

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83002; File No. SR-ISE-2018-27)

April 5, 2018

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the Rebates Provided to Members that Send Unsolicited Crossing Orders to the Exchange

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 modify the rebates it provides to Members that send unsolicited Crossing Orders³ to the Exchange.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 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 (“QCC”) order. For purposes of this Fee Schedule, orders executed in the Block Order Mechanism are also considered Crossing Orders. See Preface to ISE’s Schedule of Fees.

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 ISE's Schedule of Fees to replace the current Member Order Routing Program ("MORP"), which provides enhanced rebates to order routing firms that select the Exchange as the default routing destination for unsolicited Crossing Orders, and the Customer to Customer Rebate PLUS program,⁴ which provides an indirect incentive for Members to direct unsolicited Crossing Orders to the Exchange, with a new rebate program, entitled the "PIM and Facilitation Rebate" program. Through this new program, the Exchange aims to provide a more accessible, direct, and effective incentive to Members to direct their unsolicited Crossing Orders to the Exchange.

MORP

As noted above, the MORP is a program that provides rebates to firms that select the Exchange as their default routing destination for unsolicited Crossing Orders. To be eligible to participate in MORP, an Electronic Access Member ("EAM") must: (1) designate to the Exchange, in writing, those sessions (connections to the Exchange over which the firm submits orders) that meet the following MORP criteria; (2) provide systems to its clients that enable the

⁴ See Section IV, A of the Schedule of Fees.

electronic routing of option orders to all of the U.S. options exchanges, including ISE; (3) interface with ISE to access the Exchange's electronic options trading platform; (4) offer to its clients a customized interface and routing functionality such that ISE will be the default destination for all unsolicited Crossing Orders entered by the EAM, provided that market conditions allow the Crossing Order to be executed on ISE; (5) configure its own option order routing functionality such that ISE will be the default destination for all unsolicited Crossing Orders, provided that market conditions allow the Crossing Order to be executed on ISE, with respect to all option orders as to which the EAM has routing discretion; and (6) ensure that the default routing functionality permits users submitting option orders through such system to manually override the ISE as the default destination on an order-by-order basis. EAMs that wish to participate in the program must certify that they meet the foregoing MORP requirements, in writing, on a monthly basis.

An EAM that is MORP-eligible currently receives a rebate for all unsolicited Crossing Orders of \$0.05 per originating contract side, provided that the Member executes a minimum average daily volume ("ADV") in unsolicited Crossing Orders of at least 30,000 originating contract sides. This rebate increases to \$0.07 per originating contract side, provided that the Member executes a higher ADV in unsolicited Crossing Orders of 100,000 originating contract sides. The rebate for the highest tier achieved is applied retroactively to all eligible contracts traded in a given month.

In addition, any EAM that qualifies for the MORP rebate by executing an ADV of 30,000 originating contract sides or more is also eligible for increased Facilitation and Solicitation

break-up rebates⁵ for their Non-ISE Market Maker,⁶ Firm Proprietary,⁷ Broker-Dealer,⁸ Professional Customer,⁹ and Priority Customer orders.¹⁰ Currently, MORP eligible members that execute a qualifying ADV in unsolicited Crossing Orders of at least 30,000 originating contract sides, receive a Facilitation and Solicitation break-up rebate that is \$0.35 per contract for regular and complex orders in Select Symbols,¹¹ \$0.15 per contract for regular orders in Non-Select Symbols,¹² \$0.80 per contract for complex orders in Non-Select Symbols, and \$0.15 per contract for regular and complex orders in foreign exchange option classes.

The MORP program was designed to encourage order routing firms to execute additional unsolicited Crossing Order volume on the ISE. However, the Exchange has concluded that the MORP program has not fulfilled its intended purpose due, in large part, to the fact that the conditions for participation in the program have proven to be onerous. Accordingly, the

⁵ Break-up rebates are provided for contracts that are submitted to the Facilitation and Solicited Order Mechanisms that do not trade with their contra order except when those contracts trade against pre-existing orders and quotes on the Exchange's orderbooks. The applicable fee for Crossing Orders is applied to any contracts for which a rebate is provided.

⁶ A "Non-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.

⁷ A "Firm Proprietary" order is an order submitted by a member for its own proprietary account.

⁸ A "Broker-Dealer" order is an order submitted by a member for a broker-dealer account that is not its own proprietary account.

⁹ A "Professional Customer" is a person or entity that is not a broker/dealer and is not a Priority Customer.

