

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-83411; File No. SR-ISE-2018-50)

June 12, 2018

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Section IV.D of the Exchange's Schedule of Fees

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 May 30, 2018, 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 Section IV.D. of the Exchange's Schedule of Fees, as described further below. The text of the proposed rule change is available on the Exchange's Website at <http://ise.cchwallstreet.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 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.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend certain Market Maker<sup>3</sup> fees for Regular Orders in Non-Select Symbols<sup>4</sup> and FX Options.

Presently, the Exchange charges a base execution fee of \$ 0.25 per contract to Members who trade 250,000 contracts or less in a calendar month in Non-Select Symbols and FX Options, and a fee of \$ 0.20 per contract if a Member trades more than 250,000 contracts in Non-Select Symbols and FX Options in a calendar month. In addition, once a Member reaches the highest tier, the fee applicable to that tier will apply retroactively to all Market Maker contracts for Regular Orders in Non-Select Symbols and FX Options. Presently, the Exchange waives this fee entirely for Market Makers that execute Flash Orders.<sup>5</sup>

The Exchange proposes to eliminate this fee waiver for Flash Orders, such that Market Makers that execute Flash Orders will be subject to one of the two foregoing fee tiers. However, the Exchange notes that Flash Orders will remain exempt from the \$0.70 per contract Marketing Fee that it otherwise charges to Market Makers pursuant to Section IV.E of the Exchange's Schedule of Fees. The Exchange will also continue to provide credits to Market Makers that respond to Customer Flash Orders, pursuant to Section IV.G.

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<sup>3</sup> The term "Market Makers" refers to "Competitive Market Makers" and "Primary Market Makers" collectively. See ISE Rule 100(a)(28).

<sup>4</sup> "Non-Select Symbols" are options overlying all symbols excluding Select Symbols. "Select Symbols" are options overlying all symbols listed on ISE that are in the Penny Pilot Program.

<sup>5</sup> A "Flash Order" is an order that is exposed at the National Best Bid and Offer by the Exchange to all Members for execution prior to routing the order to another exchange or cancelling it, as provided under Supplementary Material .02 to ISE Rule 1901.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>6</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>7</sup> 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.”<sup>8</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>9</sup> (“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.<sup>10</sup> 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 . . .

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<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>8</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>9</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>10</sup> See NetCoalition, at 534 - 535.

. to be made available to investors and at what cost.”<sup>11</sup>

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-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’....”<sup>12</sup> 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.

The Exchange believes it is reasonable and equitable to eliminate the fee waiver for Flash orders because the fee that the Exchange proposes to charge for such orders are within the range of fees assessed by other exchanges employing similar pricing schemes. As noted above, pursuant to Section IV.E of the Exchange’s Schedule of Fees, the Exchange does not charge a \$.70 per contract marketing fee for Flash Orders, whereas MIAX and CBOE do so.<sup>13</sup> The Exchange also provides a credit to Market Makers that respond to Flash Orders, pursuant to Section IV.G. As such, even with the proposed rule change, the Exchange’s fee structure for Flash Orders will remain materially less expensive than the fee structures of other exchanges. Moreover, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to another exchange if they deem fee levels at a particular exchange to be excessive.

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<sup>11</sup> Id. at 537.

<sup>12</sup> 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)).

<sup>13</sup> See Miax Options Options Fee Schedule, Section 1(b) (Mar. 1, 2018); CBOE Exchange Inc. Fees Schedule (May 1, 2018).

The Exchange also believes its proposal is not unfairly discriminatory because the proposed fees for Flash Orders would apply uniformly to all similarly situated Market Makers.

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. 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 and with alternative trading systems 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.

In this instance, the Exchange's proposal does not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. Moreover, even with the proposed rule change, the range of fees that Exchange proposes to charge its Market Makers for Flash orders will remain competitive with the fees that other exchange charge. As noted above, pursuant to Section IV.E of the Exchange's Schedule of Fees, the Exchange does not charge a \$.70 per contract marketing fee for Flash Orders, whereas MIAX and CBOE do so.<sup>14</sup> The Exchange also provides a credit to Market Makers that respond to Flash Orders, pursuant to

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<sup>14</sup> See Miax Options Options Fee Schedule, Section 1(b) (Mar. 1, 2018); CBOE Exchange Inc. Fees Schedule (May 1, 2018).

Section IV.G. Thus, even with the proposed rule change, the Exchange's fee structure for Flash Orders will remain materially less expensive than the fee structures of other 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,<sup>15</sup> and Rule 19b-4(f)(2)<sup>16</sup> 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:

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

<sup>16</sup> 17 CFR 240.19b-4(f)(2).

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-2018-50 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-2018-50. 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-2018-50 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.<sup>17</sup>

Eduardo A. Aleman  
Assistant Secretary

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