

the fee charged for an unspecified damages claim before three arbitrators.<sup>27</sup>

FINRA disagreed with this assertion, explaining that the hearing session fee is used to not only cover arbitrator honoraria, but also to address certain fixed costs that are incurred in scheduling a hearing, regardless of the amount in dispute or the number of arbitrators.<sup>28</sup> Moreover, FINRA noted that the Codes authorize the Director to determine whether the hearing session fee for an unspecified damages claim should be more or less than the amount specified in the fee schedule.<sup>29</sup> Therefore, FINRA indicated that the proposed amendments would not change its practice of reducing or waiving the fees in documented cases of financial hardship.<sup>30</sup> FINRA also noted that the proposed fee for such unspecified damage claims is the same as the fee charged for hearing sessions heard by one arbitrator involving claims of \$10,000.01 to over \$500,000, thus providing case administration with a uniform fee structure that is easy to apply.<sup>31</sup>

Finally, the PIABA Letter also asserted that both of the proposed amendments would result in higher fees to the customer in a FINRA arbitration proceeding.<sup>32</sup> In its response, FINRA noted that the fees contemplated by the proposed amendments are not new and do not represent an increase in the fees currently charged.<sup>33</sup> FINRA stated that the proposed amendments clarify the fees applicable in these situations.<sup>34</sup>

#### IV. Discussion and Commission Findings

After carefully reviewing the proposed rule change, the comments and FINRA's response, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>35</sup> In particular, the Commission finds that the proposed rule change is consistent with Section

15A(b)(6) of the Act,<sup>36</sup> which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

More specifically, the Commission believes clarifying the applicability of the fee waiver provision of the postponement rule will assist in FINRA's efficient administration of the arbitration process by ensuring that arbitrators receive some compensation in the event that a scheduled hearing session is postponed as a result of a late postponement request, and may serve as an incentive to parties to settle their disputes earlier to avoid the imposition of additional fees.

The Commission also believes codifying the hearing session fee for an unspecified damages claim heard by one arbitrator will ensure consistent assessment of fees in FINRA's arbitration forum, will provide more transparency in FINRA's fee structure, and will enhance the efficiency of the forum by making the rules easier to understand and apply.

Further, the Commission believes that the proposed amendments are consistent with Section 15A(b)(5) of the Act, which requires that a national securities association have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.<sup>37</sup>

For the reasons discussed above, the Commission finds that the rule change is consistent with the Act and the rules and regulations thereunder.

#### V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>38</sup> that the proposed rule change (SR-FINRA-2009-075) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>39</sup>

**Florence E. Harmon,**  
*Deputy Secretary.*

[FR Doc. 2010-3075 Filed 2-17-10; 8:45 am]

**BILLING CODE 8011-01-P**

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61498; File No. SR-ISE-2009-90]

#### Self-Regulatory Organizations; International Securities Exchange, LLC; Order Approving Proposed Rule Change Relating to Changes to the U.S. Exchange Holdings, Inc. Corporate Documents and International Securities Exchange Trust Agreement

February 4, 2010.

On November 9, 2009, the International Securities Exchange, LLC ("ISE" 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 relating to the U.S. Exchange Holdings, Inc. ("U.S. Exchange Holdings") Corporate Documents (as defined below) and the ISE Trust Agreement (as defined below). The proposed rule change was published for comment in the **Federal Register** on November 24, 2009.<sup>3</sup> The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

#### I. Background

U.S. Exchange Holdings wholly owns ISE Holdings, Inc. ("ISE Holdings"). ISE Holdings wholly owns ISE, as well as a 31.54% interest in Direct Edge Holdings, LLC ("Direct Edge"). Direct Edge currently owns and operates a facility of the Exchange.<sup>4</sup> In addition, on May 7, 2009, Direct Edge's direct subsidiaries, EDGA Exchange, Inc. ("EDGA") and EDGX Exchange, Inc. ("EDGX"), each filed a Form 1 Application<sup>5</sup> (as amended, the "Form 1 Applications") with the Commission, to own and operate a registered national securities exchange.

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

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

<sup>3</sup> See Securities Exchange Act Release No. 61005 (November 16, 2009), 74 FR 61398 ("Notice").

