

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-90596; File No. SR-ISE-2020-40)

December 8, 2020

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Market Maker Plus Program Under Options 7, Section 3, Regular Order Fees and Rebates

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 November 24, 2020, 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 amend the Exchange's Market Maker Plus program under Options 7, Section 3, "Regular Order Fees and Rebates."

The Exchange originally filed the proposed pricing change on November 2, 2020 (SR-ISE-2020-36). On November 12, 2020, the Exchange withdrew SR-ISE-2020-36 and submitted SR-ISE-2020-35 on November 13, 2020. On November 24, 2020 the Exchange withdrew SR-ISE-2020-35 and submitted this replacement filing.

The text of the proposed rule change is available on the Exchange's Website at <https://listingcenter.nasdaq.com/rulebook/ise/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

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.

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

1. Purpose

The Exchange proposes to amend the Market Maker Plus program under Options 7, Section 3, “Regular Order Fees and Rebates.” The purpose of the proposed rule change is to amend certain qualifications for Market Makers to achieve Market Maker Plus status in order to continue to incentivize Market Makers to add liquidity on ISE.

Background

As set forth in Options 7, Section 3 of the Pricing Schedule, the Exchange operates a Market Maker Plus program for regular orders in Select Symbols<sup>3</sup> and Non-Select Symbols<sup>4</sup> that provides the below tiered rebates to Market Makers<sup>5</sup> based on time spent quoting at the National Best Bid or National Best Offer (“NBBO”). This program is designed to reward Market Makers that contribute to market quality by maintaining tight markets in Select and Non-Select Symbols.

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<sup>3</sup> “Select Symbols” are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Interval Program. See Options 7, Section 1.

<sup>4</sup> “Non-Select Symbols” are options overlying all symbols excluding Select Symbols. See Options 7, Section 1.

<sup>5</sup> The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See Options 1, Section 1(a)(20).



| <b>Market Maker Plus Tier (Specified Percentage)</b> | <b>Maker Fee / Rebate</b> |
|--|---------------------------|
| Tier 1 (80% to less than 90%)                        | \$0.50                    |
| Tier 2 (90% to less than 98%)                        | \$0.30                    |
| Tier 3 (98% or greater)                              | (\$0.40) <sup>(6)</sup>   |

Market Makers are evaluated each trading day for the percentage of time spent on the NBBO for qualifying series that expire in two successive thirty calendar day periods beginning on that trading day. A Market Maker Plus is a Market Maker who is on the NBBO a specified percentage of the time on average for the month based on daily performance in the qualifying series for each of the two successive periods described above. Qualifying series are series trading between \$0.03 and \$3.00 (for options whose underlying stock's previous trading day's last sale price was less than or equal to \$100) and between \$0.10 and \$3.00 (for options whose underlying stock's previous trading day's last sale price was greater than \$100) in premium. If a Market Maker would qualify for a different Market Maker Plus tier in each of the two successive 30 calendar day periods, then the lower of the two Market Maker Plus tier rebates shall apply to all contracts.<sup>6</sup>

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<sup>6</sup> Market Makers may enter quotes in a symbol using one or more unique, exchange assigned identifiers – i.e., badge/suffix combinations. Market Maker Plus status is calculated independently based on quotes entered in a symbol for each of the Market Maker's badge/suffix combinations, and the highest tier achieved for any badge/suffix combination quoting that symbol applies to executions across all badge/suffix combinations that the member uses to trade in that symbol. Only badge/suffix combinations quoting a minimum of ten trading days within the month will be used to determine whether the Market Maker Plus status has been met and the specific tier to be applied to the Market Maker's performance for that month.

