

SIFMA and NetCoalition further contend the prior filing lacked evidence supporting a conclusion that the market for NLS is competitive, asserting that arguments about competition for order flow and substitutability were rejected in *NetCoalition*. While the court did determine that the record before it was not sufficient to allow it to endorse those theories on the facts of that case, the court did not itself make any conclusive findings about the actual presence or absence of competition or the accuracy of these theories: Rather, it simply made a finding about the state of the SEC's record. Moreover, analysis about competition in the market for depth-of-book data is only tangentially relevant to the market for last sale data. As discussed above and in the prior filing, perfect and partial substitutes for NLS exist in the form of real-time core market data, free delayed core market data, and the last sale products of competing venues, additional competitive entry is possible, and evidence of competition is readily apparent in the pricing behavior of the venues offering last sale products and the consumption patterns of their customers. Thus, although NASDAQ believes that the competitive nature of the market for all market data, including depth-of-book data, will ultimately be established, SIFMA and NetCoalition's letter not only mischaracterizes the *NetCoalition* decision, it also fails to address the characteristics of the product at issue and the evidence already presented.

### 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.<sup>12</sup> At any time within 60 days of the filing of the

trading platform, and the marginal costs of market data production are minimal or even zero. Because the costs of providing execution services and market data are not unique to either of the provided services, there is no meaningful way to allocate these costs among the two "joint products"—and any attempt to do so would result in inherently arbitrary cost allocations.

The court explicitly acknowledged that the "joint product" theory set forth by NASDAQ's economic experts in *NetCoalition* (and also described in this filing) could explain the competitive dynamic of the market and explain why consideration of cost data would be unavailing. The court found, however, that the Commission could not rely on the theory because it was not in the Commission's record. *Id.* at 541 n.16. For the purpose of providing a complete explanation of the theory, NASDAQ is further submitting as Exhibit 3 to this filing a study that was recently submitted to the Commission in SR-NASDAQ-2010-174. See Statement of Janusz Ordober and Gustavo Bamberger at 2-17 (December 29, 2010).

<sup>12</sup> 15 U.S.C. 78s(b)(3)(a)(ii) [sic].

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.

### 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2011-092 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-NASDAQ-2011-092. 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 website viewing and printing in the Commission's Public Reference Room, 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-NASDAQ-2011-092 and should be submitted on or before August 5, 2011.

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

Cathy H. Ahn,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64853; File No. SR-ISE-2011-39]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change Relating to Complex Orders

July 11, 2011.

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 July 1, 2011, 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 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 Exchange proposes to provide for market maker quotes for complex orders, add an additional methodology for execution priority on the complex order book, and provide for enhanced allocations to designated market makers in certain circumstances. 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, at the Commission's Public Reference Room, and on the Commission's Web site at <http://www.sec.gov>.

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

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

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

## 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 Exchange 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 proposes to adopt enhancements to its complex order functionality that it believes will encourage market makers to provide additional liquidity in complex order strategies on the complex order book. First, the Exchange proposes to enable market makers to enter quotes for complex order strategies on the complex order book in the same manner as they do for single-leg orders in the regular market<sup>3</sup> and to make the same risk management tools available for such quotes as are currently available in the regular market.<sup>4</sup> The Exchange believes that market makers may prefer to use their existing quotation systems to enter quotes for complex order strategies rather than entering orders, thereby encouraging greater liquidity on the complex order book.<sup>5</sup> Quoting on the complex order book would be completely voluntary and limited to options classes to which the market maker is appointed. In this respect, the Exchange notes that there are no existing requirements that market makers provide liquidity on the complex order book, and the proposed rule specifies that market makers who choose to enter quotes for complex order strategies in their appointed options classes are not subject to the market maker quotation requirements applicable in the regular market. The

<sup>3</sup> Quotes may only be entered by market makers. ISE Rule 100(a)(42).

