

and for members to determine, the types of information that should or should not be encrypted under the rule.”<sup>27</sup> FINRA believes that the suggested alternatives would be more costly than the proposal and believes the proposal “further supports compliance with the laws in some jurisdictions.”<sup>28</sup>

Seven commenters believed that the proposal was difficult or costly to implement.<sup>29</sup> For example, some commenters believe that small firms lack the technical experience to implement the proposal and may have to hire third parties.<sup>30</sup> One commenter suggested an exception when information is provided directly to FINRA staff or on the FINRA premises.<sup>31</sup> FINRA questioned the burden on members “given the availability of web-based encryption solutions currently available at low- or no-cost.”<sup>32</sup> FINRA noted that “members may be subject to various data protection laws that are in part the impetus” of the proposal.<sup>33</sup> FINRA stated that it would “help educate its members about the process of encryption” and would “endeavor to provide information regarding various options for encrypting data, including low- or no-cost web-based encryption software.”<sup>34</sup>

Three commenters suggested that the proposed requirement to use an encryption method that “meets industry standards for strong encryption” is too vague and suggested alternatives such as providing members with the specific method of encryption.<sup>35</sup> FINRA acknowledged that, as proposed, the rule does not mandate a specific method of encryption.<sup>36</sup> However, FINRA believes that this standard, which it stated is “identical to that employed by Massachusetts and Nevada,” is necessary to “adapt to changing technology regarding encryption.”<sup>37</sup> FINRA stated that it does not believe that it is “appropriate at this time to dictate a ‘one size fits all’ approach” to encryption.<sup>38</sup> As designed, this requirement will allow each member to

choose an appropriate method of encryption that works for it.<sup>39</sup>

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 association.<sup>40</sup> In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>41</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.

The Commission believes that the proposed rule change is reasonably designed to ensure that information provided to FINRA on a portable media device in response to Rule 8210 is secure. FINRA has represented that this requirement is necessary to address laws in some jurisdictions that establish safeguards for personal information and records. The Commission also notes FINRA’s representation that there are low- or no-cost ways to encrypt files and that it will help educate its members about the process of encryption and meeting their obligations under the rule. Although the Commission recognizes that the proposed rule change does not mandate a specific encryption method, the Commission believes that some flexibility is appropriate to allow for changes in technology and for members to choose encryption methods that meet their needs. Finally, the Commission believes that the fact that information produced to it in other forms, such as paper-based forms, for which there is no comparable means of protecting the information from unwanted disclosure, should not preclude the protection of information that can be protected.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19b(2) of the Act,<sup>42</sup> that the proposed rule change (SR-FINRA-2010-021) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>43</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63017; File No. SR-ISE-2010-95]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 717

September 29, 2010.

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 September 21, 2010, 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 Exchange has filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> 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 amend to amend [sic] ISE Rule 717 (Limitations on Orders) to eliminate some of its restrictions. 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 Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See Abel/Noser Letter, Great Nation Letter, NAIBD Letter, PSE Letter, Triad Letter I, Triad Letter II, and Wulff Hansen Letter.

<sup>30</sup> See, e.g., Great Nation Letter, NAIBD Letter, and PSE Letter.

<sup>31</sup> See Wulff Hansen Letter.

<sup>32</sup> See FINRA Letter.

<sup>33</sup> *Id.*

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

<sup>35</sup> See NAIBD Letter, PSE Letter, and Great Nation Letter.

<sup>36</sup> See FINRA Letter.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> In approving this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

<sup>41</sup> 15 U.S.C. 78o-3(b)(6).

<sup>42</sup> 15 U.S.C. 78s(b)(2).

<sup>43</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>3</sup> 15 U.S.C. 78s(b)(3)(A).

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

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 is proposing to amend Rule 717(b) in order to eliminate some of its restrictions. First, Rule 717(b) currently provides that an Electronic Access Member ("EAM"), acting either as principal or agent, may not enter orders in the same options series, for the account or accounts of the same or related beneficial owner(s), in such a manner that the EAM or the beneficial owner(s) effectively is operating as a market maker by holding itself out as willing to buy and sell such options contracts on a regular or continuous basis. The Exchange is proposing that these restrictions be amended to only be applicable to Priority Customer Orders<sup>5</sup> (i.e., non-broker-dealer orders) and not Professional Orders<sup>6</sup> (as described below), since such Priority Customer Orders have priority at any price over bids and offers of Professional Orders.<sup>7</sup>

<sup>5</sup> See ISE Rule 100(37B).

