

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82999; File No. SR-ISE-2018-28)

April 5, 2018

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Schedule of Fees to Clarify the Fees and Rebates for the Complex Order Exposure Auction Pursuant to Rule 722(b)(3)(iii)

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 March 23, 2018, 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 Schedule of Fees to provide greater clarity as to how the Exchange currently charges complex orders executed during an exposure auction pursuant to Rule 722(b)(3)(iii) ("Exposure Auction").

The text of the proposed rule change is available on the Exchange's Website at <http://ise.cchwallstreet.com/>, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Schedule of Fees to provide greater clarity as to how the Exchange currently charges complex orders executed during an Exposure Auction pursuant to Rule 722(b)(3)(iii). An Exposure Auction is automatically initiated when a member submits an eligible complex order that is marked for price improvement.³ Because Exposure Auctions are initiated by complex orders entered on the complex order book, they are charged based on the same maker/taker scheme as is applicable to other complex orders that are executed on the complex order book rather than the separate pricing defined for Crossing Orders.⁴ Specifically, the Exchange treats the originating side of Exposure Auction orders as adding liquidity, and the contra side as taking liquidity, for the purpose of determining applicable fees and rebates. Since the Schedule of Fees does not currently indicate the manner in which the Exchange treats the originating or contra side of Exposure Auction orders, the Exchange proposes to add the following language in Section II:

³ Pursuant to Rule 722(b)(3)(iii), the marked complex order is exposed for a period of up to one-second. When the Exchange first adopted Rule 722(b)(3)(iii), it indicated that this exposure period, which provided members an opportunity for price improvement, was not considered an "auction." See Securities Exchange Act Release No. 57706 (April 24, 2008), 73 FR 23517 (April 30, 2008) (SR-ISE-2007-77) ("2007 Filing"). Notwithstanding the 2007 Filing, this feature would be considered an auction today.

⁴ A "Crossing Order" is an order executed in the Exchange's Facilitation Mechanism, Solicited Order Mechanism, Price Improvement Mechanism (PIM) or submitted as a Qualified Contingent Cross order. For purposes of the Fee Schedule, orders executed in the Block Order Mechanism are also considered Crossing Orders.

“During an “exposure” auction pursuant to Rule 722(b)(3)(iii), the originating side of the auction order will be assessed the applicable maker fee or rebate, and the contra side will be assessed the applicable taker fee or rebate.”

Thus, based on current rates, the Exchange charges the originating side of Non-Priority Customer⁵ Exposure Auction orders that trade against other Non-Priority Customer orders a maker fee of \$0.10 per contract in Select Symbols⁶ for Market Maker,⁷ Firm Proprietary⁸ / Broker-Dealer,⁹ and Professional Customer¹⁰ orders, and \$0.20 per contract in Select Symbols for Non-Nasdaq ISE Market Maker¹¹ orders. In Non-Select Symbols,¹² the originating side is charged a \$0.20 per contract maker fee for all Non-Priority Customer orders. The contra side Non-Priority Customer order is charged a taker fee of \$0.50 per contract in Select Symbols for Market Maker (or \$0.44 per contract for Market Makers with total affiliated Priority Customer Complex ADV of 150,000 or more contracts),¹³ Non-Nasdaq ISE Market Maker, Firm

⁵ Non-Priority Customer includes Market Maker, Non-Nasdaq ISE Market Maker, Firm Proprietary, Broker-Dealer, and Professional Customer.

⁶ “Select Symbols” are options overlying all symbols listed on ISE that are in the Penny Pilot Program.

⁷ The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively.

⁸ A “Firm Proprietary” order is an order submitted by a member for its own proprietary account.

⁹ A “Broker-Dealer” order is an order submitted by a member for a broker-dealer account that is not its own proprietary account.

¹⁰ A “Professional Customer” is a person or entity that is not a broker/dealer and is not a Priority Customer.

¹¹ 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.

¹² “Non-Select Symbols” are options overlying all symbols excluding Select Symbols.