A Market Maker's worst quoting day each month for each of the two successive periods described above, on a per symbol basis, is excluded in calculating whether a Market Maker qualifies for this rebate.<sup>7</sup>

*Proposal*

The Exchange proposes to amend Tiers 1b, 2, 3 and Tier 4 of the Market Maker Plus qualifications for options overlying SPY, QQQ and IWM. Today, a Market Maker that is on the NBBO 65% to less than 80% of the time, on average for the month based on daily performance in the qualifying series, qualifies for the SPY, QQQ and IWM Tier 1b. Today, a Market Maker that is on the NBBO 80% to less than 85% of the time, on average for the month based on daily performance in the qualifying series, qualifies for the SPY, QQQ and IWM Tier 2. Today, a Market Maker that is on the NBBO 85% to less than 90% of the time, on average for the month based on daily performance in the qualifying series, qualifies for the SPY, QQQ and IWM Tier 3. Today, a Market Maker that is on the NBBO 90% or greater of the time, on average for the month based on daily performance in the qualifying series, qualifies for the SPY, QQQ and IWM Tier 4.

The Exchange proposes to amend the SPY, QQQ and IWM Market Maker Plus qualifications for Tiers 1b, 2, 3 and Tier 4 by adding an alternative means to qualify for these tiers. The Exchange proposes for SPY, QQQ and IWM Tier 1b, that in addition to the current qualification, a Market Maker that is on the NBBO over 50% of the time, on average for the month based on daily performance in the qualifying series, and adds liquidity in the qualifying

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<sup>7</sup> In addition, the Exchange may exclude from any member's monthly Market Maker Plus tier calculation any Unanticipated Event; provided that the Exchange will only remove the day for members that would have a lower time at the NBBO for the specified series with the day included. See Options 7, Section 1(a)(2) for the definition of "Unanticipated Event."

symbol that is executed at a volume of greater than 0.10% of Customer Total Consolidated Volume<sup>8</sup> may also qualify for the SPY, QQQ and IWM Tier 1b. The Exchange proposes for SPY, QQQ and IWM Tier 2, that in addition to the current qualification, a Market Maker that is on the NBBO over 50% of the time, on average for the month based on daily performance in the qualifying series, and adds liquidity in the qualifying symbol that is executed at a volume of greater than 0.20% of Customer Total Consolidated Volume<sup>9</sup> may also qualify for the SPY, QQQ and IWM Tier 2. The Exchange proposes for SPY, QQQ and IWM Tier 3, that in addition to the current qualification, a Market Maker that is on the NBBO over 50% of the time, on average for the month based on daily performance in the qualifying series, and adds liquidity in the qualifying symbol that is executed at a volume of greater than 0.25% of Customer Total Consolidated Volume<sup>10</sup> may also qualify for the SPY, QQQ and IWM Tier 3. Additionally, the Exchange proposes for SPY, QQQ and IWM Tier 4, that in addition to the current qualification, a Market Maker that is on the NBBO over 50% of the time, on average for the month based on daily performance in the qualifying series, and adds liquidity in the qualifying symbol that is executed at a volume of greater than 0.50% of Customer Total Consolidated Volume<sup>11</sup> may also qualify for the SPY, QQQ and IWM Tier 4.<sup>12</sup> The Exchange believes that these alternative

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<sup>8</sup> 0.10% of Customer Total Consolidated Volume is approximately 22,000 contracts per day. 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. See Options 7, Section 1(b).

<sup>9</sup> 0.20% of Customer Total Consolidated Volume is approximately 44,000 contracts per day.

<sup>10</sup> 0.25% of Customer Total Consolidated Volume is approximately 55,000 contracts per day.

<sup>11</sup> 0.50% of Customer Total Consolidated Volume is approximately 110,000 contracts per day.

<sup>12</sup> For example, if a Market Maker adds 40,000 contracts of liquidity in SPY on ISE and the average Customer Total Consolidated Volume for the month is 20,000,000 per day, then

qualifications for SPY, QQQ and IWM Tiers 1b, 2, 3 and 4 will provide greater depth of liquidity in SPY, QQQ and IWM, and, in turn, attract additional volume on ISE.

No rate changes are proposed for SPY, QQQ and IWM Tiers 1b, 2, 3 or 4 for the Regular Maker Rebate or the Linked Maker Rebate.

