

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65958; File No. SR–ISE–2011–81]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees for Certain Complex Orders Executed on the Exchange

December 15, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Exchange Act” or the “Act”)<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that, on November 30, 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 fees for certain complex orders executed on the Exchange. 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 a per contract transaction fee to market

participants that add or remove liquidity in the Complex Order Book (“maker/taker fees”) in symbols that are in the Penny Pilot program. Included therein is a subset of 103 symbols that are assessed a slightly higher taker fee (the “Select Symbols”).<sup>3</sup> Specifically, the Exchange charges ISE market maker orders,<sup>4</sup> firm proprietary orders and Customer (Professional Orders)<sup>5</sup> \$0.10 per contract for providing liquidity on the Complex Order Book and \$0.30 per contract (\$0.32 per contract in the Select Symbols) for taking liquidity from the Complex Order Book. ISE market makers who take liquidity from the Complex Order Book by trading with orders that are preferenced to them are charged \$0.28 per contract (\$0.30 per contract in the Select Symbols). Non-ISE Market Makers<sup>6</sup> are currently charged \$0.20 per contract for providing liquidity and \$0.35 per contract (\$0.36 per contract in the Select Symbols) for taking liquidity from the Complex Order Book. Priority Customer orders are not charged a fee for trading in the Complex Order Book and receive a rebate of \$0.25 per contract (\$0.30 per contract in the Select Symbols) when those orders trade with non-customer orders in the Complex Order Book.

The Exchange recently received approval to allow market makers to enter quotations for complex order strategies in the Complex Order Book.<sup>7</sup> Given this enhancement to the complex order functionality, and in order to maintain a competitive fee and rebate structure for Priority Customer orders, the Exchange now proposes to amend the fees that apply to transactions in the Complex Order Book in the following three symbols: XOP, XLB and EFA.<sup>8</sup> Specifically, the Exchange proposes to amend its maker fee for complex orders in these three symbols when these orders interact with Priority Customers.<sup>9</sup>

<sup>3</sup> The Select Symbols are identified by their ticker symbol on the Exchange’s Schedule of Fees.

<sup>4</sup> The term “market makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See ISE Rule 100(a)(25).

<sup>5</sup> The term “Professional Order” means an order that is for the account of a person or entity that is not a Priority Customer. See ISE Rule 100(a)(37C).

<sup>6</sup> The term “Non-ISE Market Maker” means a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934 (the “Act”) [sic] registered in the same options class on another options exchange. See Schedule of Fees, page 4.

<sup>7</sup> See Securities Exchange Act Release No. 65548 (October 13, 2011), 76 FR 64980 (October 19, 2011) (SR–ISE–2011–39).

<sup>8</sup> The Exchange notes that XOP is currently in the Penny Pilot program and XLB and EFA are currently Select Symbols.

<sup>9</sup> The term “Priority Customer” means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during

The Exchange proposes to increase its maker fee from \$0.10 per contract to \$0.30 per contract in XOP (\$0.32 per contract in XLB and EFA) for ISE market maker orders, firm proprietary orders, and Customer (Professional Orders) when these orders interact with Priority Customer orders. The Exchange proposes to increase its maker fee from \$0.20 per contract to \$0.30 per contract in XOP (\$0.32 per contract in XLB and EFA) for Non-ISE Market Makers orders when these orders interact with Priority Customer orders. The Exchange is not proposing any change to fees for Priority Customer orders that trade in the Complex Order Book.

Further, for Priority Customer complex orders in symbols that are in the Penny Pilot program, the Exchange currently provides a rebate of \$0.25 per contract (\$0.30 per contract for Select Symbols) when these orders trade with non-customer orders in the Complex Order Book. The Exchange proposes to continue this rebate incentive. As such, Priority Customer complex orders in XOP will continue to receive a rebate of \$0.25 per contract when these orders trade with non-customer orders in the Complex Order Book, while Priority Customer complex orders in XLB and EFA will continue to receive a rebate of \$0.30 per contract when these orders trade with non-customer orders in the Complex Order Book.