<sup>4</sup> The Exchange adopted changes to ISE Rule 804 to reflect the enhanced risk management tools that will be available for market maker quotes in the Optimise platform in the regular market. Securities Exchange Act Release No. 63117 (October 15, 2010), 75 FR 65042 (October 21, 2010) (SR-ISE-2010-101).

<sup>5</sup> Quotes and orders are processed as they are received by the trading system. Quotes are not processed any more quickly than orders.

proposed rule also specifies that complex order volume executed by market makers is not taken into consideration when determining whether market makers are meeting their quotation obligations with respect to the regular market.

The Exchange seeks to encourage market makers to provide additional liquidity on the complex order book by providing them with the ability to quote complex order strategies on the complex order book. At the same time, the Exchange recognizes that market makers could encounter difficulties maintaining quotations on the complex order book if such quotes were allowed to execute against (*i.e.*, "leg-into") the regular market. In particular, market maker pricing systems automatically update the price of a market maker's quotations when there is a move in the price of an underlying security. When such a change occurs, a market maker will need to send updates for its quotes in the regular market and also send updates for its quotes in the complex order book. Accordingly, it is possible that market makers could unintentionally trade with their own quotes or the quotes of other market makers in the regular market before the quote update in the complex order book is processed (or vice versa).<sup>6</sup>

Therefore, under the proposal, the system will not automatically execute market maker quotes against bids and offers on the Exchange for the individual legs of the complex order strategy.<sup>7</sup> The Exchange believes that this is a reasonable limitation on market maker quotations that will appropriately address an operational issue that would discourage market makers from offering additional liquidity on the complex order book to the benefit of customers that seek to execute such multi-leg strategies. The Exchange also notes that market maker quotes cannot be marked for price improvement, as that would further disrupt the quoting function.<sup>8</sup>

<sup>6</sup> Indeed, ISE has long recognized the need to ameliorate small timing differences in processing market maker quotation updates by delaying market maker quotations from executing against each other for up to one second. ISE Rule 804(d)(2). The Exchange believes the restriction on complex order quotes legging-into the regular market is directly analogous.

<sup>7</sup> Pursuant to ISE Rule 722(b)(3)(ii), the ISE's trading system monitors the Exchange's regular market for the individual series that comprise the complex order and automatically executes the individual legs of a complex order against the ISE best bid or offer when the prices and sizes can satisfy the terms of the order.

<sup>8</sup> Pursuant to ISE Rule 722(b)(3)(iii), complex orders that are marked for price improvement are exposed on the complex order book for a period of up to one-second before being automatically executed.

Market makers are not restricted in any way from entering orders marked for price improvement if they so chose [*sic*].

The Exchange also proposes to add a third method of execution priority for bids and offers on the complex order book at the same price. Currently, the Exchange may designate on a class basis whether bids and offers at the same price are executed: (i) In time priority; or (2) pro-rata based on size after all Priority Customer Orders at the same price are executed in full.<sup>9</sup> The Exchange proposes to also have the flexibility to determine, on a class basis, whether all bids and orders on the complex order book at the same price are executed pro-rata based on size. Under this proposed method, Priority Customer Orders would receive a pro-rata allocation along with all other orders and quotes at the same price.

The Exchange believes that market participants may be encouraged to provide more liquidity for complex order strategies if all liquidity at the same price participates in the execution of incoming orders on an equal basis. Moreover, while the Exchange believes there is a basis under the Securities Exchange Act of 1934 (the "Act") for allowing Priority Customers to be treated differently than professional trading interest as the Exchange currently does in its regular market, such preferential treatment is not required under the Act. Indeed, under the Exchange's existing price-time execution methodology for orders on the complex order book, Priority Customers are not given preferential treatment. The Exchange further notes that this proposed rule change addresses priority among bids and offers for complex order strategies on the complex order book only, and does not affect the provisions of paragraph (b)(2) of Rule 722, which limits the execution of complex orders when there are Priority Customer Orders on the Exchange for the individual series of a complex order.

