

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66793; File No. SR-ISE-2012-27)

April 12, 2012

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend an Existing Fee Cap Program and Related Service Fee

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4² thereunder, notice is hereby given that, on April 2, 2012, the International Securities Exchange, LLC (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 Exchange. 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 ISE is proposing to amend an existing fee cap program and a related service fee. The text of the proposed rule change is available on the Exchange’s website (<http://www.ise.com>), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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 self-regulatory organization 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 self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

¹ 15 U.S.C. 78s(b)(1).

² 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 currently has a fee cap program that, subject to certain exclusions, is applicable across all products traded on ISE.³ The fee cap currently applies to transactions executed in a member's proprietary account. The fee cap also applies to crossing transactions for the account of entities affiliated with a member. That is, the cap applies to a member's crossing transactions even if the member executes crosses in the account of an affiliate, rather than the member's own account.

Under the fee cap program, the Exchange caps proprietary transaction fees in all products traded on ISE, in the aggregate, at \$100,000 per month per member, with certain exclusions which are noted below. All proprietary transactions, including non-ISE market maker contracts that are part of a crossing transaction, are eligible towards the fee cap. Volume from regular and complex orders, as well as Facilitation Mechanism, Price Improvement Mechanism, Solicited Order Mechanism, Block Order Mechanism and Qualified Contingent Cross ("QCC") orders,⁴ also counts towards the fee cap.

In addition to the fee cap, ISE also currently has a service fee of \$0.01 per side on all transactions that are eligible for the fee cap. The service fee applies once a member reaches the fee cap level and applies to every contract side included in and above the fee cap. A member who does not reach the monthly fee cap is not charged the service fee. Additionally, the service fee is not calculated in reaching the fee cap. Once the fee cap is reached, the service fee applies

³ See Securities Exchange Act Release No. 64274 [sic] (April 8, 2011), 76 FR 20754 (April 13, 2012) (SR-ISE-2011-13).

⁴ See Securities Exchange Act Release No. 63955 (February 24, 2011), 76 FR 11533 (March 2, 2011) (SR-ISE-2010-73).

to both proprietary and other account designations⁵ in all ISE products in addition to those transactions that were included in reaching the fee cap. The service fee, when charged for volume above the cap when no other transaction fees are collected, was instituted to defray the Exchange's costs of providing services to members, which include trade matching and processing, post trade allocation, submission for clearing and customer service activities related to trading activity on the Exchange.

In calculating the fee cap, the Exchange currently excludes the following:⁶ 1) any surcharge fee charged by the Exchange on licensed products,⁷ 2) fees from Non-ISE Market Maker volume not related to an affiliated member's crossing activity, 3) the fee for responses to special orders⁸ in all products, 4) the maker and taker fees charged by the Exchange for complex orders⁹ for certain option classes,¹⁰ and 5) the taker fees charged by the Exchange for regular orders¹¹ for the Select Symbols.

⁵ Other account designations include Prop-firm (Member trading for its own account and clearing in the F range at OCC), Prop-cust (Member trading for its own account and clearing in the C range at OCC), BD-firm (Member trading on behalf of another registered broker/dealer clearing in the F range at OCC), BD-cust (Member trading on behalf of another registered broker/dealer clearing in the C range at OCC), FarMM (Member trading on behalf of another registered broker/dealer clearing in the M range at OCC).

⁶ Other exchanges employ exclusions to their fee cap programs. For example, at the Chicago Board Options Exchange, Inc. ("CBOE"), Automated Improvement Mechanism ("AIM") execution fees do not count towards the fee cap employed by that exchange. See CBOE Fees Schedule, Section 1 (Equity Options Fees).

⁷ The Exchange currently charges a surcharge that ranges between \$0.02 per contract to \$0.22 per contract on the following licensed products: BKX, MFX, MID, MSH, SML, UKX, RMN, RUI, RUT, MVR, NDX, MNX, FUM, HSX, POW, TNY, WMX and NXTQ.

⁸ Special orders are order types that involve a crossing transaction or an auction, where a broadcast is transmitted to Exchange members for potential participation and/or price improvement.

⁹ A Complex Order is defined in Exchange Rule 722(a)(1) as any order involving the simultaneous purchase and/or sale of two or more different options series in the same

The Exchange's current fee cap is functionally similar to a "Multiply-Listed Option Fee Cap" in place at the CBOE¹² and a "Firm Related Equity Option Cap" in place at NASDAQ OMX PHLX, Inc. ("PHLX").¹³ Since its inception, the fee cap has served its intended purpose of attracting order flow to the Exchange. However, in response to the pricing competition prevalent across the options markets today, the Exchange now proposes to make changes to the current fee cap program that, once adopted, will allow members to continue to benefit from a fee cap while benefitting the Exchange by way of attracting increased and targeted order flow.

Specifically, the Exchange proposes to make four changes to its current fee cap program. First, the Exchange proposes to lower the cap from \$100,000 to \$75,000 per member per month. The proposal to lower the cap amount will enable the Exchange to better compete with fee caps that are currently in place at other exchanges. For example, CBOE and PHLX both currently have their fee caps at \$75,000 per month.

Second, the Exchange proposes to limit the fee cap to only trades executed in the Exchange's Facilitation Mechanism, Price Improvement Mechanism, Solicited Order Mechanism and Block Order Mechanism and to Qualified Contingent Cross ("QCC") orders. These orders are generally known as crossing orders. For the sake of clarity, the Exchange proposes to define crossing orders in the footnotes applicable to the fee cap. The Exchange

underlying security, for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purpose of executing a particular investment strategy.