Additionally, to incentivize members to trade in the Exchange’s various auction mechanisms, the Exchange currently provides a per contract rebate to those contracts that do not trade with the contra order in the Exchange’s Facilitation Mechanism,<sup>10</sup> Price Improvement Mechanism<sup>11</sup> and Solicited Order Mechanism.<sup>12</sup> This rebate currently applies to all complex orders in symbols that are subject to the Exchange’s maker/taker fees. To clarify the applicability of this rebate, the Exchange proposes to add footnote 2 to the Complex Order Maker Fee (Each Leg) for Select Symbols column and the Complex Order Taker Fee (Each Leg) for Select Symbols column on the Exchange’s Schedule of Fees. For the Facilitation and Solicited Order

a calendar month for its own beneficial account. See ISE Rule 100(a)(37A).

<sup>10</sup> See Exchange Act Release No. 61869 (April 7, 2010), 75 FR 19449 (April 14, 2010) (SR–ISE–2010–25).

<sup>11</sup> See Exchange Act Release No. 62048 (May 6, 2010), 75 FR 26830 (May 12, 2010) (SR–ISE–2010–43). The Exchange subsequently increased this rebate to \$0.25 per contract. See Exchange Act Release No. 63283 (November 9, 2010), 75 FR 70059 (November 16, 2010) (SR–ISE–2010–106).

<sup>12</sup> See Exchange Act Release No. 63283 (November 9, 2010), 75 FR 70059 (November 16, 2010) (SR–ISE–2010–106).

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

<sup>2</sup> 17 CFR 240.19b–4.

Mechanisms, the rebate is currently \$0.15 per contract. For the Price Improvement Mechanism, the rebate is currently \$0.25 per contract. The Exchange proposes to continue this rebate incentive also. As such, a per contract rebate at the current levels will continue to apply to those contracts in XOP, XLB, and EFA that do not trade with the contra order in the Exchange's Facilitation Mechanism, Price Improvement Mechanism and Solicited Order Mechanism.

The Exchange also proposes to continue providing ISE market makers with a two cent discount when trading against orders that are preferenced to them. Currently, this discount is only applicable when ISE Market Makers remove liquidity from the Complex Order Book. The Exchange now proposes to provide this fee discount when ISE Market Makers add or remove liquidity from the Complex Order Book in XOP, XLB and EFA. Accordingly, ISE market makers that add or remove liquidity in XLB and EFA in the Complex Order Book will be charged \$0.30 per contract (\$0.28 per contract in XOP) when trading with orders that are preferenced to them.

The Exchange proposes to make these fee changes operative on December 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 Act<sup>13</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>14</sup> 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 add or remove liquidity in options overlying the Penny Pilot Symbols and the Select Symbols in the Complex Order Book, as applicable.

The Exchange believes that increasing the fees applicable to orders executed in the Complex Order Book when trading against Priority Customers in XOP, XLB and EFA is appropriate given the new functionality that allows market makers to quote in the Complex Order Book. Additionally, the Exchange's fees remain competitive with fees charged by other exchanges and are therefore reasonable and equitably allocated to those members that opt to direct orders to the Exchange rather than to a

competing exchange. Specifically, the Exchange believes that its proposal to assess a make fee of \$0.30 per contract for XOP and \$0.32 for XLB and EFA when orders in these symbols interact with Priority Customers is reasonable and equitable because the fee is within the range of fees assessed by other exchanges employing similar pricing schemes.

The Exchange also believes that it is reasonable and equitable to provide a two cent discount to ISE market makers on preferenced orders because this will provide an incentive for market makers to quote in the Complex Order Book. The Exchange believes that it is reasonable and equitable to continue to provide rebates for Priority Customer complex orders because paying a rebate will continue to attract additional order flow to the Exchange and thereby create liquidity that ultimately will benefit all market participants who trade on the Exchange.

