

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57553; File No. SR-ISE-2007-76)

March 25, 2008

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Approving a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Relating to Voluntary Professionals

I. Introduction

On August 24, 2007, the International Securities Exchange, LLC (“ISE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder² to allow Public Customers to elect to become “Voluntary Professionals,” and thereby to have their orders treated like Non-Customer Orders with respect to the Exchange’s priority rules and transaction fees.³ On January 25, 2008, ISE filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on February 7, 2008.⁴ The Commission received one comment letter on the proposal.⁵ On March 24, 2008, ISE filed Amendment No. 2 to the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ A “Public Customer” is defined in ISE’s rules as “a person that is not a broker or dealer in securities.” ISE Rule 100(a)(38). A “Non-Customer” is defined as “a person or entity that is a broker or dealer in securities,” and a “Non-Customer Order” is “an order for the account of a Non-Customer.” ISE Rules 100(a)(27) and (28).

⁴ See Securities Exchange Act Release No. 57255 (February 1, 2008), 73 FR 7348.

⁵ See letter from Rachel J. Rich, St. Paul, MN, to Nancy M. Morris, Secretary, Commission, dated February 7, 2008 (“Rich Letter”).

proposed rule change.⁶ This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2.

II. Description of the Proposal

Currently, ISE grants certain advantages to Public Customer Orders⁷ over Non-Customer Orders. In particular, Public Customer Orders receive priority over Non-Customer Orders and market maker quotes at the same price. In addition, subject to certain exceptions,⁸ Public Customer Orders do not incur transaction fees, but may incur cancellation fees.⁹ Non-Customer Orders incur transaction fees, but are not subject to cancellation fees.

ISE proposes to add a new term, “Voluntary Professional,” to the list of definitions in Exchange Rule 100. A Voluntary Professional would be defined as “any Public Customer that elects, in writing, to be treated in the same manner as a broker or dealer in securities for purposes of Rules 713, 716, 722, and 723 as well as the Exchange’s schedule of fees.”¹⁰ ISE proposes

⁶ In Amendment No. 2, ISE stated that it would issue a circular informing members of the process to properly mark the orders of Voluntary Professionals. The Commission considers Amendment No. 2 a technical amendment not subject to notice and comment.

⁷ A “Public Customer Order” is defined as “an order for the account of a Public Customer.” ISE Rule 100(a)(39). For the definition of “Public Customer,” see supra note 3.

⁸ For example, Public Customer Orders currently incur fees for certain transactions in “Premium Products” (defined in the ISE Schedule of Fees) and Complex Orders that take liquidity on the Exchange’s complex order book. In addition, transaction fees are charged for Public Customer Orders entered in response to special order broadcasts, such as Facilitation orders, Solicitation orders, Block orders, and orders entered in the Exchange’s Price Improvement Mechanism. See ISE Schedule of Fees.

⁹ The Exchange imposes a cancellation fee, currently \$1.75 per cancellation, on a clearing EAM that cancelled at least 500 Public Customer orders in a month for itself or for an introducing broker, for each order cancellation in excess of the total number of orders executed for itself or for such introducing broker that month. The cancellation fee does not apply to the cancellation of Public Customer Orders that improve ISE’s disseminated quote at the time the orders were entered.

¹⁰ ISE Rules 713 (Priority of Quotes and Orders), 716 (Block Trades), 722 (Complex Orders), and 723 (Price Improvement Mechanism for Crossing Transactions) contain

further to amend its definition of Non-Customer to include Voluntary Professionals.¹¹ Thus, the orders of Voluntary Professionals would be Non-Customer Orders. Public Customers would be required to instruct Electronic Access Members (“EAMs”) in writing to designate their orders as Non-Customer Orders.

As a result of ISE’s proposal, the orders of Voluntary Professionals would be treated in ISE’s allocation process on equal terms with the orders of broker-dealers, and the orders of other Public Customers would have priority over the orders of Voluntary Professionals. The orders of Voluntary Professionals, when executed, also would incur the same transaction fees that are charged to broker-dealers.

