

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**

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>7</sup> and Rule 19b-4(f)(6) thereunder.<sup>8</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.<sup>9</sup> However, Rule 19b-4(f)(6)(iii)<sup>10</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. ISE has requested that the Commission waive the 30-day operative delay. The Commission notes that waiver of the operative delay will permit the existing pilot to continue for one month without further delay. The Commission also notes that no comments were received to date on the existing pilot.<sup>11</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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.

**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 No. SR-ISE-2009-81 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 No. SR-ISE-2009-81. 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 changes 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 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 No. SR-ISE-2009-81 and should be submitted on or before November 19, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**Elizabeth M. Murphy,**

*Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-60865; File No. SR-ISE-2009-82]

**Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Expand the Penny Pilot Program**

October 22, 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 October 19, 2009, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission ("SEC" or "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 ISE is proposing to amend its rules relating to a pilot program to quote and to trade certain options in pennies. The text of the proposed rule change is as follows, with deletions in [brackets] and additions in italics:

**Rule 710. Minimum Trading Increments**

(a) The Board may establish minimum trading increments for options traded on the Exchange. Such changes by the Board will be designated as a stated policy, practice, or interpretation with respect to the administration of this Rule 710 within the meaning of subparagraph (3)(A) of Section 19(b) of the Exchange Act and will be filed with the SEC as a rule change for effectiveness upon filing. Until such time as the Board makes a change in the increments, the following principles shall apply:

<sup>12</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.

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f)(6).

<sup>9</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange satisfied this requirement.

<sup>10</sup> *Id.*

<sup>11</sup> For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

(1) If the options contract is trading at less than \$3.00 per option, \$.05; and

(2) If the options contract is trading at \$3.00 per option or higher, \$.10.

(b) Minimum trading increments for dealings in options contracts other than those specified in paragraph (a) may be fixed by the Exchange from time to time for options contracts of a particular series.

(c) Notwithstanding the above, the Exchange may trade in the minimum variation of the primary market in the underlying security.

#### *Supplementary Material to Rule 710*

.01 Notwithstanding any other provision of this Rule 710, the Exchange will operate a pilot program to permit options classes to be quoted and traded in increments as low as \$.01. The Exchange will specify which options trade in such pilot, and in what increments, in Regulatory Information Circulars filed with the Commission pursuant to Rule 19b-4 under the Exchange Act and distributed to Members.

*The Exchange may replace, on a semi-annual basis, any penny pilot issues that have been delisted with the next most actively traded multiply listed options classes that are not yet included in the penny pilot, based on trading activity in the previous six months. The replacement issues may be added to the penny pilot on the second trading day following January 1, 2010 and July 1, 2010.*

.02 No Change.

\* \* \* \* \*

## **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

On January 24, 2007, the SEC approved ISE's rule filing, SR-ISE-2006-62, which initiated a pilot program to quote and to trade certain

options in penny increments (the "Penny Pilot Program").<sup>3</sup> Under the Penny Pilot Program, the minimum price variation for all participating options classes, except for the Nasdaq-100 Index Tracking Stock ("QQQQ"), is \$0.01 for all quotations in options series that are quoted at less than \$3 per contract and \$0.05 for all quotations in options series that are quoted at \$3 per contract or greater. The QQQQs are quoted in \$0.01 increments for all options series. Through subsequent expansions, the Penny Pilot now consists of 63 underlying securities,<sup>4</sup> and is scheduled to expire on October 31, 2009.<sup>5</sup> ISE now proposes to extend the Penny Pilot Program through December 31, 2010.

The Exchange also proposes to expand the number of issues included in the Penny Pilot Program. Specifically, ISE proposes to add the top 300 most actively traded multiply listed options classes that are not yet included in the Penny Pilot Program ("Top 300"). The Exchange proposes to determine the identity of the Top 300 based on national average daily volume in the prior six calendar months preceding their addition to the Penny Pilot Program except that the one month preceding their addition to the Penny Pilot Program would not be used for the purpose of the six month analysis.<sup>6</sup> In determining the identity of the Top 300, the Exchange will exclude options classes with high premiums. The Exchange notes that it will submit proposed rule changes pursuant to Rule 19b-4 under the Exchange Act announcing the names of the options classes selected to participate in the Penny Pilot Program.<sup>7</sup> The Exchange represents that after the addition of the 300 options classes, as proposed under this rule change, it has the necessary

<sup>3</sup> See Securities Exchange Act Release No. 55161 (January 24, 2007), 72 FR 4754 (February 1, 2007) (the "Initial Filing"). The Penny Pilot Program was subsequently extended for an additional two month period, until September 27, 2007. See Securities Exchange Act Release No. 56151 (July 26, 2007), 72 FR 42452 (August 2, 2007).

<sup>4</sup> See Securities Exchange Act Release Nos. 56564 (September 27, 2007), 72 FR 56412 (October 3, 2007) and 57508 (March 17, 2008), 73 FR 15243 (March 21, 2008).

