

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80684; File No. SR-ISE-2017-39)

May 16, 2017

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Schedule of Fees to Modify Fees and Rebates for PIM Orders

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 May 1, 2017, 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 Schedule of Fees to modify fees charged and rebates provided for orders executed in the Price Improvement Mechanism.

The text of the proposed rule change is available on the Exchange’s Website at 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 any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

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 to amend the Schedule of Fees to modify fees charged and rebates provided for orders executed in the Price Improvement Mechanism (“PIM”). In particular, the proposed rule change makes the following changes for both regular and complex orders in Select Symbols³ and Non-Select Symbols:⁴ (1) amends the fee PIM orders other than Priority Customer⁵ orders to be \$0.10 per contract, regardless of the size of the order; (2) provides discounted fees for PIM orders such that members that execute an average daily volume (“ADV”) of 7,500 or more contracts in the PIM in a given month will pay a fee of \$0.05 per contract, and Members that execute an ADV of 12,500 or more contracts in the PIM in a given month will not pay a fee for PIM orders; (3) amends the fee for Responses to PIM orders to be \$0.20 per contract; and (4) eliminates the PIM break-up rebate. Each of these proposed changes are described in more detail below.

³ “Select Symbols” are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Pilot Program.

⁴ “Non-Select Symbols” are options overlying all symbols excluding Select Symbols.

⁵ 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 Rule 100(a)(37A).

Fee for PIM Orders

Currently, regular and complex PIM orders of 100 or fewer contracts in Select and Non-Select Symbols are charged a fee of \$0.05 per contract for Market Maker,⁶ Non-Nasdaq ISE Market Maker,⁷ Firm Proprietary,⁸ Broker-Dealer, and Professional Customer⁹ orders (“non-Priority Customer orders”);¹⁰ Priority Customer orders receive free executions in the PIM. This fee for non-Priority Customer PIM orders of 100 or fewer contracts is reduced to \$0.03 per contract for orders executed by Members that have an ADV of 20,000 or more Priority Customer contracts in a given month executed in the PIM.¹¹ PIM orders of more than 100 contracts pay the fee for Crossing Orders, which is \$0.20 per contract for Non-Nasdaq ISE Market Maker, Firm

⁶ The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See Nasdaq ISE Rule 100(a)(25).

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 “Professional Customer” is a person or entity that is not a broker/dealer and is not a Priority Customer.

¹⁰ Fees apply to the originating and contra order. Firm Proprietary and Non-Nasdaq ISE Market Maker contracts traded are subject to the Crossing Fee Cap, as provided in Section IV.H of the Schedule of Fees. The Schedule of Fees is currently missing a reference indicating that footnote 6 under Section II., Complex Order Fees and Rebate, relating to the Crossing Fee Cap applies to the fee for PIM orders. The Exchange proposes to add this reference.

¹¹ This discounted fee is applied retroactively to all eligible PIM volume in that month once the threshold has been reached. Priority Customer ADV includes all volume in all symbols and order types. All eligible volume from affiliated Members will be aggregated in determining total affiliated Priority Customer ADV, provided there is at least 75% common ownership between the Members as reflected on each Member’s Form BD, Schedule A. For purposes of determining Priority Customer ADV, any day that the regular order book is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from such calculation; provided that the Exchange will only remove the day for members that would have a lower ADV with the day included.

Proprietary, Broker-Dealer, and Professional Customer orders for both regular and complex orders in Select and Non-Select Symbols.¹² Regular Market Maker orders in Select Symbols and Market Maker complex orders in both Select and Non-Select Symbols are charged a fee of \$0.20 per contract; Regular Market Maker orders in Non-Select Symbols are also charged a fee of \$0.20 per contract if sent by an Electronic Access Member (“EAM”) and are otherwise charged a fee of \$0.25 per contract, subject to applicable tier discounts.¹³

The Exchange now proposes to: (1) adopt a fee of \$0.10 per contract for non-Priority Customer orders executed in the PIM, and (2) remove the distinction between PIM orders of 100 or fewer contracts and PIM orders of more than 100 contracts. As proposed, non-Priority Customer PIM orders for both regular and complex, and in both Select and Non-Select Symbols, will be charged a fee of \$0.10 per contract. In addition, the Exchange proposes to allow members to qualify for lower fees (or no fees) based on the amount of volume they execute in the PIM. In particular, members that execute an ADV of 7,500 or more contracts in the PIM in a given month will be charged a reduced fee of \$0.05 per contract, and members that execute an ADV of 12,500 or more contracts will not be charged a fee for PIM orders. As is the case for the Exchange’s other volume based fees, the discounted fees will be applied retroactively to all eligible PIM volume in that month once the threshold has been reached.

