

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99424; File No. SR-ISE-2024-04)

January 24, 2024

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Options 7, Section 4

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 January 12, 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 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 the Exchange’s Pricing Schedule at Options 7.³

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.

³ The Exchange initially filed the proposed pricing change on January 2, 2024 (SR-ISE-2024-01). On January 12, 2024, the Exchange withdrew that filing and submitted this filing.

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 4, Complex Order Fees and Rebates, to amend note 9 related to the Complex Order Fee for PIM Orders.⁴

Today, the Exchange assesses a \$0.10 per contract Complex Order Fee for PIM Orders to all Non-Priority Customer⁵ market participants (Market Makers,⁶ Firm Proprietary⁷/Broker Dealers,⁸ and Professional Customers,⁹) in Select¹⁰ and Non-Select¹¹ Symbols. Today, Priority Customers¹² are not assessed Complex Order Fee for PIM Orders in Select and Non-Select

⁴ The PIM is a process by which an Electronic Access Member can provide price improvement opportunities for a transaction wherein the Electronic Access Member seeks to facilitate an order it represents as agent, and/or a transaction wherein the Electronic Access Member solicited interest to execute against an order it represents as agent. See Options 3, Section 13.

⁵ “Non-Priority Customers” include Market Makers, Non-Nasdaq ISE Market Makers (FarMMs), Firm Proprietary / Broker-Dealers, and Professional Customers. See Options 7, Section 1(c).

⁶ The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See Options 1, Section 1(a)(21).

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

⁸ 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).

⁹ 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).

¹⁰ “Select Symbols” are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Interval Program. See Options 7, Section 1(c).

¹¹ “Non-Select Symbols” are options overlying all symbols excluding Select Symbols. See Options 7, Section 1(c).

¹² 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” as defined below. See Options 7, Section 1(c).

Symbols. Today, note 9 to Options 7, Section 4, reduces the \$0.10 per contract fee to \$0.05 per contract for all Non-Priority Customer orders provided Members execute an average daily volume (“ADV”) of 7,500 or more contracts in the PIM in a given month. Further, the \$0.10 per contract Complex Order Fee for PIM Orders is reduced to \$0.00 per contract for all Member orders provided the Members execute an ADV of 12,500 or more contracts in the Complex PIM. The Exchange applies the discounted fees retroactively to all eligible Complex PIM volume in that month once the threshold has been reached. Additionally, Complex Order Fees for PIM Orders (including Complex PIM Orders) apply to the originating and contra order.¹³

Proposal

At this time, the Exchange proposes to amend note 9 of Options 7, Section 4 to revise the second sentence to instead provide that “Other than for Priority Customer orders, Members that execute an ADV of 12,500 or more contracts in a given month in the Complex PIM will be charged a \$0.02 per contract fee.” The Exchange will continue to reduce the Complex Order Fees for PIM Orders from \$0.10 to \$0.05 per contract for all Non-Priority Customers that execute an ADV of 7,500 or more contracts in the Complex PIM in a given month. At this time, the Exchange would decrease the reduction for Complex Order Fees for Complex PIM Orders for Non-Priority Customers that execute an ADV of 12,500 or more contracts in a given month in the Complex PIM. Today, Priority Customers pay no Complex Order Fees for PIM Orders. Today, Members that execute an ADV of 12,500 or more contracts in a given month in the Complex PIM pay no Complex Order Fees for PIM Orders, except for Priority Customers who pay no Complex Order Fees for any PIM Orders. With this change, Non-Priority Customers

¹³ See note 11 of Options 7, Section 4.

would pay a \$0.02 per contract fee for Complex Order Fees for Complex PIM Orders, provided they execute an ADV of 12,500 or more contracts in a given month in the Complex PIM.

The Exchange proposes to amend note 9 of Options 7, Section 4 to add the words “Complex Fee for PIM Orders” in place of “fee” to make clear the applicable fee. Today, the Exchange assesses Regular Order¹⁴ and Complex Order¹⁵ PIM Fees. The addition of the words “Complex Fee for PIM Orders” clarifies that the fee in note 9 is a Complex Order fee. The Exchange proposes to add the words “Other than for Priority Customer orders,” to the beginning of the second sentence, similar to the first sentence, because Priority Customers pay no Complex Order Fee for PIM Orders today and would not have a fee to reduce. Additionally, the Exchange proposes to add the words “in a given month” to the second sentence, similar to the first sentence, to make clear the time period in which Members must execute the required ADV. Finally, the Exchange proposes to amend note 9 of Options 7, Section 4 to add the word “Complex” before “PIM” to make clear the note applies to Complex PIM Orders.

Despite the decrease in the discount, the Exchange will continue to offer Non-Priority Customers an opportunity to pay a lower Complex Order Fees for PIM Orders.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁶ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁷ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among

¹⁴ See Options 7, Section 3, Regular Order Fees and Rebates.

¹⁵ See Options 7, Section 4, Complex Order Fees and Rebates.

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(4) and (5).

members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’....”¹⁸

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.”¹⁹

¹⁸ 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)).

