

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-81350; File No. SR-ISE-2017-77)

August 8, 2017

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Schedule of Fees

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 August 1, 2017, 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 its Schedule of Fees to (1) eliminate Priority Customer complex order rebates for all net zero complex orders without any associated average daily volume requirement, and (2) reduce the maker fee charged to Market Makers and Non-Nasdaq ISE Market Makers for Regular Orders in Select Symbols when trading against Priority Customer complex orders that leg into the regular order book.

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) eliminate Priority Customer<sup>3</sup> complex order rebates for all net zero complex orders without any associated average daily volume (“ADV”) requirement, and (2) reduce the maker fee charged to Market Makers<sup>4</sup> and Non-Nasdaq ISE Market Makers<sup>5</sup> for Regular Orders in Select Symbols<sup>6</sup> when trading against Priority Customer complex orders that leg into the regular order book. These changes are designed to eliminate rebate arbitrage where market participants enter valueless complex orders solely for the purpose of earning a rebate, and to reduce disincentives for Market Makers to provide liquidity on the Exchange.

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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> The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See ISE Rule 100(a)(25).

<sup>5</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>6</sup> “Select Symbols” are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Pilot Program.

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 that is 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 1,000 contracts in net zero complex orders in a given month. 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 Exchange now proposes to eliminate Priority Customer complex order rebates for all net zero complex orders, regardless of whether the order is entered on behalf of originating market participants that execute a specified ADV of net zero complex orders.

Priority Customer complex orders are typically eligible for tiered rebates that range from \$0.26 per contract (*i.e.*, for Tier 1) to \$0.49 per contract (*i.e.*, for Tier 8) depending on the member's Priority Customer Complex ADV. Pursuant to the provision described above, however, the Exchange does not provide these rebates for net zero complex orders entered on behalf of originating market participants that execute a significant ADV of these orders in a given month. This provision is designed to prevent members from engaging in rebate arbitrage by entering essentially valueless complex orders solely to recover rebates. While net zero 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. Market Makers have continued to express concerns about trading against net zero complex orders that leg into the regular market, as offending firms modify their behavior to stay within the ADV requirements set by the Exchange. These Market Makers have indicated that continued

interaction with these economically valueless orders impedes their ability to provide liquidity on the Exchange as they are charged to trade against these net zero complex orders when they leg into the regular market and execute against their quotes.

The Exchange believes that it is in the interest of a fair and orderly market to provide appropriate incentives for Market Makers to maintain quality markets. As a result, the Exchange has instituted several programs that are aimed at incentivizing Market Makers to provide liquidity, including, for example, the Market Maker Plus program, which rewards Market Makers for routinely quoting at the national best bid or offer.<sup>7</sup> Despite the Exchange's efforts to date, market participants have continued to enter valueless net zero complex orders and may earn rebates for those orders if they stay within the ADV threshold described in the rule. In particular, today, market participants can reduce their ADV in net zero complex orders and/or split their net zero order flow across multiple originating market participants to stay within the ADV thresholds set by the Exchange, and thereby qualify for Priority Customer complex order rebates. The Exchange believes that it is appropriate at this time to completely remove incentives for trading net zero complex orders by eliminating the current ADV threshold. With this proposed change, all net zero complex orders will be ineligible for Priority Customer complex order rebates. Eliminating the ADV requirement will discourage market participants from engaging in this economically valueless conduct, which impedes Market Makers' ability to maintain quality markets, as no net zero complex orders will be rebate eligible. Priority Customer complex orders that do not meet the definition of a net zero complex order will continue to receive rebates based on the tier achieved.

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<sup>7</sup> See ISE Schedule of Fees, Section I., Regular Order Fees and Rebates.

In addition, the Exchange proposes to reduce the fee charged to Market Makers and Non-Nasdaq ISE Market Makers for Regular Orders in Select Symbols when trading against Priority Customer complex orders that leg into the regular book. Currently, Market Makers (including Market Makers that qualify for Market Maker Plus)<sup>8</sup> and Non-Nasdaq ISE Market Makers are charged a maker fee of \$0.30 per contract for Regular Orders in Select Symbols when trading against Priority Customer complex orders that leg into the regular order book.<sup>9</sup> This higher maker fee was originally adopted because the Exchange pays a rebate to Priority Customer complex orders that leg into the regular order book. With the changes described above, the Exchange believes that it is appropriate to revisit this fee, and now proposes to reduce the fee to \$0.10 per contract. This change will reduce disincentives for Market Makers to provide liquidity to the benefit of all market participants that trade on the Exchange.<sup>10</sup>

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<sup>8</sup> A Market Maker Plus is a Market Maker who is on the National Best Bid or National Best Offer a specified percentage of the time for series trading between \$0.03 and \$3.00 (for options whose underlying stock's previous trading day's last sale price was less than or equal to \$100) and between \$0.10 and \$3.00 (for options whose underlying stock's previous trading day's last sale price was greater than \$100) in premium in each of the front two expiration months. The specified percentage is at least 80% but lower than 85% of the time for Tier 1, at least 85% but lower than 95% of the time for Tier 2, and at least 95% of the time for Tier 3. A Market Maker's single best and single worst quoting days each month based on the front two expiration months, on a per symbol basis, will be excluded in calculating whether a Market Maker qualifies for this rebate, if doing so will qualify a Market Maker for the rebate.

