

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-84035; File No. SR-ISE-2018-76)

September 5, 2018

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Schedule of Fees to Permit Certain Affiliated Market Participants to Aggregate Volume and Qualify for Various Pricing Incentives

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 August 24, 2018, Nasdaq ISE, LLC ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in 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 Exchange proposes to amend the Exchange's Schedule of Fees to permit certain affiliated market participants to aggregate volume and qualify for various pricing incentives.

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

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 permit certain affiliated market participants to aggregate volume and qualify for various pricing incentives. Specifically, the Exchange proposes to permit Affiliated Entities to aggregate their Complex Order volume for purposes of calculating Priority Customer Rebates in Section II of the Schedule of Fees.

Preface

The Exchange is proposing to add the following new defined terms to the Preface of the Schedule of Fees, “Affiliated Entity,” “Appointed Market Maker,” “Appointed OFP,” and “Order Flow Provider.” The Exchange also proposes to alphabetize the current definitions.

Affiliated Entity

The term “Appointed Market Maker” is proposed to be defined as a Market Maker who has been appointed by an Order Flow Provider (“OFP”) for purposes of qualifying as an Affiliated Entity. An OFP is separately proposed to be defined as any Member, other than a Market Maker, that submits orders, as agent or principal, to the Exchange.³ The Exchange proposes to define the term “Appointed OFP” as an OFP who has been appointed by a Market Maker for purposes of qualifying as an Affiliated Entity. The Exchanges proposes to define the term “Affiliated Entity” as a relationship between an Appointed Market Maker and an Appointed OFP for purposes of qualifying for certain pricing as specified in the Schedule of Fees. In order

³ Market Makers shall not be considered Appointed OFPs for the purpose of becoming an Affiliated Entity.

to become an Affiliated Entity, Market Makers and OFPs will be required to send an email to the Exchange to appoint their counterpart, at least 3 business days prior to the last day of the month to qualify for the next month.⁴ For example, with this proposal, market participants may submit emails⁵ to the Exchange to become Affiliated Entities to qualify for discounted pricing starting September 1, 2018, provided the emails are sent at least 3 business days prior to the first business day of September 2018. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity would qualify for applicable pricing, as specified in the Schedule of Fees. Each Affiliated Entity relationship will commence on the 1st of a month and may not be terminated prior to the end of any month. An Affiliated Entity relationship will terminate after a one (1) year period, unless either party terminates earlier in writing by sending an email⁶ to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Affiliated Entity relationships must be renewed annually. For example, if the start date of the Affiliated Entity relationship is September 1, 2018, the counterparties may determine to commence a new relationship as of September 1, 2019 by requiring each party to send a new email by August 28, 2019 (3 business days prior to the end of the month). Affiliated Members⁷ may not qualify as a counterparty comprising an Affiliated Entity. Each Member may qualify for only one (1) Affiliated Entity relationship at any given time. As proposed, an Affiliated Entity shall be eligible to aggregate their volume for purposes of qualifying for certain pricing specified in the Schedule of Fees, as described below.

⁴ The Exchange shall issue an Options Trader Alert specifying the email address and details required to apply to become an Affiliated Entity.

⁵ Emails shall be submitted to membership@nasdaq.com.

⁶ Id.

⁷ An “Affiliated Member” is a Member that shares at least 75% common ownership with a particular Member as reflected on the Member's Form BD, Schedule A. See Preface to Schedule of Fees.

Section II – Priority Customer Rebates

The Exchange proposes to amend Section II, entitled “Complex Order Fees and Rebates” to permit Affiliated Entities to aggregate their Complex Order volume for purposes of calculating Priority Customer Rebates. Currently Section II pays rebates⁸ to Priority Customer Complex Orders in Select Symbols⁹ and Non-Select Symbols.¹⁰ Today, all Complex Order volume executed on the Exchange, including volume executed by Affiliated Members, is included in the volume calculation, except for volume executed as Crossing Orders and Responses to Crossing Orders. Currently, there are nine Priority Customer Complex Order Tiers based on the percentage of industry volume calculation:

| | | | |
|--------|-----------------------|----------|----------|
| Tier 1 | 0.000% - 0.200% | (\$0.25) | (\$0.40) |
| Tier 2 | Above 0.200% - 0.400% | (\$0.30) | (\$0.55) |
| Tier 3 | Above 0.400% - 0.600% | (\$0.35) | (\$0.70) |
| Tier 4 | Above 0.600% - 0.750% | (\$0.40) | (\$0.75) |
| Tier 5 | Above 0.750% - 1.000% | (\$0.45) | (\$0.80) |
| Tier 6 | Above 1.000% - 1.500% | (\$0.46) | (\$0.80) |
| Tier 7 | Above 1.500% - 2.000% | (\$0.48) | (\$0.80) |
| Tier 8 | Above 2.000% - 3.250% | (\$0.50) | (\$0.85) |
| Tier 9 | Above 3.250% | (\$0.50) | (\$0.85) |

