

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50658; File No. SR-ISE-2004-32)

November 12, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto by International Securities Exchange, Inc., Relating to Fee Changes

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 September 30, 2004, the International Securities Exchange, Inc. (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On November 8, 2004, the ISE filed Amendment No. 1 to the proposed rule change.³ The ISE filed the proposal pursuant to Section 19(b)(3)(A) under the Act,⁴ which renders the proposal effective upon filing the amended proposal with the Commission.⁵ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Michael J. Simon, Senior Vice President and General Counsel, ISE, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated November 8, 2004 ("Amendment No. 1"). In Amendment No. 1, the ISE clarified: (1) that the phrase "customer order" should be replaced with the phrase "Public Customer Order," relating to the Payment for Order Flow execution fee on the ISE schedule of fees; (2) the meaning of "member refresh program;" (3) that the Cabinet Lease/Maintenance and the Additional Servers fees are the only computer fees subject to the waiver; and (4) the list of fee waivers that have expired and the list of delisted products that are proposed to be deleted.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ For purposes of calculating the 60-day abrogation period, the Commission considers the proposal to have been filed on November 8, 2004, the date the ISE filed Amendment No. 1.

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 (i) to eliminate payment for order flow fees for certain transactions where there is a corresponding linkage transaction, (ii) for a pilot period, to cap and waive the facilitation execution fee when a member transacts a certain number of contracts through the Exchange's Facilitation Mechanism, (iii) to provide up to two months of equipment fee rebates to members that "refresh" certain computer equipment they use to connect to the Exchange within certain prescribed time periods under the Exchange's member refresh program, (iv) to adopt a surcharge fee for options on exchange traded funds based on indexes developed by the New York Stock Exchange ("NYSE"), and (v) to delete references to expired fee waivers and delisted products. The text of the proposed rule change is available at the ISE and at the Commission.

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, as amended, 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 ISE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange proposes to amend the Exchange's Schedule of Fees (i) to eliminate

payment for order flow fees for certain linkage transactions, (ii) for a pilot period, to reduce and waive the facilitation execution fee and comparison fee when a member transacts a certain number of contracts through the Exchange's Facilitation Mechanism, (iii) to rebate up to two months of computer equipment lease fees to members that "refresh" certain computer equipment they use to connect to the Exchange within certain prescribed time periods under the Exchange's member firm refresh program, (iv) to adopt a surcharge fee for options on exchange traded funds based on indexes developed by the New York Stock Exchange (the "NYSE"), and (v) to delete references to expired fee waivers and delisted products.

Specifically, the Exchange proposes to eliminate the payment for order flow fee for public customer transactions that Primary Market Makers ("PMMs") effect after sending a Principal Acting as Agent Linkage order to an away exchange on behalf of the public customer.⁶ For these transactions, PMMs currently pay the Exchange's transaction fees, the away exchange's transaction fees, and two sets of clearing fees. The Exchange believes that it is appropriate to lessen the costs on PMMs by not imposing a payment for order flow fee in addition to those charges.

The Exchange also proposes to reduce and waive the facilitation execution fee and the comparison fee when a member transacts a certain number of contracts through the Exchange's Facilitation Mechanism for a pilot period ending November 30, 2005. The structure of the reduction and waiver of the facilitation execution fee and the comparison fee is based on the structure of the reduction and waiver of the Nasdaq-100 Tracking Stock ("QQQ") execution fee and the comparison fee that the Exchange instituted in November 2003 and extended in May

⁶ See Amendment No. 1, supra note 3.

2004.⁷ That is, when a member's monthly average daily volume ("ADV") in the Facilitation Mechanism reaches 8,000 contracts, the member's facilitation execution fee for the next 2,000 contracts transacted in the Facilitation Mechanism would be reduced by \$.10 per contract. Further, when a member's monthly ADV in the Facilitation Mechanism reaches 10,000 contracts, the Exchange would waive the entire facilitation execution fee and the comparison fee for each contract transacted in the Facilitation Mechanism thereafter. As with the QQQ incentives, the Exchange is proposing this fee change to encourage members to use the Facilitation Mechanism. The pilot period would expire on November 30, 2005.

Moreover, the Exchange proposes to rebate up to two months of computer equipment lease fees to members that "refresh" certain computer equipment they use to connect to the Exchange within certain prescribed time periods under the Exchange's "member refresh program." The Exchange clarifies that "member refresh program" is a voluntary program developed by the Exchange in which the Exchange seeks to have its members update their existing, obsolete computer equipment that they use to connect to the Exchange with new, state-of-the-art computer equipment.⁸ Since the Exchange is fully-electronic, it believes that it is in its and investors' best interest to enable its members to have the most efficient, reliable, and fastest computer connection to the Exchange.⁹ Since updating this computer equipment is costly and time consuming for members, the Exchange is proposing to adopt certain fee waivers to create an

⁷ See Securities Exchange Act Release Nos. 49147 (January 29, 2004), 69 FR 5629 (February 5, 2004) (File No. SR-ISE 2003-32); and 49853 (June 14, 2004), 69 FR 35087 (June 23, 2004) (File No. SR-ISE-2004-15).

