SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62399; File No. SR-ISE-2010-34)

June 28, 2010

Self-Regulatory Organizations; International Securities Exchange, LLC; Order Approving Proposed Rule Change Relating to Fees for the ISE Order Feed

I. Introduction

On May 11, 2010, the International Securities Exchange, LLC ("Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to amend its Schedule of Fees to adopt subscription fees for the sale of a new market data offering called the ISE Order Feed. The proposed rule change was published for comment in the Federal Register on May 25, 2010.[3] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

ISE proposes to establish subscription fees for the sale of the ISE Order Feed, which provides real-time updates every time a new limit order that is not immediately executable at the best bid/offer ("BBO") is placed on the ISE order book.[4] ISE Order Feed contains information on individual limit orders including the order type (buy/sell), the order price, the order size, and customer indicator (which reflects whether the order is a customer order), as well as details for

---

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 62117 (May 18, 2010), 75 FR 29381 ("Notice").

4 The ISE Order Feed does not include market orders, immediate or cancel orders, quotes, or any non-displayed interest.

each instrument series, including the symbols (series and underlying security), put or call indicator, the expiration and the strike price of the series.

The Exchange proposes to charge distributors[5] of the ISE Order Feed $2,000 per month and $10 per external controlled device[6] per month. For subscribers who redistribute the ISE Order Feed externally, or redistribute the ISE Order Feed internally and externally, the Exchange proposes to limit for any one month the combined maximum amount of fees payable to $2,500. The ISE Order Feed will be made available to both members and non-members on a subscription basis. Upon Commission approval, the Exchange intends to begin charging the ISE Order Feed fees on July 1, 2010.

III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[7] In particular, it is consistent with Section 6(b)(4) of the Act,[8] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,[9] which requires, among other things, that the rules of a national securities

---

5 A "distributor" is any firm that receives the ISE Order Feed directly from ISE or indirectly through a "redistributor" and then distributes it either internally or externally. All distributors will be required by the Exchange to execute an ISE distributor agreement. "Redistributors" include market data vendors and connectivity providers such as extranets and private network providers.

6 A "controlled device" is as any device that a distributor of the ISE Order Feed permits to access the information in the ISE Order Feed.

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

8 15 U.S.C. 78f(b)(4).

9 15 U.S.C. 78f(b)(5).

exchange 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 Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,[10] which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission has reviewed the proposal using the approach set forth in the approval order for SR-NYSEArca-2006-21 for non-core market data fees.[11] In the NYSE Arca Order, the Commission stated that "when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory."[12] It noted that the "existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."[13] If an exchange "was subject to significant competitive forces in setting the terms of a proposal," the Commission will approve a proposal unless it determines that "there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder."[14]

---

[10] 15 U.S.C. 78f(b)(8).

[11] See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) ("NYSE Arca Order").

[12] Id. at 74771.

[13] Id. at 74782.

[14] Id. at 74781.

As noted in the NYSE Arca Order, the standards in Section 6 of the Act do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data.[15] All U.S. options exchanges are required pursuant to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA Plan") to provide "core data" -- the best-priced quotations and comprehensive last sale reports -- to OPRA, which data is then distributed to the public pursuant to the OPRA Plan.[16] In contrast, individual exchanges and other market participants distribute non-core data voluntarily.[17] The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.[18] Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. The Commission therefore is able to rely on competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of Section 6.[19]

Because ISE's instant proposal relates to the distribution of non-core data, the Commission will apply the market-based approach set forth in the NYSE Arca Order. Pursuant to this approach, the first step is to determine whether ISE was subject to significant competitive forces in setting the terms of its non-core market data proposal, including the level of any fees. As in the NYSE Arca Order, in determining whether ISE was subject to significant competitive forces in setting the terms of its proposal, the Commission has analyzed ISE's compelling need

15 Id. at 74779.

16 See OPRA Plan, Sections V(a)-(c).

17 See NYSE Arca Order, supra, note 11, at 74779.

18 Id.

19 Id.

to attract order flow from market participants, and the availability to market participants of alternatives to purchasing ISE's non-core market data.

The Commission believes that the options industry currently is subject to significant competitive forces.[20] It is generally accepted that the start of wide-spread multiple listing of options across exchanges in August 1999 greatly enhanced competition among the exchanges.[21] The launch of four options exchanges since that time, numerous market structure innovations, and the start of the options penny pilot[22] have all further intensified intermarket competition for order flow.