<sup>6</sup> "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(37C).

<sup>7</sup> The Exchange notes that the Commission has previously found that it is consistent with the Act for an options exchange not to prohibit a user of its market from effectively operating as a market maker by holding itself out as willing to buy and sell options contracts on a regular or continuous basis without registering as a market maker. See Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004) (Order approving, among other things, a proposed rule change to establish rules governing the trading of options on NASDAQ Options Market ("NOM")).

The Exchange notes that in the order approving a Chicago Board Options Exchange ("CBOE") rule change to amend its rules prohibiting members from functioning as market makers, the Commission stated that any entity that acts as a "dealer," as defined in Section 3(a)(5) of the Act, 15 U.S.C. 78c(a)(5), would be required to register with the Commission under Section 15 of the Act, 15 U.S.C. 78o, and the rules and regulations thereunder, or qualify for any exception or exemption from registration. Activity that may cause a person to be deemed a dealer includes "quoting a market in or publishing quotes for securities (other than quotes on one side of the market on a quotations system generally available to non-broker-dealers, such as a retail screen broker for government securities)." See Definitions of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Securities Exchange Act Release No. 47364, 68 FR 8686, 8689,

Rule 717(b) was adopted to limit the ability of EAMs that are not market makers to compete on preferential terms within ISE's automated systems. Because Priority Customer Orders are provided with certain benefits, such as priority of bids and offers, the Exchange continues to believe that Priority Customer Orders should be subject to the Rule's restrictions. However, because Priority Orders<sup>8</sup> are not subject to any priority that is any better than market makers, the Exchange no longer believes it is necessary to impose the Rule's restrictions on the entry of broker-dealer orders. Similarly, because Voluntary Professionals are not subject to priority that is any better than market makers, we do not believe it is necessary to impose the Rule's restrictions on Voluntary Professionals.<sup>9</sup>

note 26 (February 24, 2003) (quoting OTC Derivatives Dealers, Securities Exchange Act Release No. 40594 (October 23, 1998), 63 FR 59362, 59370, note 61 (November 3, 1998)). See [sic] Securities Exchange Act Release No. 59701 (April 3, 2009), 74 FR 16247 (April 9, 2009). The Commission notes that the immediately preceding citation (Notice of filing and immediate effectiveness of SR-ISE-2009-15) is incorrect. The correct citation should be to Securities Exchange Act Release No. 59700 (April 2, 2009), 74 FR 16246 (April 9, 2009) (order approving SR-CBOE-2009-009).

<sup>8</sup> The Commission notes ISE incorrectly stated that "Priority Orders are not subject to any priority that is any better than market makers \* \* \*." The Commission believes that the term "Priority Orders" in the above-referenced sentence should be replaced with the term "Professional Orders." See Securities Exchange Act Release No. 59287 (January 23, 2009), 74 FR 5964 (January 30, 2009) (SR-ISE-2006-26) (order approving ISE proposal to create Priority Customer and Professional order types).

<sup>9</sup> The Exchange notes that this rule change would only eliminate the restrictions of Rule 717(b) in the manner proposed. Members would continue to remain subject to the requirements of Rule 408 (which requires Members to establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such Member's business, to prevent the misuse of material, nonpublic information by such Member or persons associated with such Member), Supplementary Material .02 to Rule 400 (which may consider it conduct inconsistent with just and equitable principles of trade for any person associated with a Member who has knowledge of all material terms and conditions of (i) an order and a solicited order; (ii) an order being facilitated; or (iii) orders being crossed; the execution of which are imminent, to enter, based on such knowledge, an order to buy or sell an option for the same underlying security as any option that is the subject of the order, or an order to buy or sell the security underlying such class, or an order to buy or sell any related instrument until (a) the terms of the order and any change in the terms of the order of which the person associated with the Member has knowledge are disclosed to the trading crowd, or (b) the trade can no longer reasonably be considered imminent in the view of the passage of time since the order was received); Rule 717(d) (which states that EAMs may not execute as principal orders they represent as agent unless (i) agency orders are first exposed on the Exchange for at least one (1) second, (ii) the EAM has been bidding or offering on the Exchange for at least one (1) second prior to

