

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98057; File No. SR-ISE-2023-14)

August 4, 2023

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Reduce ISE's Options Regulatory Fee

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 July 25, 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 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 ISE's Pricing Schedule at Options 7, Section 9 to reduce the ISE Options Regulatory Fee or “ORF”.

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on August 1, 2023.

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.

¹ 15 U.S.C. 78s(b)(1).

² 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

ISE proposes to lower its ORF from \$0.0014 to \$0.0013 per contract side on August 1, 2023. Previously, ISE lowered or waived its ORF in 2017, 2021 and 2022.³ After a review of its regulatory revenues and regulatory costs, the Exchange proposes to reduce the ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs.

Volumes in the options industry went over 900,000,000 in 2023. ISE has taken measures this year as well as in prior years to lower and waive its ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. Despite those prior measures, ISE will need to reduce its ORF again to account for trading volumes in the first half of 2023 that were higher than the Exchange

³ See Securities Exchange Act Release Nos. 81345 (August 8, 2017), 82 FR 37939 (August 14, 2017) (SR-ISE-2017-71) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE's Schedule of Fees With Respect to the Options Regulatory Fee); 92577 (August 5, 2021), 86 FR 44092 (August 11, 2021) (SR-ISE-2021-16) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE's Options Regulatory Fee); and 94070 (January 26, 2022), 87 FR 5524 (February 1, 2022) (SR-ISE-2022-02)(Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reduce ISE's Options Regulatory Fee).

forecast for ORF assessment purposes, which resulted in the collection of more ORF revenues than anticipated in the first half of 2023. At this time, ISE believes that the options volume it experienced in the first half of 2023 is likely to persist. The anticipated options volume would continue to impact ISE's ORF collection which, in turn, has caused ISE to propose reducing the ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would not exceed the Exchange's total regulatory costs.

Collection of ORF

ISE will continue to assess its ORF for each customer option transaction that is either: (1) executed by a Member on ISE; or (2) cleared by an ISE Member at The Options Clearing Corporation ("OCC") in the customer range,⁴ even if the transaction was executed by a non-Member of ISE, regardless of the exchange on which the transaction occurs.⁵ If the OCC clearing member is an ISE Member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA⁶); and (2) if the OCC clearing member is not an ISE Member, ORF is collected only on the cleared customer contracts executed at ISE, taking into account any CMTA instructions which may result in collecting the ORF from a non-Member.⁷

⁴ Participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

⁵ The Exchange uses reports from OCC when assessing and collecting the ORF.

⁶ CMTA or Clearing Member Trade Assignment is a form of "give-up" whereby the position will be assigned to a specific clearing firm at OCC.

⁷ By way of example, if Broker A, an ISE Member, routes a customer order to CBOE and the transaction executes on CBOE and clears in Broker A's OCC Clearing account, ORF will be collected by ISE from Broker A's clearing account at OCC via direct debit. While this transaction was executed on a market other than ISE, it was cleared by an ISE Member in the member's OCC clearing account in the customer range, therefore there is a regulatory nexus between ISE and the transaction. If Broker A was not an ISE Member, then no ORF should be assessed and collected because there is no nexus; the transaction did not execute on ISE nor was it cleared by an ISE Member.

In the case where a Member both executes a transaction and clears the transaction, the ORF will be assessed to and collected from that Member. In the case where a Member executes a transaction and a different Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction and not the Member who executes the transaction. In the case where a non-Member executes a transaction at an away market and a Member clears the transaction, the ORF will be assessed to and collected from the Member who clears the transaction. In the case where a Member executes a transaction on ISE and a non-Member clears the transaction, the ORF will be assessed to the Member that executed the transaction on ISE and collected from the non-Member who cleared the transaction. In the case where a Member executes a transaction at an away market and a non-Member clears the transaction, the ORF will not be assessed to the Member who executed the transaction or collected from the non-Member who cleared the transaction because the Exchange does not have access to the data to make absolutely certain that ORF should apply. Further, the data does not allow the Exchange to identify the Member executing the trade at an away market.

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the

Exchange of the supervision and regulation of member customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as Office of the General Counsel, technology, and internal audit. Indirect expenses were approximately 39% of the total regulatory costs for 2023. Thus, direct expenses were approximately 61% of total regulatory costs for 2023.⁸

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its Members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange is proposing to reduce the amount of ORF that will be collected by the Exchange from \$0.0014 per contract side to \$0.0013 per contract side. The Exchange issued an Options Trader Alert on June 30, 2023 indicating the proposed rate change for August 1, 2023.⁹

The proposed reduction is based on current levels of options volume. The below table displays monthly total volume for 2023.¹⁰

⁸ These numbers are taken from the Exchange's 2023 Regulatory Budget.

