

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52237; File No. SR-ISE-2005-28)

August 10, 2005

Self-Regulatory Organizations; International Securities Exchange, Inc.; Order Granting Approval of a Proposed Rule Change and Amendment No. 1 Thereto Relating to Fee Changes for Transactions in Options on the Standard & Poor's Depository Receipts® on a Retroactive Basis

On May 20, 2005, the International Securities Exchange, Inc. ("ISE" or "Exchange") 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 retroactively establish, as of January 10, 2005, a \$.10 per contract surcharge fee for certain transactions in options based on the Standard & Poor's Depository Receipts®, or SPDRs® ("SPDRs").³ On June 15, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.⁴ The proposed rule change and Amendment No. 1 were published for comment in the Federal Register on July 11, 2005.⁵ No comments were received regarding the proposal, as amended. This order approves the proposed rule change, as amended.

The Exchange's Schedule of Fees currently has in place a surcharge fee item that calls for a \$.10 per contract fee for transactions in certain licensed products. The Exchange has entered into a license agreement with Standard and Poor's, a unit of McGraw-Hill Companies, Inc.,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange filed with the Commission an identical fee change on May 20, 2005 (SR-ISE-2005-06), which was immediately effective as of that date under Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(2) thereunder. See Securities Exchange Act Release No. 51901 (June 22, 2005), 70 FR 37455 (June 29, 2005). Because the Exchange sought to apply the same surcharge fee on a retroactive basis as of January 10, 2005, the Exchange submitted this proposal to the Commission under Section 19(b)(2) of the Act.

⁴ In Amendment No. 1, the Exchange made non-substantive changes to clarify the purpose for the fee change.

⁵ See Securities Exchange Act Release No. 51948 (June 30, 2005), 70 FR 39832.

authorizing the Exchange to list SPDR options. The Exchange proposes to adopt this fee for transactions in SPDR options in order to defray the licensing costs. The Exchange believes that charging the participants that trade these instruments is the most equitable means of recovering the costs of the license. However, because competitive pressures in the industry have resulted in the waiver of transaction fees for Public Customers,⁶ the Exchange proposes to exclude Public Customer Orders⁷ from this surcharge fee. Accordingly, this surcharge fee will only be charged to Exchange members with respect to non-Public Customer Orders (e.g., Market Maker and Firm Proprietary orders) and shall apply to Linkage Orders under a pilot program that is set to expire on July 31, 2006.⁸

Additionally, the Commission notes that the Exchange has represented that, if it is concluded by the courts after all avenues of appeal that no license from Standard and Poor's was required by the Exchange to list SPDR options, then upon any refund by Standard and Poor's to the ISE, the Exchange shall submit a rule filing to the Commission providing for a reimbursement of the fees paid by members to the Exchange as a result of this surcharge.

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 exchange⁹

⁶ Public Customer is defined in ISE Rule 100(a)(32) as a person that is not a broker or dealer in securities.

⁷ Public Customer Order is defined in ISE Rule 100(a)(33) as an order for the account of a Public Customer.

⁸ See ISE Rule 1900(10) (defining Linkage Orders). The surcharge fee will apply to the following Linkage Orders: Principal Acting as Agent Orders and Principal Orders. The expiration date for this pilot program was recently extended from July 31, 2005 to July 31, 2006. See Exchange Act Release No. 34-52168 (July 29, 2005) (File No. SR-ISE-2005-32).

⁹ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

and, in particular, the requirements of Section 6(b) of the Act¹⁰ and the rules and regulations thereunder. Specifically, the Commission finds that the proposal to retroactively establish a \$.10 per contract surcharge fee for certain transactions in options on SPDRs that occurred on the ISE between January 10, 2005 and May 19, 2005,¹¹ is consistent with Section 6(b)(4) of the Act,¹² which requires the equitable allocation of reasonable dues, fees, and other charges among Exchange members and other persons using Exchange facilities. The Commission believes that, because the options on SPDRs have been listed and traded on the Exchange since January 10, 2005, the retroactive extension of the surcharge fee to all applicable transactions occurring between January 10, 2005 and May 19, 2005 is equitable in order to defray ISE's licensing costs.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (File No. SR-ISE-2005-28), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland
Deputy Secretary

¹⁰ 15 U.S.C. 78f(b).

¹¹ See supra note 3.

¹² 15 U.S.C. 78f(b)(4).

¹³ Id.

¹⁴ 17 CFR 200.30-3(a)(12).