SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-101547; File No. SR-ISE-2024-49)

November 7, 2024

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt a New Approach to the Options Regulatory Fee (ORF) in 2025

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on October 31, 2024, Nasdaq ISE, LLC ("ISE" or "Exchange") filed with the Securities and Exchange Commission (the "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 9C regarding the Options Regulatory Fee.

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments to be operative on January 1, 2025.

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

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

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 amend its current ORF in several respects. ISE proposes to amend its methodology of collection to: (1) specify that it is including options transactions in ISE proprietary products; and (2) assess ORF in all clearing ranges except market makers who clear as "M" at The Options Clearing Corporation ("OCC"). Additionally, ISE will assess a different rate for trades executed on ISE ("Local ORF Rate") and trades executed on non-ISE exchanges ("Away ORF Rate").

Background on Current ORF

Today, ISE assesses its ORF for each Customer[3] option transaction that is either: (1) executed by a Member[4] on ISE; or (2) cleared by an ISE Member at OCC in the Customer range,[5] even if the transaction was executed by a non-Member of ISE, regardless of the exchange on which the transaction occurs.[6] If the OCC clearing member is an ISE Member, ORF is assessed and collected on all ultimately cleared Customer contracts (after adjustment for

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3 Today, ORF is collected from Customers, Professionals and broker-dealers that are not affiliated with a clearing member that clear in the "C" range at OCC. See supra notes 13 and 14 for descriptions of Priority Customers and Professional Customers.

4 The term "Member" means an organization that has been approved to exercise trading rights associated with Exchange Rights. See General 1, Section 1(a)(13).

5 Market 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.

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

CMTA[7]); 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.[8] The current ISE ORF is $0.0013 per contract side.

Today, 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. Today, 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. Today, 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. Today, 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. Today, in the case where a Member executes a transaction at an away market and a non-Member ultimately 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

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7 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.

8 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.

the trade at an away market.

ORF Revenue and Monitoring of ORF

Today, the Exchange monitors the amount of revenue collected from the ORF ("ORF Regulatory Revenue") to ensure that it, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs.[9] In determining whether an expense is considered an Options 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 Options Regulatory Cost.

ORF Regulatory Revenue, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the Options 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. Options 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 are only those expenses that are in support of the regulatory functions, such areas include Office of the General Counsel, technology, finance, and internal audit. Indirect expenses will not exceed 35% of the total Options Regulatory Costs. Thus, direct expenses would be 65% of total Options Regulatory Costs for 2024.[10]

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9 The regulatory costs for options comprise a subset of the Exchange's regulatory budget that is specifically related to options regulatory expenses and encompasses the cost to regulate all Members' options activity ("Options Regulatory Cost").

10 Direct and indirect expenses are based on the Exchange's 2024 Regulatory Budget.

The ORF is designed to recover a material portion of the Options Regulatory 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 for January 1, 2025

ISE has been reviewing it methodologies for the assessment and collection of ORF. As a result of this review, ISE proposes to revamp the current process of assessing and collecting ORF in various ways. Below ISE will explain the modelling it performed and the outcomes of the modelling which have led the Exchange to propose the below changes.

Effective January 1, 2025, ISE proposes to assess ORF to each ISE Member for multi-listed options transactions, including options transactions in ISE proprietary products,[11] cleared by OCC in all clearing ranges except market makers who clear as "M" at OCC ("Market Makers")[12] where: (1) the execution occurs on ISE or (2) the execution occurs on another exchange and is cleared by an ISE Member. With this change, ISE proposes to amend its current ORF to assess ORF on Priority Customer,[13] Professional Customer,[14] and Firm Proprietary[15] and

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11 Proprietary products are products with intellectual property rights that are not multi-listed. ISE lists proprietary products.

12 Capacity "M" covers Market Makers registered on ISE and market makers registered at non-ISE exchanges.

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). Unless otherwise noted, when used in this Pricing Schedule the term "Priority Customer" includes "Retail". See Options 7, Section 1(c).

14 A "Professional Customer" is a person or entity that is not a broker/dealer and is not a Priority Customer. See Options 7, Section 1(c). The "C" range at OCC includes both Priority Customer and Professional Customer transactions.

15 A "Firm Proprietary" order is an order submitted by a Member for its own proprietary account. See Options 7, Section 1(c).

Broker-Dealer[16] transactions. All market participants, except Market Makers, would be subject to ORF.