ISE currently competes with seven options exchanges for order flow. Attracting order flow is an essential part of ISE's competitive success.[23] If ISE cannot attract order flow to its market, it will not be able to execute transactions. If ISE cannot execute transactions on its

---

20 The Commission has previously stated that the options industry is subject to significant competitive forces. See Securities Exchange Act Release No. 59949 (May 20, 2009), 74FR 25593 (May 28, 2009) (SR-ISE-2007-97) (order approving the ISE's proposal establishing fees for a real-time depth of market data offering).

21 See generally Concept Release: Competitive Developments in the Options Markets, Securities Exchange Act Release No. 49175 (February 3, 2004), 69 FR 6124 (February 9, 2004); see also Battalio, Robert, Hatch, Brian, and Jennings, Robert, Toward a National Market System for U.S. Exchange-listed Equity Options, The Journal of Finance 59 (933-961); De Fontnouvelle, Patrick, Fishe, Raymond P., and Harris, Jeffrey H., The Behavior of Bid-Ask Spreads and Volume in Options Markets During the Competition for Listings in 1999, The Journal of Finance 58 (2437-2463); and Mayhew, Stewart, Competition, Market Structure, and Bid-Ask Spreads in Stock Option Markets, The Journal of Finance 57 (931-958).

22 See, e.g., Securities Exchange Act Release Nos. 55162 (January 24, 2007), 72 FR 4738 (February 1, 2007) (SR-Amex-2006-106); 55073 (January 9, 2007), 72 FR 4741 (February 1, 2007) (SR-BSE-2006-48); 55154 (January 23, 2007), 72 FR 4743 (February 1, 2007) (SR-CBOE-2006-92); 55161 (January 24, 2007), 72 FR 4754 (February 1, 2007) (SR-Phlx-2006-62); 55156 (January 23, 2007), 72 FR 4759 (February 1, 2007) (SR-NYSEArca-2006-73); and 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR-Phlx-2006-74).

23 ISE states in its filing that it "has a compelling need to attract order flow from market participants in order to maintain its share of trading volume." See Notice, supra note 3, at 29382.

market, it will not generate transaction revenue. If ISE cannot attract orders or execute transactions on its market, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue and thus not be competitive with other exchanges that have this ability.

ISE must compete vigorously for order flow to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on ISE to act reasonably in setting its fees for ISE market data, particularly given that the market participants that will pay such fees often will be the same market participants from whom ISE must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.[24]

In addition to the need to attract order flow, the availability of alternatives to the ISE Order Feed significantly affect the terms on which ISE can distribute this market data.[25] In setting the fees for the ISE Order Feed, ISE must consider the extent to which market participants would choose one or more alternatives instead of purchasing its data.[26] The most basic source of information concerning the depth generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.[27] In this respect, the core data feeds that include an exchange's own transaction information are a

---

[24] Id. at 29383.

[25] See NYSE Arca Order, supra note 11, at 74784.

[26] Id. at 74783.

[27] Id.

significant alternative to the exchange's market data product.[28] Further, other options exchanges can produce their own market data products, and thus are sources of potential competition for ISE.[29] In addition, one or more securities firms could act independently and distribute their own order data, with or without a fee.[30]

The Commission believes that there are a number of alternative sources of information that impose significant competitive pressures on ISE in setting the terms for distributing the ISE Order Feed. The Commission believes that the availability of those alternatives, as well as ISE's compelling need to attract order flow, imposed significant competitive pressure on ISE to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because ISE was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that the terms of the proposal fail to meet the applicable requirements of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis. Further, the Commission did not receive any comment letters raising concerns of a substantial countervailing basis that the terms of the proposal failed to meet the requirements of the Act or the rules thereunder.

---

28 Id. Information on transactions executed on ISE is available through OPRA.

29 In its filing, ISE states that "[o]ther exchanges, including some who may enjoy greater market share than ISE, are potential competitors as they too sell similar market data offerings that market participants may choose to purchase instead. For example, NASDAQ OMX PHLX ("PHLX") has filed a proposed rule change to adopt fees for a market data product that includes a data feed that is similar to the ISE Order Feed. See Securities Exchange Act Release No. 61878 (April 8, 2010), 75 FR 20023 (April 16, 2010) (SR-PHLX-2010-48). The PHLX' Specialized Order Feed, which PHLX has proposed to integrate into its TOPO Plus Orders market data offering, includes 'real-time information to keep track of single order book(s).'" See Notice, supra note 3, at 29383.

30 Id.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-ISE-2010-34) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Florence E. Harmon
Deputy Secretary

31 17 CFR 200.30-3(a)(12).