⁸ Rebates are provided per contract per leg if the order trades with non-Priority Customer orders in the Complex Order Book or trades with quotes and orders on the regular order book. Customer Complex Order rebates are paid a rebate based on a percentage of industry volume. Priority Customer Complex Tiers are based on Total Affiliated Member Complex Order Volume (excluding Crossing Orders and Responses to Crossing Orders) and are calculated as a percentage of Customer Total Consolidated Volume. “Customer Total Consolidated Volume” means the total national volume cleared at The Options Clearing Corporation in the Customer range in equity and ETF options in that month.

⁹ “Select Symbols” are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Pilot Program.

¹⁰ “Non-Select Symbols” are options overlying all symbols excluding Select Symbols. For Non-Select Symbols, no rebates will be paid for orders in NDX, NQX and MNX

The Exchange proposes to incentivize certain Members, who are not Affiliated Members, to enter into an Affiliated Entity relationship for the purpose of aggregating Complex Order volume to qualify for Section II, Priority Customer Rebates. The Exchange proposes to add a sentence to note 16 within Section II of the Schedule of Fees to provide, “Affiliated Entities may aggregate their Complex Order volume for purposes of calculating Priority Customer Rebates. The Appointed OFP would receive the rebate associated with the qualifying volume tier based on aggregated volume.”

By aggregating volume, the Affiliated OFP, who submits Priority Customer order volume, is offered an opportunity to qualify for higher rebates, thereby lowering costs and encouraging Members to send more order flow. Priority Customer liquidity benefits all market participants by providing more order flow to the marketplace and more trading opportunities. Affiliated Members are not eligible to enter an Affiliated Entity relationship.

2. Statutory Basis

The Exchange believes that its proposal to amend its Schedule of Fees is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Section 6(b)(4) and (b)(5) of the Act,¹² 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 its facilities, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange’s proposal to amend the Preface of the Schedule of Fees to add the definitions of “Appointed Market Maker,” “Appointed OFP,” “Order Flow Provider” and “Affiliated Entity” is reasonable because the Exchange is proposing to identify the applicable market participants that may qualify to aggregate volume as an Affiliated Entity. Further the

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4), (5).

Exchange seeks to make clear the manner in which Members may participate on the Exchange as Affiliated Entities by setting timeframes for communicating agreements among market participants and terms of early termination. The Exchange also clearly states that no Affiliated Member may become a counterparty to an Affiliated Entity. The Exchange believes that these terms are reasonable because Members could elect to become a counterparty to an Affiliated Entity, provided they are not Affiliated Members.

The Exchange's proposal to amend the Preface of the Schedule of Fees to add the definitions of "Appointed Market Maker," "Appointed OFP," "Order Flow Provider" and "Affiliated Entity" is equitable and not unfairly discriminatory because all Members that are not Affiliated Members may choose to enter into an Affiliated Entity relationship.

The Exchange also believes that it is reasonable, equitable and not unfairly discriminatory to alphabetize the definitions for ease of reference.

Section II – Priority Customer Rebates

The Exchange's proposal to permit Affiliated Entities to aggregate Complex Order volume for purposes of qualifying Appointed OFPs for Section II Priority Customer Rebates is reasonable because it will attract additional Priority Customer order flow to the Exchange. Priority Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. Appointed OFPs directing Priority Customer order flow to the Exchange may be eligible to qualify for a Priority Customer Rebate or a higher Priority Customer Rebate tier, with this proposal, as a result of aggregating volume with an Appointed Market Maker and thereby qualifying for higher Priority Customer Rebates.

Permitting Members to aggregate volume for purposes of qualifying the Appointed OFP for Section II Priority Customer Rebates may also encourage the counterparties that comprise the Affiliated Entities to incentivize each other to attract and seek to execute more Priority Customer volume on ISE. In turn, market participants would benefit from the increased liquidity with which to interact and potentially tighter spreads on orders. Overall, incentivizing market participants with increased opportunities to earn higher Priority Customer rebates may increase the quality of the liquidity available on ISE.

