

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-96926; File No. SR-ISE-2023-05)

February 14, 2023

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend ISE Pricing Schedule at Options 7, Section 6 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 February 1, 2023, 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 the ISE Pricing Schedule at Options 7, Section 6 to modify the Crossing Fee Cap.

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.

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 at Options 7, Section 6.H to increase the Crossing Fee Cap.

As set forth in Options 7, Section 6.H, the Exchange presently offers a Crossing Fee Cap of \$150,000 per month, per Member, on all Firm Proprietary³ transactions that are part of the originating or contra-side of a Crossing Order.⁴ Fees charged by the Exchange for Responses to Crossing Orders⁵ are not included in the calculation of the monthly fee cap. Surcharge fees charged by the Exchange for licensed products and the fees for index options as set forth in Section 5 are not included in the calculation of the monthly fee cap.⁶ For purposes of the Crossing Fee Cap, the Exchange will attribute eligible volume to the Member on whose behalf the Crossing Order was executed.

³ A Firm Proprietary order is an order submitted by a member for its own proprietary account.

⁴ Crossing Orders are contracts that are submitted as part of a Facilitation, Solicitation, PIM, Block or QCC order. All eligible volume from affiliated Members is 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 “Responses to Crossing Order” is 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. See Options 7, Section 1(c).

⁶ In addition, a service fee of \$0.00 per side currently applies to all order types that are eligible for the fee cap. The service fee would apply once a Member reaches the fee cap level and would apply to every contract side above the fee cap. A Member who does not reach the monthly fee cap is not charged the service fee. Once the fee cap is reached, the service fee shall apply to eligible Firm Proprietary orders in all Nasdaq ISE products. The service fee is not calculated in reaching the cap.

At this time, the Exchange proposes to increase the Crossing Fee Cap from \$150,000 to \$200,000. The Exchange also proposes that once a Member exceeds the fee cap level, the Member will be subject to a reduced transaction fee of \$0.02 per capped contract. Thus, if a Member exceeds the \$200,000 Crossing Fee Cap in a given month, the Member would be charged a reduced fee of \$0.02 per contract for their Crossing Orders instead of \$0.20 (for Crossing Orders except orders submitted in the Price Improvement Mechanism (“PIM”))⁷ or \$0.10 (for PIM orders). The Exchange notes that Members may also currently qualify for discounted fees (or qualify for free executions) on their Firm Proprietary PIM orders if they meet certain PIM volume requirements.⁸ The Exchange therefore proposes to stipulate that the Member will be subject to a reduced transaction fee of \$0.02 per capped contract, unless the Member also qualifies for free executions. The Exchange further proposes to delete all references to the service fee in this Section 6.H. As noted above, the Exchange currently does

⁷ As described in Options 3, Section 13, PIM is a process by which an EAM can provide price improvement opportunities for a “Crossing Transaction,” which is comprised of the order the EAM represents as agent (the “Agency Order”) and a counter-side order for the full size of the Agency Order (the “Counter-Side Order”). Upon the entry of a Crossing Transaction into the PIM, PIM responses (i.e., “Improvement Orders”) may be entered during the auction exposure period.

⁸ See Options 7, Section 3 (note 13) (providing that other than for Priority Customer orders, the \$0.10 PIM fee is \$0.05 per contract for orders executed by Members that execute an ADV of 7,500 or more contracts in the PIM in a given month. Members that execute an ADV of 12,500 or more contracts in the PIM will be charged \$0.02 per contract. The discounted fees are applied retroactively to all eligible PIM volume in that month once the threshold has been reached); and Options 7, Section 4 (note 9) (providing that other than for Priority Customer orders, the \$0.10 PIM fee is \$0.05 per contract for orders executed by Members that execute an ADV of 7,500 or more contracts in the PIM in a given month. Members that execute an ADV of 12,500 or more contracts in the PIM will not be charged a fee. The discounted fees are applied retroactively to all eligible PIM volume in that month once the threshold has been reached). As emphasized in the foregoing, a Member could potentially qualify for free executions on their PIM orders and also exceed the Crossing Fee Cap in a given month.

not charge any service fees in relation to the Crossing Fee Cap as this fee is set to \$0.00, and the Exchange therefore proposes to delete this obsolete fee.

While the Crossing Fee Cap will increase under this proposal and Members will be charged a nominal transaction fee of \$0.02 per capped contract once the fee cap level is exceeded, the Exchange believes that Members will continue to be incentivized to bring Firm Proprietary Crossing Order flow to ISE to achieve the benefits of the cap on their Crossing Order transactions fees.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ 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. 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]

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

‘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’....”¹¹

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.”¹²

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.

The Exchange believes that its proposal to increase the Crossing Fee Cap from \$150,000 to \$200,000 is reasonable. The Crossing Fee Cap was established to reward Members for executing a higher volume of Firm Proprietary Crossing Orders on the Exchange by capping the

¹¹ 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)).

