

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93314; File No. SR-ISE-2021-21)

October 14, 2021

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule at Options 7, Section 6.A to Modify the QCC and Solicitation Rebate Program

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 September 30, 2021, 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 Pricing Schedule at Options 7, Section 6.A to modify its Qualified Contingent Cross ("QCC") and Solicitation rebate program, as described further below.

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.] [sic]

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 purpose of the proposed rule change is to modify the Exchange’s QCC³ and Solicitation Rebate program in Options 7, Section 6.A by: (i) providing a new additional rebate of \$0.01 per originating contract side to qualifying Members, and (ii) amending the qualifications for the existing \$0.01 additional rebate. The Exchange also proposes a technical amendment in Options 7, Section 4. Each change is discussed in detail below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on October 1, 2021.

Background

Today, Members using QCC and/or other solicited orders executed in the Solicitation⁴ or Facilitation⁵ Mechanisms (together with QCC, collectively, “Solicited Orders”) receive rebates for each originating contract side in all symbols traded on the Exchange. Once a Member

³ 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 Options 3, Section 7, coupled with a contra-side order or orders totaling an equal number of contracts. See Options 3, Section 7(j).

⁴ The Solicitation or 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. See Options 3, Section 11(d).

⁵ 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 Options 3, Section 11(b).

reaches a certain volume threshold in Solicited Orders during a month, the Exchange provides rebates to that Member for all of its eligible Solicited Order traded contracts for that month.⁶ Rebates will be applied to Solicited Order traded contracts once the volume threshold is met. Members will receive the rebate for all Solicited Orders except for Solicited Orders between two Priority Customers.⁷ Solicited Orders between two Priority Customers will not receive any rebate. The volume threshold and corresponding rebates are as follows:⁸

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)

For Members that achieve the highest volume threshold of 1,000,000 or more originating contract sides, the Exchange also currently provides an additional rebate of \$0.01 per originating contract side on Solicited Orders that qualify for the QCC and Solicitation Rebate program if the Member achieves in a given month: (i) combined Solicited Order volume of more than 1,750,000

⁶ 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.

⁷ 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, Section 1(a)(37).

⁸ Volume resulting from all Solicited Orders will be aggregated in determining the applicable volume tier.

originating contract sides and (ii) Priority Customer Complex Tiers 6 - 9 in Section 4 (the “note * incentive”).⁹ The purpose of this incentive is to encourage Members to provide high volumes of Solicited Order activity well above the highest QCC and Solicitation Rebate volume tier of 1,000,000 or more originating contract sides, and also provide significant complex order volume.

New QCC and Solicitation Incentive

To further encourage Solicited Order and complex order flow, the Exchange now proposes to provide a new additional incentive that will be structured similarly to the existing note * incentive, except the proposed incentive will also be applied to the lower QCC and Solicitation Rebate volume tiers (in addition to the highest volume tier). Furthermore, Members will be able to qualify for the proposed incentive by achieving less stringent Priority Customer Complex Tiers in Section 4. Specifically, the Exchange proposes that Members will receive an additional rebate of \$0.01 per originating contract side on Solicited Orders that qualify for the QCC and Solicitation Rebate program if they achieve Priority Customer Complex Tier 2 or higher in a given month (the “note & incentive”).

The note & incentive will be applied to all of the QCC and Solicitation Rebate volume tiers except for the lowest tier (for which the Exchange does not currently provide a QCC and Solicitation Rebate). This additional rebate opportunity will be cumulative of the base rebates so that qualifying Members could receive up to \$0.06 in the second QCC and Solicitation Rebate volume tier, \$0.08 in the third tier, \$0.10 in the fourth tier, \$0.11 in the fifth tier, and \$0.13 in the

⁹ As set forth in Options 7, Section 4, Priority Customer Complex Tiers are based on Total Affiliated Member or Affiliated Entity complex order volume (excluding Crossing Orders and Responses to Crossing Orders) calculated as a percentage of Customer Total Consolidated Volume.

sixth and highest tier (i.e., the \$0.11 base rebate, the \$0.01 note * incentive, and the \$0.01 note & incentive).

While structured similarly to the existing note * incentive, the proposed incentive will be less stringent in that it will require Members to send a lower amount of Solicited Order and complex order volume in order to qualify for the incentive. As such, the proposed note & incentive may be more readily accessible to Members. If more Members find this rebate is accessible to them, then more will seek to qualify for it by sending Solicited Order and complex order flow to the Exchange.

Existing OCC and Solicitation Incentive

As described above, the Exchange currently offers the \$0.01 note * incentive to qualifying Members if they achieve in a given month: (i) combined Solicited Order volume of more than 1,750,000 originating contract sides and (ii) Priority Customer Complex Tiers 6 – 9 in Section 4. When the Exchange adopted the note * incentive in 2019, there were only nine Priority Customer Complex Tiers in Section 4.¹⁰ The Exchange has since amended its Pricing Schedule to adopt Priority Customer Complex Tier 10, and now proposes to update the existing Priority Customer Complex Tier qualification in the note * incentive accordingly.¹¹ As amended, the qualification will require Members to achieve Priority Customer Complex Tier 6 **or higher**. The amended qualification will therefore include Priority Customer Complex Tier 10 while also giving the Exchange flexibility to accommodate any similar changes to its Priority Customer Complex Tiers going forward. The Exchange notes that no Member is currently

¹⁰ See Securities Exchange Act Release No. 85647 (April 15, 2019), 84 FR 16300 (April 18, 2019) (SR-ISE-2019-09) (the “2019 Filing”).