PIM Response Fees and Break-Up Rebates

Currently, for regular orders in Select and Non-Select Symbols, the Exchange charges all market participants a fee of \$0.50 per contract for Responses to Crossing Orders. For complex orders, the fee for Responses to Crossing Orders is \$0.48 per contract in Select Symbols for all

¹² Fees apply to the originating and contra order. Firm Proprietary and Non-Nasdaq ISE Market Maker contracts traded are subject to the Crossing Fee Cap, as provided in Section IV.H of the Schedule of Fees.

¹³ See Schedule of Fees, Section IV.C.

market participants, and in Non-Select Symbols is \$0.91 per contract for Market Maker orders and \$0.96 per contract for Non-Nasdaq ISE Market Maker, Firm Proprietary, Broker-Dealer, Professional Customer, and Priority Customer orders. In addition, the Exchange provides a PIM break-up rebate for contracts that are submitted to PIM that do not trade with their contra order.¹⁴ This PIM break-up Rebate is provided to Non-Nasdaq ISE Market Maker, Firm Proprietary, Broker-Dealer, Professional Customer, and Priority Customer orders, and is \$0.35 per contract for regular and complex orders in Select Symbols, \$0.15 per contract for regular orders in Non-Select Symbols, and \$0.80 per contract for complex orders in Non-Select Symbols. The Exchange now proposes to (1) charge a lower fee of \$0.20 per contract for Responses to PIM orders for all market participants, and (2) eliminate the PIM break-up rebate provided for contracts that do not trade with their contra order.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁵ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁶ 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.

Fee for PIM Orders

The Exchange believes that the proposed fees for PIM orders are reasonable and equitable because they are designed to increase participation in the PIM. In particular, the

¹⁴ The applicable fee is applied to any contracts for which a rebate is provided. For complex orders submitted to the PIM the rebate is provided per contract leg except when those contracts trade against pre-existing orders and quotes on the Exchange's order books.

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(4) and (5).

Exchange believes that the proposed fee for PIM orders is reasonable and equitable as it is designed to reward members that send a high volume of PIM orders to the Exchange. As proposed, although the Exchange is removing incentives for small PIM orders of 100 or fewer contracts, members will pay a fee for PIM orders that remains lower than the fees charged for other Crossing Orders, and will qualify for volume based discounts, including free executions in the PIM for members that meet the higher proposed volume threshold. The Exchange believes that this fee structure will incentivize members to execute their orders in the PIM to the benefit of all market participants that trade on the Exchange. Furthermore, the Exchange believes that this proposed change is not unfairly discriminatory as all non-Priority Customer orders will continue to be subject to the same fees, and can qualify for further discounts based on volume executed in the PIM. Priority Customer orders will also continue to receive free executions in the PIM. The Exchange believes that it is equitable and not unfairly discriminatory to charge lower fees for Priority Customer orders as a Priority Customer is by definition not a broker or 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). This limitation does not apply to participants whose behavior is substantially similar to that of market professionals, including, Professional Customers, who will generally submit a higher number of orders than Priority Customers. Furthermore, the Exchange notes that all market participants can qualify for free executions in the PIM if the member executes the required volume of contracts in the PIM.

PIM Response Fees and Break-Up Rebates

The Exchange also believes that the proposed changes to PIM response fees and break-up rebates are reasonable and equitable as they are designed to make it more attractive for market participants to respond to PIM auctions, thereby increasing price improvement opportunities for

PIM orders. As proposed, market participants that respond to PIM auctions will pay a response fee that is significantly lower than that charged for responses to other Crossing Orders, and members that initiate a PIM auction will no longer qualify for break-up rebates if they enter an order into the PIM that does not trade against its contra order. The Exchange believes that these changes will make it easier for firms to participate in the PIM by responding to these auctions with price improvement. Furthermore, the Exchange does not believe that the proposed rule change is unfairly discriminatory as all market participants that respond to PIM auctions will be charged the same fee for Responses to PIM orders, and no market participants will be eligible for PIM break-up rebates, which are being eliminated.

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

In accordance with Section 6(b)(8) of the Act,¹⁷ the Exchange does not believe that the proposed rule change will impose any burden on intermarket or intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the proposed fee change is pro-competitive as it is designed to provide incentives for members to submit orders to the PIM, and to encourage members to respond to PIM auctions and thereby increase price improvement opportunities for orders submitted to the PIM. The Exchange operates in a highly competitive market in which market participants can readily direct their order flow to competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fee changes reflect this competitive environment.

¹⁷ 15 U.S.C. 78f(b)(8).

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,¹⁸ and Rule 19b-4(f)(2)¹⁹ 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
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-ISE-2017-39 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.

¹⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁹ 17 CFR 240.19b-4(f)(2).

All submissions should refer to File Number SR-ISE-2017-39. 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; 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-2017-39 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.²⁰

Eduardo A. Aleman
Assistant Secretary

²⁰ 17 CFR 200.30-3(a)(12).