¹² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

associated fees. The Exchange believes that the increased fee cap will be set at a level that continues to appropriately reward Members for executing high volumes of such Crossing Orders. Despite the proposed increase, the Exchange believes that Members will continue to be incentivized to bring Firm Proprietary Crossing Order flow to ISE to receive the benefits of capped fees for their Crossing Order transactions. In that vein, the Exchange believes that its proposal to begin charging a transaction fee of \$0.02 per capped contract once the Member has exceeded the Crossing Fee Cap level is reasonable because it is a nominal amount compared to the \$0.20 fee for Crossing Orders (except PIM orders) and the \$0.10 fee for PIM orders normally assessed to Members for their Firm Proprietary orders. As such, the Exchange believes that the Crossing Fee Cap, as amended, still serves to lower fees for Members that transact certain qualifying Firm Proprietary Crossing Order volume on ISE, thus enabling these Members the ability to lower costs. The Exchange further believes that it is reasonable to assess no fees instead of assessing the reduced \$0.02 transaction fee for capped contracts in the event the Member exceeds the Crossing Fee Cap level in a given month and also qualifies for free executions under a separate incentive program. Given the interactions of various incentive programs that apply to Crossing Orders (and in this case, PIM orders) as noted above, the Exchange wants to ensure that Members get the most favorable incentive they qualify for under its Pricing Schedule. The Exchange also believes that the proposed changes to remove all references to the service fee in the Crossing Fee Cap is reasonable. As noted above, the Exchange currently does not charge any service fees in relation to the Crossing Fee Cap as this fee is set to \$0.00. The Exchange therefore proposes to delete this fee to avoid potential confusion by market participants.

The Exchange believes that the proposed changes described above to the Crossing Fee Cap are equitable and not unfairly discriminatory because the changes will apply uniformly to all Members engaged in Firm Proprietary trading in options classes traded on the Exchange. The Exchange does not believe that it is unfairly discriminatory to offer the Crossing Fee Cap to Firm Proprietary transactions as differentiated pricing already exists on the Exchange's Pricing Schedule to encourage different segments of order flow. For instance, the Exchange generally provides Priority Customer¹³ orders more favorable pricing through lower or no transaction fees, including Priority Customer Crossing Orders that are presently assessed no fees, and through rebate opportunities like the Priority Customer rebate currently provided for adding liquidity in Non-Select Symbols.¹⁴ Professional Customer¹⁵ orders are presently charged a lower transaction fee for executed QCC orders and for orders executed in the Solicited Order Mechanism (\$0.10 for Professional Customers versus \$0.20 for all other non-Priority Customers).¹⁶ Broker-Dealer¹⁷ and Firm Proprietary orders are incentivized in the Exchange's PIM and Facilitation Rebate program.¹⁸ Market Makers¹⁹ are offered rebates through the Exchange's Market Maker

¹³ 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).

¹⁴ See Options 7, Sections 3 and 4. Non-Select Symbols are options overlying all symbols that are not included in the Penny Interval Program.

¹⁵ A "Professional Customer" is a person or entity that is not a broker/dealer and is not a Priority Customer.

¹⁶ See Options 7, Sections 3 (note 16) and Section 4 (note 14).

¹⁷ A "Broker-Dealer" order is an order submitted by a member for a broker-dealer account that is not its own proprietary account.

¹⁸ See Options 7, Sections 6.C.

¹⁹ The term "Market Makers" refers to Competitive Market Makers and Primary Market Makers, collectively. See Options 1, Section 1(a)(21).

Plus program.²⁰ The Exchange further believes there is nothing impermissible about offering the Crossing Fee Cap solely to Firm Proprietary transactions given that this practice is consistent with firm fee caps in place on other options exchanges.²¹ To the extent the amended Crossing Fee Cap continues to encourage additional Firm Proprietary Crossing Order flow to ISE, such increased order flow brings increased liquidity and additional opportunities for interaction with this order flow, which ultimately benefits all market participants.

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 this proposal will place any category of market participant at a competitive disadvantage. As discussed above, the proposed changes to the Crossing Fee Cap will apply uniformly to all Members engaged in Firm Proprietary trading in options classes traded on the Exchange. To the extent the amended Crossing Fee Cap continues to provide an incentive for Members to bring additional Firm Proprietary Crossing Order flow to the Exchange, such order flow brings increased liquidity to the benefit of 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

²⁰ See Options 7, Sections 3 (note 5).

²¹ See, e.g., Monthly Firm Fee Cap in Nasdaq Phlx Options 7, Section 4; and Firm and Broker Dealer Monthly Fee Cap in NYSE Arca Options Fees and Charges at https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf.

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. 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 order execution venues 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.²² 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.

²² 15 U.S.C. 78s(b)(3)(A)(ii).

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-2023-05 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-2023-05. 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 such 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-2023-05 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.²³

Sherry R. Haywood,
Assistant Secretary.

²³ 17 CFR 200.30-3(a)(12).