

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-85647; File No. SR-ISE-2019-09)

April 15, 2019

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish a Priority Customer Complex Order Surcharge and Provide an Additional Rebate Per Originating Contract Side to Qualifying Members

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 April 1, 2019, 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 its Pricing Schedule in Options 7.

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 amend the Exchange’s Pricing Schedule in Options 7 to: (1) establish a \$0.05 per contract surcharge for Priority Customer³ complex orders in SPY that leg into the regular order book; and (2) amend its QCC and Solicitation Rebate program to provide an additional rebate of \$0.01 per originating contract side to qualifying members.

Priority Customer Complex Order Surcharge

The Exchange currently has a pricing structure in place that provides rebates to Priority Customer complex orders in order to encourage members to bring that order flow to the Exchange. The Exchange provides these rebates to members that achieve Priority Customer Complex Tiers⁴ in Select Symbols⁵ and Non-Select Symbols⁶ (other than NDX, NQX or MNX). All complex order volume executed on the Exchange, including volume executed by Affiliated

³ 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).

⁴ The Priority Customer Complex Tiers are based on total Affiliated Member or Affiliated Entity complex order volume (excluding Crossing Orders and Responses to Crossing Orders), and are calculated as a percentage of Customer Total Consolidated Volume (hereinafter, “Complex Order Volume Percentage”). “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.

⁵ “Select Symbols” are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Pilot Program. SPY is a Select Symbol.

⁶ “Non-Select Symbols” are options overlying all symbols excluding Select Symbols.

Members,⁷ is included in the volume calculation, except for volume executed as Crossing Orders⁸ and Responses to Crossing Orders.⁹ Affiliated Entities¹⁰ may also aggregate their complex order volume for purposes of qualifying Appointed OFPs for these Priority Customer rebates.¹¹ Rebates are provided per contract per leg if the Priority Customer complex order trades with non-Priority Customer orders in the complex order book or trades with quotes and orders on the regular order book.¹²

As set forth in Section 4 of the Pricing Schedule, there are currently nine Priority Customer Complex Tiers as follows:

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.

⁸ A “Crossing Order” is an order executed in the Exchange’s Facilitation Mechanism, Solicited Order Mechanism, Price Improvement Mechanism (PIM) or submitted as a Qualified Contingent Cross order. For purposes of this Pricing Schedule, orders executed in the Block Order Mechanism are also considered Crossing Orders.

⁹ “Responses to Crossing Orders” are any contra-side interest submitted after the commencement of an auction in the Exchange's Facilitation Mechanism, Solicited Order Mechanism, Block Order Mechanism or PIM.

¹⁰ An “Affiliated Entity” is a relationship between an Appointed Market Maker and an Appointed OFP for purposes of qualifying for certain pricing specified in the Pricing Schedule. An “Appointed Market Maker” is a Market Maker who has been appointed by an Order Flow Provider (“OFP”) for purposes of qualifying as an Affiliated Entity. An “Appointed OFP” is an OFP (i.e., a member, other than a Market Maker, that submits orders, as agent or principal, to the Exchange) who has been appointed by a Market Maker for purposes of qualifying as an Affiliated Entity. Each member may qualify for only one Affiliated Entity relationship at any given time. Affiliated Members are not eligible to enter an Affiliated Entity relationship.

¹¹ The Appointed OFP would receive the rebate associated with the qualifying volume tier based on aggregated volume.

¹² The rebate for the highest tier volume achieved is applied retroactively to all eligible Priority Customer complex volume once the threshold has been reached. Members will not receive rebates for net zero complex orders. For purposes of determining which complex orders qualify as “net zero” the Exchange will count all complex orders that leg into the regular order book and are executed at a net price per contract that is within a range of \$0.01 credit and \$0.01 debit.

