

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-101349; File No. SR-ISE-2024-48)

October 15, 2024

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 3

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 October 1, 2024, 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 Exchange's Pricing Schedule at Options 7, Section 3.

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 in Options 7, Section 3.

Today, as set forth in Options 7, Section 3, the Exchange assesses all market participants (except Priority Customers)³ a uniform regular order maker fee of \$0.70 per contract for Non-Select Symbol⁴ executions that add liquidity on the Exchange. Priority Customers are assessed a \$1.00 per contract regular order maker rebate in Non-Select Symbols.⁵ Additionally, the Exchange also currently offers Members an additional rebate of \$0.14 per contract if they execute more than 0.10% of Regular Order Non-Select Symbol Priority Customer volume (excluding Crossing Orders⁶ and Responses to Crossing Orders)⁷ calculated as a percentage of Customer Total Consolidated Volume⁸ per day in a given month ("Note 15 Incentive").⁹ The

³ 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).

⁴ "Non-Select Symbols" are options overlying all symbols excluding Select Symbols. "Select Symbols" are options overlying all symbols listed on the Exchange that are in the Penny Interval Program.

⁵ In addition, for Priority Customer orders adding liquidity in Non-Select Symbols, there is no fee or rebate provided when trading against Priority Customer complex orders that leg into the regular order book. See Options 7, Section 3, note 18.

⁶ A "Crossing Order" is an order executed in the Exchange's Facilitation Mechanism, Solicited Order Mechanism, Price Improvement Mechanism (PIM) or submitted as a Qualified Contingent Cross order. For purposes of this Pricing Schedule, orders executed in the Block Order Mechanism are also considered Crossing Orders.

⁷ "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.

⁸ "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.

⁹ See Options 7, Section 3, note 15.

Note 15 Incentive is designed to encourage Members to transact in greater regular Non-Select Symbol Priority Customer volume on the Exchange to receive rebates up to \$1.14 per contract (i.e., the \$1.00 base maker rebate plus the additional \$0.14 Note 15 Incentive).

The Exchange now proposes to amend the Note 15 Incentive by increasing the additional \$0.14 rebate to \$0.18 per contract. The additional rebate qualifications are not changing under this proposal. Accordingly, Members would be eligible to receive higher rebates of up to \$1.18 per contract (i.e., the base \$1.00 maker rebate plus the proposed additional \$0.18 Note 15 Incentive) under this proposal when sending the same amount of regular Non-Select Symbol Priority Customer volume as they do today. Ultimately, the Exchange believes that the proposed changes will attract more Priority Customer Non-Select Symbol order flow to ISE because Members may be incentivized to send such order flow to ISE to receive the increased rebate.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹¹ 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

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) and (5).

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’”¹²

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.”¹³

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 eighteen 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

¹² 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)).

¹³ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

increase its liquidity and market share relative to its competitors.

The Exchange believes that the proposed changes to the Note 15 Incentive are reasonable for the reasons that follow. As discussed above, the Exchange is increasing the additional \$0.14 rebate to \$0.18 per contract without amending the additional rebate volume qualifications discussed above. Accordingly, Members would be eligible to receive higher rebates of up to \$1.18 per contract (i.e., the base \$1.00 maker rebate plus the proposed additional \$0.18 Note 15 Incentive) under this proposal when sending the same amount of regular Non-Select Symbol Priority Customer volume as they do today. As discussed above, the Exchange believes that the proposed changes will attract more Priority Customer Non-Select Symbol order flow to ISE because Members may be incentivized to send such order flow to ISE to receive the increased rebate. Increased Priority Customer order flow in Non-Select Symbols would create additional liquidity to the benefit of all market participants and investors that trade on the Exchange.

The Exchange further believes that increasing the Note 15 Incentive from \$0.14 to \$0.18 per contract is equitable and not unfairly discriminatory because the proposed change will apply uniformly to all similarly situated market participants. The Exchange believes that it is equitable and not unfairly discriminatory to offer the Note 15 Incentive to only Priority Customers because Priority Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other 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.

The Exchange does not believe that the proposed changes to the Note 15 Incentive to increase the additional \$0.14 rebate to \$0.18 per contract will impose an undue burden on intra-market competition as the proposal will apply uniformly to all Priority Customers. While the proposed Note 15 incentive will only apply to Priority Customers, Priority Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other 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 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.¹⁴ 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-ISE-2024-48 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-2024-48. This file number should be included on the subject line if email is used. To help the Commission process and review your

¹⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

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 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-2024-48 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.¹⁵

Sherry R. Haywood,

Assistant Secretary.

¹⁵ 17 CFR 200.30-3(a)(12).