

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-49755; File No. SR-ISE-2004-12)**

**May 21, 2003**

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 27, 2004, the International Securities Exchange, Inc. ("Exchange" or "ISE") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change 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 for certain transactions excluding Public Customer Orders in options on exchange traded funds ("ETFs") based on certain licensed indexes.

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

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

**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 for certain transactions in options on exchange traded funds based on (i) four indexes developed by Lehman Brothers Inc. including the Lehman Brothers 1-3 year Treasury Bond Index, the Lehman Brothers 7-10 year Treasury Bond Index, the Lehman Brothers 20+ year Treasury Bond Index and the Lehman Brothers U.S. Aggregate Index (collectively, the “Lehman Indexes”) and (ii) one index developed by Goldman, Sachs & Co., the GS \$ InvesTop™ Index (the “Goldman 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. This surcharge fee item excludes Public Customer Orders.<sup>3</sup>

The Exchange recently licensed the right to list options on ETFs based on the Lehman Indexes and the Goldman Index. In order to defray the licensing costs associated with listing these new products, the Exchange is proposing to add these new products to the surcharge fee item in the Exchange’s Schedule of Fees. The Exchange believes that charging the participants that trade in options on these products is the most equitable means of recovering the costs of the licenses. 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 from this surcharge fee. Accordingly, this surcharge fee will only be charged with respect to non-Public Customer Orders.

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<sup>3</sup> 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.

For example, if broker A has a Public Customer Order that broker A gives to broker B (an ISE electronic access member) to execute on the ISE, broker B will not be charged the proposed \$.10 fee. On the other hand, if broker A gives broker B (an ISE electronic access member) an order for the account of broker A (or another broker-dealer), broker B will be charged the \$.10 fee.<sup>4</sup>

## 2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(4) of the Act that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.<sup>5</sup>

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

The proposed rule change does not 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 rule change establishes or changes a due, fee, or other charge and, therefore, has become effective immediately pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>6</sup> and

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<sup>4</sup> Telephone conversation between Joseph W. Ferraro, Assistant General Counsel, ISE, and Ronesha A. Butler, Attorney, Division of Market Regulation, Commission, May 10, 2004.

<sup>5</sup> 15 U.S.C. 78f(b)(4).

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

Rule 19b-4(f)(2) thereunder.<sup>7</sup> At any time within 60 days of the filing of such 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.

#### **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 Number SR-ISE-2004-12 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-2004-12. 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

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<sup>7</sup> 17 CFR 19b-4(f)(2).

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 office of the Exchange. 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-2004-12 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.<sup>8</sup>

Margaret H. McFarland  
Deputy Secretary

*Action as set forth or recommended herein  
APPROVED pursuant to authority delegated by the  
Commission under Public Law 87-592.*

*For the Division of Market Regulation*

by: \_\_\_\_\_  
(Date)

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<sup>8</sup> 17 CFR 200.30-3(a)(12).