The ORF would be collected by OCC on behalf of ISE from (1) ISE clearing members for all Priority Customer, Professional Customer, Firm Proprietary and Broker-Dealer transactions they clear or (2) non-members for all Priority Customer, Professional Customer, Firm Proprietary and Broker-Dealer transactions they clear that were executed on ISE. This model collects ORF where there is a nexus with ISE and does not collect ORF from a non-Member where the transaction takes place away from the Exchange.

Further, effective January 1, 2025, the Exchange proposes to establish a different ORF for trades executed on ISE ("Local ORF Rate") and trades executed on non-ISE exchanges ("Away ORF Rate") by market participants. For Priority Customer, Professional Customer, and broker-dealer (not affiliated with a clearing member) transactions that clear in the "C" range at OCC transactions (collectively "Customers") the Exchange proposes to assess a Local ORF Rate of $0.01169 per contract and an Away ORF Rate of $0.00 per contract. For Firm Proprietary and Broker-Dealer transactions that clear in the "F" range at OCC (collectively "Firm Proprietary and Broker-Dealer Transactions") the Exchange proposes to assess a Local ORF Rate of $0.000067 per contract and an Away ORF Rate of $0.000067 per contract. The combined amount of Local ORF and Away ORF collected may not exceed 88% of Options Regulatory Cost. ISE will ensure that ORF Regulatory Revenue does not exceed Options Regulatory Cost. As is the case today, the Exchange will notify Members via an Options Trader Alert of these changes at least 30 calendar days prior to January 1, 2025.

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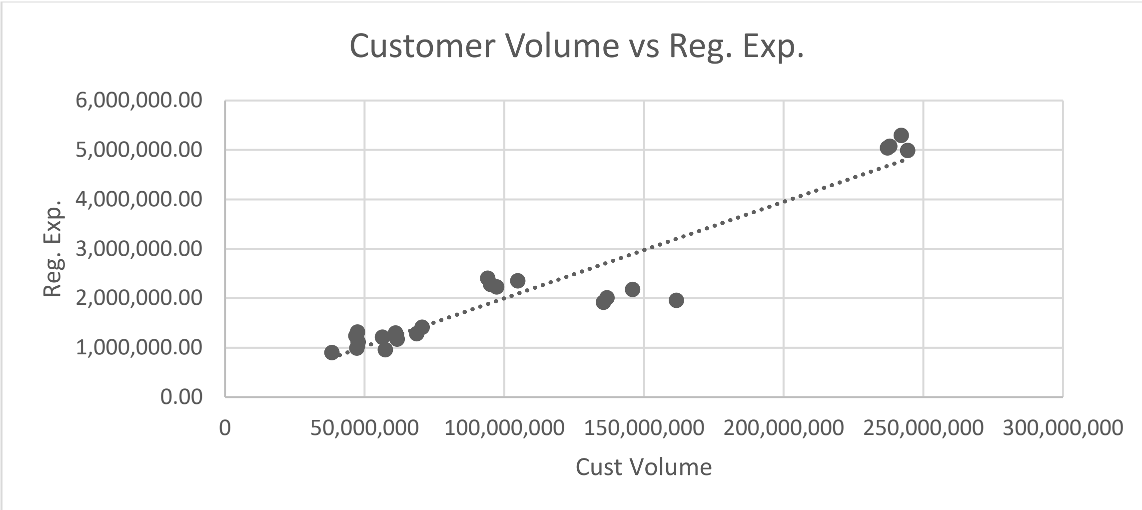
16 A "Broker-Dealer" order is an order submitted by a Member for a broker-dealer account that is not its own proprietary account. See Options 7, Section 1(c). A Broker-Dealer clears in the "F" range at OCC.

The Exchange utilized historical and current data from its affiliated options exchanges to create a new regression model that would tie expenses attributable to regulation to a respective source.[17] To that end, the Exchange plotted Customer volumes from each exchange[18] against Options Regulatory Cost from each exchange for the Time Period. Specifically, the Exchange utilized standard charting functionality to create a linear regression. The charting functionality yields a "slope" of the line, representing the marginal cost of regulation, as well as an "intercept," representing the fixed cost of regulation. The Exchange considered using non-linear models, but concluded that the best R^2 ("R-Squared")[19] results came from a standard y = Mx +B format for regulatory expense. The R-Squared for the below charting method ranged from 85% to 95% historically. As noted, the plots below represent the Time Period. The X-axis reflects Customer volumes by exchange, by quarter and the Y-axis reflects regulatory expense by exchange.