In explaining the purpose of the proposal, the Exchange states that its members have indicated that certain of their non-broker-dealer customers, who employ sophisticated trading strategies that involve cancelling a large percentage of their orders before the orders are executed, would prefer to have their orders categorized as Non-Customer Orders. By electing to become Voluntary Professionals, such customers would not be subject to the Exchange’s cancellation fees.¹²

ISE further states that the Voluntary Professional designation otherwise would not affect non-broker-dealer individuals and entities with respect to all other ISE rules. For example, ISE rules relating to the Intermarket Linkage¹³ would continue to apply to all customers who are not

provisions concerning priority in the allocation of orders. The Commission notes that the orders of Voluntary Professionals would still be treated as Public Customer Orders with respect to the rules governing Customer Participation Orders as set forth in ISE Rule 715 (Types of Orders).

¹¹ ISE Rule 100(a)(21) would be amended to state: “The term ‘Non-Customer’ means a person or entity that is a broker or dealer in securities and Voluntary Professionals.”

¹² See supra note 9 and accompanying text.

¹³ See Chapter 19 of the ISE Rules.

broker-dealers – even those customers whose orders are identified as Non-Customer Orders because they are Voluntary Professionals. Similarly, rules regarding customer suitability and other protections for customers would continue to apply with respect to all customers who are not broker-dealers.¹⁴

III. Discussion and Commission Findings

After careful consideration of the proposed rule change, the Commission finds that the proposed rule change is consistent with Section 6(b)¹⁵ of the Act and the rules thereunder.¹⁶ In particular, the Commission believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁷ which requires that the rules of a national securities exchange, among other things, be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed rule change would allow Public Customers to elect to become Voluntary Professionals by choosing to instruct EAMs to designate their orders as Non-Customer Orders. Through such an election, the orders of such customers no longer would be subject to cancellation fees. The Commission believes that, in view of this result, the ability to become a

¹⁴ See Chapter 6 of the ISE Rules. Telephone conversation between Ira Brandriss and Ronesha Butler, Special Counsels, Division of Trading Markets, Commission, and Katherine Simmons, Deputy General Counsel, ISE, on March 11, 2008.

¹⁵ 15 U.S.C. 78f(b).

¹⁶ In approving the proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78f(b)(5).

Voluntary Professional could represent significant savings for a Public Customer whose trading strategy involves placing, and then cancelling, orders frequently.

By electing to become a Voluntary Professional, a Public Customer would cede the priority rights normally granted to the orders of Public Customers, and fees would be incurred on a Voluntary Professional's transactions. The Commission notes, however, that this result is determined solely by the choice of the customer. Thus, the proposed rule change would not introduce any rule that would alter the preferential treatment accorded to the orders of a Public Customer against that Public Customer's will.

The Commission believes that the proposed rule change would not limit or restrict Public Customers in any way. On the contrary, it would give Public Customers more flexibility and expand their ability to participate cost-effectively in ISE's marketplace. The Commission notes that the one commenter who expressed a view to the Commission regarding the proposal favored the proposed rule change as "fair and just" and believed that it would promote increased trading activity.¹⁸

The Commission notes further that Voluntary Professionals would continue to benefit from all the protections afforded to Public Customers under the rules of the Exchange (other than the advantages Public Customers have with respect to priority and transaction fees). In addition, the advantages with respect to priority and fees would be restored when a Public Customer rescinded its election to be a Voluntary Professional.

In sum, the Commission believes that the proposed rule change appropriately would accommodate Public Customers who employ trading strategies that involve numerous order

¹⁸ See Rich Letter supra note 5.

cancellations by allowing them to assess and determine for themselves the most beneficial status and fee structure for their orders, and to choose accordingly.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule change (SR-ISE-2007-76), as modified by Amendment Nos. 1 and 2, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Florence E. Harmon
Deputy Secretary

¹⁹ 15 U.S.C. 78s(b)(2).

²⁰ 17 CFR 200.30-3(a)(12).