Priority Customer Complex Tier	Complex Order Volume Percentage	Rebate for Select Symbols	Rebate for Non-Select Symbols
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)

Going forward, the Exchange proposes to impose a \$0.05 per contract surcharge on Priority Customer complex orders in SPY that leg into the regular order book, which will be applied in addition to the applicable rebate.¹³ For example, if a member qualifies for Priority Customer Complex Tier 1, the member's Priority Customer complex orders in SPY that leg into the regular order book for non-net zero activity will earn \$0.20 per contract (i.e., \$0.25 per contract rebate for Select Symbols minus the \$0.05 per contract surcharge). If, however, the member's SPY Priority Customer complex orders execute against non-Priority Customer orders in the complex order book instead of legging into the regular order book, those orders will earn the \$0.25 per contract rebate and not be assessed the \$0.05 surcharge.

¹³ As discussed above, the Exchange currently provides the Tiers 1-9 Priority Customer complex order rebates to non-net zero Priority Customer complex orders that leg into the regular order book. See supra note 12, with accompanying text.

The Exchange is proposing this surcharge to reduce the costs of such transactions. Not only does the Exchange provide the tiered rebates discussed above to Priority Customer complex orders, but the Exchange also does not charge any maker or taker fees for such orders.¹⁴

QCC and Solicitation Rebate

Currently, members using the Qualified Contingent Cross (“QCC”)¹⁵ and/or other solicited crossing orders, including solicited orders executed in the Solicitation,¹⁶ Facilitation¹⁷ or Price Improvement Mechanisms (“PIM”),¹⁸ receive rebates for each originating contract side in all symbols traded on the Exchange. Once a member reaches a certain volume threshold in QCC orders and/or solicited crossing orders during a month, the Exchange provides rebates to that member for all of its QCC and solicited crossing order traded contracts for that month.¹⁹

The applicable rebates are applied on QCC and solicited crossing order traded contracts once the volume threshold is met. Members receive the rebate for all QCC and/or other solicited crossing

¹⁴ See Options 7, Section 4.

¹⁵ A QCC Order is comprised of an originating order to buy or sell at least 1000 contracts that is identified as being part of a qualified contingent trade, as that term is defined in Supplementary Material .01 to Rule 715, coupled with a contra-side order or orders totaling an equal number of contracts. See Rule 715(j).

¹⁶ The Solicited Order Mechanism is a process by which an Electronic Access Member (“EAM”) can attempt to execute orders of 500 or more contracts it represents as agent against contra orders that it solicited. Each order entered into the Solicited Order Mechanism shall be designated as all-or-none. See Rule 716(e).

¹⁷ The Facilitation Mechanism is a process by which an EAM can execute a transaction wherein the EAM seeks to facilitate a block-size order it represents as agent, and/or a transaction wherein the EAM solicited interest to execute against a block-size order it represents as agent. See Rule 716(d).

¹⁸ PIM is a process by which an EAM can provide price improvement opportunities for a transaction wherein the EAM seeks to facilitate an order it represents as agent, and/or a transaction wherein the EAM solicited interest to execute against an order it represents as agent. See Rule 723.

¹⁹ All eligible volume from affiliated members will be aggregated in determining QCC and Solicitation volume totals, provided there is at least 75% common ownership between the members as reflected on each member's Form BD, Schedule A.

orders except for QCC and solicited orders between two Priority Customers, which do not receive any rebate. Today, the volume thresholds and corresponding rebates are as follows:

Originating Contract Sides	Rebate
0 to 99,999	\$0.00
100,000 to 199,999	(\$0.05)
200,000 to 499,999	(\$0.07)
500,000 to 749,999	(\$0.09)
750,000 to 999,999	(\$0.10)
1,000,000+	(\$0.11)

At this time, the Exchange proposes to provide an additional incentive for members that achieve high volumes of QCC and other solicited crossing activity well above the current highest volume threshold of more than 1,000,000 originating contract sides and also provide significant complex order volume in a given month. Specifically, members will receive an additional rebate of \$0.01 per originating contract side on QCC and/or other solicited crossing orders that qualify for the QCC and Solicitation Rebate program if they achieve in a given month: (i) combined QCC and other solicited crossing order volume of more than 1,750,000 originating contract sides and (ii) Priority Customer Complex Tiers 6 – 9, as described above. This additional rebate opportunity will be cumulative of the \$0.11 base rebate since qualifying members will have exceeded requisite volume threshold to receive the additional \$0.01 incentive for a total of \$0.12 per originating contract side on QCC and solicited crossing order traded contracts.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁰ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²¹ 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.