Second, in those instances where the restrictions are applicable, Rule 717(b) currently provides that, in determining whether an EAM or beneficial owner effectively is operating as a market maker, the Exchange will consider, among other things, the simultaneous or near-simultaneous entry of limit orders to buy and sell the same options contract; the multiple acquisition and liquidation of positions in the same options series during the same day; and the entry of multiple limit orders at different prices in the same options series. The Exchange is proposing to remove the condition pertaining to the multiple acquisition and liquidation of positions from its list of factors used for determining whether a beneficial owner is operating as a market maker. In light of the proliferation of day trading activity and the fact that such a prohibition does not exist on other markets,<sup>10</sup> the Exchange no longer believes that this activity should be considered a factor in determining whether an EAM or beneficial owner is effectively acting as a market maker.

2. Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>11</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>12</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, and to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The proposed changes should contribute to the Exchange's ability to maintain a fair and orderly market in a manner that will limit unfair advantage and encourage competition. Specifically, because broker-dealer orders are not subject to priority on the ISE that is any

receiving an agency order that is executable against such bid or offer, (iii) the Member utilizes the Facilitation Mechanism pursuant to Rule 716(d), or (iv) the Member utilizes the Price Improvement Mechanism for Crossing Transactions pursuant to Rule 723; and Rule 717(e) (which states that EAMs may not execute orders they represent as agent on the Exchange against orders solicited from Members and non-member broker-dealers to transact with such orders unless (i) the unsolicited order is first exposed on the Exchange for at least one (1) second, (ii) the Member utilizes the Solicited Order Mechanism pursuant to Rule 716(e), (iii) the Member utilizes the Facilitation Mechanism pursuant to Rule 716(d) or (iv) the Member utilizes the Price Improvement Mechanism for Crossing Transactions pursuant to Rule 723).

<sup>10</sup> See note 7 and Securities Exchange Act Release No. 59700 (April 2, 2009), 74 FR 16246 (April 9, 2009) (SR-CBOE-2009-009).

<sup>11</sup> 15 U.S.C. 78f (b) [sic].

<sup>12</sup> 15 U.S.C. 78f (b)(5) [sic].

better than market makers, the Exchange does not believe it is necessary to impose the Rule's restrictions on the entry of broker-dealer orders. The Exchange believes that the elimination of these restrictions will permit entities other than market makers to enter orders on both sides of the market more freely, resulting in more orders on the ISE book and therefore increase liquidity on the ISE market, all to the benefit of investors.

#### *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**

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) <sup>13</sup> of the Act and Rule 19b-4(f)(6) <sup>14</sup> thereunder. The Exchange provided 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 the proposed rule change.

At any time within 60 days of the filing of the 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.

### **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-2010-95 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-2010-95. 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,<sup>15</sup> 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, 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-2010-95 and should be submitted on or before October 27, 2010.

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

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

[FR Doc. 2010-25068 Filed 10-5-10; 8:45 am]

BILLING CODE 8010-01-P

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-63022; File No. SR-NASDAQ-2010-116]

### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify Nasdaq's Order Routing Rule**

September 30, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") <sup>1</sup>, and Rule 19b-4 <sup>2</sup> thereunder, notice is hereby given that on September 27, 2010, The NASDAQ Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II, which Items have been prepared by Nasdaq. 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**

Nasdaq is filing a proposal for the NASDAQ Options Market ("NOM" or "Exchange") to modify Chapter VI, Section 11 of the NOM rules, to add a new order routing option and to assign a name to the existing routing option.

The text of the proposed rule change is available from Nasdaq's Web site at <http://nasdaq.cchwallstreet.com>, at Nasdaq's principal office, 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 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 Exchange has prepared summaries, set forth in sections A, B, and C below, of

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

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

<sup>15</sup> The text of the proposed rule change is available on the Commission's Web site at <http://www.sec.gov/rules/sro.shtml>.

<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.