

Act, the rules and regulations thereunder, and the rules of the Exchange.²⁷

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁸ that the proposed rule change (SR-BATS-2011-035), as modified by Partial Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Elizabeth M. Murphy,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65724; File No. SR-ISE-2011-72]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Transaction Fees and Rebates for Certain Complex Orders Executed on the Exchange

November 10, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that, on October 28, 2011, 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 and II 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 certain transaction fees and rebates. The text of the proposed rule change is available on the Exchange's Web site (<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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently assesses per contract transaction charges and credits to market participants that add or remove liquidity from the Exchange ("maker/taker fees") in a number of options classes (the "Select Symbols").³ The Exchange's maker/taker fees are applicable to regular and complex orders executed in the Select Symbols.⁴ The fees and rebates for complex orders in the Select Symbols also apply to all symbols that are in the Penny Pilot program.⁵

For complex orders in the Select Symbols and in symbols that are in the Penny Pilot program but excluding the Designated Symbols, the Exchange currently charges a "take" fee of: (i) \$0.30 per contract for ISE Market Maker,⁶ Market Maker Plus,⁷ Firm

³ Options classes subject to maker/taker fees are identified by their ticker symbol on the Exchange's Schedule of Fees.

⁴ The Exchange has also adopted fees and rebates for complex orders in a subset of the Select Symbols ("Designated Symbols") that are different from the fees for complex orders in the Select Symbols. These Designated Symbols are AAPL, BAC, C, F, GLD, INTC, IWM, JPM, QQQ, SLV, SPY and XLF. See Exchange Act Release Nos. [sic] 65084 (August 10, 2011), 76 FR 50805 (August 16, 2011) (SR-ISE-2011-49).

⁵ See Exchange Act Release Nos. 65021 (August 3, 2011), 76 FR 48933 (August 9, 2011) (SR-ISE-2011-45); and 65550 (October 13, 2011), 76 FR 64984 (October 19, 2011) (SR-ISE-2011-65).

⁶ The term "Market Makers" refers to "Competitive Market Makers" and "Primary Market Makers" collectively. See ISE Rule 100(a)(25). Market Makers who remove liquidity in the Select Symbols from the Complex Order Book by trading with orders preferred to them are currently charged \$0.28 per contract.

⁷ A Market Maker Plus is an ISE Market Maker who is on the National Best Bid or National Best Offer 80% of the time for series trading between \$0.03 and \$5.00 (for options whose underlying stock's previous trading day's last sale price was less than or equal to \$100) and between \$0.10 and \$5.00 (for options whose underlying stock's

Proprietary and Customer (Professional)⁸ orders; and (ii) \$0.35 per contract for Non-ISE Market Maker⁹ orders. Priority Customer¹⁰ orders are not charged a "take" fee for complex orders. For complex orders in these same symbols, the Exchange currently charges a "make" fee of: (i) \$0.10 per contract for ISE Market Maker, Market Maker Plus, Firm Proprietary and Customer (Professional) orders; and (ii) \$0.20 per contract for Non-ISE Market Maker orders. Priority Customer orders are not charged a "make" fee for complex orders.

For complex orders in the Designated Symbols, the Exchange currently charges a "take" fee of: (i) \$0.31 per contract for ISE Market Maker, Market Maker Plus, Firm Proprietary and Customer (Professional) orders; and (ii) \$0.36 per contract for Non-ISE Market Maker orders. Priority Customer orders are not charged a "take" fee for complex orders in the Designated Symbols. The "make" fee for complex orders in the Designated Symbols is the same as the "make" fee the Exchange currently charges for the Select Symbols and symbols that are in the Penny Pilot program noted above. Priority Customer orders are not charged a "make" fee for complex orders in the Designated Symbols.

The Exchange now proposes to increase the "take" fee for complex orders in both the Select Symbols and the Designated Symbols to (i) \$0.32 per contract for ISE Market Maker, Market

previous trading day's last sale price was greater than \$100) in premium in each of the front two expiration months and 80% of the time for series trading between \$0.03 and \$5.00 (for options whose underlying stock's previous trading day's last sale price was less than or equal to \$100) and between \$0.10 and \$5.00 (for options whose underlying stock's previous trading day's last sale price was greater than \$100) in premium across all expiration months in order to receive the rebate. The Exchange determines whether a Market Maker qualifies as a Market Maker Plus at the end of each month by looking back at each Market Maker's quoting statistics during that month. If at the end of the month, a Market Maker meets the Exchange's stated criteria, the Exchange rebates \$0.10 per contract for transactions executed by that Market Maker during that month. The Exchange provides Market Makers a report on a daily basis with quoting statistics so that Market Makers can determine whether or not they are meeting the Exchange's stated criteria.

⁸ A Customer (Professional) is a person who is not a broker/dealer and is not a Priority Customer.