[17] This new model seeks to provide a new approach to attributing Options Regulatory Cost to Options Regulatory Expense. In creating this model, the exchange did not rely on data from a single SRO as it had in the past.

[18] The Exchange utilized data from all Nasdaq affiliated options exchanges to create this model from 2023 Q3 through 2024Q2 ("Time Period").

[19] R-Squared is a statistical measure that indicates how much of the variation of a dependent variable is explained by an independent variable in a regression model. The formula for calculating R-squared is: R2=1−Unexplained Variation/Total Variation.



The results of this modelling indicated a high correlation and intercept for the baseline cost of regulating the options market as a whole. Specifically, the regression model indicated that (1) the marginal cost of regulation is easily measurable, and significantly attributable to Customer activity; and (2) the fixed cost of setting up a regulatory regime should arguably be dispersed across the industry so that all options exchanges have substantially similar revenue streams to satisfy the "intercept" element of cost. When seeking to offset the "set-up" cost of regulation, the Exchange attempted several levels of attribution. The most successful attribution was related to industry wide Firm Proprietary and Broker-Dealer Transaction volume. Of note, through analysis of the results of this regression model, there was no positive correlation that could be established between Customer away volume and regulatory expense. This led the Exchange to utilize a model with a two-factor regression on a quarterly basis for the last four quarters of volumes relative to the pool of expense data for the six Nasdaq affiliated options exchanges. Once again, standard spreadsheet functionality (including the Data Analysis Packet) was used to determine the mathematics for this model. The results of this two-factor model, which resulted in the attribution of Customer Local ORF and Firm Proprietary and Broker-Dealer Transaction Local and Away ORF, typically increased the R-Squared (goodness of fit) to

>97% across multiple historical periods.[20]

Utilizing the new regression model, and assumptions in the proposal, the model demonstrates that Customer volumes are directly attributable to marginal cost, and also shows that Firm Proprietary and Broker-Dealer Transaction volumes industry-wide are a valid method (given the goodness of fit) to offset the fixed cost of regulation. Applying the regression coefficient values historically, the Exchange established a "normalization" by per options exchange. This "normalization" encompassed idiosyncratic exchange expense-volume relationships which served to tighten the attributions further while not deviating by more than 30% from the mean for any single options exchange in the model. The primary driver of this need for "normalization" are negotiated regulatory contracts that were negotiated at different points in time, yielding some differences in per contract regulatory costs by exchange. Normalization is therefore the average of a given exchange's historical (prior 4 quarters) ratio of regulatory expense to revenue when using the regressed values (for Customer Local ORF and Firm Proprietary and Broker-Dealer Transaction Local and Away ORF) that yields an effective rate by exchange. The "normalization" was then multiplied to a "targeted collection rate" of approximately 88% to arrive at ORF rates for Customer, Firm Proprietary and Broker-Dealer Transactions. Of note, when comparing the ORF rates generated from this method, historically, there appears to be a very tight relationship between the estimated modeled collection and actual expense and the regulatory expenses for that same period. In summary, the model does not appear to increase marginal returns.

One other important aspect of this modeling is the input of Options Regulatory Costs.

[20] The Exchange notes that various exchanges negotiate their respective contracts independently with FINRA creating some variability. Additionally, an exchange with a floor component would create some variability.

The Exchange notes that in defining Options Regulatory Costs it accounts for the nexus between the expense and options regulation. By way of example, the Exchange excludes certain indirect expenses such as payroll expenses, accounts receivable, accounts payable, marketing, executive level expenses and corporate systems.

The Exchange would continue to monitor the amount of Options Regulatory Revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs. In determining whether an expense is considered an Options Regulatory Cost, the Exchange would continue to review 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 will continue to offset Options Regulatory Cost. Members will continue to be provided with 30 calendar day notice of any change to ORF.

As is the case today, ORF Regulatory Revenue, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the Options Regulatory Costs to the Exchange for the supervision and regulation of Members' transactions, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. As discussed above, Options Regulatory Costs include direct regulatory expenses[21] and certain indirect expenses in support of the regulatory function.[22]

Finally, the Exchange notes that this proposal will sunset on July 1, 2025, at which point

[21] 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.

