

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-81941; File No. SR-ISE-2017-93)

October 25, 2017

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rules for Excluding Days from the Exchange's ADV and Market Maker Plus Tier Calculations in the Schedule of Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 11, 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 the Exchange's provisions for excluding a day from its volume calculations for purposes of determining volume based pricing, and to adopt language that allows the Exchange to remove a day from Market Maker Plus tiers whenever a day is removed from the Exchange's volume calculations.

The text of the proposed rule change is available on the Exchange's Website at www.ise.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 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 Exchange's provisions for excluding a day from its volume calculations for purposes of determining volume based pricing, and to adopt language that allows the Exchange to remove a day from Market Maker Plus tiers whenever a day is removed from the Exchange's volume calculations.

To avoid penalizing members when aberrant low volume days result from systems or other issues at the Exchange, or where the Exchange closes early for holiday observance, the Exchange has language in its Schedule of Fees allowing it to exclude certain days from its average daily volume ("ADV") calculations. Currently, language in the Exchange's Schedule of Fees provides that, for purposes of determining ADV for certain incentive programs,³ any day that the Exchange, or complex order book, as appropriate, is not open for the entire trading day

³ The current language in the Schedule of Fees applies to the calculation of Priority Customer Complex ADV used to determine pricing for Priority Customer complex order tiers and a discounted Market Maker taker fee in complex orders. See Schedule of Fees, II. Complex Order Fees and Rebates. It also applies to the calculation of a member's ADV in unsolicited Crossing Orders for the Member Order Routing Program. See Schedule of Fees, IV. Other Options Fees and Rebates, E. Member Order Routing Program.

or the Exchange instructs members in writing to route their orders to other markets may be excluded from such calculation; provided that the Exchange will only remove the day for members that would have a lower ADV with the day included. The proposed rule change would: (1) apply the rules for excluding a day to all ADV calculations rather than specified incentive programs,⁴ and (2) remove the Exchange's ability to separately exclude a day for the regular and complex order books.⁵ As proposed, with these two changes, the Exchange's rules will state that any day that the market is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from the ADV calculation; provided that the Exchange will only remove the day for members that would have a lower ADV with the day included. The Exchange will inform members of any day that is to be excluded from its ADV calculations through an Options Trader Alert.

Currently, the Exchange's rules for removing a day from its ADV calculations apply to specific ADV calculations. In particular, the Exchange can remove a day from tier calculations for the following programs: (1) Priority Customer complex order rebates,⁶ and a Market Maker taker fee discount in complex orders that is also based on Priority Customer Complex ADV;⁷ and

⁴ See id. Since the proposed language will now apply to all current and future programs administered by the Exchange that are based on ADV, the Exchange proposes to move it to the Preface of its Schedule of Fees. For example, PIM and FX Options tiered pricing, currently in the Schedule of Fees at Sections III would now be subject to the proposed rule change in the Preface as a result of this rule change.

⁵ See Securities Exchange Act Release No. 73601 (November 11, 2014), 79 FR 69170 (November 20, 2014) (SR-ISE-2014-51).

⁶ The Exchange provides ADV based tiered rebates to Priority Customer complex orders that trade with non-Priority Customer orders in the complex order book or trade with quotes and orders on the regular order book. See Section I and II of ISE's Schedule of Fees.

⁷ The Market Maker complex order taker fee in Select Symbols fee is reduced from \$0.47 per contract to \$0.44 per contract for Market Makers with total affiliated Priority

(2) Member Order Routing Program rebates.⁸ The Exchange now believes that it is appropriate to expand this provision to cover all ADV calculations rather than limit it to specific enumerated programs. Applying this rule to all ADV calculations will benefit members by permitting the Exchange to exclude aberrant low volume days from its ADV calculations regardless of the specific pricing program impacted. As is the case today, the Exchange will only remove the day for members that would have a lower ADV with the day included.