⁹ A Non-ISE Market Maker, or Far Away Market Maker ("FARM"), is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended ("Exchange Act"), registered in the same options class on another options exchange.

¹⁰ A Priority Customer is defined in ISE Rule 100(a)(37A) as a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

²⁷ 15 U.S.C. 78f(b)(1).

²⁸ 15 U.S.C. 78s(b)(2).

²⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Maker Plus, Firm Proprietary and Customer (Professional) orders; and (ii) \$0.36 for Non-ISE Market Maker orders. With this proposed fee change, the Exchange seeks to standardize the “take” fee charged for complex orders in the Select Symbols and the Designated Symbols and, as a result, proposes to remove the table identifying the Designated Symbols from its Schedule of Fees as it is no longer necessary to separately identify the “take” fee for Designated Symbols from the “take” fee for the Select Symbols because all Select Symbols are now charged one rate.

Further, for Priority Customer complex orders in the Select Symbols and in the symbols that are in the Penny Pilot program but excluding the Designated Symbols, the Exchange currently provides a rebate of \$0.25 per contract when these orders trade with non-customer orders in the complex order book. For Priority Customer complex orders in the Designated Symbols, the Exchange currently provides a rebate of \$0.27 per contract when these orders trade with non-customer orders in the complex order book. The Exchange now proposes to increase the rebate for Priority Customer complex orders in the Select Symbols and the Designated Symbols to \$0.30 per contract when these orders trade with non-customer orders in the complex order book. With this proposed fee change, the Exchange seeks to standardize the rebate for Priority Customer complex orders in both the Select Symbols and the Designated Symbols when these orders trade with non-customer orders in the complex order book and proposes to reflect this change in footnote 3 on the Schedule of Fees.

The Exchange does not propose to change the rebate for Priority Customer complex orders in the symbols that are in the Penny Pilot program but are not a Select Symbol (“Non-Select Penny Pilot Symbols”) when these orders trade with non-customer orders in the complex order book. That rebate shall remain at \$0.25 per contract. In order to distinguish this established rebate from the newly proposed rebate for Priority Customer complex orders in the Select Symbols, the rebate for Non-Select Penny Pilot Symbols is now reflected in the proposed new text in footnote 11 on the Schedule of Fees.

Additionally, ISE Market Makers who remove liquidity in the Select Symbols from the complex order book by trading with orders that are preferenced to them are currently charged \$0.28 per contract. Further, ISE Market Makers who remove liquidity in the Designated Symbols from the complex order book by trading

with orders that are preferenced to them are currently charged \$0.29 per contract. The Exchange now proposes to increase the fee charged to ISE Market Makers who remove liquidity in the Select Symbols and the Designated Symbols from the complex order book by trading with orders that are preferenced to them to a single rate of \$0.30 per contract. Thereby, once again, standardizing the fee charged to ISE Market Makers who remove liquidity from the complex order book by trading with orders that are preferenced to them in both the Select Symbols and the Designated Symbols.

The Exchange proposes a fee of \$0.28 per contract for ISE Market Makers who remove liquidity in the Non-Select Penny Pilot Symbols from the complex order book by trading with orders that are preferenced to them. In order to distinguish this fee from the fee that is applicable to ISE Market Makers who remove liquidity from the complex order book in the Select Symbols by trading with orders preferenced to them, the fee charged to ISE Market Makers who remove liquidity in the Non-Select Penny Pilot Symbols from the complex order book by trading with orders that are preferenced to them is now reflected in proposed footnote 12 on the Schedule of Fees.

Further, the Exchange does not propose any changes to the fees and rebates for complex orders in Non-Select Penny Pilot Symbols. The Exchange currently charges a “take” fee of (i) \$0.30 per contract for ISE Market Maker, Market Maker Plus, Firm Proprietary and Customer (Professional) orders; and (ii) \$0.35 per contract for Non-ISE Market Maker orders. Priority Customer orders are not charged a “take” fee for complex orders in Non-Select Penny Pilot Symbols. For complex orders in these same symbols, the Exchange currently charges a “make” fee of: (i) \$0.10 per contract for ISE Market Maker, Market Maker Plus, Firm Proprietary and Customer (Professional) orders; and (ii) \$0.20 per contract for Non-ISE Market Maker orders. Priority Customer orders are not charged a “make” fee for complex orders in any of the symbols that are in the Penny Pilot program. The Exchange proposes only to create a table in the Schedule of Fees to identify these fees more clearly.

The Exchange also proposes to amend the heading of its fee schedule to clarify that the fees in this section of the Schedule of Fees apply to Select Symbols and complex orders for symbols that are in the Penny Pilot program. Additionally, the Exchange is proposing to amend the headers in the

table to reflect the changes discussed herein and to add additional columns to reflect the fees for adding and removing liquidity in complex orders for Non-Select Penny Pilot Symbols. Further, the Exchange proposes to clarify that the term “Symbols” in fact refers to “Select Symbols” where appropriate throughout this section of the Schedule of Fees.