¹⁰ 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 ISE Rule 100(a)(37A).

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

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

Exchange proposes to eliminate the MORP program and, as discussed below, the Exchange proposes to replace it with the proposed PIM and Facilitation Rebate program, described below.

Customer to Customer Rebate PLUS

As part of the QCC and Solicitation Rebate program, the Exchange presently offers a set of rebates called “Customer to Customer” Rebate PLUS.¹³ These rebates apply to “Customer to Customer” Orders¹⁴ and in particular, those executed by two Priority Customers with: (1) a specified volume of QCC¹⁵ and other solicited Crossing Orders in a given month; and (2) 175,000 or more unsolicited originating Facilitation¹⁶ contract sides per month. Once a Member meets the volume thresholds described above, the Member receives \$0.05 per contract “Customer to Customer” Rebate PLUS for each originating contract side of their “Customer to Customer” Orders.

As a means of consolidating its incentive programs relating to unsolicited Crossing orders, and to provide more direct incentives to encourage such orders, the Exchange proposes to eliminate the Customer to Customer Rebate PLUS program and replace it with the proposed PIM and Facilitation Rebate, described below.

¹³ See Section IV, A of the Schedule of Fees.

¹⁴ A “Customer to Customer” order is a QCC or other solicited order between two Priority Customers.

¹⁵ A QCC Order is comprised of an originating order to buy or sell at least 1000 contracts that is identified as being part of a qualified contingent trade, as that term is defined in Supplementary Material .01 below, coupled with a contra-side order or orders totaling an equal number of contracts. See ISE Rule 715(j).

¹⁶ The Facilitation Mechanism is a process by which an EAM can execute a transaction wherein the EAM seeks to facilitate a block-size order it represents as agent, and/or a transaction wherein the EAM solicited interest to execute against a block-size order it represents as agent. See Rule 716(d).

PIM and Facilitation Rebate

In lieu of the MORP and the Customer to Customer Rebate PLUS program, the Exchange proposes to incentivize the flow of unsolicited Crossing Orders to the Exchange by establishing a PIM and Facilitation Rebate program. This proposed program would offer rebates to Members that use the Facilitation Mechanism or PIM for unsolicited Crossing Orders whereby the contra-side of those orders: (1) is either Firm Proprietary or Broker-Dealer; and (2) has total affiliated ADV¹⁷ of 250,000 or more contracts. Members whose orders meet these conditions will be entitled to receive a rebate of \$0.02 per originating contract for up to 199,999 originating contract sides in a month. To the extent that Members have at least 200,000 originating contract sides in a given month, then the Members will be entitled to receive a rebate of \$0.03 for all of its originating contract sides in that month that qualify for the PIM and Facilitation Rebate Program during that month, including the Members' first qualifying 199,999 originating contract sides.

To the extent that Members qualify for the foregoing rebate, they may also become eligible for two additional rebates on the originating contract sides of their unsolicited Crossing Orders. First, if Members separately achieve, on a cumulative basis, more than 1,000,000 QCC and Solicitation Order Mechanism¹⁸ originating contracts sides in a month, then they will earn an additional \$0.01 rebate per originating contract side. Second, if Members achieve Priority Customer Complex ADV of between 100,000-224,999 contracts, then they will earn an

¹⁷ Eligible volume from affiliated Members will be aggregated in determining total affiliated ADV, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A.

¹⁸ The Solicited Order Mechanism is a process by which an EAM can attempt to execute orders of 500 or more contracts it represents as agent against contra orders that it solicited. Each order entered into the Solicited Order Mechanism shall be designated as all-or-none. See ISE Rule 716(e).

additional \$0.01 rebate per originating contract side on their unsolicited Crossing Orders that qualify for the PIM and Facilitation Rebate program. This second additional rebate will be \$0.02 to the extent that Members achieve Priority Customer Complex ADV Orders of 225,000 contracts or more. For avoidance of doubt, if a Member has 200,000 originating contract sides in a month that qualify for a \$0.03 rebate under the PIM and Facilitation Rebate program and the Member also achieves Priority Customer Complex Order ADV of 225,000 contracts in that same month, then the Member will receive an additional \$0.02 rebate on all of its 200,000 originating contract sides that qualify for the PIM and Facilitation Rebate program, for a total rebate on such originating contract sides of \$0.05. These two additional rebate opportunities will be cumulative, meaning that a Member can qualify for both of them and receive an additional rebate of up to \$0.03 per originating contract side.