<sup>5</sup> See Securities Exchange Act Release No. 34-60222 (July 1, 2009), 74 FR 32994 (July 9, 2009).

<sup>6</sup> The Exchange will not include options classes in which the issuer of the underlying security is subject to an announced merger or is in the process of being acquired by another company, or if the issuer is in bankruptcy. For purposes of assessing national average daily volume, the Exchange will use data compiled and disseminated by the Options Clearing Corporation.

<sup>7</sup> ISE will also issue a Regulatory Information Circular, which will be published on its Web site, identifying the options classes added to the Penny Pilot Program.

system capacity to support the listing of additional series under the Penny Pilot Program.

ISE believes that it is appropriate to exclude high priced underlying securities, as the benefit to the public from including such issues is minimal because of the high price of at-the-money options.<sup>8</sup> The Exchange believes an appropriate threshold for designation as "high priced" at the time of selection of new issues to be included in the Penny Pilot Program is \$200 per share or a calculated index value of 200. At \$200 per share or a calculated index value of 200, strike prices are in \$10 increments, so the "at the money" strike is more likely to carry an intrinsic value of \$3 or more, and thus not trade in a penny increment. With a greater distance between strikes, there are fewer series that are actively traded. The determination of whether a security is trading above \$200 or above a calculated index value of 200 shall be based on the price at the close of trading on the Expiration Friday prior to being added to the Penny Pilot Program.

The Exchange proposes to phase-in the additional classes to the Penny Pilot Program over four successive quarters. Specifically, the Exchange proposes to add 75 classes on November 2, 2009; February 1, 2010; May 3, 2010; and August 2, 2010. The classes to be added on November 2, 2009 will be based on the most actively traded multiply listed classes for the six month period from April 1, 2009 through September 30, 2009. The classes to be added on February 1, 2010 will be based on the most actively traded multiply listed classes for the six month period from July 1, 2009 through December 31, 2009. The classes to be added on May 3, 2010 will be based on the most actively traded multiply listed classes for the six month period from October 1, 2009 through March 31, 2010. The classes to be added on August 2, 2010 will be based on the most actively traded classes for the six month period from January 1, 2010 through June 30, 2010.

Additionally, the Exchange proposes that any Penny Pilot Program issues that have been delisted may be replaced on a semi-annual basis by the next most actively traded multiply listed options classes that are not yet included in the Penny Pilot Program, based on trading activity in the previous six months. The replacement issues would be added to the Penny Pilot Program on the second

<sup>8</sup> For instance, as of August 12, 2009, the near term at the money call in GOOG (August 460 Calls) was trading at \$6.50 with the underlying at \$459.84. The lowest strike price September call trading below \$3 (with the underlying at the same price) was the September 500 Call.

trading day following January 1, 2010 and July 1, 2010.<sup>9</sup> The Exchange will employ the same parameters to prospective replacement issues as approved and applicable under the Penny Pilot Program, including excluding high-priced underlying securities.

The Exchange agrees to submit semi-annual reports to the Commission that will include sample data and analysis of information collected from April 1 through September 30, and from October 1 through March 31, for each year, for the ten most active and twenty least active options classes added to the Pilot Program.<sup>10</sup> As the Penny Pilot Program matures and expands, the Exchange believes that this proposed sampling approach provides an appropriate means by which to monitor and assess the Penny Pilot Program's impact. The Exchange will also identify, for comparison purposes, a control group consisting of the ten least active options classes from the existing 63 Penny Pilot Program classes. This report will include, but is not limited to: (1) Data and analysis on the number of quotations generated for options included in the report; (2) an assessment of the quotation spreads for the options included in the report; (3) an assessment of the impact of the Penny Pilot Program on the capacity of the ISE's automated systems; (4) data reflecting the size and depth of markets, and (5) any capacity problems or other problems that arose related to the operation of the Penny Pilot Program and how the Exchange addressed them.

The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

## 2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the "Exchange Act") for this proposed rule change is found in Section 6(b)(5), in that the proposed rule change is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the proposed rule change allows for a measured expansion of the

<sup>9</sup> The replacement issues will be announced to the Exchange's membership via Regulatory Information Circulars and published by the Exchange on its Web site.

<sup>10</sup> The Exchange will continue to provide data concerning the existing 63 Penny Pilot Program classes.

Penny Pilot Program for the benefit of market participants.

### 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 written comments from members or other interested parties.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)<sup>11</sup> of the Act and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>12</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>13</sup> normally does not become operative for 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii)<sup>14</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that waiver of the 30-day operative delay will allow the Penny Pilot Program to continue uninterrupted. Further, the exchange represents that this proposed rule change is based on proposals submitted by another exchange regarding the

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

expansion and extension of the Penny Pilot Program<sup>15</sup> and the phase-in dates for the additional classes that will be added to the Penny Pilot Program.<sup>16</sup>

The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the Exchange to implement the 75 additional classes on November 2, 2009 and permit the Penny Pilot Program to continue uninterrupted, consistent with other exchanges.<sup>17</sup> Accordingly, the Commission designates the proposed rule change operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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.

