SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89421; File No. SR-ISE-2020-30)

July 29, 2020

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Options 7, Sections 1, 3, and 6

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 20, 2020, Nasdaq ISE, LLC ("ISE" or "Exchange") 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 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 Options 7, Section 6, Other Options Fees and Rebates. The Exchange also proposes an amendment to Options 7, Section 1, General Provisions, and Options 7, Section 3, Regular Order Fees and Rebates.

The Exchange originally filed the proposed pricing change on July 9, 2020 (SR-ISE-2020-29). On July 20, 2020, the Exchange withdrew that filing and submitted this filing.

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.

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

2 17 CFR 240.19b-4.

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 proposes to amend Options 7, Section 6, Other Options Fees and Rebates. Specifically, the Exchange proposes to eliminate a discount in Options 7, Section 6H related to the Crossing Fee Cap. The Exchange also proposes an amendment to Options 7, Section 1, General Provisions, and Options 7, Section 3, Regular Order Fees and Rebates. Each change will be described below.

Options 7, Section 6

Today, the Exchange offers a Crossing Fee Cap of $90,000 per month, per Member on all Firm Proprietary[3] transactions that are part of the originating or contra-side of a Crossing Order[4] within Options 7, Section 6H. Members that elect, prior to the start of the month, to pay $65,000 per month, per Member are entitled to have their crossing fees capped at that level instead.

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3 A "Firm Proprietary" order is an order submitted by a member for its own proprietary account. See Options 7, Section 1.

4 Crossing Orders are contracts that are submitted as part of a Facilitation, Solicitation, PIM, Block or Qualified Contingent Cross order. All eligible volume from affiliated Members is aggregated for purposes of the Crossing Fee Cap, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A.

By way of background regarding the Crossing Fee Cap, today, fees charged by the Exchange for Responses to Crossing Orders are not included in the calculation of the monthly fee cap. Surcharge fees charged by the Exchange for licensed products and the fees for index options are set forth in Options 7, Section 5 and are not included in the calculation of the monthly fee cap. A service fee of $0.00 per side will apply to all order types that are eligible for the fee cap.[5] Once the fee cap is reached, the service fee shall apply to eligible Firm Proprietary orders in all Nasdaq ISE products. The service fee is not calculated in reaching the cap. For purposes of the Crossing Fee Cap the Exchange will attribute eligible volume to the ISE Member on whose behalf the Crossing Order was executed.

At this time, the Exchange is proposing to eliminate the opportunity for Members to elect, prior to the start of the month, to pay $65,000 per month, per Member to have their crossing fees capped at that level, instead of the current cap of $90,000 per month, per Member. The Exchange has offered this reduced cap since 2015, provided Members pay prior to the start of the month. While some Members did elect this option in prior years, and continued to elect this option through 2020, no new Member initially elected this option in 2020. The Exchange does not believe this discount incentivizes Members to bring Crossing Order flow to the Exchange as originally intended. With this proposal, the Exchange would not accept elections from Members to have their crossing fees capped at $65,000 for the month of July 2020 and moving forward. Finally, the Exchange notes that all Members remain eligible to have their fees capped at $90,000 per month, per Member.

5 The service fee shall apply once a member reaches the fee cap level and shall apply to every contract side above the fee cap. A member who does not reach the monthly fee cap will not be charged the service fee.

The Exchange proposes several technical amendments to Options 7, Section 6H including: (1) adding punctuation; (2) capitalizing the term "member" in several places; and (3) updating a citation from "Section III" to "Section 5."

Options 7, Section 1

The Exchange proposes an amendment to Options 7, Section 1, General Provisions. The Exchange proposes to amend the description of Penny Symbols to replace the term "Penny Pilot Program" with "Penny Interval Program." On April 1, 2020 the Commission approved the amendment to the OLPP to make permanent the Pilot Program (the "OLPP Program").[6] The Exchange recently filed a proposal to amend ISE Options 3, Section 3 to conform the rule to Section 3.1 of the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options (the "OLPP").[7] The Exchange's proposal amended ISE Options 3, Section 3 to refer to a Penny Interval Program instead of a Penny Pilot Program. This proposed change to Options 7, Section 1 conforms the name of the program.

Options 7, Section 3

The Exchange proposes to update an incorrect reference within Options 7, Section 3 to the Crossing Fee Cap to change the reference from "Section IV.H" to "Options 7, Section 6.H."

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in

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6 See Securities Exchange Act Release No. 88532 (April 1, 2020), 85 FR 19545 (April 7, 2020) (File No. 4-443) ("Approval Order").

7 See SR-ISE-2020-24 (not yet published).

8 15 U.S.C. 78f(b).

general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[9] 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 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."[10]

Likewise, in NetCoalition v. Securities and Exchange Commission[11] ("NetCoalition") the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[12] As the court emphasized, the Commission "intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost."[13]

Further, "[n]o one disputes that competition for order flow is 'fierce.' … As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-

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9 15 U.S.C. 78f(b)(4) and (5).