The combination of the base rebate and the additional rebates will offer Members that use the Facilitation Mechanism or PIM for unsolicited Crossing Orders an opportunity to receive as much as \$0.06 in rebates per originating contract side.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²⁰ 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 Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the

¹⁹ 15 U.S.C. 78f(b).

²⁰ 15 U.S.C. 78f(b)(4) and (5).

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.”²¹

Likewise, in NetCoalition v. Securities and Exchange Commission²² (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.²³ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”²⁴

Further, “[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’ . . .”²⁵ Although the court and the SEC were discussing the

²¹ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

²² NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

²³ See NetCoalition, at 534 - 535.

²⁴ Id. at 537.

²⁵ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that its proposal to eliminate the MORP is reasonable because the MORP has proven to be ineffective in achieving its aim of attracting additional unsolicited Crossing Order flow to the Exchange. The conditions for participation in the MORP have proven to be too onerous for Members. Furthermore, the Exchange has limited resources available to it to devote to the operation of special pricing programs and as such, it is equitable to allocate those resources to those programs that are effective and away from those programs that are ineffective. The proposal to eliminate the MORP is not unfairly discriminatory because the proposal will apply uniformly to all similarly situated Members.

The Exchange's proposal to eliminate the Customer to Customer Rebate PLUS program is also both reasonable and equitable because this program provides only an indirect incentive to Members to send unsolicited Crossing Orders to the Exchange and the Exchange prefers to re-allocate its limited resources to the provision of a stronger and more direct incentive. The proposal to eliminate the Customer to Customer Rebate PLUS program is not unfairly discriminatory because the proposal will apply uniformly to all similarly situated Members.

The Exchange's proposal to replace the MORP and the Customer to Customer Rebate PLUS program with the PIM and Facilitation Rebate program is also reasonable and equitable. The Exchange expects the PIM and Facilitation program will complement its QCC and Solicitation Rebate program for solicited Crossing Orders and it will provide a more easily accessible, direct, and effective incentive for Members to send their unsolicited Crossing Orders to the Exchange. In particular, the proposal will encourage Members to send unsolicited PIM and Facilitation orders to the Exchange and to meet the 200,000 contract threshold to obtain the

higher \$0.03 base rebate.²⁶ The Exchange also believes that it reasonable and equitable to provide an additional rebate as a reward to Members that achieve high levels of QCC and Solicitation activity in addition to Facilitation and PIM activity. It is also reasonable and equitable for the Exchange to provide additional rebates to Members that achieve high volumes of Priority Customer complex activity as a means of incentivizing increased use of the Exchange's Complex Order Book. The Exchange expects that this package of rebates will be attractive to market participants.

Finally, the Exchange believes that the proposed rebates for unsolicited Crossing Orders in the PIM and Facilitation Mechanism are not unfairly discriminatory. Although the proposal is focused on incentives for unsolicited Crossing Orders, it replaces existing Exchange rebate programs with a similar aim. In any event, the Exchange already maintains a robust QCC and Solicitation Rebate program of incentives for members that submit solicited Crossing Orders to the QCC or the Solicitation, Facilitation, or Price Improvement Mechanisms. Furthermore, the Exchange's decision to limit program eligibility to those unsolicited Crossing Orders that involve Firm Proprietary or Broker Dealer contra-side parties is not unfairly discriminatory because the Exchange wishes to encourage the direct submission by Members of Crossing Orders to the Exchange, and as a matter of practice, Firm Proprietary and Broker-Dealer orders are most likely to directly submitted by Members as these participant types typically utilize the crossing fee cap on ISE and have increased incentive to pre-pay for their Crossing Orders. Finally, the Exchange will apply the proposed rebates uniformly to all Members' orders that meet the required volume thresholds.

²⁶ The Exchange believes it is reasonable to determine rebates with reference to "total affiliated ADV" because it applies the same concept elsewhere, including in calculating its QCC and Solicitation Rebate program rebates.

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 changes to the Exchange's rebate programs are intended to attract additional order flow to ISE. The Exchange believes that the proposal will enhance the competitiveness of the ISE relative to other options exchanges.

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 and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to 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.

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,²⁷ and Rule 19b-4(f)(2)²⁸ 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-2018-27 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-2018-27. 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

²⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁸ 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-2018-27 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.²⁹

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Assistant Secretary

²⁹ 17 CFR 200.30-3(a)(12).