The Exchange also proposes to add a period at the end of Options 7, Section 3 after note 18 in the Pricing Schedule.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>13</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>14</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 Exchange's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' ... As the SEC explained, '[i]n the U.S.

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the Market Maker would have a percentage of 0.20% (40,000 divided by 20,000,000) of Customer Total Consolidated Volume and would qualify for Tier 2 in SPY and would be entitled to the \$0.18 per contract Regular Maker Rebate and the \$0.15 per contract Linked Maker Rebate. The Exchange arrives at 40,000 contracts by accumulating all executed volume that added liquidity (including quotes and orders) by a particular Market Maker Participant in SPY.

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(4) and (5).

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>15</sup>

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>16</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

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<sup>15</sup> NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

<sup>16</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).



The Exchange's proposal to amend the SPY, QQQ and IWM Tiers 1b, 2, 3 and Tier 4 qualifications by adding an alternative means<sup>17</sup> to qualify for these tiers is reasonable. With respect to SPY, QQQ and IWM, Market Makers may continue to qualify for Tier 1b, by being on the NBBO 65% to less than 80% of the time, on average for the month based on daily performance in the qualifying series. Likewise, Market Makers may continue to qualify for SPY, QQQ and IWM Tier 2, by being on the NBBO 80% to less than 85% of the time, on average for the month based on daily performance in the qualifying series. Market Makers may continue to qualify for SPY, QQQ and IWM Tier 3 by being on the NBBO 85% to less than 90% of the time, on average for the month based on daily performance in the qualifying series. Finally, Market Makers may continue to qualify for SPY, QQQ and IWM Tier 4 by being on the NBBO 90% or greater of the time, on average for the month based on daily performance in the qualifying series. In summary, Market Makers that met the SPY, QQQ and IWM Tier 1b, 2, 3 or 4 qualifications last month would

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<sup>17</sup> The Exchange proposes for SPY, QQQ and IWM Tier 1b, that in addition to the current qualification, a Market Maker that is on the NBBO over 50% of the time, on average for the month based on daily performance in the qualifying series, and adds liquidity in the qualifying symbol that is executed at a volume of greater than 0.10% of Customer Total Consolidated Volume may also qualify for the SPY, QQQ and IWM Tier 1b. The Exchange proposes for SPY, QQQ and IWM Tier 2, that in addition to the current qualification, a Market Maker that is on the NBBO over 50% of the time, on average for the month based on daily performance in the qualifying series, and adds liquidity in the qualifying symbol that is executed at a volume of greater than 0.20% of Customer Total Consolidated Volume may also qualify for the SPY, QQQ and IWM Tier 2. The Exchange proposes for SPY, QQQ and IWM Tier 3, that in addition to the current qualification, a Market Maker that is on the NBBO over 50% of the time, on average for the month based on daily performance in the qualifying series, and adds liquidity in the qualifying symbol that is executed at a volume of greater than 0.25% of Customer Total Consolidated Volume may also qualify for the SPY, QQQ and IWM Tier 3. Additionally, the Exchange proposes for SPY, QQQ and IWM Tier 4, that in addition to the current qualification, a Market Maker that is on the NBBO over 50% of the time, on average for the month based on daily performance in the qualifying series, and adds liquidity in the qualifying symbol that is executed at a volume of greater than 0.50% of Customer Total Consolidated Volume may also qualify for the SPY, QQQ and IWM Tier 4.

continue to qualify for those tiers, provided each trading day they continued to spend the same percentage of time on the NBBO for qualifying series. With this proposal, the Exchange believes that these alternative qualifications for SPY, QQQ and IWM in Tiers 1b, 2, 3 and 4 will provide an opportunity for Market Makers to contribute greater depth of liquidity in SPY, QQQ and IWM on ISE, and, in turn, attract additional customer volume on ISE. The Exchange notes that the alternative qualifications, which require that Market Makers add liquidity in Customer volume, will incentivize Market Makers to tighten their quotes to execute against an increased number of orders, which benefits all Members who may interact with that interest on ISE's Order Book.