⁹ See Options Trader Alert 2023-15.

¹⁰ Volume data in the table represents numbers of contracts; each contract has two sides.

Month	Total Volume	Customer Sides
January 2023	919,299,330	802,712,235
February 2023	883,234,837	780,284,838
March 2023	1,052,984,722	915,674,991
April 2023	760,808,909	67,318,772
May 2023	944,534,205	826,490,407
June 2023 ¹¹	909,616,267	801,688,960

Options volumes remained higher in 2023 with March 2023 exceeding 1,000,000,000 total contracts, higher than any month in 2022. With respect to customer options volume, it also remains high in 2023. There can be no assurance that the Exchange’s regulatory costs for the remainder of 2023 will not differ materially from the Exchange’s budgeted amount, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue that may be generated utilizing an ORF rate of \$0.0014 per contract side may result in revenue which exceeds the Exchange’s estimated regulatory costs for 2023 if options volumes remain at levels higher than forecasted. ISE lowered its ORF in 2022 to account for the options volume in 2022. The Exchange proposes to reduce its ORF to \$0.0013 per contract side to ensure that revenue does not exceed the Exchange’s estimated regulatory costs in 2023. Particularly, the Exchange believes that reducing the ORF when combined with all of the Exchange’s other regulatory fees and fines, would allow the Exchange to continue covering a

¹¹ June numbers reflect volumes through June 29, 2023.

material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the rate of \$0.0014 per contract side.¹²

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. If the Exchange determines regulatory revenues may exceed or are projected to exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission and notifying¹³ its Members via an Options Trader Alert.¹⁴

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹⁵ Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act¹⁶, which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁷ requirement that the rules of an exchange not be designed to permit unfair discrimination

¹² The Exchange notes that its regulatory responsibilities with respect to Member compliance with options sales practice rules have largely been allocated to FINRA under a 17d-2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

¹³ The Exchange provides Members with such notice at least 30 calendar days prior to the operative date of the change. See Options Trader Alert 2023-15.

¹⁴ The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange’s projected regulatory revenue, including projected revenue from ORF, along with projected regulatory expenses.

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(4).

¹⁷ 15 U.S.C. 78f(b)(5).

between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee change is reasonable because customer transactions will be subject to a lower ORF fee as of August 1, 2023 and the amount of the lower fee will fund a reasonable portion of the Exchange's regulatory costs. Moreover, the proposed reduction is necessary for the Exchange to avoid collecting revenue, in combination with other regulatory fees and fines, that would be in excess of its anticipated regulatory costs.

The Exchange designed the ORF to generate revenues that would be less than the amount of the Exchange's regulatory costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may collect revenue which would exceed its regulatory costs. Indeed, the Exchange notes that when taking into account the potential that recent options volume persists, it estimates the ORF may generate revenues that would cover more than the approximated Exchange's projected regulatory costs. As such, the Exchange believes it's reasonable and appropriate to reduce the ORF amount from \$0.0014 to \$0.0013 per contract side.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all Members on all their transactions that clear in the customer range at OCC.¹⁸ The Exchange believes the ORF ensures fairness by assessing higher

¹⁸ If the OCC clearing member is an ISE member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not an ISE member, ORF is collected only on the cleared customer contracts executed at ISE, taking into account any CMTA

fees to those Members that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into customer complaints and the terminations of registered persons. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., Member proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its Members, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG")¹⁹ the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses.

instructions which may result in collecting the ORF from a non-member.

¹⁹ ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its Members.

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. This proposal does not create an unnecessary or inappropriate intra-market burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. The Exchange notes, however, the proposed change is not designed to address any competitive issues. Indeed, this proposal does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

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 is effective upon filing pursuant to Section 19(b)(3)(A)²⁰ of the Act and subparagraph (f)(2) of Rule 19b-4²¹ thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f)(2).

summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)²² of the Act to determine whether the proposed rule change 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-ISE-2023-14 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-2023-14. This file number should be included on the subject line if email 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the

²² 15 U.S.C. 78s(b)(2)(B).

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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-ISE-2023-14 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF 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).