Finally, for options classes that are allocated pro-rata based on size with Priority Customer Order priority, the Exchange proposes to provide enhanced allocations to market makers designated by the entering member (a "Preferred Market Maker"). Under the proposal, a Preferred Market Maker would receive the same enhanced allocation on the complex order book provided for Preferred Market Makers in the regular market. Specifically, a Preferred Market Maker would receive an allocation equal to the greater of: (i) The proportion of the total size at the best price represented by the size of its quote, or

<sup>9</sup> ISE Rule 722(b)(3)(i).

(ii) sixty percent of the contracts to be allocated if there is only one other professional complex order or market maker quotes at the best price, and forty percent if there are two or more other professional complex orders and/or market maker quotes at the best price. Preferred Market Makers on the complex book must comply with their quoting obligations in the regular market, including the enhanced quoting requirements in Rule 804(e)(2)(ii) applicable to Competitive Market Makers that receive Preferred Orders.<sup>10</sup> This means, among other things, that market makers must be quoting at least 90% of the series of an options class in the regular market to receive an enhanced allocation on the complex order book.<sup>11</sup>

## 2. Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b),<sup>12</sup> in general, and Section 6(b)(5)<sup>13</sup> in particular, that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange Believes [sic] that customer [sic] would benefit from enhanced liquidity on the complex order book.

In particular, the Exchange believes that giving market makers the ability to enter quotes for complex order strategies on the complex order book and to utilize market maker risk management tools could increase the liquidity available for investors that place complex orders on the Exchange. The Exchange believes it is necessary to assure the smooth operation of quotes on the complex order [sic] by preventing such quotations from legging into the regular market like orders. In this respect, entering quotations will be completely voluntary, so that a market maker could choose to offer liquidity though the posting of orders if it wanted the opportunity to leg-into the market.

<sup>10</sup> Electronic Access Members and Preferred Market Makers may not coordinate their actions. Such conduct would be a violation of Rule 400 (Just and Equitable Principles of Trade). The Exchange will proactively conduct surveillance for, and enforce against, such violations. See Securities Exchange Act Release No. 51818 (June 10, 2005), 70 FR 35146 (June 16, 2005) (Order Approving SR-ISE-2005-18) at footnote 10.

<sup>11</sup> The Chicago Board Options Exchange also permits preferencing of complex orders. CBOE Rule 8.13(d), Interpretations and Policies .01.

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

<sup>13</sup> 15 U.S.C. 78f(b)(5).

Therefore, the Exchange does not think it is unreasonably discriminatory to prevent market makers from legging-into the market.

Moreover, the Exchange does not believe it is unreasonably discriminatory to make the ability to quote on the complex order book available only to market makers that are appointed to the options class in the regular market. Indeed, under the ISE membership structure, only those members that own or lease market maker memberships are permitted to enter quotes in the regular market. Allowing other market participants to quote on the complex order book would be inconsistent with this membership structure. Notwithstanding, the Exchange is not aware of any demand from non-market maker participants to quote on the complex order book. Indeed, the Exchange is proposing to implement this rule change on a voluntary basis precisely because it believes a mandatory quoting requirement for complex order [sic] would discourage members from participating on the Exchange as market makers in the regular market.

The Exchange also notes that orders resting on the book in the regular market may not receive an execution when quotes on the complex order book are prevented from legging in. Complex orders are contingency transactions, and prices posted on the complex order book are not firm, nor included in the national market system. The Exchange attempts to provide better execution quality for complex orders resting on the complex order book by seeking to satisfy the contingency with individual orders in the regular market when possible. The Exchange notes, however, that this is an enhanced execution service that has been developed only in the last few years. While exchanges have always prohibited the execution of complex orders at prices that would trade through the best bids and offers on the exchange, or at the same price as public customer orders on the regular book in certain circumstances, there has never been a regulatory requirement to integrate potential liquidity on the complex order book with the regular market. As discussed above, the Exchange believes it is operationally necessary to prevent market maker quotes from legging-into the regular market; otherwise, market makers will not be able to quote on the complex order book. Moreover, customers in the regular market are not being discriminated against, as the very same market makers provide liquidity in the regular market. Accordingly, the proposal will provide benefits to

customers that use complex strategies, while not degrading the execution quality of customer orders in the regular market.