[22] The indirect expenses include support from such areas as Office of the General Counsel, technology, finance and internal audit.

the Exchange would revert back to the ORF methodology and rate ($0.0013 per contract side) that was in effect prior to this rule change.[23]

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.[24] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act[25], 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)[26] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Proposal for January 1, 2025

The Exchange believes the proposed ORF to be assessed on January 1, 2025, is reasonable, equitable and not unfairly discriminatory for various reasons. First, as of January 1, 2025, the Exchange would expand the collection of ORF to all clearing ranges, except Market Makers, provided the transaction was executed by an ISE Member or cleared by an ISE Member. With this amendment, ISE would begin to assess Firm Proprietary and Broker-Dealer Transactions an ORF, provided the transactions were executed by an ISE Member or cleared by an ISE Member, including options transactions in proprietary products. Second, as of January 1,

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23 The Exchange proposes to reconsider the sunset date in 2025 and determine whether to proceed with the proposed ORF structure at that time.

24 15 U.S.C. 78f(b).

25 15 U.S.C. 78f(b)(4).

26 15 U.S.C. 78f(b)(5).

2025, the Exchange would assess different rates to Customer transactions for the Local ORF Rate and Away ORF Rate as compared to Firm Proprietary and Broker-Dealer Transactions. Third, as of January 1, 2025, the combined amount of Local ORF and Away ORF collected would not exceed 88% of Options Regulatory Cost as all Members, except Market Makers, would be assessed ORF.

The Exchange believes that assessing all Members, except Market Makers, an ORF is reasonable, equitable and not unfairly discriminatory. While the Exchange acknowledges that there is a cost to regulate Market Makers, unlike other market participants, Market Makers have various regulatory requirements with respect to quoting as provided for in Options 2, Section 4. Specifically, Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. Primary Market Makers are obligated to quote in the Opening Process and intra-day.[27] Additionally, Market Makers may enter quotes in the Opening Process to open an option series and they are required to quote intra-day.[28] Further, unlike other market participants, Primary Market Makers and Market Makers have obligations to compete with other Market Makers to improve the market in all series of options classes to which the Market Maker is appointed and to update market quotations in response to changed market conditions in all series of options classes to which the Market Maker is appointed.[29] Also, Primary Market Makers and Market Makers incur other costs imposed by the Exchange related to their quoting obligations in addition to other fees paid by other market participants. Market Makers are subject to a number of fees, unlike other market participants. Primary

[27] See ISE Options 3, Section 8 and Options 2, Section 5.

[28] Id.

[29] See ISE Options 2, Section 4(b)(1) and (3).

Market Makers and Competitive Market Makers pay Access Fees[30] in addition to other fees paid by other market participants. These liquidity providers are critical market participants in that they are the only market participants that are required to provide liquidity to ISE and are necessary for opening the market. Excluding Market Maker transactions from ORF allows these market participants to manage their costs and consequently their business model more effectively thus enabling them to better allocate resources to other technologies that are necessary to manage risk and capacity to ensure that these market participants continue to compete effectively on ISE in providing tight displayed quotes which in turn benefits markets generally and market participants specifically. Finally, the Exchange notes that Market Makers may transact orders in addition to submitting quotes on the Exchange. This proposal would except orders submitted by Market Makers, in addition to quotes, for purposes of ORF. Market Makers utilize orders in their assigned options series to sweep the order book. The Exchange believes the quantity of orders utilized by Market Makers in their assigned series is de minimis. In their unassigned options series, Market Makers utilize orders to hedge their risk or respond to auction. The Exchange notes that the number of orders submitted by Market Makers in their unassigned options series are far below the cap[31] and therefore de minimis.

The Exchange believes including options transactions in ISE proprietary products is reasonable, equitable and not unfairly discriminatory because ISE lists various proprietary products for which the Exchange incurs Options Regulatory Costs. The Exchange believes that

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30 See ISE Options 7, Section 8A.

31 See ISE Options 2, Section 6(b)(1) and (2). The total number of contracts executed during a quarter by a Competitive Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded by such Competitive Market Maker in classes to which it is appointed and with respect to which it was quoting pursuant to Options 2, Section 5(e)(1). The total number of contracts executed during a quarter by a Primary Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded per each Primary Market Maker Membership.

only exchanges that list proprietary products should be able to collect a Local ORF on their products. ISE notes that there are a small number of ISE proprietary products transacted as compared to multi-list options. Also, ISE would only collect an ORF for proprietary products transacted on its market. As such, the Exchange believes that only a Local ORF should be applied to an ISE proprietary product.