Moreover, 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 options exchanges. Additionally, the Exchange believes it remains an attractive venue for market participants to trade complex orders despite its proposed fee change as its fees remain competitive with those charged by other exchanges for similar trading strategies. 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. 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 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.<sup>15</sup> 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 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](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2011-81 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-2011-81. 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

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

<sup>14</sup> 15 U.S.C. 78f(b)(4).

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

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-2011-81 and should be submitted on or before January 11, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65955; File No. SR-NYSEARCA-2011-90]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adopting the Text of Financial Industry Regulatory Authority Rule 5210, Which Prohibits the Publication of Manipulative or Deceptive Quotations or Transactions, as NYSE Arca Equities Rule 5210

December 14, 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 December 7, 2011, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) 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 self-regulatory organization. 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 adopt the text of Financial Industry Regulatory Authority (“FINRA”) Rule 5210, which prohibits the publication of manipulative or deceptive quotations or transactions, as NYSE Arca Equities

Rule 5210. The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room, and <http://www.nyse.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 IV below. The Exchange 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 the text of FINRA Rule 5210, which prohibits the publication of manipulative or deceptive quotations or transactions, as NYSE Arca Equities Rule 5210.<sup>3</sup>

###### Background

On July 30, 2007, the National Association of Securities Dealers, Inc. (“NASD”), and NYSE Regulation, Inc. (“NYSE”) consolidated their member firm regulation operations into a combined organization, FINRA, and entered into a Regulatory Services Agreement under which FINRA agreed to perform certain regulatory functions of the Exchange on behalf of the Exchange. On June 14, 2010, FINRA also assumed responsibility for performing the market surveillance and enforcement functions performed by NYSE. To facilitate FINRA’s performance of these enforcement functions and further harmonize the rules of FINRA and NYSE Arca Equities, the Exchange is proposing to adopt the text of FINRA Rule 5210.<sup>4</sup> FINRA Rule 5210 prohibits members from publishing or circulating, or causing to be published or circulated, any communication that purports to report any transaction as a purchase or sale of any security, unless such member

believes that such transaction was a bona fide purchase or sale of such security. The Rule also prohibits members from publishing or circulating, or causing to be published or circulated, any communication that purports to quote the bid price or asked price for any security, unless the member believes that such quotation represents a bona fide bid for, or offer of, such security.

The Exchange believes that the proposed rule change will strengthen FINRA’s ability to bring sanctions on behalf of the Exchange against an ETP Holder for engaging in manipulative forms of quoting behavior, for example, quote stuffing and layering. FINRA Rule 5210 (formerly NASD Rule 3310 and IM 3310)<sup>5</sup> was successfully used in the Acceptance, Waiver and Consent announced in September 2010 by FINRA against Trillium Brokerage Services and other individual Respondents.<sup>6</sup> The Exchange believes that the proposed rule change would augment FINRA’s ability on behalf of the Exchange to take action against manipulative quoting behavior on the Exchange.

###### 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),<sup>7</sup> in general, and furthers the objectives of Section 6(b)(5),<sup>8</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. Specifically, the Exchange believes that the proposed rule change would provide an additional basis for bringing enforcement actions against ETP Holders that engage in deceptive and manipulative quoting activity. To the extent the Exchange has proposed changes that differ from the FINRA version of the Rules, such changes are technical in nature and do not change the substance of the FINRA Rule.

##### B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose

<sup>3</sup> See Securities Exchange Act Release No. 60835 (Oct. 16, 2009), 74 FR 54616 (Oct. 22, 2009) (SR-FINRA-2009-055). The Exchange’s affiliates, New York Stock Exchange LLC and NYSE Amex LLC, are proposing to adopt a substantially similar rule.

<sup>4</sup> For consistency with Exchange rules, the Exchange proposes to change all references from “member” to “ETP Holder.”

<sup>5</sup> See *supra* n. 4.

<sup>6</sup> See <http://www.finra.org/web/groups/industry/@ip/enf/@ad/documents/industry/p122044.pdf>.

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

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>16</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.