

GSD's rules provide that a netting applicant must have an established, profitable business history of a minimum of six months or personnel with sufficient operational background and experience to ensure in the judgment of FICC's Membership and Risk Management Committee the ability of the firm to conduct its business.<sup>7</sup> Third, FICC believes that the foregoing information will provide sufficient evidence that the applicant meets FICC's membership standards. Upon approval for membership, such a firm will be required to submit interim financial data to FICC, which will be used to monitor adherence to FICC's established financial parameters. As of its fiscal year-end, the firm will be required to provide its annual audited financial statement. At that time, the applicable interim statement will be compared to the audited financial statement. If there are discrepancies, the firm will be required to supply FICC with an acceptable explanation.

#### *B. Financial Statements Prepared at the Applicant or Member Level*

Prior to this rule change, the rules of both FICC divisions specified that all required audited financial statements be prepared at the applicant or member level. However, some entities do not prepare their own audited financial statements. Their financial status is included in audited consolidated financial statements of a parent company.<sup>8</sup>

FICC will amend both divisions' rules to permit the submission of audited consolidated financial statements in situations where audited financial statements are not prepared at the applicant or member level. First, many members are not required to prepare their own audited financial statements by their regulators and doing so would be very expensive. Second, FICC is comfortable in accepting audited consolidated financial statements because FICC is able to obtain information regarding an applicant's or member's financial status through interim financial data on the applicant or member itself. This interim data is on the applicant or member firm level and is obtained from regulatory reports filed by the applicant or member itself or unaudited financial reports prepared internally by the applicant or member. FICC staff compares data from the applicable interim statement to the audited financial statement or applicable audited consolidated financial statement. If there are discrepancies, the firm would be required to supply FICC with an acceptable explanation. In addition, in instances where the member or

applicant is unregulated and regulatory reports are thus not available, FICC may request consolidating financial statements from the member firm, which will show the financials of the entities that were included in the audited consolidated financial statement.

In addition to this change, FICC will make a technical change to the term "financial statements" in GSD Rule 2, Section 7, to update the current reference to "shareholder's equity" to "owner's equity" to encompass those entities that do not have shareholders.

#### *C. Compliance With Certain Capital Requirements*

Before this rule change, GSD's rules stated that a comparison-only applicant must be in compliance with the capital requirements imposed by its designated examining authority, appropriate regulatory agency, or other examining authority or regulator, and any other self-regulatory organizations to which it is subject by statute, regulation, or agreement. FICC will eliminate this requirement because comparison-only membership does not present FICC with any credit or financial risk since FICC does not guarantee that service.

#### *D. Letters of Credit*

GSD's rules used to provide that if an approved letter of credit issuer was a non-U.S. bank acting through a branch or agency in the U.S., it was required to provide FICC with a "guarantee of performance" of such branch or agency deemed sufficient by FICC. FICC believes that the current language needs to be clarified because it was never meant to require a financial guarantee. FICC believes that it is not appropriate to require the head office of an approved letter of credit issuer to provide a financial guarantee for its branch or agency, given that the latter is simply an "arm" of the head office itself and not a separate legal entity.

Accordingly, FICC will change the current language to specify that non-U.S. banks wishing to become approved letter of credit issuers must have language in their opinion of counsel indicating that the head office is "ultimately responsible" for the credit obligation of the branch or agency. This language is already contained in the pro forma legal opinions that are part of the FICC letter of credit issuer application.

## **II. Discussion**

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in its custody or

control or for which it is responsible.<sup>9</sup> The rule change will harmonize both of FICC's division's application requirements and will make clear to all applicants and members of the breadth of financial information that FICC will require and review in order to develop an accurate risk profile to evaluate an applicant's or member's financial responsibility. Accordingly, the proposed rule should assist FICC mitigate financial risk to itself and to its members and therefore should help FICC to assure the safeguarding of securities and funds which are in its custody or control or for which it is responsible.

## **III. Conclusion**

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act<sup>10</sup> and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-FICC-2004-09) be, and hereby is, approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-51016; File No. SR-ISE-2005-02]

### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the International Securities Exchange, Inc., Establishing Fees for Transactions in Options on the Standard & Poor's Depository Receipts®**

January 11, 2005.

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 January 6, 2005, the International Securities Exchange, Inc. ("Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in

<sup>9</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>10</sup> 15 U.S.C. 78q-1.

<sup>11</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> FICC Rule 2, § 4 and Rule 3, § 2(c).

<sup>8</sup> References to a "parent" company can mean a direct parent, intermediate parent, or ultimate parent company.

Items I, II, and III 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 its Schedule of Fees to establish fees for transactions in options on the Standard & Poor's Depository Receipts,<sup>®</sup> or SPDR<sup>®</sup>. The text of the proposed rule change is available at the Commission and at the Exchange.

### 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 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 its Schedule of Fees to establish fees for transactions in options on Standard & Poor's Depository Receipts<sup>®</sup>, or SPDR<sup>®</sup>. Specifically, the Exchange is proposing to adopt an execution fee and a comparison fee for all transactions in options on SPDRs.<sup>3</sup> The amount of the execution fee and comparison fee shall be the same for all order types on the Exchange—that is, orders for Public Customers, Market Makers, and Firm Proprietary—and shall be equal to the execution fee and comparison fee currently charged by the Exchange for Market Maker and Firm Proprietary transactions in equity options.<sup>4</sup> The Exchange believes the proposed rule change will further the Exchange's goal

<sup>3</sup> The Exchange has represented that these fees will be charged only to Exchange members. Telephone conversation between Joseph Ferraro, Associate General Counsel, ISE, and Nathan Saunders, Attorney, Division of Market Regulation, Commission, January 10, 2005.

<sup>4</sup> The execution fee is currently between \$.21 and \$.12 per contract side, depending on the Exchange Average Daily Volume, and the comparison fee is currently \$.03 per contract side.

of introducing to the marketplace new products that are competitively priced.

##### 2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b)(4) of the Act,<sup>5</sup> in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

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

The Exchange does not believe that the proposed rule change will 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 with respect to this proposed rule change.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>6</sup> and Rule 19b-4(f)(2)<sup>7</sup> thereunder, because it concerns a fee imposed by the Exchange. 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

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

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>7</sup> 17 CFR 19b-4(f)(2).

No. SR-ISE-2005-02 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-ISE-2005-02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the 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 Number SR-ISE-2005-02 and should be submitted on or before February 8, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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<sup>8</sup> 17 CFR 200.30-3(a)(12).