The Exchange believes that assessing different rates to Customer transactions for the Local ORF Rate and Away ORF Rate as compared to Firm Proprietary and Broker-Dealer Transactions and collecting no more than 88% of Options Regulatory Cost is reasonable, equitable and not unfairly discriminatory. Customer transactions account for a material portion of ISE's Options Regulatory Cost.[32] Customer transactions in combination with Firm Proprietary and Broker-Dealer Transactions account for a large portion of the Exchange's surveillance expense. Therefore, the Exchange believes that 88% of Options Regulatory Cost is appropriate and correlates to the degree of regulatory responsibility and Options Regulatory Cost borne by the Exchange. With respect to Customer transactions, options volume continues to surpass volume from other options participants. Additionally, there are rules in the Exchange's Rulebook that deal exclusively with Customer transactions, such as rules involving doing business with a Customer, which would not apply to Firm Proprietary and Broker-Dealer Transactions.[33] For these reasons, regulating Customer trading activity is "much more labor-

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32 The Exchange notes that the regulatory costs relating to monitoring Members with respect to Customer trading activity are generally higher than the regulatory costs associated with Members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Members that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the Member's relationship with its Customers via more labor-intensive exam-based programs. 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 of the regulatory program.

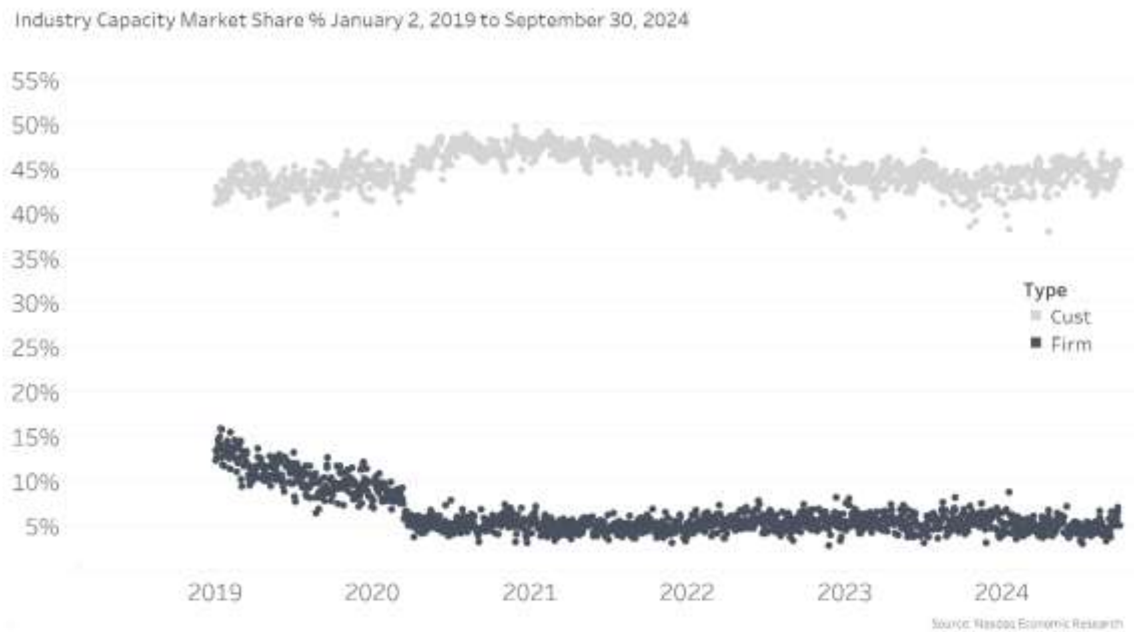
33 See ISE Options 10 Rules.

intensive" and therefore, more costly. The Exchange believes that a large portion of the Options Regulatory Cost relates to Customer allocation because obtaining Customer information may be more time intensive. For example, non-Customer market participants are subject to various regulatory and reporting requirements which provides the Exchange certain data with respect to these market participants. In contrast, Customer information is known by Members of the Exchange and is not readily available to ISE.[34] The Exchange may have to take additional steps to understand the facts surrounding particular trades involving a Customer which may require requesting such information from a broker-dealer. Further, Customers require more Exchange regulatory services based on the amount of options business they conduct. For example, there are Options Regulatory 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 Options Regulatory Costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the Options Regulatory Costs associated with administering the non-Customer component when coupled with the amount of volume attributed to such Customer transactions. Utilizing the new regression model, and assumptions in the proposal, it appears that ISE's Customer regulation occurs to a large extent on Exchange. Utilizing the new regression model, and assumptions in the proposal, the Exchange does not believe that significant Options Regulatory Costs should be attributed to Customers for activity that may occur across options markets. To that end, with this proposal, the Exchange would assess Customers a Local ORF, but not an Away ORF rate.