¹¹ See Securities Exchange Act Release No. 90501 (November 24, 2020), 85 FR 77328 (December 1, 2020) (SR-ISE-2020-39) (the “2020 Filing”).

achieving both Priority Customer Complex Tier 10 and combined Solicited Order volume of more than 1,750,000 originating contract sides to receive the \$0.01 additional incentive, so expects that the proposed changes will have minimal impact.

Technical Amendment

The Exchange proposes a minor, technical amendment in note 16 of Options 7, Section 4, which currently describes the Priority Customer Complex Tiers, to add a reference to Affiliated Entity¹² within the note's first sentence. The proposed change will simply align the note's language with corresponding language presently in the header of the Priority Customer complex rebates table.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹³ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁴ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among

¹² 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 Schedule of Fees. Market Makers and OFPs are 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. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity is eligible 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 email 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 by each party sending an email to the Exchange. Affiliated Members 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.

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(4) and (5).

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. 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’....”¹⁵

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.”¹⁶

¹⁵ 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)).

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

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.

New QCC and Solicitation Incentive

The Exchange believes that its proposal to provide Members with an additional incentive of \$0.01 per originating contract side on Solicited Orders that qualify for the QCC and Solicitation Rebate program if they achieve Priority Customer Complex Tier 2 or higher in a given month is reasonable because this incentive is intended to encourage Members to send more Solicited Order and complex order flow to the Exchange. As discussed above, the proposed note & incentive is similar to the existing note * incentive, except the proposed incentive will be less stringent in that it will require Members to send a lower amount of Solicited Order and complex order volume in order to qualify for the incentive. As such, the proposed note & incentive may be more readily accessible to Members. If more Members find this rebate is accessible to them, then more will seek to qualify for it by sending Solicited Order and complex order flow to the Exchange. All market participants benefit from increased order interaction when more order flow is available on ISE.

The Exchange further believes that the proposed note & incentive is equitable and not unfairly discriminatory because any Member may qualify for the proposed incentive by

submitting the requisite volume of Solicited Orders and complex orders. Furthermore, the Exchange will uniformly apply the proposed incentive to all qualifying Members.

Existing QCC and Solicitation Incentive

The Exchange believes that the proposed changes to amend the existing qualification in the note * incentive is reasonable for the following reasons. First, the proposed changes would more closely align to the Exchange's original intent in the 2019 Filing to provide the note * incentive to qualifying Members that achieved anything above 1.000% of Total Affiliated Member or Affiliated Entity Complex Order Volume (Excluding Crossing Orders and Responses to Crossing Orders) calculated as a percentage of Customer Total Consolidated Volume (i.e., Priority Customer Complex Tiers 6 – 9 at the time of the 2019 Filing).¹⁷ The 2020 Filing amended, among other changes, the Priority Customer Complex Tiers by adding a new Tier 10 as the highest tier and adjusting the volume percentages in Tiers 8 and 9 accordingly.¹⁸ The volume percentages in Tier 6, however, remained the same with the 2020 Filing, so even with the addition of Tier 10, corresponding changes should have been made to the note * incentive qualifications to include Tier 10 to align with the original intent of this incentive. Second, as noted above, the proposed changes to include Tier 10 in the incentive qualifications are expected to have minimal impact as no Member is currently achieving both Priority Customer Complex Tier 10 and combined Solicited Order volume of more than 1,750,000 originating contract sides to receive the \$0.01 additional rebate.

Lastly, the Exchange believes that the proposed changes to the existing qualification are equitable and not unfairly discriminatory because any Member may qualify for the note *

¹⁷ See 2019 Filing.

¹⁸ See 2020 Filing.

incentive by submitting the requisite volume of Solicited Orders and complex orders. The Exchange will apply the amended qualification to all qualifying Members uniformly.

Technical Amendment

The Exchange's proposal to amend note 16 in Options 7, Section 4 is reasonable, equitable, and not unfairly discriminatory. As discussed above, the Exchange is simply aligning the note's language corresponding language currently in the header of the Priority Customer complex rebates table. The Exchange believes that the proposed changes will bring clarity and transparency to the Exchange's Pricing Schedule.

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 its proposal will place any category of market participant at a competitive disadvantage. As discussed above, any Member may qualify for the QCC and Solicitation Rebates, including the note * incentive and the proposed note & incentive. The proposed changes are primarily aimed at attracting greater Solicited Order and complex order flow to the Exchange. To the extent the Exchange's proposal incentivizes Members to bring more order flow to ISE, the Exchange believes that the resulting additional volume and liquidity will benefit all market participants.

In terms of inter-market competition, 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 options 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. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Members or competing exchanges to maintain their competitive standing in the financial markets.

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.¹⁹ 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:

¹⁹ 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-2021-21 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-2021-21. 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-2021-21 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.²⁰

J. Matthew DeLesDernier
Assistant Secretary

²⁰ 17 CFR 200.30-3(a)(12).