

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-91976; File No. SR-ISE-2021-11)

May 24, 2021

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend ISE's Pricing Schedule at Options 7, Section 5, for NQX Index Options Fees and Rebates for Regular and Complex Orders

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 11, 2021, 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, 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 ISE's Pricing Schedule at Options 7, Section 5, Index Options Fees and Rebates.

The Exchange originally filed the proposed pricing change on April 30, 2021 (SR-ISE-2021-10). On May 11, 2021, the Exchange withdrew that filing and submitted this 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 Options 7, Section 5, Index Options Fees and Rebates. Specifically, the Exchange proposes to amend Part B, NQX Index Options Fees and Rebates for Regular and Complex Orders. NQX is a proprietary index based on 1/5 the value of the Nasdaq-100 Index.

Currently, the fees and rebates assessed for NQX regular and complex orders are as follows:

<b>Market Participant</b>	<b>Maker Fee / Rebate</b>	<b>Taker Fee / Rebate</b>
Market Maker	(\$0.25)	\$0.00
Market Maker (for orders sent by Electronic Access Members)	(\$0.25)	\$0.00
Non-Nasdaq ISE Market Maker (FarMM)	\$0.25	\$0.25
Firm Proprietary / Broker-Dealer	\$0.25	\$0.25
Professional Customer	\$0.25	\$0.25
Priority Customer	\$0.00	\$0.00

NQX Taker Fees apply to the originating and contra side of Crossing Orders and to Responses to Crossing Orders. The Exchange proposes to amend this pricing.

First, the Exchange proposes to amend the NQX regular and complex order pricing for Market Makers,<sup>3</sup> including for orders sent by Electronic Access Members, to remove the current Maker Rebates of \$0.25 per contract. The Exchange proposes to instead assess a Maker Fee of \$0.25 per contract to Market Makers, including for orders sent by Electronic Access Members, similar to other Non-Priority Customers<sup>4</sup> in NQX. Since no market participants would be subject

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<sup>3</sup> The term Market Makers refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See Options 1, Section 1(a)(21). The term Competitive Market Maker means a Member that is approved to exercise trading privileges associated with CMM Rights. See Options 1, Section 1(a)(12). The term Primary Market Maker means a Member that is approved to exercise trading privileges associated with PMM Rights. See Options 1, Section 1(a)(36).

<sup>4</sup> 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 Options 1,

to an NQX Maker Rebate with the removal of the Market Maker rebates, the Exchange also proposes to amend the column header from “Maker Fee/Rebate” to “Maker Fee.” The Exchange also proposes to amend the column header “Taker Fee/Rebate” to “Taker Fee” as there are no Taker Rebates.

Second, the Exchange proposes to amend the current regular and complex order NQX Taker Fees for Market Makers, including for orders sent by Electronic Access Members, from \$0.00 per contract to \$0.25 per contract.

With this proposal, ISE would uniformly assess a \$0.25 per contract NQX Maker and Taker Fee to all market participants for regular and complex orders, except Priority Customers. Priority Customers will continue to pay no NQX Maker or Taker Fee.

## 2. Statutory Basis

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

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Section 1(a)(37). Unless otherwise noted, when used in this Pricing Schedule the term “Priority Customer” includes “Retail” as defined below. A Non-Priority Customer would include a Market Maker, Non-Nasdaq ISE Market Maker (FarMM), Firm Proprietary/Broker-Dealer, and Professional Customer.

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

<sup>6</sup> 15 U.S.C. 78f(b)(4) and (5).

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. 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>7</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>8</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

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<sup>7</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>8</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange's proposal to amend its NQX regular and complex order pricing for Market Makers, including for orders sent by Electronic Access Members, to remove the \$0.25 per contract Maker Rebate and instead assess a \$0.25 per contract Maker Fee, and start assessing a \$0.25 per contract Taker Fee<sup>9</sup> is reasonable. The Exchange initially paid NQX Maker Rebates to Market Makers, including for orders sent by Electronic Access Members, to encourage Market Maker activity in NQX and offset the NQX license surcharge of \$0.25 per contract, which is paid by all market participants. The Exchange desired to incentivize Market Makers to provide liquidity in the new product during the initial months of trading when it initially offered Market Makers these incentives in 2018.<sup>10</sup> As NQX has been trading for over 2 years at this time, the Exchange proposes to align the pricing for Market Makers, including for orders sent by Electronic Access Members, with other Non-Priority Customer participants that currently pay \$0.25 per contract Maker and Taker Fees. Also, the proposed pricing aligns with pricing for the Nasdaq-100 Index ("NDX"), another proprietary product, in that Non-Priority Customers are uniformly assessed a transaction fee for regular orders, regardless of whether they are making or taking liquidity, and Priority Customers are not assessed any fees. The \$0.25 per contract fee is reasonable as NQX is an exclusively listed product on ISE only. Also, the \$0.25 per contract fee is well within the range of amounts assessed for NDX options, another Exchange proprietary

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<sup>9</sup> Market Makers, including for orders sent by Electronic Access Members, currently pay no NQX regular or complex order Taker Fees.

