

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-80922; File No. SR-ISE-2017-49)

June 14, 2017

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Schedule of Fees to (1) Reduce the Priority Customer Taker Fee for Regular Orders in SPY to \$0.35 Per Contract, and (2) Lower the Threshold of Net Zero Complex Contracts

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 31, 2017, Nasdaq ISE, LLC (“ISE” or “Exchange”) filed with the Securities and Exchange Commission (“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 its Schedule of Fees to (1) reduce the Priority Customer taker fee for regular orders in SPY to \$0.35 per contract, and (2) lower the threshold of net zero complex contracts from 2,000 contracts to 1,000 contracts.

The text of the proposed rule change is available on the Exchange’s Website at [www.ise.com](http://www.ise.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 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

The purpose of the proposed rule change is to amend the Schedule of Fees to (1) reduce the Priority Customer<sup>3</sup> taker fee for regular orders in SPY to \$0.35 per contract, and (2) lower the threshold of net zero complex contracts from 2,000 contracts to 1,000 contracts. Each of these changes is described in more detail below.

Priority Customer Taker Fee

Currently, the Exchange charges a taker fee for regular orders in Select Symbols<sup>4</sup> that is \$0.44 per contract for Market Maker<sup>5</sup> orders, \$0.45 per contract for Non-Nasdaq ISE Market

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<sup>3</sup> 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 Rule 100(a)(37A).

<sup>4</sup> "Select Symbols" are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Pilot Program.

<sup>5</sup> The term "Market Makers" refers to "Competitive Market Makers" and "Primary Market Makers" collectively. See ISE Rule 100(a)(25).

Maker,<sup>6</sup> Firm Proprietary,<sup>7</sup> Broker-Dealer,<sup>8</sup> and Professional Customer orders,<sup>9</sup> and \$0.40 per contract for Priority Customer orders. The Exchange now proposes to adopt a reduced Priority Customer taker fee of \$0.35 per contract for regular orders in SPY, which is the most actively traded name on the Exchange. This taker fee will remain unchanged for Select Symbols other than SPY. The Exchange believes that this reduction in fees will attract additional Priority Customer orders in SPY to the Exchange.

#### Net Zero Complex Orders

Currently, the Exchange does not provide Priority Customer rebates for complex orders that leg in to the regular order book and trade at a net price per contract at or near \$0.00 (*i.e.*, net zero complex orders), provided those orders are entered on behalf of originating market participants that execute an ADV of at least 2,000 contracts in net zero complex orders in a given month.<sup>10</sup> While these complex orders would generally not find a counterparty in the complex order book, they may leg in to the regular order book where they are typically executed by Market Makers or other market participants on the individual legs who pay a fee to trade with this order flow. The Exchange does not provide rebates for net zero complex orders to prevent

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<sup>6</sup> A “Non-Nasdaq ISE Market Maker” is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended, registered in the same options class on another options exchange

<sup>7</sup> A “Firm Proprietary” order is an order submitted by a member for its own proprietary account.

<sup>8</sup> A “Broker-Dealer” order is an order submitted by a member for a broker-dealer account that is not its own proprietary account.

<sup>9</sup> A “Professional Customer” is a person or entity that is not a broker/dealer and is not a Priority Customer.

<sup>10</sup> See Securities Exchange Act Release No. 80219 (March 13, 2017), 82 FR 14249 (March 17, 2017) (SR-ISE-2017-22). Priority Customer complex orders that do not meet the definition of a net zero complex order, or that are entered on behalf of originating market participants that do not reach the 2,000 contract ADV threshold, remain eligible for rebates based on the tier achieved.

members from engaging in rebate arbitrage by entering valueless complex orders solely to recover rebates. For purposes of determining which complex orders qualify as net zero, the Exchange counts all complex orders that leg in to the regular order book and are executed at a net price per contract that is within a range of \$0.01 credit and \$0.01 debit. The 2,000 contract threshold exists to differentiate market participants that are entering legitimate complex orders from those that are entering net zero complex orders solely to earn a rebate. The Exchange now proposes to lower the threshold of net zero complex contracts from 2,000 contracts to 1,000 contracts per day. As such, net zero priced complex orders that leg into the regular order book and are entered by firms with an ADV in this type of activity of 1,000 contracts or more in a given month will not earn the Priority Customer complex order rebate.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>11</sup> in general, and Section 6(b)(4) of the Act,<sup>12</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

### Priority Customer Taker Fee

The Exchange believes that it is reasonable and equitable to reduce the Priority Customer taker fee for regular orders in SPY as the proposed fees are more favorable than those currently offered on the Exchange. The Exchange is targeting SPY for this change as SPY is the most actively traded symbol on the Exchange. With this change, the Exchange will charge lower taker fees for Priority Customer orders in SPY, thereby attracting additional order flow in this symbol to the benefit of all members that trade on the Exchange. The Exchange also believes that it is

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<sup>11</sup> 15 U.S.C. 78f.

