

applicant, Market Street or any Liquidity Provider is an affiliated person of that Borrowing Fund, within the meaning of section 2(a)(3) of the Act, or an affiliated person of any affiliated person of that Borrowing Fund.

Florence E. Harmon,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61100; File No. SR-ISE-2009-100]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change Relating to the Amounts that Direct Edge ECN, in Its Capacity as an Introducing Broker for Non-ISE Members, Passes Through to Such Non-ISE Members

December 2, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 30, 2009, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by ISE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the amounts that Direct Edge ECN ("DECN"), in its capacity as an introducing broker for non-ISE Members, passes through to such non-ISE Members.

The text of the proposed rule change is available on the Exchange's Internet Web site at <http://www.ise.com>.

#### 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 III 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

DECN, a facility of ISE, operates two trading platforms, EDGX and EDGA. On November 30, 2009, the ISE filed for immediate effectiveness a proposed rule change to: (i) Amend DECN's fee schedule for ISE Members<sup>3</sup> to reflect pass through charges of other market centers;<sup>4</sup> and (ii) make technical

<sup>3</sup> References to ISE Members in this filing refer to DECN Subscribers who are ISE Members.

<sup>4</sup> On October 1, 2009, the Exchange added new fee categories for the INET order type. When a member routes to Nasdaq using the INET order type and removes liquidity on Tapes A or C, the member incurs a fee of \$0.0030 on either EDGA or EDGX. Such situation yields Flag "L". The INET order type sweeps the EDGA or EDGX book, and routes the remainder to Nasdaq. If the order is marketable, it removes liquidity from the EDGA or EDGX book, as applicable, first. If the order is non-marketable, the order posts on Nasdaq. With regards to a Member's use of the INET order type for Tapes A or C securities, Members routing an ADV: (i) Less than 5,000,000 shares are currently charged \$0.0030 per share, as described in the schedule; (ii) equal to or greater than 5,000,000 shares but less than 20,000,000 shares are currently charged \$0.0027 per share; (iii) equal to or greater than 20,000,000 shares but less than 30,000,001 shares are currently charged \$0.0026 per share; and (iv) equal to or greater than 30,000,001 shares are currently charged \$0.0025 per share. The rates, in all cases, are calculated for shares removed from Nasdaq. The Exchange believes that these tier-based rates incent Members to sweep the EDGA or EDGX book first and then offer a discounted rate to Nasdaq's rates if the remainder of the order is routed to Nasdaq. These discounted rates arise in part from reduced administrative costs associated with certain volume levels. See Securities Exchange Act Release No. 60769 (October 2, 2009), 74 FR 51903 (October 8, 2009) (SR-ISE-2009-68).

In SR-ISE-2009-99, the Exchange amended its fees in order to reflect changes to the actual transaction fees assessed by away markets. Specifically, the Exchange amended its fees schedule to reflect changes to Nasdaq's best removal tier rate. For example, on November 1, 2009, the best removal tier rate increased on Nasdaq from \$0.0027 per share executed to \$0.0028 per share executed for Tape A & C securities. See Securities Exchange Act Release No. 60959 (November 6, 2009), 74 FR 58672 (November 13, 2009) (SR-NASDAQ-2009-096). The Exchange amended its fee schedule so that when Nasdaq's best removal tier rate changes, EDGA and EDGX's fees change as well, in lock step. The new language reads as follows:

Subscribers routing an average daily volume ("ADV"): (i) Less than 5,000,000 shares will be charged \$0.0030 per share, as described in the schedule; (ii) equal to or greater than 5,000,000 shares but less than 20,000,000 shares will be

charged to the fee schedule.<sup>5</sup> The changes made pursuant to SR-ISE-2009-99 became operative on December 1, 2009.

In its capacity as a member of ISE, DECN currently serves as an introducing broker for the non-ISE Member subscribers of DECN to access EDGX and EDGA. DECN, as an ISE Member and introducing broker, receives rebates and is assessed charges from DECN for transactions it executes on EDGX or EDGA in its capacity as introducing broker for non-ISE Members. Since the amounts of such rebates and charges were changed pursuant to SR-ISE-2009-99, DECN wishes to make corresponding changes to the amounts it passes through to non-ISE Member subscribers of DECN for which it acts as introducing broker. As a result, the per share amounts that non-ISE Member subscribers receive and are charged will be the same as the amounts that ISE Members receive and are charged.