<sup>4</sup> See Securities and Exchange Act Release No. 59135 (December 22, 2008); 73 FR 79954 (December 30, 2008) (SR-ISE-2008-85) (relating to a corporate transaction in which: (1) ISE Holdings purchased an ownership interest in Direct Edge by contributing cash and the marketplace then operated by ISE Stock Exchange, LLC for the trading of U.S. cash equity securities; and (2) Direct Edge's wholly-owned subsidiary, Maple Merger Sub LLC became the operator of the marketplace as a facility of ISE).

<sup>5</sup> The Commission published the Form 1 Applications, as modified by Amendment No. 1, on September 17, 2009. See Securities Exchange Act Release No. 60651 (September 11, 2009), 74 FR 179 (File No. 10-193 and 10-194).

<sup>27</sup> See PIABA Letter at 2 (noting that if the proposed amendments were adopted, a hearing session fee of \$450 would be charged for an unspecified damage claim heard by one arbitrator, but that a hearing session fee of \$1,000 would apply for an unspecified damage claim heard by three arbitrators).

<sup>28</sup> See FINRA Response at 3-4.

<sup>29</sup> *Id.* at 4.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See PIABA Letter at 1.

<sup>33</sup> See FINRA Response at 4.

<sup>34</sup> *Id.*

<sup>35</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>36</sup> 15 U.S.C. 78o-3(b)(6).

<sup>37</sup> 15 U.S.C. 78o-3(b)(5).

<sup>38</sup> 15 U.S.C. 78s(b)(2).

<sup>39</sup> 17 CFR 200.30-3(a)(12).

U.S. Exchange Holdings is a wholly-owned subsidiary of Eurex Frankfurt AG (Eurex Frankfurt). Eurex Frankfurt is a wholly-owned subsidiary of Eurex Zürich AG ("Eurex Zürich"), which in turn is jointly owned by Deutsche Börse AG ("Deutsche Börse") and SIX Swiss Exchange ("SIX"). SIX is owned by SIX Group (Eurex Frankfurt, Eurex Zürich, Deutsche Börse, SIX, SIX Group, and U.S. Exchange Holdings, Inc. are collectively referred to herein as the "Upstream Owners").

In connection with the acquisition of ISE Holdings by the Upstream Owners in December 2007,<sup>6</sup> ISE Holdings, U.S. Exchange Holdings, Wilmington Trust Company, as Delaware trustee, and Sharon Brown-Hruska, Robert Schwartz and Heinz Zimmermann, as trustees, entered into a Trust Agreement, dated as of December 19, 2007 (the "ISE Trust Agreement"). As discussed in the Eurex Acquisition Order, the ISE Trust Agreement is designed to enable the Exchange to operate in a manner that complies with the federal securities laws, including the objectives and requirements of Sections 6(b) and 19(g) of the Act,<sup>7</sup> and to facilitate the ability of the Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act.<sup>8</sup>

## II. Description of the Proposal

In the instant filing, the Exchange, on behalf of the U.S. Exchange Holdings, proposed amendments to (i) the Certificate of Incorporation and Bylaws of U.S. Exchange Holdings (the "Corporate Documents"); and (ii) the ISE Trust Agreement, to provide that the Regulatory Provisions (as defined below) in the Corporate Documents and the ISE Trust Agreement, which currently apply only to ISE, also shall apply to any "Controlled National Securities Exchange," defined to any mean national securities exchange, or facility thereof, that U.S. Exchange Holdings may control, directly or indirectly.

Specifically, and as more fully described in the Notice, the Exchange proposed to replace certain references to "ISE" in the Corporate Documents with the term "each Controlled National Securities Exchange." These references appear in the ownership and voting limitations sections of the Corporate Documents, as well as other miscellaneous sections, including, but not limited to, the confidentiality

section, the books and records section, the compliance with laws section, the jurisdiction section, and the amendments section (the "Regulatory Provisions"). Similarly, the Exchange proposed to amend certain provisions of the ISE Trust Agreement to replace certain references to "ISE" that appear in Articles II through VIII of the ISE Trust Agreement with references to "each Controlled National Securities Exchange."

## III. Discussion

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.<sup>9</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>10</sup> which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and the rules and regulation thereunder, and Section 6(b)(5) of the Act<sup>11</sup> in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public interest.

