SECURITIES AND EXCHANGE COMMISSION
(Release No.34-89321; File No. SR-ISE-2020-26)

July 15, 2020

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule at Options 7

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on July 1, 2020, Nasdaq ISE, LLC ("ISE" 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 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 Exchange proposes to amend the Exchange's Pricing Schedule at Options 7, as described further below.

The text of the proposed rule change is available on the Exchange's Website at https://listingcenter.nasdaq.com/rulebook/ise/rules, 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 any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

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 purpose of the proposed rule change is t to amend the Exchange's Pricing Schedule at Options 7. Each change is described below.

Response Fees

Today, for regular orders in Non-Select Symbols,[3] the Exchange charges all market participants a fee for Responses to Crossing Orders[4] (except PIM orders) that is $0.50 per contract. For complex orders in Non-Select Symbols, this Response fee is $0.91 per contract for Market Makers[5] and $0.96 per contract for all other market participants. In addition, for regular orders in Select Symbols[6] and Non-Select Symbols, the Exchange currently charges all market participants a fee for Responses to PIM orders that is $0.35 per contract. For complex orders in both Select and Non-Select Symbols, the PIM Response fee is likewise $0.35 per contract for all market participants.

The Exchange now proposes to increase the Response fees described above. Specifically, the fees for Responses to Crossing Orders (except PIM orders) in Non-Select Symbols for both

3 "Non-Select Symbols" are options overlying all symbols excluding Select Symbols.

4 "Responses to Crossing Orders" is any contra-side interest submitted after the commencement of an auction in the Exchange's Facilitation Mechanism, Solicited Order Mechanism, Block Order Mechanism or Price Improvement Mechanism ("PIM").

5 "Market Makers" are "Competitive Market Makers" and "Primary Market Makers" collectively. See Options 1, Section 1(a)(21).

6 "Select Symbols" are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Interval Program.

regular and complex orders will increase to $1.10 per contract for all market participants. In addition, the fees for Responses to PIM orders in Select Symbols for regular and complex orders will increase to $0.50 per contract for all market participants. Lastly, the fees for Responses to PIM orders in Non-Select Symbols for regular and complex orders will increase to $1.10 per contract for all market participants.

Facilitation and Solicitation Break-up Rebate

Currently, the Exchange provides a Facilitation and Solicitation break-up rebate of $0.15 per contract for regular and complex orders in Select Symbols. This rebate applies to all Non-Nasdaq ISE Market Maker,[7] Firm Proprietary[8] / Broker-Dealer,[9] Professional Customer,[10] and Priority Customer[11] orders submitted in the Facilitation and Solicited Order Mechanisms that do not trade with their contra order, except when those contracts trade against pre-existing orders and quotes on the Exchange's order books. The Exchange now proposes to adopt the same break-up rebate for regular and complex orders in Non-Select Symbols, and apply the rebate in the same manner to Non-Nasdaq ISE Market Maker, Firm Proprietary / Broker-Dealer, Professional Customer, and Priority Customer orders. The Exchange also proposes technical

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7 A "Non-Nasdaq ISE Market Maker" is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended, registered in the same options class on another options exchange.

8 A "Firm Proprietary" order is an order submitted by a member for its own proprietary account.

9 A "Broker-Dealer" order is an order submitted by a member for a broker-dealer account that is not its own proprietary account.

10 A "Professional Customer" is a person or entity that is not a broker/dealer and is not a Priority Customer.

11 A "Priority Customer" is a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), as defined in Nasdaq ISE Options 1, Section 1(a)(37).

changes in note 4 of Options 7, Section 3 to revise "orderbooks" to "order books," and in the Crossing Order Fees and Rebates table in Options 7, Section 4 to revise "Breakup Rebate" to "Break-up Rebate" for greater consistency with the Pricing Schedule.

Taker Fees

The Exchange currently charges all Non-Priority Customers[12] a taker fee of $0.72 per contract for regular orders in Non-Select Symbols (except NDX and NQX).[13] The Exchange now proposes to increase this fee to $0.90 per contract for all Non-Priority Customers.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[15] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' … As the SEC explained, '[i]n the U.S.

12 Non-Priority Customers include Market Makers, Non-Nasdaq ISE Market Makers (FarMMs), Firm Proprietary / Broker-Dealers, and Professional Customers.

13 NDX and NQX, which are Non-Select Symbols, are presently subject to separate pricing for index options in Section 5 of the Pricing Schedule.

14 15 U.S.C. 78f(b).