<sup>10</sup> See Securities Exchange Act Release No. 83639 (July 16, 2018), 83 FR 34625 (July 20, 2018) (SR-ISE-2018-61) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Schedule of Fees To Add Establish Fees and Rebates for NQX Options and Make Several Clarifying Changes).

product which assesses a \$0.75 per contract fee to Non-Priority Customers. The lower fee amount of \$0.25 per contract for NQX options as compared to \$0.75 per contract for NDX options is reasonable because NQX options is based on 1/5 of the value of the Nasdaq-100 Index whereas NDX options are based on the full value of the Nasdaq-100 Index, and the Exchange therefore seeks to assess corresponding reduced fees for NQX options. The Exchange notes that market participants are offered an opportunity to either transact NDX options, the Nasdaq 100 Micro Index Options or “XND,”<sup>11</sup> or PowerShares QQQ Trust (“QQQ”) options.<sup>12</sup> Although all of the products are based on the Nasdaq-100 Index, and collectively they offer various notional sizes as well as different fees.<sup>13</sup> These products all offer exposure to the Nasdaq-100 Index which is different from exposure to competing products. Finally, pricing by symbol is a common practice on many U.S. options exchanges as a means to incentivize order flow to be sent to an exchange for execution in particular products. Other options exchanges price by symbol.<sup>14</sup>

The Exchange’s proposal to amend its NQX regular and complex order pricing for Market Makers, including for orders sent by Electronic Access Members, to remove the \$0.25

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<sup>11</sup> XND is based on 1/100<sup>th</sup> of the value of the Nasdaq-100 Index.

<sup>12</sup> QQQ is an exchange-traded fund based on the Nasdaq-100 Index. Products such as QQQ provides market participants with a variety of choices in selecting the product they desire to utilize to transact the Nasdaq-100 Index as QQQ options overlie the same index as NDX, namely the Nasdaq-100 Index. This relationship between QQQ options and NDX options is similar to the relationship between RUT and the iShares Russell 2000 Index (“IWM”), which is the ETF on RUT.

<sup>13</sup> See ISE Options 7, Section 3 for simple orders and Options 7, Section 4 for complex orders for pricing on QQQ options. XND options pricing is located within ISE Options 7, Section 5A. The applicable ISE complex order fees for Non-Select Symbols in Options 7, Section 4 apply to NDX options. See also Nasdaq Phlx LLC (“Phlx”) Options 7, Section 4 for XND pricing. XND is currently listed only on Phlx.

<sup>14</sup> See pricing for Russell 2000 Index (“RUT”) on Cboe Exchange, Inc.’s Fees Schedule.

per contract Maker Rebate and instead assess a \$0.25 per contract Maker Fee, and start assessing a \$0.25 per contract Taker Fee is equitable and not unfairly discriminatory as ISE would uniformly assess a \$0.25 per contract fee to all market participants, except Priority Customers. Priority Customers will continue to pay no Maker or Taker Fee. All other Non-Priority Customers would uniformly be assessed a \$0.25 per contract fee regardless of whether the Non-Priority Customer is making or taking liquidity. The Exchange's proposal to amend the column headers from "Maker Fee/Rebate" to "Maker Fee" and "Taker Fee/Rebate" to "Taker Fee" is reasonable, equitable and not unfairly discriminatory as no Member would be subject to a Maker Rebate with the removal of the rebates for Market Makers, including for orders sent by Electronic Access Members and there are no Taker Rebates today.

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 intra-market competition, the Exchange does not believe that the proposed changes will place any category of market participant at a competitive disadvantage. Overall, the Exchange's proposal is designed to incentivize participants to bring additional order flow to the Exchange, and create a more active and quality market in NQX. While Market Makers would pay a fee for either making or taking liquidity in NQX with this proposal, the Exchange believes that Market Makers will continue to be incentivized to offer liquidity in this product which is based on the Nasdaq-100 Index and offers investors similar strategies for investors. Market Makers on ISE are the only Market Makers making a market in NQX. Also, the Exchange would uniformly assess a \$0.25 per contract NQX fee to all market participants for



regular and complex orders, except Priority Customers, regardless of whether the Non-Priority Customer is making or taking liquidity.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market where other options markets may create products similar to those offered on ISE. There are other products today which are similarly based on the Nasdaq-100 Index. Market participants are offered an opportunity to either transact NDX, XND, or QQQ options. Although all of the products are based on the Nasdaq-100 Index and offer various notional sizes as well as different fees.<sup>15</sup> These products all offer exposure to the Nasdaq-100 Index which is different from exposure to competing products.

The Exchange's proposal to amend the column headers from "Maker Fee/Rebate" to "Maker Fee" and "Taker Fee/Rebate" to "Taker Fee" does not impose an undue burden on competition as no Member would be subject to a Maker Rebate with the removal of the rebates for Market Makers, including Market Maker (for orders sent by Electronic Access Members) and there are no Taker Rebates today.

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>16</sup> At any time within 60 days of the filing of the proposed rule change, the Commission

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<sup>15</sup> See ISE Options 7, Section 3 for simple orders and Options 7, Section 4 for Complex Orders for pricing on QQQ options. XND options pricing is located within Options 7, Section 5A. The applicable Complex Order fees for Non-Select Symbols in Options 7, Section 4 apply to NDX options. See also Nasdaq Phlx LLC ("Phlx") Options 7, Section 4 for XND pricing. XND is currently listed only on Phlx.

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2021-11 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-2021-11. 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-2021-11 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>

J. Matthew DeLesDernier  
Assistant Secretary

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