where to route an order. See proposed Rule 1903(c), (d) and (e). Under paragraph (a) to proposed Rule 1904, the decision to take action with respect to orders affected by a technical or systems issue shall be made by the Exchange. Depending on where those orders are located, a Linkage Handler would be permitted to initiate a cancellation of an order(s) pursuant to the Exchange's standing or specific instructions or as otherwise provided in Exchange Rules (*e.g.*, the Exchange's standing instruction might provide, among other things, that the Linkage Handler could initiate the cancellation of orders if the Linkage Handler is experiencing technical or systems issues routing orders to an away exchange). See Notice, 78 FR at 16735 n.20.

Exchange shall provide notice of the cancelation of the Members' original order to affected Members as soon as practicable.

Paragraph (b) of Proposed Rule 1904 provides that the Exchange may also determine to release orders being held on the Exchange awaiting an away exchange execution as it deems to be necessary to maintain fair and orderly markets if a technical or systems issue occurs at the Exchange, a Linkage Handler, or another exchange to which an order has been routed.

Proposed Rule 1905 (Routing Service Error Accounts)

New ISE Rule 1905 provides that each Linkage Handler shall maintain, in the name of the Linkage Handler, one or more accounts for the purpose of liquidating unmatched trade positions that may occur in connection with the routing service provided under new ISE Rule 1903 ("error positions").

Paragraph (a) of the rule provides that errors to which the rule applies include any action or omission by the Exchange, a Linkage Handler, or another exchange to which an Exchange order has been routed, that results in an unmatched trade position due to the execution of an order that is subject to the away market routing service and for which there is no corresponding order to pair with the execution (each a "routing error"); and that such routing errors would include, without limitation, positions resulting from determinations by the Exchange to cancel or release an order pursuant to new ISE Rule 1904.

Paragraph (b) of the rule provides that error positions will be liquidated in a Linkage Handler's error account. Paragraph (c) of new ISE Rule 1905 requires that a Linkage Handler utilizing its error account to liquidate error positions shall liquidate the positions as soon as practicable. The Linkage Handler could determine to liquidate the position itself or have a third-party broker-dealer liquidate the position on the Linkage Handler's behalf. Paragraph (c)(i)

provides that the routing broker shall establish and enforce policies and procedures reasonably designed to (1) adequately restrict the flow of confidential and proprietary information associated with the liquidation of the error position in accordance with Rule 1903 and (2) prevent the use of information associated with other orders subject to the routing services when making determinations regarding the liquidation of error positions. In addition, paragraph (c)(ii) provides that the Linkage Handler shall make and keep records associated with the liquidation of such error positions and shall maintain such records in accordance with Rule 17a-4 under the Act.²¹

Finally, paragraph (d) provides that the Exchange shall make and keep records to document all determinations to treat positions as error positions under the rule, and shall maintain such records in accordance with Rule 17a-1 under the Act.²²

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b) of the Act²³ and the rules and regulations thereunder applicable to a national securities exchange.²⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁵ which requires, among other

²¹ 17 CFR 240.17a-4. Because a Linkage Handler will be performing an Exchange function on a contractual basis and at the direction of the Exchange, the Exchange also proposes to exclude Linkage Handlers from the limits on compensation in ISE Rule 705(d). Instead, the Exchange states that such liability matters will be handled on a contractual basis as they are with other vendors or services to the Exchange. See Notice, 78 FR at 16737.

²² 17 CFR 240.17a-1.

²³ 15 U.S.C. 78f(b).

²⁴ 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).

²⁵ 15 U.S.C. 78f(b)(5).

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, 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 are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also believes the proposed rule change is consistent with Section 11A(a)(1)(C) of the Act²⁶ in that it seeks to assure economically efficient execution of securities transactions.

The Commission finds that ISE's proposed rules governing the routing of orders are consistent with the Act. As described above, the Exchange would contract with one or more Linkage Handlers that are not affiliated with the Exchange to route ISOs to other markets.²⁷ Further, the routing of orders would be optional;²⁸ and the Exchange would be responsible for routing decisions and would retain control of the routing logic.²⁹ None of ISE or its affiliates is approved to be a designated examining authority, and therefore, neither the Exchange, nor any affiliate of the Exchange,³⁰ may be the designated examining authority for a Linkage Handler absent Commission approval and amendment of ISE's rules governing the routing of orders by

²⁶ 15 U.S.C. 78k-1(a)(1)(C).

²⁷ The Commission notes that Linkage Handlers would be required to comply with Rule 15c3-5 under the Act. See supra note 17.

²⁸ Members may choose to avoid routing by using the Do Not Route designation. See supra note 15 and accompanying text.

²⁹ See proposed ISE Rule 1903(d) and (e).