<sup>9</sup> Market Makers that qualify for Market Maker Plus are not charged a fee or provided a rebate when trading against non-Priority Customer complex orders that leg into the regular order book. Other Market Makers and Non-Nasdaq ISE Market Makers are charged the regular \$0.10 per contract fee when trading against non-Priority Customer complex orders that leg into the regular order book.

<sup>10</sup> With the proposed fee reduction, Market Makers (other than those that qualify for Market Maker Plus) and Non-Nasdaq ISE Market Makers will be charged a maker fee of \$0.10 per contract for Regular Orders in Select Symbols regardless of the order on the other side of the trade. The Exchange therefore proposes to effectuate this change by deleting footnote 11.

## 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.

The Exchange believes that it is reasonable and equitable to remove the ADV threshold from the net zero provision in the Schedule of Fees as this change is designed to remove financial incentives for market participants to engage in rebate arbitrage by entering net zero complex orders on the Exchange that do not have any economic substance. With the current provision, offending firms have repeatedly found ways to continue to submit these economically valueless orders to the detriment of the Exchange and market participants that trade on the Exchange. The continued submission of these net zero complex orders by a handful of market participants has generated complaints from the Market Makers that 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 eliminating the ADV threshold will take away the incentives for firms to continue to enter net zero complex orders purely to earn a rebate, thereby reducing the cost of these trades to the Exchange and its members.

Market Makers may be impeded in providing liquidity when doing so may result in trading against these net zero complex orders that leg into the regular market. The Exchange believes that it is important that Market Makers be properly incentivized to maintain quality markets, and is therefore proposing to take steps to eliminate the incentives for market participants to enter net zero complex orders. Priority Customer complex orders, including net

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

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

zero complex orders that leg in to the regular order book, are currently paid significant rebates by the Exchange, which are funded in part by charging higher fees to the market participants that trade against these orders. The Exchange believes that eliminating the ADV requirement in this provision will discourage market participants from entering valueless net zero complex orders, which are entered for the sole purpose of earning a rebate. As a result, the Exchange believes that Market Makers will be aided in their role of providing liquidity and maintaining quality markets to the benefit of all market participants that trade on the Exchange.

Furthermore, the Exchange believes that the proposed change is not unfairly discriminatory as it is designed to stop market participants from taking advantage of Exchange rebates by entering orders that lack economic substance. The Exchange is proposing to eliminate Priority Customer complex order rebates for all market participants, regardless of their ADV in this activity. Thus, all market participants that enter net zero complex orders will be uniformly denied rebates for those orders. To the extent that those market participants execute non-net zero complex orders, however, they will continue to receive Priority Customer complex order rebates based on their ADV in that activity. The Exchange does not believe that it is unfairly discriminatory to eliminate the ADV threshold for net zero complex orders since the elimination of this threshold means that no market participants will receive rebates for these orders.

The Exchange also believes that it is reasonable and equitable reduce the maker fee charged to Market Makers and Non-Nasdaq ISE Market Makers for Regular Orders in Select Symbols when trading against Priority Customer complex orders that leg into the regular order book. With the changes described above related to net zero complex orders, which will eliminate rebates for certain Priority Customer complex orders that leg in to the regular order book, the Exchange believes that it is appropriate to also reduce the amount charged to Market Makers

when trading against such Priority Customer complex orders in the regular order book. Furthermore, the Exchange believes that reducing the fee charged to Market Makers and Non-Nasdaq ISE Makers when trading against Priority Customer complex order that leg into the regular order book will increase incentives for those firms to provide liquidity to the benefit of all market participants that trade on the Exchange. The Exchange does not believe that this change is unfairly discriminatory as the same \$0.10 per contract maker fee applies to Market Makers (other than those that qualify for Market Maker Plus) and Non-Nasdaq ISE Market Makers when trading against other orders in these symbols, and is also the same as the maker fees charged to Firm Proprietary,<sup>13</sup> Broker-Dealer,<sup>14</sup> and Professional Customer orders.<sup>15</sup>

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

In accordance with Section 6(b)(8) of the Act,<sup>16</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. By eliminating the ADV requirement applicable to the Exchange's net zero complex order provision in the Schedule of Fees, the proposed rule change is designed to eliminate the ability for certain market participants to engage in rebate arbitrage to the detriment of the Exchange and its members. Rather than impede competition, the Exchange believes that this change will enhance competition by enabling Market Makers to step up and maintain quality markets to the benefit of all market participants that trade on the Exchange. In addition, the reduction of Market Maker and Non-

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<sup>13</sup> A "Firm Proprietary" order is an order submitted by a member for its own proprietary account.

<sup>14</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>15</sup> A "Professional Customer" is a person or entity that is not a broker/dealer and is not a Priority Customer.

<sup>16</sup> 15 U.S.C. 78f(b)(8).

Nasdaq ISE Market Maker fees for trading against Priority Customer complex orders that leg into the regular order book will also further competition as the fees are consistent with those charged to other market participants. 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>17</sup> and Rule 19b-4(f)(2)<sup>18</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 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:

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<sup>17</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>18</sup> 17 CFR 240.19b-4(f)(2).

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-2017-77 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-2017-77. 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-2017-77 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>19</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>19</sup> 17 CFR 200.30-3(a)(12).