Furthermore, the current rules for removing a day may be applied separately for the regular and complex order books, allowing the Exchange to remove a day based on separate impact to the regular or complex market. In connection with the changes discussed above, the Exchange also proposes to eliminate the ability to separately exclude a day for the regular and complex order books by adding the general interpretation to the Preface section so that it applies universally. Although the Exchange had previously filed rule changes that consider the regular and complex order books separately, the Exchange no longer believes that it is necessary to do so, and will therefore not exclude days where, for example, only the complex order book experiences a systems issue. With this rule change the Exchange would generally exclude days for either the simple or complex order books where any systems issue occurs. The Exchange' tiers seek to incentive market participants to transact a greater amount of liquidity on the ISE markets. The Exchange does not desire to disincentive a member simply because the day is shortened due to a holiday or because the market has experienced an unexpected closure. The proposal seeks to provide market participants with the ability to plan for and in the case of

Customer Complex ADV of 150,000 or more contracts. See Section I of ISE's Schedule of Fees.

⁸ The Member Order Routing Program is a program that provides tiered rebates to order routing firms that select the Exchange as the default routing destination for unsolicited Crossing Orders. See Section IV, E of the Schedule of Fees.

unexpected events, not be harmed by shortened or closed days. By not considering the simple and complex order books separately, the Exchange believes that market participants will be incentivized to send both simple and complex order flow without concern on days whether a market event has occurred. This rule change will simplify the operation of this rule. The Exchange notes that NASDAQ PHLX, LLC (“Phlx”), which also trades complex orders, excludes a day for the entire market rather than only for a specific segment of order flow.⁹

Finally, the Exchange operates a Market Maker Plus program that provides tiered rebates to Market Makers¹⁰ in Select Symbols¹¹ based on time at the national best bid or offer (“NBBO”). Specifically, a Market Maker Plus is a Market Maker who is on the NBBO 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 3.¹² Market Makers that qualify for Market Maker Plus receive a maker rebate for regular orders in Select Symbols

⁹ See the Preface to Phlx’s Pricing Schedule.

¹⁰ The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See ISE Rule 100(a)(25).

¹¹ “Select Symbols” are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Pilot Program.

¹² 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.

of \$0.15 per contract for Tier 1, \$0.18 per contract for Tier 2,¹³ and \$0.22 per contract for Tier 3,¹⁴ instead of the regular maker fee of \$0.10 per contract.¹⁵ Market Maker Plus is designed to reward Maker Makers that make quality markets. As discussed above, however, member participation, including Market Maker participation, is generally lower on days when the Exchange is experiencing a system or other issue that results in the market not being open for the entire trading day or the Exchange instructing members in writing to route their orders to other markets. Similar to the treatment described above for ADV calculations, the Exchange similarly believes that it is appropriate to remove these days from the Market Maker Plus calculation to avoid penalizing Market Makers on days that the Exchange is experiencing an issue. The Exchange therefore proposes to adopt language that provides that, other than days where the Exchange closes early for holiday observance, any day that the market is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from the Market Maker Plus tier calculation; provided that the Exchange will only remove the day for members that would have a lower time at the NBBO for the specified series with the day included.

The proposed rule text would allow the Exchange to provide relief to Market Makers as to the Market Maker Plus tier calculation similar to that provided for ADV tiers, except that the

¹³ This rebate is \$0.16 per contract in SPY and QQQ, except when trading against complex orders that leg into the regular book. A Market Maker that achieves Tier 2 Market Maker Plus in either SPY or QQQ will receive this rebate in both SPY and QQQ.

¹⁴ This rebate is \$0.20 per contract in SPY and QQQ, except when trading against complex orders that leg into the regular book under footnote 10 above. A Market Maker that achieves Tier 3 Market Maker Plus in either SPY or QQQ will receive this rebate in both SPY and QQQ.

¹⁵ A \$0.10 per contract fee applies when trading against Priority Customer complex orders that leg into the regular order book. There will be no fee charged or rebate provided when trading against non-Priority Customer complex orders that leg into the regular order book.

Exchange does not propose to use this authority to remove days from the Market Maker Plus tier calculation where the Exchange closes early for holiday observance. While Market Makers can plan for known events, such as a holiday, they are unable to plan for market events which may close the market for part of a trading day. The Exchange believes that permitting the exception for the unanticipated event therefore provides flexibility to Market Makers in anticipating where to send order flow. The Exchange desires to incentivize Market Makers to send order flow to ISE to meet their tier requirements.