ISE is seeking accelerated approval of this proposed rule change, as well as an effective date of December 1, 2009. ISE represents that this proposal will ensure that both ISE Members and non-ISE Members (by virtue of the pass-through described above) will in effect receive and be charged equivalent amounts and that the imposition of such amounts will begin on the same December 1, 2009 start date.

##### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with

charged *Nasdaq's best removal tier rate* per share; (iii) equal to or greater than 20,000,000 shares but less than 30,000,001 shares will be charged *Nasdaq's best removal tier rate—\$0.0001* per share; and (iv) equal to or greater than 30,000,001 shares will be charged *Nasdaq's best removal tier rate—\$0.0002* per share. The rates, in all cases, are calculated for shares removed from Nasdaq. (emphasis added)

For the month of December this equates to \$0.0028 per share for (ii), above, \$0.0027 per share for (iii), above, and \$0.0026 per share for (iv), as described above.

<sup>5</sup> In SR-ISE-2009-99, the Exchange made technical changes to the fee schedule. Effective December 1, 2009, the Exchange amended the meaning of several flags. In particular, the N and W flags are no longer used to reflect activity outside of regular market hours. The Exchange adopted flags 3-7 to reflect pre- and post-market activity. See Securities Exchange Act Release No. 60914 (November 2, 2009), 74 FR 57726 (November 9, 2009) (SR-ISE-2009-88). In SR-ISE-2009-99, the Exchange corrected a reference in footnote 1 to the fee schedule to reflect this change. The new language reads as follows:

In addition, subscribers can also qualify for a rebate of \$0.0032 per share for all liquidity posted on EDGX if they add or route at least 10,000,000 shares of average daily volume prior to 9:30 AM or after 4:00 PM (includes all flags except 6) AND add a minimum of 75,000,000 shares of average daily volume on EDGX in total, including during both market hours and pre and post-trading hours. (emphasis added)

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

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

the objectives of Section 6 of the Act,<sup>6</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>7</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, this proposal will ensure that dues, fees and other charges imposed on ISE Members are equitably allocated to both ISE Members and non-ISE Members (by virtue of the pass-through described above).

#### *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. 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 No. SR-ISE-2009-100 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-2009-100. 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 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 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 such filing also will be available for inspection and copying at the principal office of the ISE. 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-2009-100 and should be submitted on or before December 30, 2009.

### IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

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.<sup>8</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(4)<sup>9</sup> of the Act, which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities.

As described more fully above, ISE recently amended DECN's fee schedule for ISE Members to, among other things, indicate that its fees using the INET order type on Tape A and C will change in conjunction with Nasdaq's best removal tier rate and make technical changes to the fee schedule.<sup>10</sup> The fee changes made pursuant to the Member Fee Filing became operative on December 1, 2009. DECN receives rebates and is charged fees for transactions it executes on EGDG or EDGA in its capacity as an introducing

broker for its non-ISE member subscribers.

The current proposal, which will apply retroactively to December 1, 2009, will allow DECN to pass through the revised rebates and fees to the non-ISE member subscribers for which it acts as an introducing broker. The Commission finds that the proposal is consistent with the Act because it will provide rebates and charge fees to non-ISE member subscribers that are equivalent to those established for ISE member subscribers in the Member Fee Filing.<sup>11</sup>

ISE has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of notice of filing thereof in the *Federal Register*. As discussed above, the proposal will allow DECN to pass through to non-ISE member subscribers the revised rebate and fees established for ISE member subscribers in the Member Fee Filing, resulting in equivalent rebates and fees for ISE member and non-member subscribers. In addition, because the proposal will apply the revised rebates and fees retroactively to December 1, 2009, the revised rebates and fees will have the same effective date, thereby promoting consistency in the DECN's fee schedule. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act, for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**.

### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (SR-ISE-2009-100) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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<sup>8</sup> In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78f(b)(4).

<sup>10</sup> See File No. SR-ISE-2009-99 (the "Member Fee Filing").

<sup>11</sup> *Id.*

<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<sup>6</sup> 15 U.S.C. 78f.

<sup>7</sup> 15 U.S.C. 78f(b)(4).