Priority Customer Complex Order Surcharge

The Exchange believes that it is reasonable to establish a \$0.05 per contract surcharge for Priority Customer complex orders in SPY that leg into the regular order book. As noted above, the Exchange is proposing this surcharge on Priority Customer complex orders in SPY, which is one of the most heavily traded symbols on ISE, to recoup the costs of such transactions. Not only does the Exchange provide the tiered rebates discussed above to Priority Customer complex orders, but the Exchange also does not charge any maker or taker fees for such orders. Despite the proposed change, the Exchange believes that the complex order pricing structure will continue to encourage members to bring Priority Customer complex order flow to ISE as the surcharge is minimal and only applies in limited circumstances (i.e., when SPY Priority Customer complex orders leg into the regular order book). Finally, the Exchange notes that members will still net a rebate for each Priority Customer Complex Tier even after the surcharge is applied.

The Exchange believes that the proposed surcharge is equitable and not unfairly discriminatory because the Exchange will uniformly apply this fee to all similarly situated market participants. Even with this surcharge, SPY complex order pricing for Priority

²⁰ 15 U.S.C. 78f(b).

²¹ 15 U.S.C. 78f(b)(4) and (5).

Customers will continue to be lower than for all other market participants. The Exchange does not believe that this pricing structure is unfairly discriminatory because Priority Customer orders bring valuable liquidity to the market, which in turn benefits other market participants by increasing their opportunities to trade.

QCC and Solicitation Rebate

The Exchange believes that its proposal to provide a supplementary \$0.01 rebate cumulative of the base \$0.11 rebate to members that achieve in a given month both combined QCC and other solicited crossing order volume of more than 1,750,000 originating contract sides and Priority Customer Complex Tiers 6-9 is reasonable because this incentive is intended to encourage members that achieve high volumes of QCC and other solicited crossing activity to continue to send more complex order flow to the Exchange to achieve Priority Customer Complex Tiers 6-9 to earn the additional \$0.01 rebate. All market participants benefit from increased order interaction when more order flow is available on ISE. The Exchange also believes that the proposed changes will continue to encourage members to submit greater numbers of QCC and other solicited crossing orders to ISE to receive the additional rebate. Furthermore, the Exchange notes that it currently has other incentive programs to promote and encourage growth in specific business areas to garnish greater order flow. For example, the Exchange offers additional rebates to members that achieve high volumes of unsolicited PIM and Facilitation activity as well as complex activity.²²

The Exchange also believes that the proposed changes are equitable and not unfairly discriminatory because any member may qualify for the proposed supplemental rebate by submitting QCC and other solicited crossing orders as well as complex orders. Finally, the

²² See Options 7, Section 6.B (PIM and Facilitation Rebate).

Exchange will apply the proposed incentive uniformly to all members' orders that meet the requisite volume thresholds.

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. As it relates to the proposed surcharge for Priority Customer complex orders in SPY, the Exchange believes that its proposal will continue to encourage members to send more complex order flow to ISE given that the surcharge will apply in limited circumstances, and that Priority Customers will still earn a rebate in each Priority Customer Complex Tier even after the surcharge is applied. The Exchange further believes that the additional QCC and Solicitation Rebate proposed above will encourage members to submit more QCC and other solicited crossing orders as well as complex orders. Accordingly, the Exchange believes that the fees and rebates proposed above will continue to attract order flow to the Exchange, thereby encouraging additional volume and liquidity. All market participants benefit from increased order interaction when more order flow is available on ISE.

The Exchange operates in a highly competitive market in which market participants can readily direct their order flow to 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. For the reasons described above, the Exchange believes that the proposed fee changes reflect this competitive environment.

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,²³ and Rule 19b-4(f)(2)²⁴ 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-2019-09 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-2019-09. 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

²³ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁴ 17 CFR 240.19b-4(f)(2).

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-2019-09 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.²⁵

Eduardo A. Aleman
Deputy Secretary

²⁵ 17 CFR 200.30-3(a)(12).