The Exchange's proposal to amend the SPY, QQQ and IWM Tiers 1b, 2, 3 and Tier 4 qualifications by adding an alternative means to qualify for these tiers is equitable and not unfairly discriminatory. The proposal would continue to require Market Makers who qualify for the Market Maker Plus program to quote significantly at the NBBO, thereby continuing to contribute to market quality in a meaningful way. All Market Makers will be subject to the same qualification criteria for Market Maker Plus. The Exchange also continues to believe that it is not unfairly discriminatory to offer rebates under this program to only Market Makers. Market Makers, and in particular, those Market Makers that participate in the Market Maker Plus Program and achieve Market Maker Plus status, add value through continuous quoting<sup>18</sup> and are subject to additional requirements and obligations (such as quoting obligations<sup>19</sup>) that other market participants are not.

The Exchange will apply the proposed changes to SPY, QQQ, and IWM as they are three of the most actively traded symbols on ISE. The Exchange believes that providing an alternative

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<sup>18</sup> See Options 2, Section 5.

<sup>19</sup> See Options 2, Section 4 and Options 3, Section 8(c).

means for Market Makers to qualify for Market Maker Plus tiers will incentivize additional liquidity in these three names, which will have a beneficial impact on market quality on the Exchange. Further, the Exchange believes that the proposed new Tier 1b, 2, 3 and 4 qualifications for SPY, QQQ, and IWM will continue to require Market Makers to quote at the NBBO for a significant percentage of time in order to glean the benefits of the associated incentives. For the foregoing reasons, the Exchange believes that its proposal will further encourage Market Makers to maintain tight markets in SPY, QQQ, and IWM, thereby increasing liquidity and attracting additional order flow to the Exchange and, will benefit all market participants in the quality of order interaction.

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.

Inter-market Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. 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 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.

#### Intra-market Competition

The Exchange's proposal to amend the SPY, QQQ and IWM Tiers 1b, 2, 3 and Tier 4 qualifications by adding an alternative means<sup>20</sup> to qualify for these tiers does not impose an undue burden on competition. The proposal would continue to require Market Makers who qualify for the Market Maker Plus program to quote significantly at the NBBO, thereby continuing to contribute to market quality in a meaningful way. All Market Makers will be subject to the same qualification criteria for Market Maker Plus. The Exchange also continues to believe that it is not unfairly discriminatory to offer rebates under this program to only Market Makers. Market Makers, and in particular, those Market Makers that participate in the Market Maker Plus Program and achieve Market Maker Plus status, add value through continuous quoting<sup>21</sup> and are subject to additional requirements and obligations (such as quoting obligations<sup>22</sup>) that other market participants are not.

The Exchange will apply the proposed changes to SPY, QQQ, and IWM as they are three of the most actively traded symbols on ISE. The Exchange believes that providing an alternative means for Market Makers to qualify for Market Maker Plus tiers will incentivize additional liquidity in these three names which will have a beneficial impact on market quality on the Exchange. Further, the Exchange believes that the proposed new Tier 1b, 2, 3 and 4 qualifications for SPY, QQQ, and IWM will continue to require Market Makers to quote at the

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<sup>20</sup> See note 17 above.

<sup>21</sup> See Options 2, Section 5.

<sup>22</sup> See Options 2, Section 4 and Options 3, Section 8(c).

NBBO for a significant percentage of time in order to glean the benefits of the associated incentives. For the foregoing reasons, the Exchange believes that its proposal will further encourage Market Makers to maintain tight markets in SPY, QQQ, and IWM, thereby increasing liquidity and attracting additional order flow to the Exchange, which will benefit all market participants in the quality of order interaction.

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>23</sup> and Rule 19b-4(f)(2)<sup>24</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:

Electronic comments:

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

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<sup>23</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>24</sup> 17 CFR 240.19b-4(f)(2).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2020-40 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-2020-40. 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-2020-40 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>25</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>25</sup> 17 CFR 200.30-3(a)(12).