The Exchange has designated this proposal to be operative on November 1, 2011.

2. Statutory Basis

The Exchange believes that its proposal to amend its Schedule of Fees is consistent with Section 6(b) of the Exchange Act¹¹ in general, and furthers the objectives of Section 6(b)(4) of the Exchange Act¹² in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and other persons using its facilities. The impact of the proposal upon the net fees paid by a particular market participant will depend on a number of variables, most important of which will be its propensity to interact with and respond to certain types of orders.

The Exchange believes that its proposal to assess a \$0.32 per contract “take” fee for ISE Market Maker, Market Maker Plus, Firm Proprietary and Customer (Professional) orders in the Select Symbols that are subject to the Exchange’s maker/taker fees is reasonable because the fee is within the range of fees assessed by other exchanges employing similar pricing schemes and in some cases, is lower than the fees assessed by other exchanges. For example, NASDAQ OMX PHLX, Inc. (“PHLX”) recently announced a fee increase for removing liquidity in complex orders from \$0.29 to \$0.32 per contract for Specialist orders and from \$0.30 to \$0.35 per contract for Firm and Professional orders.¹³ Therefore, while ISE is proposing a fee increase, the resulting fee remains lower than the fee change proposed by PHLX for similar orders. Finally, ISE’s proposed increase for Non-ISE Market Maker orders to \$0.36 per contract is a nominal increase over the rate currently in place at PHLX. PHLX currently charges \$0.35 per contract for these orders.¹⁴

The Exchange believes that it is reasonable and equitable to provide a rebate for Priority Customer complex

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4).

¹³ See OTA #63—PHLX and NOM Update Pricing Effective Tuesday, November 1, 2011, available at <http://www.nasdaqtrader.com/TraderNews.aspx?id=OTA2011-63>.

¹⁴ *Id.*

orders when these orders trade with non-customer orders in the complex order book because paying a rebate would continue to attract additional order flow to the Exchange and create liquidity in the symbols that are subject to the rebate, which the Exchange believes ultimately will benefit all market participants who trade on ISE. The Exchange already provides this rebate and is now proposing to increase the rebate. The Exchange believes that the proposed rebate for options overlying the symbols that are subject to the Exchange's maker/taker fees is competitive with fees charged by other exchanges and is therefore reasonable and equitably allocated to those members that direct orders to the Exchange rather than to a competing exchange. The proposed increased rebate of \$0.30 per contract for Priority Customer complex orders is identical to the rebate level recently announced by PHLX.¹⁵

The Exchange notes that PHLX currently assesses a fee for complex orders for certain symbols that are preferenced to market makers at that exchange at a rate of \$0.27 per contract. For complex orders that are not preferenced to market makers that remove liquidity in those symbols, PHLX charges a take fee of \$0.29 per contract. In its recent announcement, PHLX proposes to increase the fee for preferenced market makers from \$0.27 per contract to \$0.30 per contract and, for non-preferenced market makers, from \$0.29 per contract to \$0.32 per contract.¹⁶ ISE notes that with this proposed fee change, the Exchange, while increasing this fee, will maintain the same two cent differential that is currently in place at PHLX.¹⁷

The complex order pricing employed by the Exchange has proven to be an effective pricing mechanism and attractive to Exchange participants and their customers. The Exchange believes that changing certain aspects of its maker/taker fees and rebates will attract additional complex order business while at the same time creating standardization in complex order pricing across symbols that make up the majority of the daily volume in options trading.

The Exchange further believes that the Exchange's maker/taker fees are not unfairly discriminatory because the fee structure is consistent with fee structures that exist today at other

options exchanges. Additionally, the Exchange believes that the proposed fees are fair, equitable and not unfairly discriminatory because the proposed fees are consistent with price differentiation that exists today at other option exchanges. The Exchange operates in a highly competitive market in which market participants can readily direct order flow to another exchange if they deem fee levels at a particular exchange to be excessive. With this proposed fee change, the Exchange believes it remains an attractive venue for market participants to trade complex orders.

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 Exchange 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 Exchange Act.¹⁸ At any time within 60 days of the filing of such 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 Exchange Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

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 Exchange 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 email to rule-comments@sec.gov. Please include File Number SR-ISE-2011-72 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-2011-72. This file number should be included on the subject line if email 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 Web site 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 a.m. and 3 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-2011-72 and should be submitted on or before December 8, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Elizabeth M. Murphy,
Secretary.

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¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See PHLX Fee Schedule at <http://www.nasdaqtrader.com/content/marketregulation/membership/phlx/feesched.pdf>.

¹⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁹ 17 CFR 200.30-3(a)(12).