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

11 NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

12 See NetCoalition, at 534 - 535.

13 Id. at 537.

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'…."[14] Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

Options 7, Section 6

The Exchange believes that it is reasonable to amend Options 7, Section 6H to eliminate the opportunity for Members to elect, prior to the start of the month, to pay $65,000 per month, per Member to have their crossing fees capped at that level instead of at $90,000 per month, per Member. This discount was intended to incentivize members to bring Crossing Order flow to the Exchange. While some Members did elect this option in prior years, and continued to elect this option through 2020, no new Member initially elected this option in 2020. The Exchange notes that only a small percentage of ISE Members elected this discount and, therefore, would no longer receive the discount going forward. The Exchange does not believe this discount incentivizes Members to bring Crossing Order flow to the Exchange as originally intended and, therefore, proposes to eliminate this discount. The Exchange was unable to incentivize any new Member to elect the discount in 2020 and, therefore, attract additional Crossing Order flow. The Exchange would continue to cap all Firm Proprietary transactions that are part of the originating or contra side of a Crossing Order at $90,000 per month, per Member.

The Exchange believes that it is equitable and not unreasonably discriminatory to amend Options 7, Section 6H to eliminate the opportunity for Members to elect, prior to the start of the

14 Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

month, to pay $65,000 per month, per Member to have their crossing fees capped at that level instead of at $90,000 per month, per Member. The Exchange would not accept elections from any Member to have their crossing fees capped at $65,000 per month, per Member for the month of July 2020 and moving forward. Also, all Members remain eligible to have their fees capped at $90,000 per month, per Member. Specifically, with respect to the small percentage of ISE Members, who elected this discount and would no longer receive the discount, the Exchange notes that those Members would continue to be offered the opportunity to cap their crossing fees at $90,000. Also, the Exchange notes that it offers Members discounts and rebates to attract order flow to ISE. Depending on the amount of order flow attracted to the Exchange, certain discounts or rebates may be discontinued in favor of other discounts or rebates. For example, as of July 1, 2020, the Exchange began offering a Facilitation and Solicitation Break-up Rebate for Non-Select Symbols to 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.[15]

The Exchange's proposed technical amendments to Options 7, Section 6H are reasonable, equitable and not unfairly discriminatory. These amendments are non-substantive and clarify the current rule text.

Options 7, Section 1

The Exchange's proposal to amend Options 7, Section 1 to replace the term "Penny Pilot Program" with "Penny Interval Program" is reasonable, equitable and not unfairly

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15 See Securities Exchange Act Release No. 89321 (July 15, 2020) (SR-ISE-2020-26).

discriminatory. This amendment seeks to conform the name of the program, which governs the listing of certain standardized options.

Options 7, Section 3

The Exchange's proposal to update an incorrect reference within Options 7, Section 3 to the Crossing Fee Cap is reasonable, equitable and not unfairly discriminatory. This change will bring clarity to the Pricing Schedule.

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 not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

The proposal does not impose an undue burden on intermarket competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. 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 that have been exempted from compliance with the statutory standards applicable to 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.

Intramarket Competition

The proposed amendments do not impose an undue burden on intramarket competition.

Options 7, Section 6

The Exchange believes that it does not impose an undue burden on competition to amend Options 7, Section 6H to eliminate the opportunity for Members to elect, prior to the start of the month, to pay $65,000 per month, per Member to have their crossing fees capped at that level instead of at $90,000 per month, per Member. The Exchange has offered this opportunity to all Members. While some Members did elect this option in prior years, and continued to elect this option through 2020, no new Member initially elected this option in 2020. Therefore, the Exchange believes that eliminating the opportunity for Members to elect, prior to the start of the month, to pay the discounted fee does not impose an undue burden on competition, as there was no new interest from Members, who had not previously elected this opportunity, in 2020 to pay the lower fee. The Exchange would not accept elections from any Member to have their crossing fees capped at $65,000 per month, per Member for the month of July 2020 and moving forward. Also, all Members remain eligible to have their fees capped at $90,000 per month, per Member.

The Exchange's proposed technical amendments to Options 7, Section 6H are non-substantive and do not impose a burden on competition.

Options 7, Section 1

The Exchange's proposal to amend Options 7, Section 1 to replace the term "Penny Pilot Program" with "Penny Interval Program" does not impose an undue burden on competition. This amendment seeks to conform the name of the program, which governs the listing of certain standardized options.

Options 7, Section 3

The Exchange's proposal to update an incorrect reference within Options 7, Section 3 to the Crossing Fee Cap does not impose an undue burden on competition. This change will bring clarity to the Pricing Schedule.

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[16] and Rule 19b-4(f)(2)[17] 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 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

16 15 U.S.C. 78s(b)(3)(A)(ii).

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

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-ISE-2020-30 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-2020-30. 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-2020-30 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.[18]

J. Matthew DeLesDernier
Assistant Secretary

[18] 17 CFR 200.30-3(a)(12).