³⁰ See supra note 16 and accompanying text.

its Linkage Handlers.³¹ The Commission also notes that the rule contemplates procedures and internal controls designed to protect confidential and proprietary information, which should help ensure that the Linkage Handlers do not misuse routing information obtained from the Exchange. In addition, the Exchange would provide its routing services in compliance with the Act and the rules thereunder, including but not limited to, the requirements in Sections 6(b)(4) and (5) of the Act³² that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members and other persons using the Exchange's facilities, and not be designed to permit unfair discrimination between customers, brokers, or dealers.³³ The Commission notes that such rules governing the routing of orders by Linkage Handlers should help ISE comply with its responsibility under the Plan.³⁴

The Commission recognizes that technical or systems issues may occur, and believes that new ISE Rule 1904, in allowing ISE to cancel or release orders affected by technical or systems issues, should provide a reasonably efficient means for ISE to handle such orders, and appears reasonably designed to permit ISE to maintain fair and orderly markets.³⁵

³¹ See id.

³² 15 U.S.C. 78f(b)(4) and (5).

³³ See proposed ISE Rule 1903(c).

³⁴ See supra note 4.

³⁵ The Commission notes that ISE states that it believes that allowing the Exchange to cancel or release orders under such circumstances would allow the Exchange to maintain fair and orderly markets, and that new ISE Rule 1905 is designed ensure full trade certainty for market participants and avoid disrupting the clearance and settlement process. See Notice, 78 FR at 16737. The Commission also notes that ISE states that a decision to cancel or release orders due to a technical or systems issue is not equivalent to the Exchange declaring self-help against another exchange pursuant to ISE Rule 1905. See 17 CFR 242.611(b). See also Notice, 78 FR at 16735 n.21.

The Commission also believes that allowing the Exchange to resolve error positions through the use of error accounts maintained by each Linkage Handler pursuant to the procedures set forth in the rule, and as described above, is consistent with the Act.³⁶ The Commission notes that the rule establishes criteria for determining which positions are error positions to which the rule applies, and the procedures for the handling of such positions. In particular, the Commission notes that Proposed ISE Rule 1905 only applies to error positions that result from the Linkage Handler's routing service, and that such positions shall be liquidated by the Linkage Handler, as applicable, as soon as practicable.³⁷ In this regard, the Commission believes that the new rule appears reasonably designed to further just and equitable principles of trade and the protection of investors and the public interest, and to help prevent unfair discrimination, in that it should help assure the handling of error positions will be based on clear and objective criteria, and that the resolution of those positions will occur promptly through a transparent process.

The Commission is also concerned about the potential for misuse of confidential and proprietary information. The Commission notes that Linkage Handlers will be required to establish and enforce policies and procedures reasonably designed to (1) adequately restrict the flow of confidential and proprietary information associated with the liquidation of the error positions, and (2) prevent the use of information associated with other orders subject to the routing services when making determinations regarding the liquidation of error positions.³⁸ The

³⁶ The Commission notes that ISE states that it believes that it is reasonable and appropriate to address routing errors through the error account of a Linkage Handler in the manner proposed because, among other reasons, the Linkage Handler is the executing broker associated with such transactions. See Notice, 78 FR at 16736.

³⁷ See ISE Rule 1905(c).

³⁸ See ISE Rule 1905(c)(i)

Commission believes that these requirements should help mitigate the Commission's concerns. In particular, the Commission believes that these requirements should help assure that none of ISE, its Linkage Handlers, or any third-party broker-dealer is able to misuse confidential or proprietary information obtained in connection with the liquidation of error positions for its own benefit. The Commission also notes that each Linkage Handler would be required to make and keep records associated with the liquidation of error positions³⁹ and ISE would be required to make and keep records to document all determinations to treat positions as error positions under this Rule.⁴⁰

Finally, the Commission notes that the proposed procedures for routing orders, canceling orders and the handling of error positions are similar to procedures the Commission has approved for other exchanges.⁴¹

³⁹ See ISE Rule 1905(c)(ii).

⁴⁰ See ISE Rule 1905(d). The Commission notes that the Exchange will transition options classes from the current process to the new proposed process using Linkage Handlers over a period of time and will notify its members via information circular as products are transitioned.

⁴¹ See, e.g., Securities Exchange Act Release Nos. 68583 (January 4, 2013), 78 FR 2302 (January 10, 2013) (SR-C2-2012-038); 68584 (January 4, 2013), 78 FR 2304 (January 10, 2013) (SR-CBOE-2012-109); 68585 (January 4, 2013), 78 FR 2308 (January 10, 2013) (SR-CBOE-2012-108); and 60551 (August 20, 2009), 74 FR 43196 (August 26, 2009) (SR-CBOE-2009-040).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁴² that the proposed rule change (SR-ISE-2013-18) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴³

Kevin M. O'Neill
Deputy Secretary

⁴² 15 U.S.C. 78s(b)(2).

⁴³ 17 CFR 200.30-3(a)(12).