Section 19(b)<sup>12</sup> of the Act and Rule 19b-4<sup>13</sup> thereunder require a self-regulatory organization to file proposed rule changes with the Commission. Although U.S. Exchange Holdings and the ISE Trust are not self-regulatory organizations, the Corporate Documents and certain provisions of the ISE Trust Agreement are rules of an exchange if they are stated policies, practices, or interpretations (as defined in Rule 19b-4 under the Act) of the exchange, and must therefore be filed with the Commission pursuant to Section 19(b)(4) of the Act and Rule 19b-4 thereunder.<sup>14</sup> Accordingly, the Exchange filed the Corporate Documents and the ISE Trust Agreement with the Commission.

The Corporate Documents currently include Regulatory Provisions designed to maintain the independence of the regulatory functions of the Exchange, the sole national securities exchange controlled, directly or indirectly, by U.S. Exchange Holdings.<sup>15</sup> However, the

Regulatory Provisions, by their terms, currently do not apply to additional national securities exchanges that U.S. Exchange Holdings might control, directly or indirectly, as a result of a subsequent transaction. The Exchange notes that EDGA and EDGX have filed the Form 1 Applications with the Commission that, if approved, would result in U.S. Exchange Holdings, indirectly controlling two additional national securities exchanges.<sup>16</sup> Accordingly, the Exchange proposes to amend the Corporate Documents to apply the Regulatory Provisions to any national securities exchange, or facility thereof, that U.S. Exchange Holdings may control, directly or indirectly. The Commission believes that the amended Corporate Documents are designed to assist any national securities exchange, or facility thereof, that U.S. Exchange Holdings may control, directly or indirectly, in fulfilling their self-regulatory obligations and in administering and complying with the requirements of the Act.<sup>17</sup>

The ISE Trust Agreement contains provisions that are designed to enable the Exchange to operate in a manner that complies with the federal securities laws, and to facilitate the ability of the Exchange and the Commission to fulfill their regulatory and oversight obligations under the Act.<sup>18</sup> These provisions, however, are limited solely to the Exchange and not to any other national securities exchange that ISE Holdings might control, directly or indirectly. The Exchange proposes that the ISE Trust Agreement be amended and restated to replace references to ISE with references to any national securities exchange controlled, directly or indirectly, by ISE Holdings, or facility thereof. The Commission believes that amending and restating the ISE Trust Agreement to reference any national securities exchange, or facility thereof, that ISE Holdings may control, directly or indirectly, is designed to facilitate the ability of those national securities exchanges to comply with the requirements of the Act.<sup>19</sup>

## IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the

<sup>6</sup> See Securities Exchange Act Release No. 56955 (December 13, 2007), 72 FR 71979 (December 19, 2007) (File No. SR-ISE-2007-101) ("Eurex Acquisition Order").

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

<sup>8</sup> ISE Trust Agreement, Articles V, VI, and VIII.

<sup>9</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78f(b)(1).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> 15 U.S.C. 78s(b)(1).

<sup>13</sup> 17 CFR 240.19b-4.

<sup>14</sup> See Eurex Acquisition Order, *supra* note 6.

<sup>15</sup> See Eurex Acquisition Order, *supra* note 6.

<sup>16</sup> See Notice, *supra* note 3. Approval of this proposed rule change in no way prejudices or determines what actions the Commission may take with respect to the Form 1 Applications.

<sup>17</sup> See Eurex Acquisition Order, *supra* note 6, for an additional discussion of specific provisions in the Corporate Documents.

<sup>18</sup> ISE Trust Agreement, Articles V, VI, and VIII.

<sup>19</sup> See Eurex Acquisition Order, *supra* note 6, for an additional discussion of specific provisions in the ISE Trust Agreement.

proposed rule change (SR-ISE-2008-90), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Florence E. Harmon,**  
Deputy Secretary.

[FR Doc. 2010-3076 Filed 2-17-10; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61500; File No. SR-CBOE-2010-010]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Temporary Membership Status and Interim Trading Permit Access Fees

February 4, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on January 29, 2010, the Chicago Board Options Exchange, Incorporated ("CBOE" or the "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 CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

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

CBOE proposes to adjust (i) the monthly access fee for persons granted temporary CBOE membership status ("Temporary Members") pursuant to Interpretation and Policy .02 under CBOE Rule 3.19 ("Rule 3.19.02") and (ii) the monthly access fee for Interim Trading Permit ("ITP") holders under CBOE Rule 3.27. The text of the proposed rule change is available on the Exchange's Web site (<http://www.cboe.org/Legal/>), at the Exchange's Office of the Secretary, 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, CBOE 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 CBOE 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 current access fee for Temporary Members under Rule 3.19.02<sup>2</sup> and the current access fee for ITP holders under Rule 3.27<sup>3</sup> are both \$7,928 per month. Both access fees are currently set at the indicative lease rate (as defined below) for January 2010. The Exchange proposes to adjust both access fees effective at the beginning of February 2010 to be equal to the indicative lease rate for February 2010 (which is \$5,433). Specifically, the Exchange proposes to revise both the Temporary Member access fee and the ITP access fee to be \$5,433 per month commencing on February 1, 2010.