In contrast, the Options Regulatory Cost of regulating Firm Proprietary and Broker-Dealer Transactions is materially less than the Options Regulatory Costs of regulating Customer

[34] The Know Your Customer or "KYC" provision is the obligation of the broker-dealer.

transactions, as explained above. The below chart derived from OCC data reflects the percentage of transactions by market participant.



With this model, the addition of Firm Proprietary and Broker-Dealer Transactions to the collection of ORF does not entail significant volume when compared to Customer transactions. As these market participants are more sophisticated, the Exchange notes that there are not the same protections in place for Firm Proprietary and Broker-Dealer Transactions as compared to Customer transactions. Therefore, with the proposed model, the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions. However, the Exchange notes that it appears from the new regression model and assumptions in the proposal, that unlike Customer transactions, the regulation of Firm Proprietary and Broker-Dealer Transactions occurs both on the Exchange and across options markets. To that end, the Exchange proposes to assess Firm Proprietary and Broker-Dealer Transactions both a Local ORF and an Away ORF in contrast to Customer transactions that would only be assessed a Local ORF. The Exchange believes that not assessing Market Maker transactions an ORF permits these market participants to utilize their resources to quote tighter in the market. Tighter quotes benefits Customers as well as other market participants who interact with that liquidity.

The Exchange's proposal to establish both a Local ORF Rate and an Away ORF Rate and allocate the portion of Options Regulatory Cost differently between the two separate rates, by market participant, ensures that the Local ORF Rate and Away ORF Rate reflect the amount of Options Regulatory Costs associated with different types of surveillances and are reasonable, equitable and not unfairly discriminatory. The Exchange is responsible for regulating activity on its market as well as activity that may occur across options markets. The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess only Firm Proprietary and Broker-Dealer Transactions an Away ORF. With this model, while the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions, it occurs both on the Exchange and across options markets.[35] The Exchange believes that assessing the Firm Proprietary and Broker-Dealer Transactions the same rate for Local ORF and Away ORF is appropriate given the lower volume that is attributed to these Members combined with the activity that is required to be regulated both on the Exchange and across options markets. The Exchange notes that there are Exchange rules that involve cross market surveillances that relate to activities conducted by Firm Proprietary and Broker-Dealer Members.[36] While not large in number, when compared to the overall number of Exchange rules

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35 ISE pays the Financial Industry Regulatory Authority ("FINRA") to perform certain cross-market surveillances on its behalf. In order to perform cross-market surveillances, Consolidated Audit Trail ("CAT") data is utilized to match options transactions to underlying equity transactions. This review is data intensive given the volumes of information that are being reviewed and analyzed.

36 ISE conducts surveillances and enforces ISE Rules, however only a subset of those rules is subject to cross-market surveillance, such as margin and position limits. Of note, some ISE trading rules are automatically enforced by ISE's System.

that are surveilled by ISE for on-Exchange activity, the Away ORF that would be assessed to Firm Proprietary and Broker-Dealer regulation would account for those costs. Additionally, the Exchange believes that limiting the amount of ORF assessed for activity that occurs on non-ISE exchanges avoids overlapping ORFs that would otherwise be assessed by ISE and other options exchanges that also assess an ORF. Also, the Exchange's proposal continues to ensure that Options Regulatory Revenue, in combination with other regulatory fees and fines, does not exceed Options Regulatory Costs. Fines collected by the Exchange in connection with a disciplinary matter will continue to offset Options Regulatory Cost.

Capping the combined amount of Local ORF and Away ORF collected at 88% of Options Regulatory Cost commencing January 1, 2025, is reasonable, equitable and not unfairly discriminatory as given these factors. The Exchange will review the ORF Regulatory Revenue at the end of January 2025 and would amend the ORF if it finds that its ORF Regulatory Revenue exceeds its projections.[37]

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 intra-market competition not necessary or appropriate in furtherance of the purposes of the Act.

The proposed changes to ORF do not impose an undue burden on inter-market competition because ORF is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange notes, however, the proposed change is not designed to address any competitive issues. The Exchange is obligated to ensure that the amount of ORF Regulatory Revenue, in combination with its other regulatory fees and fines, does not exceed ORF Regulatory Cost.

[37] ISE would submit a rule change to the Commission to amend ORF rates.