⁸ See Amendment No. 1, supra note 3.

⁹ Id.

incentive for members to participate.¹⁰ The Exchange recently implemented a voluntary member firm refresh program in which the Exchange seeks to have its members “refresh” their computer equipment that they use to connect to the Exchange with newer computer equipment. To induce members to participate in the program in a timely fashion, the Exchange proposes to rebate one month’s computer equipment lease fees to members who agree to refresh their computer equipment no later than November 30, 2004.¹¹ Further, the Exchange proposes to rebate an additional one month’s computer equipment lease fees to members who complete the refresh within two months of such agreement. The Exchange clarifies that only the Cabinet Lease/Maintenance fee of \$400 per Gateway per month and the Additional Servers fee of \$250 per server per month would be subject to the proposed fee waiver.¹²

The Exchange proposes to adopt a ten cent (\$0.10) per contract surcharge fee for non-customer transactions in options on exchange-traded-funds (“ETFs”) based on two indexes developed by the NYSE, as discussed below. The Exchange recently signed a license agreement with the NYSE that grants the Exchange the right to, among other things, list options on ETFs based on indexes developed by the NYSE. The Exchange is listing two such products--the iShares NYSE 100 Index Fund (symbol: NY), and the iShares NYSE Composite Index Fund (symbol: NYC). The Exchange believes that adopting the surcharge fee for transactions in these products is the best way to off-set the license fee for these products.

¹⁰ Id.

¹¹ The Exchange extended the date by which a Member must contract with the Exchange to refresh its equipment from October 29, 2004 to November 30, 2004. See Amendment No. 1, supra note 3.

¹² See Amendment No. 1, supra note 3. To make that evident on the Schedule of Fees, the Exchange has placed an asterisk next to those fee items and the Notes on the Schedule of Fees.

Furthermore, the Exchange proposes to delete references to the following expired fee waivers: a Market Maker and Firm Proprietary Execution Fee waiver for Firm Proprietary trades in the iShares S&P 100 Index Fund through June 30, 2004; and a Surcharge for Firm Proprietary trades in the iShares S&P 100 Index Fund through June 30, 2004. The Exchange also proposes to delete references to the following delisted products: GS \$ InvesTop Index, Technology Select Sector SPDR Fund (XLK), Utilities Select Sector SPDR Fund (XLU), Health Care Select Sector SPDR Fund (XLV), Industrial Select Sector SPDR Fund (XLI), Consumer Discretionary Select Sector SPDR Fund (XLY), Materials Select Sector SPDR Fund (XLB), Consumer Staples Select Sector SPDR Fund (XLP); Russell 2000 Value iShares (IWN), Russell 1000 Growth iShares (IWF), Russell 1000 Value iShares (IWD), Russell Midcap Index Fund iShares (IWR), Russell 3000 Value Index Fund iShares (IWW), Russell 3000 Growth Index Fund iShares (IWZ), Russell Midcap Growth Index Fund iShares (IWP), Russell Midcap Value Index Fund iShares (IWS), Russell 1000 Index Fund iShares (IWB), and Russell 3000 Index Fund iShares (IWV).¹³

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act¹⁴ in general, and furthers the objectives of the Act¹⁵ in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, except in the case of the surcharge fee (which is, however, consistent with the

¹³ See Amendment No. 1, supra note 3.

¹⁴ 15 U.S.C. 78s(b).

¹⁵ 15 U.S.C. 78f(b)(4).

Exchange's treatment of other licensed products), these fees generally would eliminate, reduce, waive, or rebate fees.

B. Self-Regulatory Organization's Statement on Burden on Competition

The ISE does not believe that the proposed rule change will 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

The foregoing proposed rule change has been designated as a fee change pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁶ and Rule 19b-4(f)(2)¹⁷ thereunder because it establishes or changes a due, fee, or other charge imposed by the Exchange. Accordingly, the proposal will take effect upon filing the amended proposal with the Commission. At any time within 60 days of the filing of such amended proposed rule change, the Commission may summarily abrogate such rule change, as amended, 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.¹⁸

¹⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁷ 17 CFR 240.19b-4(f)(2).

¹⁸ For purposes of calculating the 60-day abrogation period, the Commission considers the proposal to have been filed on November 8, 2004, the date the ISE filed Amendment No. 1.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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 Number SR-ISE-2004-32 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-ISE-2004-32. 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. Copies of this 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-2004-32 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Margaret H. McFarland
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).