

Agency Order of 500 contracts or more against a contra side order of the same size it has solicited from a broker-dealer,¹⁵ but only when a better price for the full size of the Agency Order is not available in the aggregate of all quotes, orders, and responses from Crowd Participants. The Mechanism would require the Agency Order to be exposed to Crowd Participants for 10 seconds before the solicited order could trade against it. In no case would the customer receive a price inferior to the Exchange's BBO.

Under the proposal, if the execution price is not improved for the full size of the customer's order (*i.e.*, the Agency Order), the Agency Order would be executed in full against the solicited order at the originally proposed price (unless there are public customer orders on the book at that price or the Exchange BBO has improved over that price). The Commission believes that customers seeking to transact orders of the size eligible for entry into the Mechanism "500 contracts or more" can assess the implications of the Mechanism's terms of use. The Commission notes, moreover, that the proposed rule change would require EAMs to provide customers with the terms and conditions of the Mechanism in writing before entering orders into it on their behalf.

In addition, the Commission notes that the proposed rule change would not permit solicited orders to trade when there is a public customer order on the book at the proposed execution price. In such circumstances, if there is sufficient size in the aggregate to fill the Agency Order, first the public customer order, and then any other quotes, orders, and responses, are executed against the Agency Order, and the solicited order is canceled. If there is insufficient size, both the Agency Order and solicited order are canceled.

The Commission further notes that ISE has included a provision stating that an EAM may not use the Mechanism to circumvent the Exchange rules limiting principal transactions. For example, this

provision would prohibit an EAM from entering contra side orders solicited from broker-dealers with which the EAM is affiliated or from broker-dealers with which the EAM has an arrangement that would allow it to realize economic benefits similar to internalization.

Finally, the Commission notes that ISE's rules prohibit anticipatory hedging based on knowledge of an imminent transaction before the terms and conditions of the transaction are disclosed to the trading crowd. These rules already apply to solicited order transactions. ISE proposes to amend those rules to establish that entry of the terms and conditions of a solicited order transaction are deemed "disclosed" when they are entered into the Mechanism. The Commission believes this proposed amendment is reasonable and conforms to a similar provision regarding transactions entered into the Exchange's Facilitation Mechanism.

IV. Conclusion

For the reasons discussed above, the Commission finds that the proposal is consistent with the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (SR-ISE-2001-22), as amended, be and hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49957; File No. SR-ISE-2004-22]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the International Securities Exchange, Inc., Relating to Fee Changes

July 1, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 1, 2004, the International Securities Exchange, Inc. ("ISE" or "Exchange") 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 Exchange. The ISE submitted Amendment No. 1 to the proposed rule change on June 21, 2004.³ 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 Exchange is proposing to amend its Schedule of Fees to adopt a \$.10 per contract surcharge and temporary fee waivers for certain transactions in options based on the S&P MidCap 400 Index.

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 noted that it did not solicit or receive comments on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange 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 is proposing to amend its Schedule of Fees to adopt a \$.10 per contract surcharge and temporary fee waivers for certain transactions in options based on the S&P MidCap 400 Index.

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 to use various indexes and trademarks of Standard & Poor's, a division of The McGraw-Hill Companies, Inc., in connection with the listing and trading of index options on the S&P MidCap 400 Index. As with

¹⁵ The Commission notes that, under ISE Rule 717(g), an EAM generally is not permitted to represent an order for the account of an ISE market maker. Thus, an EAM would not be permitted to use the Mechanism to execute an Agency Order against an order solicited from an ISE market maker. Telephone conversation between Michael Simon, Senior Vice President and General Counsel, ISE, and Ira Brandriss, Assistant Director, Division, Commission, on June 29, 2004. The Commission notes that the ISE has filed another proposed rule change to amend Rule 717(g) to permit an EAM to enter an order on behalf of an ISE market maker under specified conditions. See File No. SR-ISE-2004-17. This Order, however, approves the proposed rule change only to the extent that the restriction of current ISE Rule 717(g) applies.

¹⁶ 17 CFR 200.30-3(a)(12).

¹⁷ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated June 18, 2004 ("Amendment No. 1"). Amendment No. 1 replaced and superceded the original filing in its entirety. In Amendment No. 1, the Exchange provided additional clarification regarding its proposed changes and made a correction to the proposed fee schedule.

licensed equity options, the Exchange is adopting a fee for trading in these options 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 all transaction fees for customers, the Exchange proposes to exclude Public Customer Orders ⁴ from this surcharge fee. Accordingly, this surcharge fee will only be charged with respect to non-Public Customer Orders (*i.e.*, Market Maker and Firm Proprietary orders).

Additionally, for competitive purposes and in an attempt to generate trading interest, the Exchange is proposing to temporarily waive all transaction fees for non-Public Customer Orders in S&P MidCap 400 Index options. Specifically, the Exchange is proposing to waive the following transaction fees for non-Public Customer Orders in S&P MidCap 400 Index options until November 25, 2004: (i) The market maker and firm proprietary execution fee; (ii) the surcharge fee; and (iii) the comparison fee.

The Exchange is also proposing to make certain non-substantive clarifications to its Schedule of Fees. Specifically, the Exchange proposes to clarify its Note under the Comparison Fee section of its Schedule of Fees.⁵ The Exchange seeks to clarify that its comparison fees apply to both equity and index options. The Exchange further proposes to amend the text in the note to the Comparison Fee relating to the waiver of the fee for Public Customer Orders in order to achieve consistency of terms within the Schedule of Fees. Finally, the Exchange proposes to reinsert relevant text related to a fee waiver contained in the Notes under the Market Maker and Firm Proprietary section that was inadvertently deleted in a prior rule filing.⁶

⁴ Public Customer Order is defined in Exchange Rule 100(a)(33) as an order for the account of a Public Customer. Public Customer is defined in Exchange Rule 100(a)(32) as a person that is not a broker or dealer in securities.

⁵ The Commission notes that the Comparison Fee originally was published for notice and comment as part of the ISE's adoption of its Schedule of Fees, and that the fee initially was waived for customer trades for a period of six months. *See* Securities Exchange Act Release No. 42473 (Feb. 29, 2000), 65 FR 11818 (Mar. 6, 2000) (notice of SR-ISE-00-02) and 42730 (Apr. 28, 2000) 65 FR 26256 (May 5, 2000) (approval order of SR-ISE-00-02).

⁶ *See* Securities Exchange Act Release No. 49853 (June 16, 2004) (notice of SR-ISE-2004-15).

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with the provisions of section 6(b) of the Act,⁷ in general, and section 6(b)(4) of the Act,⁸ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

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

The Exchange does not believe that the proposed rule change, as amended, 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, as amended. 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 rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act ⁹ and Rule 19b-4(f)(2) ¹⁰ thereunder because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of 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.¹¹

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:

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4).

⁹ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁰ 17 CFR 240.19b-4(f)(2).

¹¹ For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under section 19(b)(3)(C) of the Act, the Commission considers that period to commence on June 21, 2004, the date the ISE filed Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

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-2004-22 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-2004-22. 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal offices 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-2004-22 and should be submitted on or before July 29, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,
Deputy Secretary.

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¹² 17 CFR 200.30-3(a)(12).