Proposal for January 1, 2025

Excluding Market Makers does not impose an undue burden on intra-market competition because, unlike other market participants, Market Makers have various regulatory requirements with respect to quoting as provided for in Options 2, Section 4. Specifically, Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. Primary Market Makers are obligated to quote in the Opening Process and intra-day.[38] Additionally, Market Makers may enter quotes in the Opening Process to open an option series and they are required to quote intra-day.[39] Further, unlike other market participants, Primary Market Makers and Market Makers have obligations to compete with other Market Makers to improve the market in all series of options classes to which the Market Maker is appointed and to update market quotations in response to changed market conditions in all series of options classes to which the Market Maker is appointed.[40] Also, Primary Market Makers and Market Makers incur other costs imposed by the Exchange related to their quoting obligations in addition to other fees paid by other market participants. Market Makers are subject to a number of fees, unlike other market participants. Primary Market Makers and Competitive Market Makers pay Access Fees[41] in addition to other fees paid by other market participants. These liquidity providers are critical market participants in that they are the only market participants that are required to provide liquidity to ISE and are necessary for opening the market. Excluding Market Maker transactions from ORF does not impose an intra-market burden on competition, rather it allows these market participants to manage their costs and

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38 See ISE Options 3, Section 8 and Options 2, Section 5.

39 Id.

40 See ISE Options 2, Section 4(b)(1) and (3).

41 See ISE Options 7, Section 8A.

consequently their business model more effectively thus enabling them to better allocate resources to other technologies that are necessary to manage risk and capacity to ensure that these market participants continue to compete effectively on ISE in providing tight displayed quotes which in turn benefits markets generally and market participants specifically. Finally, the Exchange notes that Market Makers may transact orders on the Exchange, in addition to submitting quotes. The Exchange's proposal to except orders submitted by Market Makers, in addition to quotes, for purposes of ORF does not impose an undue burden on intra-market competition because Market Makers utilize orders in their assigned options series to sweep the order book. Further, the Exchange believes the quantity of orders utilized by Market Makers in their assigned series is de minimis. In their unassigned options series, Market Makers utilize orders to hedge their risk or respond to auction. The Exchange notes that the number of orders submitted by Market Makers in their unassigned options series are far below the cap[42] and therefore de minimis.

Uniformly including options transactions in ISE proprietary products in ORF for all ISE Members does not impose an undue burden on intra-market competition. The Exchange believes that only exchanges that list proprietary products should be able to collect a Local ORF on their products. ISE notes that there are a small number of ISE proprietary products transacted as compared to multi-list options. Also, ISE would only collect an ORF for proprietary products transacted on its market.

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42 See ISE Options 2, Section 6(b)(1) and (2). The total number of contracts executed during a quarter by a Competitive Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded by such Competitive Market Maker in classes to which it is appointed and with respect to which it was quoting pursuant to Options 2, Section 5(e)(1). The total number of contracts executed during a quarter by a Primary Market Maker in options classes to which it is not appointed may not exceed twenty-five percent (25%) of the total number of contracts traded per each Primary Market Maker Membership.

The Exchange's proposal to expand the clearing ranges to specifically include Firm Proprietary and Broker-Dealer Transactions, in addition to Priority Customer and Professional Customer transactions, as of January 1, 2025, does not impose an undue burden on intra-market competition as Customer transactions account for a material portion of ISE's Options Regulatory Cost.[43] Customer transactions in combination with Firm Proprietary and Broker-Dealer Transactions account for a large portion of the Exchange's surveillance expense. With respect to Customer transactions, options volume continues to surpass volume from other options participants. Additionally, there are rules in the Exchange's Rulebook that deal exclusively with Customer transactions, such as rules involving doing business with a Customer, which would not apply to Firm Proprietary and Broker-Dealer Transactions.[44] For these reasons, regulating Customer trading activity is "much more labor-intensive" and therefore, more costly. Further, the Exchange believes that a large portion of the Options Regulatory Cost relates to Customer allocation because obtaining Customer information may be more time intensive. For example, non-Customer market participants are subject to various regulatory and reporting requirements which provides the Exchange certain data with respect to these market participants. In contrast, Customer information is known by Members of the Exchange and is not readily available to ISE.[45] The Exchange may have to take additional steps to understand the facts surrounding

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43 The Exchange notes that the regulatory costs relating to monitoring Members with respect to customer trading activity are generally higher than the regulatory costs associated with Members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating Members that engage in customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of customers, but also the Member's relationship with its customers via more labor-intensive exam-based programs. 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 of the regulatory program.