The Exchange further believes that liquidity on the complex order book may be enhanced by executing all interest at the same price pro-rata based on size. In this respect, the Exchange notes that Priority Customers are not given preferential treatment under the existing price-time methodology and that Priority Customer orders would be treated equally with all other trading interest at the same price under the pro-rata based on size methodology. Having the ability to determine on a class basis whether bids and offers on the complex order book at the same price will be executed in time priority, pro-rata based on size with Priority Customer Priority, or pro-rata based on size without Priority Customer Priority will give the Exchange greater flexibility to respond to market needs and enhance its ability to compete more effectively.

Finally, the Exchange believes that its proposal to give Preferred Market Makers enhanced allocations is designed to protect priority customers and to be consistent with Commission policy with respect to execution guarantees. In particular, as in the regular market, Preferred Market Makers will only receive enhanced allocations of complex orders in options classes in which Priority Customer Orders are given priority over all other interest at the same price. Additionally, the potential for enhanced allocations is limited to only those market makers that are providing liquidity in at least 90% of the series in the options class in the regular market. The Exchange believes that providing the opportunity to receive enhanced allocations might incentivize market makers to provide additional liquidity on the complex order book and potentially provide incentive [sic] for additional market makers to quote at the higher requirement in the regular market for the options class.

### *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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) As the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be 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 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 Number SR-ISE-2011-39 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-2011-39. 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 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-2011-39 and should be submitted on or before August 5, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Cathy H. Ahn,**  
Deputy Secretary.

[FR Doc. 2011-17797 Filed 7-14-11; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64850; File No. SR-CHX-2011-16]

### Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Alter its Fee Schedule To Increase its SRO, DEA and Off-Exchange Trader Fees

July 11, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 30, 2011, the Chicago Stock Exchange, Inc. ("CHX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. CHX has filed the proposal pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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 CHX proposes to amend its Schedule of Participant Fees and Assessments (the "Fee Schedule"),

effective July 1, 2011, to alter its schedule of fees for Participants relating to its SRO, Off-Exchange trader and DEA fees. The text of this proposed rule change is available on the Exchange's Web site at [http://www.chx.com/rules/proposed\\_rules.htm](http://www.chx.com/rules/proposed_rules.htm) and in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549.

#### 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 CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX 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

Through this filing, the Exchange proposes to amend its Schedule of Participant Fees and Assessments (the "Fee Schedule"), effective July 1, 2011, to amend its existing SRO, Off-Exchange trader and DEA fees. These fee changes are being proposed in response to the increased importance and expense of the Exchange's regulatory efforts and competitive pricing pressures.

The Exchange proposes to increase both its SRO and DEA fees to reflect increased current and planned expenses related to the Exchange's regulatory responsibilities. Currently, the Exchange's SRO fee is \$500 per month for each Participant firm and its DEA fee is \$800 per month for each firm for which the Exchange is its DEA. Through this filing, the Exchange proposes increasing the SRO fee to \$600 per month for each Participant firm and the DEA fee to \$1,000 per month.

Additionally, the Exchange currently charges each off-Exchange Participant firm, that is solely involved in proprietary securities trading and for which the CHX is DEA, a \$500 annual fee for each trader. Through this filing, the Exchange proposes to amend its Fee Schedule to allow off-Exchange Participant firms to register two traders at no charge while capping the total annual trader fees payable by each off-Exchange Participant firm at \$70,000. The Exchange is proposing this

<sup>14</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

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