The indicative lease rate is defined under Rule 3.27(b) as the highest clearing firm floating monthly rate<sup>4</sup> of the CBOE Clearing Members that assist in facilitating at least 10% of the CBOE transferable membership leases.<sup>5</sup> The Exchange determined the indicative lease rate for February 2010 by polling each of these Clearing Members and obtaining the clearing firm floating monthly rate designated by each of these Clearing Members for that month.

The Exchange used the same process to set the proposed Temporary Member and ITP access fees that it used to set the current Temporary Member and ITP access fees. The only difference is that the Exchange used clearing firm floating monthly rate information for the month of February 2010 to set the proposed access fees (instead of clearing firm floating monthly rate information for the

month of January 2010 as was used to set the current access fees) in order to take into account changes in clearing firm floating monthly rates for the month of February 2010.

The Exchange believes that the process used to set the proposed Temporary Member access fee and the proposed Temporary Member access fee itself are appropriate for the same reasons set forth in CBOE rule filing SR-CBOE-2008-12 with respect to the original Temporary Member access fee.<sup>6</sup> Similarly, the Exchange believes that the process used to set the proposed ITP access fee and the proposed ITP access fee itself are appropriate for the same reasons set forth in CBOE rule filing SR-CBOE-2008-77 with respect to the original ITP access fee.<sup>7</sup>

Each of the proposed access fees will remain in effect until such time either that the Exchange submits a further rule filing pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>8</sup> to modify the applicable access fee or the applicable status (*i.e.*, the Temporary Membership status or the ITP status) is terminated.

Accordingly, the Exchange may, and likely will, further adjust the proposed access fees in the future if the Exchange determines that it would be appropriate to do so taking into consideration lease rates for transferable CBOE memberships prevailing at that time.

The procedural provisions of the CBOE Fee Schedule related to the assessment of each proposed access fee are not proposed to be changed and will remain the same as the current procedural provisions relating to the assessment of that access fee.

##### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>10</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and

<sup>2</sup> See Securities Exchange Act Release No. 56458 (September 18, 2007), 72 FR 54309 (September 24, 2007) (SR-CBOE-2007-107) for a description of the Temporary Membership status under Rule 3.19.02.

<sup>3</sup> See Securities Exchange Act Release No. 58178 (July 17, 2008), 73 FR 42634 (July 22, 2008) (SR-CBOE-2008-40) for a description of the Interim Trading Permits under Rule 3.27.

<sup>4</sup> Rule 3.27(b) defines the clearing firm floating monthly rate as the floating monthly rate that a Clearing Member designates, in connection with transferable membership leases that the Clearing Member assisted in facilitating, for leases that utilize that monthly rate.

<sup>5</sup> The concepts of an indicative lease rate and of a clearing firm floating monthly rate were previously utilized in the CBOE rule filings that set and adjusted the Temporary Member access fee. Both concepts are also codified in Rule 3.27(b) in relation to ITPs.

<sup>6</sup> See Securities Exchange Act Release No. 57293 (February 8, 2008), 73 FR 8729 (February 14, 2008) (SR-CBOE-2008-12), which established the original Temporary Member access fee, for detail regarding the rationale in support of the original Temporary Member access fee and the process used to set that fee, which is also applicable to this proposed change to the Temporary Member access fee as well.

<sup>7</sup> See Securities Exchange Act Release No. 58200 (July 21, 2008), 73 FR 43805 (July 28, 2008) (SR-CBOE-2008-77), which established the original ITP access fee, for detail regarding the rationale in support of the original ITP access fee and the process used to set that fee, which is also applicable to this proposed change to the ITP access fee as well.

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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

<sup>10</sup> 15 U.S.C. 78f(b)(4).

<sup>20</sup> 17 CFR 200.30-3(a)(12).

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