¹⁹ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of seventeen 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's proposal to amend note 9 of Options 7, Section 4 to decrease the reduction in the Complex Order Fee for PIM Orders for Non-Priority Customers that execute an ADV of 12,500 or more contracts in a given month in the Complex PIM from paying no fee to paying \$0.02 per contract is reasonable because, despite the decrease in the discount, the Exchange will continue to offer Non-Priority Customers an opportunity to pay a lower Complex Order Fees for PIM Orders from \$0.10 to \$0.02 per contract. Additionally, the Exchange will continue to reduce the Complex Order Fees for Complex PIM Orders from \$0.10 to \$0.05 per contract for all Non-Priority Customers that execute an ADV of 7,500 or more contracts in the Complex PIM in a given month. Unlike other market participants, Priority Customers pay no Complex Order Fee for PIM Orders. The proposed \$0.02 per contract Complex Order Fee for PIM Orders for Non-Priority Customers that execute an ADV of 12,500 or more contracts in a given month in the Complex PIM is competitive and remains lower than comparable fees at other options exchanges. BOX Exchange LLC ("BOX") assesses a \$0.05 per contract fee to its Professional Customer or Broker-Dealer and Market Maker for Complex Order Price Improvement Period ("COPIP") Orders.²⁰ Additionally, Miami International Securities

²⁰ See BOX's Fee Schedule.

Exchange, Inc. (“MIAX”) assesses a \$0.30 per contract fee to Public Customers that are not a Priority Customer, MIAX Market Maker, Non-MIAX Market Maker, Non-Member Broker-Dealer and Firm in its Complex Price Improvement Mechanism (“cPRIME”).²¹

The Exchange’s proposal to amend note 9 of Options 7, Section 4 to decrease the reduction in the Complex Order Fee for PIM Orders for Non-Priority Customers that execute an ADV of 12,500 or more contracts in a given month in the Complex PIM from paying no fee to paying \$0.02 per contract is equitable and not unfairly discriminatory because all Non-Priority Customers are eligible for the discount and would uniformly be assessed the lower fee provided they executed the requisite volume in a given month in the Complex PIM. Priority Customers are not eligible for the discount because they pay no Complex Order Fee for PIM Orders. 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 (particularly in response to pricing) in turn facilitates tighter spreads which may cause an additional corresponding increase in order flow from other market participants. Attracting more liquidity from Priority Customers will benefit all market participants that trade on the ISE.

The Exchange’s proposal to amend note 9 of Options 7, Section 4 to add the words “Complex Fee for PIM Orders” in place of “fee” to make clear the applicable fee is reasonable because the addition of these words makes clear that the fees in note 9 are Complex Order fees as compared to Regular Order fees. The Exchange’s proposal to add the words “Other than for Priority Customer orders,” to the beginning of the second sentence, similar to the first sentence, is reasonable because Priority Customers pay no Complex Order Fee for PIM Orders today and

²¹ See MIAX’s Fee Schedule.

would not have a fee to reduce. The addition of the language makes clear that the fees apply to Non-Priority Customers. The Exchange's proposal to add the words "in a given month" to the second sentence, similar to the first sentence, is reasonable because it makes clear the time period in which Members must execute the required ADV. Finally, the Exchange's proposal to amend note 9 of Options 7, Section 4 to add the word "Complex" before "PIM" is reasonable because it makes clear the note applies to Complex PIM Orders and not Regular PIM Orders. The technical amendments to the rule text of note 9 are intended to clarify the current rule text and do not substantively amend the rule text. The Exchange also believes the aforementioned technical amendments to the rule text of note 9 are equitable and not unfairly discriminatory as the rule text does not impact any Member.

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 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.

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. The Exchange's proposal to amend note 9 of Options 7, Section 4 to decrease the reduction in the Complex Order Fee for PIM Orders for Non-Priority Customers that execute an ADV of 12,500 or more contracts in a given month in the Complex PIM from paying no fee to paying \$0.02 per contract does not impose an undue burden on competition because all Non-Priority Customers are eligible for the discount and would uniformly be assessed the lower fee provided they executed the requisite volume in a given month in the Complex PIM. Unlike other market participants, Priority Customers are not eligible for the discount because they pay no Complex Order Fee for PIM Orders. 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 (particularly in response to pricing) in turn facilitates tighter spreads which may cause an additional corresponding increase in order flow from other market participants. Attracting more liquidity from Priority Customers will benefit all market participants that trade on the ISE.

The Exchange's proposal to amend note 9 of Options 7, Section 4 to add the words "Complex Fee for PIM Orders" in place of "fee" to make clear the applicable fee does not impose an undue burden on competition because the addition of these words makes clear that the fees in note 9 are Complex Order fees as compared to Regular Order fees. The Exchange's proposal to add the words "Other than for Priority Customer orders," to the beginning of the second sentence, similar to the first sentence, does not impose an undue burden on competition

because Priority Customers pay no Complex Order Fee for PIM Orders today and would not have a fee to reduce. Further, the addition of the language makes clear that the fees apply to Non-Priority Customers. The Exchange’s proposal to add the words “in a given month” to the second sentence, similar to the first sentence, does not impose an undue burden on competition because it makes clear the time period in which Members must execute the required ADV. Finally, the Exchange’s proposal to amend note 9 of Options 7, Section 4 to add the word “Complex” before “PIM” does not impose an undue burden on competition because it makes clear the note applies to Complex PIM Orders and not Regular PIM Orders. These technical amendments to the rule text of note 9 are intended to clarify the current rule text. The technical amendments do not substantively amend the rule text and do not impact any Member.

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 Act²² and Rule 19b-4(f)(2)²³ 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: (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).

²³ 17 CFR 240.19b-4(f)(2).

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-2024-04 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-2024-04. 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-2024-04 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.²⁴

Sherry R. Haywood,

Assistant Secretary.

²⁴ 17 CFR 200.30-3(a)(12).