

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-50900; File No. SR-ISE-2004-36)

December 21, 2004

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

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 November 30, 2004, the International Securities Exchange, Inc. (the “Exchange” or the “ISE”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which items have been prepared by the ISE. On December 15, 2004, the ISE filed an amendment to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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: (i) extend, for one year, until November 30, 2005, a program that caps and waives execution and comparison fees for

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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> See Form 19b-4 dated December 15, 2004 (“Amendment No. 1”). In Amendment No. 1, ISE updated the attached Schedule of Fees to reflect the applicable text in effect as of the date of filing of the proposed rule change, included clarifying language explaining the Exchange’s purpose in extending the QQQ cap and fee waiver, removed the reference to a proposed change to the Schedule of Fees concerning the Exchange’s proposed Price Improvement Mechanism (“PIM”) that was pending Commission approval at the time of filing, and made other conforming changes to the text of the proposed rule change. The Exchange plans to resubmit the proposed change relating to the ISE Schedule of Fees dealing with the PIM in a separate, subsequent rule filing to the Commission.

Amendment No. 1 to the proposed rule change replaced the original proposed rule change in its entirety.

transactions in options on the Nasdaq 100 Tracking Stock (“QQQ”) when a member transacts a certain number of QQQ option contracts; (ii) increase, from 700,000 to 1,000,000, the Exchange’s average daily volume (“A.D.V.”) breakpoint which is used for determining the execution fee for market maker and firm proprietary transactions; and (iii) delete references to expired fee waivers.

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 ISE 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. 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 ISE Schedule of Fees to (i) extend, for one year, until November 30, 2005, a program that caps and waives execution and comparison fees for transactions in QQQ options when a member transacts a certain number of QQQ option contracts, (ii) increase, from 700,000 to 1,000,000, the Exchange’s A.D.V. breakpoint which is used for determining the execution fee for market maker and firm proprietary transactions, and (iii) delete references to expired fee waivers.

Specifically, the Exchange proposes to extend, until November 30, 2005, its program that caps and waives execution and comparison fees for transactions in QQQ options when a member transacts a certain number of QQQ option contracts on the Exchange. Under that program, when

a member's A.D.V. in QQQ options reaches 8,000 contracts, the member's execution fee for the next 2,000 QQQ option contracts is reduced by \$.10 per contract. Further, when a member's monthly A.D.V. in QQQ options reaches 10,000 contracts, the Exchange waives the entire execution fee and the comparison fee for each QQQ option contract traded thereafter. The Exchange instituted this program in November 2003 for a six month period, expiring in May 2004.<sup>4</sup> The Exchange extended this program in May 2004 for an additional six month period, expiring in November 2004.<sup>5</sup> The Exchange now proposes extending this program for a one year period, expiring on November 30, 2005. The Exchange seeks to extend this program for competitive reasons. This program was initiated and extended in an attempt to increase the Exchange's market share in the QQQ option product.

The Exchange also proposes to increase, from 700,000 to 1,000,000, the Exchange's A.D.V breakpoint which is used for determining the execution fee for market maker and firm proprietary transactions. The breakpoints were established when the Exchange commenced trading in May 2000, and have not been revised since that time. As a result of the increase in the overall industry A.D.V. and Exchange A.D.V., the Exchange is proposing to revise the breakpoint so that it is more reflective of the current overall industry A.D.V., as well as current Exchange A.D.V. Accordingly, the Exchange is proposing to revise the calculation so that a \$.14 per contract charge is applied when Exchange A.D.V. is from 500,001 to 1,000,000

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<sup>4</sup> See Securities Exchange Act Release No. 49147 (Jan. 29, 2004), 69 FR 5629 (Feb. 5, 2004) (File No. SR-ISE-2003-32).

<sup>5</sup> See Securities Exchange Act Release No. 49853 (June 14, 2004), 69 FR 35087 (June 23, 2004) (File No. SR-ISE-2004-15).

contracts, and a \$.12 per contract charge is applied when Exchange A.D.V. is over 1,000,000 contracts.<sup>6</sup>

Furthermore, the Exchange proposes to delete the following references to expired fee waivers for certain transactions in S&P MidCap 400 Index options: the market maker and firm proprietary execution fee waiver that expired on November 25, 2004; and the non-Public Customer Order surcharge execution fee waiver that expired on November 25, 2004.

## 2. Basis

The Exchange believes that the proposed rule change is consistent with the requirement under Section 6(b)(4) of the Act<sup>7</sup> that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, the Exchange believes that the proposed rule change would enable the Exchange to continue offering competitively priced products.

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

The Exchange 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.

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<sup>6</sup> The Commission notes that the effect of the increased breakpoint contained in the proposed rule change will be to increase by \$0.02 the per contract charge when Exchange A.D.V. is from 700,001 to 1,000,000 contracts.

<sup>7</sup> 15 U.S.C. 78f(b)(4).

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change, as amended, has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>8</sup> and Rule 19b-4(f)(2)<sup>9</sup> thereunder, in that 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 after the filing of Amendment No. 1 to the proposed rule change, the Commission may summarily abrogate such rule change 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.<sup>10</sup>

### 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 No. SR-ISE-2004-36 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.

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<sup>8</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>9</sup> 17 CFR 19b-4(f)(2).

<sup>10</sup> For purposes of calculating the 60-day abrogation period, the Commission considers the abrogation period to have begun on December 15, 2004, the date on which the Commission received Amendment No. 1.

All submissions should refer to File Number SR-ISE-2004-36. 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 Commissions 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. Copies of such 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-2004-36 and should be submitted by [insert date 21 days from the date of publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>11</sup> 17 CFR 200.30-3(a)(12).