Paying the Priority Customer Rebate to the Affiliated OFP is consistent with the Act because as between the Appointed Market Maker and the Appointed OFP, the Appointed OFP would be submitting Priority Customer Orders as part of its business model. Appointed Market Makers do not typically submit such order flow. The Appointed Market Maker does have the opportunity to obtain a low Market Maker Taker Fee for Select Symbols of \$0.47 per contract as compared to \$0.50 per contract if the Market Maker qualified for Priority Customer Complex Tier 8 and \$0.44 per contract for Market Makers that achieve Priority Customer Complex Tier 9.

The Exchange's proposal to permit Affiliated Entities to aggregate Complex Order volume for purposes of qualifying Appointed OFPs for Section II Priority Customer Rebates is equitable and not unfairly discriminatory because all ISE Members, other than Affiliated Members, may elect to become an Affiliated Entity as either an Appointed Market Maker or an Appointed OFP.¹³ Also, each Member may participate in only one Affiliated Entity relationship at a given time, which imposes a measure of exclusivity among market participants, allowing each party to rely on the other's executed Priority Customer volume on ISE to receive a

¹³ Both Members must elect each other to become an Affiliated Entity for one year. Participation is effected by an agreement of both parties that have provided proper notification to the Exchange. A party may elect to terminate the agreement at any time prior to one year.

corresponding benefit in terms of a higher rebate. Any market participant that by definition is not an Affiliated Member may elect to become a counterparty of an Affiliated Entity.

The Exchange's proposal to exclude Affiliated Members from qualifying as an Affiliated Entity is reasonable, equitable and not unfairly discriminatory because Affiliated Members may aggregate volume today for purposes of Section II Priority Customer Rebates.¹⁴ Also, the Exchange will apply all qualifications in a uniform manner when approving Affiliated Entities.

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. The Exchange's proposal to amend the Preface of the Pricing Schedule to add the definitions of "Appointed Market Maker," "Appointed OFP," "Order Flow Provider" and "Affiliated Entity" does not impose an undue burden on competition because these definitions apply to all members and member organizations uniformly. Alphabetizing the remaining definitions will provide ease of reference. The Exchange believes that its proposal does not impose any burden on inter-market competition because similar programs exist on other markets.¹⁵

Section II – Priority Customer Rebates

In terms of intra-market competition, the Exchange does not believe that its proposal to permit counterparties of an Affiliated Entity to aggregate Priority Customer volume for purposes of qualifying for Section II Priority Customer Rebates imposes an undue burden on intra-market competition because all ISE Members, other than Affiliated Members, may become an Affiliated Entity as either an Appointed Market Maker or an Appointed OFP. Also, each ISE Member may

¹⁴ See Section II of the Schedule of Fees.

¹⁵ The Nasdaq Options Market LLC, Nasdaq Phlx LLC and Nasdaq BX, Inc. have similar programs.

participate in only one Affiliated Entity relationship at a given time, which imposes a measure of exclusivity among market participants, allowing each party to rely on the other's executed Priority Customer volume on ISE to receive a corresponding benefit in terms of a higher rebate. The Exchange will apply all qualifications in a uniform manner to all market participants that elect to become counterparties of an Affiliated Entity. Any market participant that is by definition an Affiliated Member may not become a counterparty of an Affiliated Entity.

Market Makers are valuable market participants that provide liquidity in the marketplace and incur costs that other market participants do not incur. Market Makers are subject to quoting obligations¹⁶ that do not apply to other market participants. Incentivizing these market participants to execute Priority Customer volume on ISE may result in tighter spreads. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. Appointed OFPs directing order flow to the Exchange may be eligible to qualify for a Priority Customer Rebate or a higher Priority Customer Rebate tier, with this proposal, as a result of aggregating volume with an Appointed Market Maker and thereby qualifying for higher Priority Customer Rebates. Permitting Members to affiliate for purposes of qualifying for Section II Priority Customer Rebates may also encourage the counterparties that comprise the Affiliated Entities to incentivize each other to attract and seek to execute more Priority Customer volume on ISE.

The Exchange's proposal to exclude Affiliated Members from becoming an Affiliated Entity does not impose an undue burden on intra-market competition because Affiliated Members may aggregate volume today for purposes of qualifying for Priority Customer Rebates.

¹⁶ See ISE Rule 804.

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.¹⁷ 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-2018-76 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.

¹⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to File Number SR-ISE-2018-76. 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-2018-76 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

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Assistant Secretary

¹⁸ 17 CFR 200.30-3(a)(12).