## 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-2009-82 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-2009-82. 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

<sup>15</sup> See Securities Exchange Act Release No. 60711 (September 23, 2009), 74 FR 49419 (September 28, 2009).

<sup>16</sup> See Securities Exchange Act Release No. 60833 (October 16, 2009).

<sup>17</sup> For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78(c)(f).

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 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 No. SR-ISE-2009-82 and should be submitted on or before November 19, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Elizabeth M. Murphy,**

*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60868; File No. SR-NYSE-2009-83]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change Amending Its Initial Listing Fees for Operating Companies

October 22, 2009.

#### I. Introduction

On August 26, 2009, New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change amending its schedule of initial listing fees for operating companies. The proposed rule change was published in the **Federal Register** on September 17,

2009.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

The Exchange proposes to amend its initial listing fees for operating companies as set forth in Section 902.03 of the Listed Company Manual, with retroactive application to any initial listing of new classes of securities on or after the date August 26, 2009. Currently, companies initially listing a new class of securities on the Exchange pay \$0.0048 per share for up to and including 75 million shares, \$0.00375 per share for any additional shares over 75 million shares up to and including 300 million shares, and \$0.0019 per share for any additional shares over 300 million shares. Additionally, the first time an issuer lists a class of common shares, the issuer is subject to an additional one-time special charge of \$37,500. The current minimum and maximum listing fees applicable to an issuer that lists a class of common shares the first time on the Exchange are \$150,000 and \$250,000, respectively, which includes the one-time special charge of \$37,500.

The Exchange proposes to replace the current listing fee schedule with a flat rate initial listing fee of \$0.0032 per share with respect to shares listed at the time a class of common shares is first listed on the Exchange.<sup>4</sup> NYSE further proposes to increase the one-time special charge from \$37,500 to \$50,000. Finally, the Exchange proposes to maintain the maximum initial listing fee of \$250,000, but decrease the minimum initial listing fee from \$150,000 to \$125,000.<sup>5</sup>

Because the current listing fee schedule applied to both new listings and additional listings, the Exchange has proposed to create a new category for the listing of additional shares (the "Listing of Additional Shares Fee Schedule"). In its filing, the Exchange states that the current fee schedule will remain unchanged for the listing of additional shares of a class of previously

<sup>3</sup> See Securities Exchange Act Release No. 60644 (September 10, 2009), 74 FR 47842 (hereinafter referred to as "Notice").

<sup>4</sup> Under the proposal, initial listing fees for the following types of listings will also be charged at a rate of \$0.0032 per share: (i) At the time it first lists, an issuer lists one or more classes of preferred stock or warrants, whether or not common shares are also listed at that time; and (ii) once listed, an issuer lists a new class of preferred stock or warrants.

<sup>5</sup> In its filing, the Exchange states that the proposed increase to the one-time special charge is intended to offset a portion of the reduction in listing fee revenue attributable to the proposed lower listing fee per share and proposed lower minimum listing fee.

listed securities.<sup>6</sup> Consistent with its current approach, the Exchange will include the shares with respect to which the company paid fees at the time of the initial listing of that class in calculating the fees for additional shares pursuant to the Listing of Additional Shares Fee Schedule. As noted above, the fees for listing additional shares will not be changed under the proposal. However, the Exchange is proposing to make certain non-substantive and clarifying changes to the Listing of Additional Shares Fee Schedule which includes a new example to explain how the additional listing fees are calculated.

#### III. Discussion and Commission's Findings

After careful review, 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. Specifically, the Commission finds that the proposal is consistent with Sections 6(b)(4) and (b)(5) of the Act,<sup>7</sup> which require, among other things, that the rules of an exchange (i) provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities, and (ii) are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

According to the Exchange, the lower initial listing fees will enable the Exchange to compete more effectively on a cost basis with other securities exchanges for listings of companies undertaking initial public offerings. Particularly, the Exchange states that smaller companies that have historically listed on the Exchange now qualify for listing under the recently adopted Assets and Equity Test<sup>8</sup> and many of these companies would benefit from the lower minimum initial listing fee.

Additionally, the Exchange represents that under the proposal no company will pay higher initial listing fees, and companies whose fees are not limited by the \$250,000 maximum will pay a reduced initial listing fee. The Exchange asserts that although companies that are subject to the \$250,000 maximum fee under both the current and the proposed fee schedule would not benefit from a reduction in fees, this is appropriate because these companies already benefit from a lower effective listing fee per share than other companies. As noted

<sup>6</sup> See Notice, *supra* note 3.

<sup>7</sup> 15 U.S.C. 78f(b)(4) and (b)(5).

<sup>8</sup> See Securities Exchange Act Release No. 58934 (November 12, 2008), 73 FR 69708 (November 19, 2008) (SR-NYSE-2008-98).

<sup>18</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.