15 15 U.S.C. 78f(b)(4) and (5).

national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'…."[16]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."[17]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

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16 NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

17 Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

Response Fees

The Exchange believes that the proposed increase to the fees for responses to Crossing Orders is reasonable, equitable and not unfairly discriminatory. With the proposed changes, the response fees will now be uniform at $0.50 per contract for regular and complex orders in Select Symbols, and at $1.10 per contract for regular and complex orders in Non-Select Symbols, in both cases across all Crossing Orders and all market participant types. While the response fees are increasing under this proposal, the proposed fees are still within the range of rates charged for similar auction mechanisms at other options exchanges.[18]

Facilitation and Solicitation Break-up Rebate

The Exchange believes that the proposed Facilitation and Solicitation break-up rebates for Non-Select Symbols are reasonable because these incentives will encourage use of the Facilitation and Solicited Order Mechanisms. Specifically, the Exchange believes that the proposed rebates will encourage increased originating regular and complex Non-Nasdaq ISE Market Maker, Firm Proprietary / Broker-Dealer, Professional Customer, and Priority Customer order flow to the Facilitation and Solicited Order Mechanisms, thereby potentially increasing the initiation of and volume executed through such auctions. Additional auction order flow provides market participants with additional trading opportunities at potentially improved prices. The Exchange further believes that the proposed Facilitation and Solicitation break-up rebates for

18 See Nasdaq MRX ("MRX") Pricing Schedule, Options 7, Section 3, Table 2, and Section 5.E, which set forth comparable rates for responses to Crossing Orders on MRX. For example, MRX charges all market participants a $0.50 per contract fee for responses to Crossing Orders in Penny Symbols and a $1.10 per contract fee for responses to Crossing Orders in Non-Penny Symbols. See also Cboe EDGX Options ("EDGX") Fee Schedule, "Automated Improvement Mechanism ("AIM") and Solicitation Auction Mechanism ("SAM") Pricing," which charges all market participants a fee of $0.50 (Penny Pilot Securities) and $1.05 (Non-Penny Pilot Securities) for AIM and SAM responses.

Non-Select Symbols are set at reasonable rates because they are aligned with the break-up rebates currently provided for Select Symbols, as discussed above.

The Exchange believes that the proposed Facilitation and Solicitation break-up rebates for Non-Select Symbols are equitable and not unfairly discriminatory because the proposed rebates will apply equally to all non-Market Maker originating orders submitted to the Facilitation and Solicited Order Mechanisms that do not trade with their contra orders (except when those originating contracts trade against pre-existing orders and quotes on the Exchange's order books). While Market Makers will not receive the Facilitation and Solicitation break-up rebates for Non-Select Symbols, the Exchange believes that the application of the rebate is equitable and not unfairly discriminatory because Market Makers are not eligible for Facilitation and Solicitation break-up rebates in Select Symbols today. In addition, the Exchange currently offers Market Makers other rebate programs that do not apply to non-Market Makers, such as the Market Maker Plus Program.

Taker Fees

The Exchange believes that the proposed increase to the Non-Select Symbol taker fees is reasonable, equitable and not unfairly discriminatory. With the proposed changes, the taker fees will uniformly increase to $0.90 per contract for all Non-Priority Customers. The Exchange notes that Priority Customers will continue to be assessed no taker fee for Non-Select Symbols under this proposal. While the taker fees are increasing for Non-Priority Customers, the proposed fees are within the range of taker fees at another options exchange.[19]

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19 See Cboe C2 Options ("C2") Fees Schedule, "Transaction Fees," which charges the following fees in Non-Penny Classes for orders that remove liquidity: $0.85 for Public Customer orders, $0.90 for C2 Market Maker orders, and $0.93 for Non-Customer, Non-Market Maker orders (Professional Customer, Firm, Broker/Dealer, non-C2 Market Maker, JBO, etc.).

The Exchange believes that it is equitable and not unfairly discriminatory to continue charging Priority Customers no taker fees in Non-Select Symbols as the Exchange has historically offered lower execution fees or rebates to those market participants. Furthermore, Priority Customer order flow enhances liquidity on the Exchange for the benefit of all market participants by providing more trading opportunities, which in turn attracts Market Makers and other market participants that may trade with this order flow.

B. <u>Self-Regulatory Organization's Statement on Burden on Competition</u>

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of intra-market competition, the Exchange does not believe that its proposal will place any category of market participant at a competitive disadvantage. The proposed response fees for Crossing Orders will be consistent across all market participants, as discussed above. In addition, the Facilitation and Solicitation break-up rebates proposed for Non-Select Symbols will be applied to market participants in the same manner as the Facilitation and Solicitation break-up rebates are applied today for Select Symbols. Lastly, the Non-Select Symbol taker fees will be increased uniformly across all Non-Priority Customers while Priority Customers will continue to be charged no taker fee.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In this instance, while the Exchange is increasing the response fees and taker fees in the manner discussed above, the Exchange does not believe this will cause an undue burden on competition as the increased fees are still within the range of similar fees charged by other options exchanges.

In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

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[20] and Rule 19b-4(f)(2)[21] thereunder. 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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the

20 15 U.S.C. 78s(b)(3)(A)(ii).

21 17 CFR 240.19b-4(f)(2).

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 e-mail to rule-comments@sec.gov. Please include File Number SR-ISE-2020-26 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISE-2020-26. 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 website (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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2020-26 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier
Assistant Secretary

22 17 CFR 200.30-3(a)(12).