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 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 believes that the proposed change to the ADV calculation is reasonable and equitable as it provides a new framework for removing days from the Exchange's volume calculations that the Exchange believes is beneficial to members. The proposed rule change would apply the rules for excluding a day to all ADV calculations rather than specified incentive programs, thereby further protecting members if the Exchange experiences a systems or other issue that results in a day being excluded from the Exchange's ADV calculations. Without this change, members would only have the day excluded for the specific ADV based pricing programs described in this filing, and would not get the benefit for other un-enumerated programs. While the Exchange had previously filed to separately consider the regular and

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(4) and (5).

complex books, the Exchange no longer believes that this authority is necessary. By not considering the simple and complex order books separately, the Exchange believes that market participants will be incentivized to send both simple and complex order flow without concern on days whether a market event has occurred. The Exchange believes that this change will make this rule easier to administer without having a significant impact on members. Moreover, the Exchange believes that the proposed changes preserve the Exchange's intent behind adopting volume-based pricing. Finally, the Exchange further believes that the proposed change is not unfairly discriminatory because it applies equally to all members and ADV calculations.

The Exchange also believes that the proposed language for Market Maker Plus tier calculations is reasonable and equitable since it would allow the Exchange to remove a day from its Market Maker Plus tier calculations in similar circumstances as the Exchange currently removes days from its ADV calculations, and only when beneficial to the member. The Exchange believes that this proposed change is appropriate as it avoids penalizing Market Makers on days where the Exchange is experiencing a systems or other issue. Without this change, Market Makers that are wary of participation on the Exchange following an issue at the Exchange could fall into a lower Market Maker Plus tier, resulting in an effective cost increase for those members. The proposed language for removing a day from the Market Maker Plus tier calculation mirrors the language currently in place for the ADV calculation, except that the Exchange proposes that it will not remove days where the Exchange closes early for holiday observance. While Market Makers can plan for known events, such as a holiday, they are unable to plan for market events which may close the market for part of a trading day. The Exchange believes that permitting the exception for the unanticipated event therefore provides flexibility to Market Makers in anticipating where to send order flow. The Exchange desires to incentivize

Market Makers to send order flow to ISE to meet their tier requirements. The Exchange believes that this is appropriate to incentivize Market Makers to continue making quality markets where the Exchange is not experiencing an issue and merely closes early for holiday observance. Finally, the Exchange believes that the proposed language for the Market Maker Plus tier calculation is not unfairly discriminatory as all Market Makers have the ability to qualify for Market Maker Plus by making quality markets on the Exchange and can therefore benefit from the proposed changes. As explained above, all members also benefit from a similar provision that applies to the Exchange's ADV calculations.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would apply the rules for excluding a day to all ADV calculations rather than specified incentive programs, thereby further protecting members if the Exchange experiences a systems or other issue that results in a day being excluded from the Exchange's ADV calculations. This rule change does not impose an undue burden on competition because without this change, members would only have the day excluded for the specific ADV based pricing programs described in this filing, and would not get the benefit for other un-enumerated programs. The Exchange will uniformly apply the proposed language related to ADV based pricing programs. The proposal to not consider the simple and complex order books separately does not impose an undue burden on competition because the Exchange would uniformly calculate the ADV based pricing programs in a uniform manner for all market participants. The Exchange believes that this change will make this rule easier to administer without having a significant impact on members. Moreover, the Exchange believes that the proposed changes preserve the Exchange's intent behind adopting volume-based pricing. Finally, the Exchange

further believes that the proposed change is not unfairly discriminatory because it applies equally to all members and ADV calculations.

The proposed rule change is designed adopt a new provision covering the Market Make Plus tier calculation. The proposed language for removing a day from the Market Maker Plus tier calculation mirrors the language currently in place for the ADV calculation, except that the Exchange proposes that it will not remove days where the Exchange closes early for holiday observance. While Market Makers can plan for known events, such as a holiday, they are unable to plan for market events which may close the market for part of a trading day. The Exchange believes that permitting the exception for the unanticipated event therefore provides flexibility to Market Makers in anticipating where to send order flow. The Exchange desires to incentivize Market Makers to send order flow to ISE to meet their tier requirements. The Exchange believes that the proposed modifications to its ADV and Market Maker Plus tier calculations are pro-competitive and will result in lower total costs to end users, a positive outcome of competitive markets.

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 Act¹⁸ and Rule 19b-4(f)(2)¹⁹ 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:

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. Please include File Number SR-ISE-2017-93 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-2017-93. 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

¹⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁹ 17 CFR 240.19b-4(f)(2).

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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2017-93 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.²⁰

Eduardo A. Aleman
Assistant Secretary

²⁰ 17 CFR 200.30-3(a)(12).