¹³ Further, Nasdaq ISE Market Makers making or taking liquidity receive a discount of \$0.02 when trading against Priority Customer orders preferenced to them in the Complex

Proprietary / Broker-Dealer, and Professional Customer orders. In Non-Select Symbols, the contra side Non-Priority Customer order is charged a \$0.86 per contract taker fee for Market Maker orders,¹⁴ and a \$0.88 per contract taker fee for Non-Nasdaq ISE Market Maker, Firm Proprietary / Broker-Dealer, and Professional Customer orders.¹⁵

When Non-Priority Customer orders trade against Priority Customer¹⁶ orders in Exposure Auctions and the originating side is a Non-Priority Customer order, the originating side is charged a maker fee of \$0.47 per contract in Select Symbols for Market Maker orders (or \$0.44 per contract for Market Makers with total affiliated Priority Customer Complex ADV of 150,000 or more contracts),¹⁷ and \$0.48 per contract for Non-Nasdaq ISE Market Maker, Firm Proprietary / Broker-Dealer, and Professional Customer orders. In Non-Select Symbols, the originating side is charged a \$0.86 per contract maker fee for Market Maker orders,¹⁸ and a \$0.88 per contract maker fee for Non-Nasdaq ISE Market Maker, Firm Proprietary / Broker-Dealer, and Professional Customer orders. The contra side Priority Customer order is paid a volume-

Order Book in equity options that are able to be listed and traded on more than one options exchange. This discount does not apply to FX Options Symbols or to option classes designated by the Exchange to receive a guaranteed allocation pursuant to Nasdaq ISE Rule 722(b)(3)(i)(B).

¹⁴

Id.

¹⁵

The Exchange also currently charges a \$0.03 per contract complex surcharge for Non-Priority Customer complex orders in Non-Select Symbols that take liquidity from the complex order book, excluding complex orders executed in the Facilitation Mechanism, Solicited Order Mechanism, Price Improvement Mechanism and Exposure Auctions. See Securities Exchange Act Release No. 82644 (February 6, 2018), 83 FR 6069 (February 12, 2018) (SR-ISE-2018-10).

¹⁶

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).

¹⁷

See note 13 above.

¹⁸

Id.

based tiered rebate,¹⁹ which currently ranges from \$0.26 per contract in Select Symbols (if the member executes Priority Customer Complex ADV of 0 to 14,999 contracts in a given month) to \$0.50 per contract in Select Symbols (if the member executes Priority Customer Complex ADV of 225,000 or more contracts in a given month). In Non-Select Symbols, the tiered rebate paid to the contra side Priority Customer order currently ranges from \$0.40 per contract (if the member executes Priority Customer Complex ADV of 0 to 14,999 contracts in a given month) to \$0.85 per contract (if the member executes Priority Customer Complex ADV of 225,000 or more contracts in a given month).

When Non-Priority Customer orders trade against Priority Customer orders in Exposure Auctions and the originating side is a Priority Customer order, the originating side receives the tiered rebate in Select and Non-Select Symbols, as discussed above. The contra side Non-Priority Customer is charged the taker fee in Select and Non-Select Symbols, as discussed above.²⁰ Lastly, when Priority Customer orders trade against Priority Customer orders in Exposure Auctions, neither the originating side nor the contra side is charged a fee or given a rebate because the Exchange currently does not charge a maker or taker fee for Priority Customer complex orders, and provides a rebate only if the Priority Customer complex order trades against a Non-Priority Customer complex order, as described above.

While the proposed change discussed above is consistent with current practice, the Exchange believes that the clarifications will eliminate any potential confusion around how Exposure Auction orders are charged today.

¹⁹ The Exchange provides rebates to members for adding and taking liquidity based on tiers that reflect their Priority Customer Complex average daily volume (“ADV”) executed during a given month.

²⁰ See note 15 above.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²¹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²² 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 it is reasonable, equitable and not unfairly discriminatory to clarify in Section II of the Schedule of Fees as to how the Exchange currently charges Exposure Auction orders, as further discussed above. The Exchange believes that the proposed change will eliminate any potential confusion around how Exposure Auction orders are charged today, and will make the Schedule of Fees more transparent to members and investors.

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 change is not intended to address any competitive issues but rather to provide more clarity and transparency regarding how Exposure Auction orders are charged today. The Exchange 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

²¹ 15 U.S.C. 78f(b).

²² 15 U.S.C. 78f(b)(4) and (5).

routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

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,²³ and Rule 19b-4(f)(2)²⁴ 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-2018-28 on the subject line.

²³ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁴ 17 CFR 240.19b-4(f)(2).

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-2018-28. 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. 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-2018-28 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.²⁵

Eduardo A. Aleman
Assistant Secretary

²⁵ 17 CFR 200.30-3(a)(12).