¹⁰ The current exclusion applies to options classes that are subject to Rebates and Fees for Adding and Removing Liquidity in Select Symbols ("Select Symbols").

¹¹ An order means a commitment to buy or sell securities as defined in Exchange Rule 715.

¹² The CBOE fees are capped at \$75,000. See CBOE Fees Schedule, Section 1 (Equity Options Fees).

¹³ PHLX Firms are subject to a maximum fee of \$75,000. See PHLX Fee Schedule, Section II (Equity Options Fees).

believes the proposal to limit the cap to these order types will simplify the Exchange's fees and allow it to better compete for trading volume that contributes to fee caps at other exchanges. The Exchange also believes the proposal will make it easier for members to track their fee cap-eligible trading activity. To reflect change, the Exchange proposes to remove what was previously footnote 2 on page 17 of the Exchange's Schedule of Fees and consolidate the rule text applicable to the fee cap program into a single footnote. As a result, footnote 1 on page 16, footnote 9 on page 19 and footnote 6 on page 21 now reflect that the fees are capped at \$75,000 per member per month on all Firm Proprietary and Non-ISE Market Maker transactions that are part of a originating or contra side of a crossing order.

Third, as noted above, in calculating the fee cap, the Exchange currently excludes the maker and taker fees charged by the Exchange for complex orders for certain option classes and the taker fees charged by the Exchange for regular orders for the Select Symbols. The Exchange proposes to remove these exclusions as they are no longer applicable because this activity is not part of one of the crossing order transactions and in order to simplify the fee schedule text. As a result, the Exchange proposes to amend the text in footnote 9 on page 19 and footnote 6 on page 21 to reflect this change.

Finally, the Exchange proposes to make the current service fee of \$0.01 per side incremental after a member reaches the fee cap. As noted above, the service fee currently applies once a member reaches the fee cap level and applies to every contract side included in and above the fee cap. The Exchange notes that since members pay a transaction fee for contracts executed up to the cap level, they are defraying the Exchange's costs for providing services that include trade matching and processing, post trade allocation, submission for clearing and customer service activities related to their trading activity on the Exchange. ISE

believes that the service fee need only be charged to incremental contracts where no transaction fee is assessed to offset the Exchange's costs.

The Exchange has designated this proposal to be operative on April 2, 2012.

2. Statutory Basis

The Exchange believes that its proposal to amend its Schedule of Fees is consistent with Section 6(b) of the Act¹⁴ in general, and furthers the objectives of Section 6(b)(4) of the Act¹⁵ in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities.

The Exchange believes proposed amendment to the fee cap is reasonable because it will continue to potentially lower transaction fees for members providing liquidity on the Exchange. Members who reach the fee cap during a month will not have to pay regular transaction fees and thus will be able to lower their monthly fees.

The Exchange believes that the fee cap is not unfairly discriminatory because all members, including non-ISE market makers, are eligible to reach the cap. The Exchange's fee cap applies only to firm proprietary business, and not customer or market maker business, because the Exchange is specifically targeting this type of business as a competitive response to similar fee caps other exchanges have adopted,¹⁶ and thus to make it more attractive for members to send such business to the Exchange. The Exchange has adopted other incentive programs

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ See supra notes 12 and 13.

targeting other business areas: lower fees (or no fees) for customer orders;¹⁷ and tiered pricing that reduces rates for market makers based on the level of business they bring to the Exchange.¹⁸

The Exchange further believes the proposed changes to the fee cap program is equitable because it would uniformly apply to all members engaged in proprietary trading in option classes traded on the Exchange. As noted, ISE market makers currently receive the benefit of a fee reduction under a sliding scale fee structure applicable to non-Select Symbols.

The Exchange believes that the proposed change to the service fee is reasonable because it will also potentially lower transaction fees for members. Members who reach the fee cap during a month will pay the service fee instead of the regular transaction fees and thus will be able to lower their monthly fees. The Exchange believes that charging a service fee is also reasonable because it will allow the Exchange to recoup the costs incurred in providing certain services, which include trade matching and processing, post trade allocation, submission for clearing and customer service activities related to trading activity on the Exchange. The Exchange believes the proposed fee change will attract additional order flow to the Exchange and thereby will benefit all market participants.

The Exchange believes the proposed change to the service fee is equitable and not unfairly discriminatory because it would apply uniformly to all members engaged in proprietary

¹⁷ For example, the customer fee is \$0.00 per contract for products other than Second Market Options, Singly Listed Indexes, Singly Listed ETFs and FX Options. For Second Market Options, the customer fee is \$0.05 per contract and for Singly Listed Options, Singly Listed ETFs and FX Options, the customer fee is \$0.18 per contract. The Exchange also currently has an incentive plan in place for certain specific FX Options which has its own pricing. See ISE Schedule of Fees.

¹⁸ The Exchange currently has a sliding scale fee structure that ranges from \$0.01 per contract to \$0.18 per contract depending on the level of volume a Member trades on the Exchange in a month.

trading. The proposed change to the manner by which the service fee is charged is designed to give members who trade a lot on the Exchange a benefit by way of a lower transaction fee.

The Exchange believes the proposed fee change will benefit market participants by potentially lowering their fees while allowing the Exchange to remain competitive with other exchanges that offer similar fee cap programs. For the reasons noted above, the Exchange believes that the proposed fees are fair, equitable and not unfairly discriminatory.

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 has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.¹⁹ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

¹⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

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. Please include File Number SR-ISE-2012-27 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISE-2012-27. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the 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-2012-27 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Kevin M. O'Neill
Deputy Secretary

²⁰ 17 CFR 200.30-3(a)(12).