

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-84487; File No. SR-ISE-2018-87)

October 25, 2018

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchanges Schedule of Fees to Modify the Crossing Fee Cap

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 October 11, 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 modify the Crossing Fee Cap, 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

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 Schedule of Fees to exclude Non-Nasdaq ISE Market Makers³ from the Crossing Fee Cap in Section IV.H.

By way of background, Crossing Orders are contracts that are submitted as part of a Facilitation, Solicitation, Price Improvement Mechanism ("PIM"), Block or QCC order. As set forth in Section IV.H of the Schedule of Fees, the Exchange currently caps Crossing Order fees at \$90,000 per month per member on all Firm Proprietary and Non-Nasdaq Market Maker transactions that are part of the originating or contra side of a Crossing Order.⁴ The following fees are not included in the calculation of the monthly Crossing Fee cap: (1) Fees for Responses to Crossing Orders, (2) surcharge fees for licensed products and the fees for index options as set forth in Section III, and (3) service fee.⁵ For purposes of the Crossing Fee Cap the Exchange

³ 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.

⁴ Members that elect prior to the start of the month to pay \$65,000 per month will have these crossing fees capped at that level instead. All eligible volume from affiliated Members will be 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.

⁵ A service fee of \$0.00 per side applies to all order types that are eligible for the fee cap. The service fee does not apply once a Member reaches the fee cap level and does 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. Once the fee cap is reached, the service fee applies to eligible Firm Proprietary and Non-Nasdaq ISE market Maker orders in all Nasdaq ISE products. The service fee is not calculated in reaching the cap.

attributes eligible volume to the ISE Member on whose behalf the Crossing Order was executed.⁶ The Exchange now seeks to exclude Non-Nasdaq ISE Market Maker transactions from the Crossing Fee Cap, and make related changes to remove references to Non-Nasdaq ISE Market Maker contracts throughout its Schedule of Fees where the Crossing Fee Cap is described.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁸ 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 Crossing Fee Cap was established to reward members for executing a high volume of Firm Proprietary and Non-Nasdaq ISE Market Maker Crossing Orders on the Exchange. However, the Exchange has determined that this program has not proven to be effective in encouraging Non-Nasdaq ISE Market Maker volume in Crossing Orders and therefore believes it is reasonable to eliminate the Crossing Fee Cap for these market participants. Furthermore, the Exchange believes that it is reasonable to no longer apply the Crossing Fee Cap to Non-Nasdaq

⁶ The Exchange's fee cap is functionally similar to the Clearing Trading Permit Holder Fee Cap in place at Cboe Exchange ("CBOE"), and the Monthly Firm Fee Cap in place at Nasdaq PHLX ("Phlx"). See CBOE Fees Schedule, Equity Options Rate Table, Clearing Trading Permit Holder Fee Cap, footnote 11; and Phlx Pricing Schedule, Section II, Monthly Firm Fee Cap.

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4) and (5).

ISE Market Maker transactions because other options exchanges offer similar fee caps that only apply to firm proprietary orders.⁹

The Exchange further believes that the proposed fee change is equitable and not unfairly discriminatory because it would apply uniformly to all members engaged in Firm Proprietary trading in options classes traded on the Exchange. The Exchange's decision to no longer apply the Crossing Fee Cap to Non-Nasdaq ISE Market Maker orders is not unfairly discriminatory because as noted above, the Exchange has determined that this program has not proven to be effective in encouraging Non-Nasdaq ISE Market Maker volume in Crossing Orders and as a matter of practice, members submitting Firm Proprietary orders are most likely to use or pre-pay the Crossing Fee Cap. As such, the Exchange believes there will be minimal impact on removing this fee cap for Non-Nasdaq ISE Market Maker orders. Moreover, the proposed variance between Firm Proprietary and Non-Nasdaq ISE Market Maker participants does not misalign pricing in that Firm Proprietary orders already benefit from certain pricing advantages that Non-Nasdaq ISE Market Makers do not also enjoy, such as a PIM and Facilitation rebate as

⁹ See CBOE Fees Schedule, Equity Options Rate Table, Clearing Trading Permit Holder Fee Cap, footnote 11 (providing in relevant part that the "...Clearing Trading Permit Holder Fee Cap in all products except Underlying Symbol List A (34) excluding binary options (the "Fee Cap") and Sector Indexes (47), the Cboe Options Proprietary Products Sliding Scale for Clearing Trading Permit Holder Proprietary Orders (the "Proprietary Products Sliding Scale"), the Clearing Trading Permit Holder Proprietary VIX Sliding Scale (the "VIX Sliding Scale"), and the Supplemental VIX Total Firm Discount (the Supplemental VIX Discount") apply to (i) Clearing Trading Permit Holder proprietary orders ("F" origin code), and (ii) orders of Non-Trading Permit Holder Affiliates of a Clearing Trading Permit Holder. A "Non-Trading Permit Holder Affiliate" for this purpose is a 100% wholly owned affiliate or subsidiary of a Clearing Trading Permit Holder that is registered as a United States or foreign broker-dealer and that is not a Cboe Options Trading Permit Holder. Only proprietary orders of the Non-Trading Permit Holder Affiliate that clear through a Cboe Options-registered OCC clearing number(s) will be included in calculating the Fee Cap, Proprietary Products Sliding Scale, VIX Sliding Scale, and Supplemental VIX Discount."). In addition, Phlx's Monthly Firm Fee Cap is only offered to firm proprietary orders. See Phlx Pricing Schedule, Section II, Monthly Firm Fee Cap.

well as a lower complex order maker fee.¹⁰ Such differentiated pricing exists today on another options exchange.¹¹ The Exchange believes there is nothing impermissible about ISE offering the Crossing Fee Cap solely to Firm Proprietary transactions given that this practice is consistent with the above examples and the fee caps in place at other options exchanges.¹² Furthermore, to the extent the Crossing Fee Cap provides an incentive for Firm Proprietary orders to transact order flow on the Exchange, such order flow brings increased liquidity to the benefit of all market participants, including Non-Nasdaq ISE 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. Although the Exchange is no longer including Non-Nasdaq ISE Market Maker transactions in the Crossing Fee Cap, as described above, the Exchange notes that other options exchanges offer similar fee caps that apply only to firm proprietary orders and the Exchange therefore seeks to modify its fee cap for competitive reasons.¹³ 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

¹⁰ See Schedule of Fees, Section IV.B. See Schedule of Fees, Section II (assessing Non-Nasdaq ISE Market Maker orders a complex order maker fee of \$0.20 per contract in Select Symbols, while Firm Proprietary orders are assessed the lower \$0.10 per contract maker fee).

¹¹ CBOE assesses a reduced transaction fee to Clearing Trading Permit Holder Proprietary participants, which clear in the Firm range at The Options Clearing Corporation, of \$0.43 per contract for electronic Penny Classes and \$0.70 per contract for electronic Non-Penny Classes. In contrast, CBOE assesses Non-Trading Permit Holder Market Makers a \$0.47 per contract fee for electronic Penny Classes and a \$0.75 per contract fee for electronic Non-Penny Classes. See CBOE Fees Schedule.

¹² See note 9 above.

¹³ See note 9 above.

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. For the reasons discussed above, the Exchange believes that the proposed fee change reflects 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.¹⁴ 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:

¹⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2018-87 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-2018-87. 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-2018-87 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.¹⁵

Eduardo A. Aleman
Assistant Secretary

¹⁵ 17 CFR 200.30-3(a)(12).