44 See ISE Options 10 Rules.

45 The Know Your Customer or "KYC" provision is the obligation of the broker-dealer.

particular trades involving a Customer which may require requesting such information from a broker-dealer. Further, Customers require more Exchange regulatory services based on the amount of options business they conduct. For example, there are Options Regulatory 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 Options Regulatory Costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the Options Regulatory Costs associated with administering the non-Customer component when coupled with the amount of volume attributed to such Customer transactions. Not attributing significant Options Regulatory Costs to Customers for activity that may occur across options markets does not impose an undue burden on intra-market competition because the data in the regression model demonstrates that ISE's Customer regulation occurs to a large extent on Exchange.

The Exchange believes that assessing Firm Proprietary and Broker-Dealer Transactions a different ORF and assessing both a Local ORF and an Away ORF to these transactions does not impose an undue burden on intra-market competition because the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions. With this model, the addition of Firm Proprietary and Broker-Dealer Transactions to the collection of ORF does not entail significant volume when compared to Customer transactions. Unlike Customer transactions, the regulation of Firm Proprietary and Broker-Dealer Transactions occurs both on the Exchange and across options markets. To that end, the Exchange proposes to assess Firm Proprietary and Broker-Dealer Transactions both a Local ORF and an Away ORF.

The Exchange's proposal to allocate the portion of costs differently between the Local

ORF and Away ORF does not create an undue burden on intra-market competition. The Exchange believes that each rate reflects the amount of Options Regulatory Costs associated with different types of surveillances and does not create an undue burden on competition as ISE Members, excluding except Market Makers, would be uniformly assessed either a Local ORF Rate or an Away ORF Rate depending on where the transaction occurred and whether the transaction was executed or cleared by an ISE Member. Also, the Exchange would uniformly assess the Local ORF Rate and an Away ORF Rate by market participant. The Exchange is responsible for regulating activity on its market as well as activity that may occur across options markets.

The Exchange believes that assessing only Firm Proprietary and Broker-Dealer Transactions an Away ORF does not create an undue burden on intra-market competition because while the regulation of Firm Proprietary and Broker-Dealer Transactions is less resource intensive than the regulation of Customer transactions, the regulation of Firm Proprietary and Broker-Dealer Transactions occurs both on the Exchange and across options markets.[46] The Exchange believes that assessing Firm Proprietary and Broker-Dealer Transactions the same rate for Local ORF and Away ORF is appropriate given the lower volume that is attributed to these Members combined with the activity that is required to be regulated both on the Exchange and across options markets. There are Exchange rules that involve cross market surveillances that relate to activities conducted by Firm Proprietary and Broker-Dealer Members.[47] While not

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46 ISE pays the Financial Industry Regulatory Authority ("FINRA") to perform certain cross-market surveillances on its behalf. In order to perform cross-market surveillances, Consolidated Audit Trail ("CAT") data is utilized to match options transactions to underlying equity transactions. This review is data intensive given the volumes of information that are being reviewed and analyzed.

47 ISE conducts surveillances and enforces ISE Rules, however only a subset of those rules is subject to cross-market surveillance, such as margin and position limits. Of note, some ISE trading rules are automatically enforced by ISE's System.

large in number, when compared to the overall number of Exchange rules that are surveilled by ISE for on-Exchange activity, the Away ORF that would be assessed to Firm Proprietary and Broker-Dealer Transactions would account for those Options Regulatory Costs. Additionally, the Exchange believes that limiting the amount of ORF assessed for activity that occurs on non-ISE exchanges does not impose a burden on intra-market competition, rather it avoids overlapping ORFs that would otherwise be assessed by ISE and other options exchanges that also assess an ORF. With this model, Customer transactions would be assessed a higher Local ORF, while not being assessed an Away ORF as compared to Firm Proprietary and Broker-Dealer Transactions. The Exchange believes that this difference in allocation is appropriate and correlates to the degree of regulatory responsibility and Options Regulatory Costs borne by different Members of the Exchange in light of the volume different Members transact on the Exchange.

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[48] and Rule 19b-4(f)(2)[49] thereunder.

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 necessary or appropriate in the public interest, for the protection of investors, or

48 15 U.S.C. 78s(b)(3)(A)(ii).

49 17 CFR 240.19b-4(f)(2).

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 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-2024-49 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-2024-49. 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 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-2024-49 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.[50]

Sherry R. Haywood,

Assistant Secretary.

[50] 17 CFR 200.30-3(a)(12).