<sup>12</sup> 15 U.S.C. 78f(b)(4).

equitable and not unfairly discriminatory to only offer this reduced taker fee to Priority Customer orders. A Priority Customer is by definition not a broker or 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). This limitation does not apply to participants on the Exchange whose behavior is substantially similar to that of market professionals, including Professional Customers, who will generally submit a higher number of orders than Priority Customers.

#### Net Zero Complex Orders

The Exchange believes that the proposed change to lower the threshold of net zero complex contracts is reasonable, equitable, and not unfairly discriminatory as it is designed to remove financial incentives for market participants to engage in rebate arbitrage by entering valueless complex orders on the Exchange that do not have any economic purpose. The Exchange has determined that the current threshold is still too high to effectively discourage market participants from engaging in rebate arbitrage, and believes that the lower threshold proposed in this filing more accurately reflects the Exchange's original intent. No market participants meet the current ADV threshold, as firms have modified their activity to ensure that their complex ADV in the net zero range is lower than the current 2,000 ADV threshold. Between May 1, 2017 and May 26, 2017, for example, the market participant with the largest ADV in net zero contracts executed an ADV of 1,204 net zero contracts. By comparison the average net zero ADV of market participants that traded complex orders during this time period was only 24 contracts, with the vast majority of these market participants executing no net zero contracts.<sup>13</sup> The continued submission of a high volume of net zero complex orders that leg into the regular order book by these firms has generated complaints from the Market Makers that

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<sup>13</sup> Excluding market participants that did not execute any net zero complex orders, the average net zero ADV was only 109 contracts.

trade against these orders in the regular order book, as firms recognize these net zero complex orders as essentially non-economic.

The Exchange believes that lowering the threshold will make it more difficult for firms to continue to enter net zero complex orders purely to earn a rebate. In particular, the Exchange notes that any firm that engages in this activity will be prevented from doing so with an ADV of more than 1,000 contracts in net zero complex orders. This will reduce the cost of these trades to the Exchange and its members as firms are limited in the amount of this net zero complex order activity that they can conduct on the Exchange. The Exchange believes that market participants will stop entering net zero complex orders when they reach the proposed ADV threshold as these firms are entering these orders solely for the purpose of earning a rebate. Indeed, this is consistent with the Exchange's experience with this rule to date, as firms that were previously entering a high volume of net zero complex orders have reduced their volume in activity covered by this rule in response to other changes.

To the extent that market participants enter legitimate complex orders, however, they will continue to receive the same rebates that they do today. In addition, market participants that enter an insubstantial volume of net zero complex orders will also continue to receive rebates. The Exchange believes that it is reasonable, equitable, and not unfairly discriminatory to continue to provide rebates where appropriate based on the market participant executing only a low ADV of net zero complex orders. While the Exchange could prohibit rebates for any net zero complex orders without an ADV threshold, doing so would disadvantage innocent market participants that are not engaged in rebate arbitrage. The Exchange believes that the decision to allow rebates for firms with a limited ADV in net zero complex orders properly balances the need to encourage market participants to send order flow to the Exchange, and the need to prevent activity that is

harmful to the market. Moreover, all market participants will be treated the same based on their net zero ADV.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,<sup>14</sup> the Exchange does not believe that the proposed rule change will impose any burden on intermarket or intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed reduction in Priority Customer taker fees for regular orders in SPY is better for these market participants, and illustrates competition in the options industry. In addition, the proposed net zero complex order change is designed to reduce the ability for certain market participants to engage in rebate arbitrage to the detriment of the Exchange and its members. The Exchange operates in a highly competitive market in which market participants can readily direct their order flow to competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fee changes reflect this competitive environment.

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,<sup>15</sup> and Rule 19b-4(f)(2)<sup>16</sup> 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

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<sup>14</sup> 15 U.S.C. 78f(b)(8).

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>16</sup> 17 CFR 240.19b-4(f)(2).

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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2017-49 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-2017-49. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m.



and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2017-49 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>17</sup> 17 CFR 200.30-3(a)(12).