

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-85025; File No. SR-ISE-2018-102)

February 1, 2019

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Provisions for Excluding a Day from its Pricing Tier Calculations

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 December 21, 2018, Nasdaq ISE, LLC ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III, 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 pricing tier calculations.

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 proposed rule change. The text of these statements may be examined at the places specified in

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

<sup>2</sup> 17 CFR 240.19b-4.

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 pricing tier calculations. First, the Exchange is standardizing its practice for removing a day from volume calculations in its Pricing Schedule with its affiliated options market, Nasdaq PHLX LLC (“Phlx”).<sup>3</sup> Second, the Exchange is making similar changes to its rule for removing a day from Market Maker Plus tiers. Each change is discussed below.

Background

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 currently has language in its Pricing Schedule allowing it to exclude certain days from its average daily volume (“ADV”) calculations. Currently, Section 1 of the Exchange’s Pricing Schedule provides 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 proviso language in Section 1 (hereinafter, the “better of rule”) ensures that members would only have the day removed when doing so is beneficial for the member. As such, the Exchange only applies the better of rule to

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<sup>3</sup> See Phlx Pricing Schedule, Options 7, Section 1(b). The Exchange’s other affiliated options markets, Nasdaq GEMX, Nasdaq MRX, Nasdaq BX, and The Nasdaq Options Market will also file similar rule change proposals to conform to Phlx’s rule.

ADV calculations, and not for other volume-based pricing where members would not benefit from having the day excluded (e.g., straight volume accumulations).

In addition, the Exchange operates a Market Maker Plus program that provides tiered rebates to Market Makers in Select Symbols based on time spent quoting at the National Best Bid or National Best Offer ("NBBO"). Market Maker Plus is designed to reward Market Makers that make quality markets. As provided in Section 3, note 5, Market Makers are evaluated each trading day for the percentage of time spent on the NBBO for qualifying series that expire in two successive thirty calendar day periods beginning on that trading day.<sup>4</sup> A Market Maker Plus is a Market Maker who is on the NBBO a specified percentage of the time on average for the month based on daily performance in the qualifying series for each of the two successive periods described above.<sup>5</sup> Similar to the treatment described above for ADV calculations, the Exchange is also allowed to exclude 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 from its Market Maker Plus tier calculations; 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. Unlike

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<sup>4</sup> Qualifying series are 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. If a Market Maker would qualify for a different Market Maker Plus tier in each of the two successive periods described above, then the lower of the two Market Maker Plus tier rebates shall apply to all contracts.

<sup>5</sup> Market Makers may enter quotes in a symbol using one or more unique, exchange assigned identifiers - i.e., badge/suffix combinations. Market Maker Plus status is calculated independently based on quotes entered in a symbol for each of the Market Maker's badge/suffix combinations, and the highest tier achieved for any badge/suffix combination quoting that symbol applies to executions across all badge/suffix combinations that the member uses to trade in that symbol. A Market Maker's worst quoting day each month for each of the two successive periods described above, on a per symbol basis, will be excluded in calculating whether a Market Maker qualifies for this rebate.

ADV calculations, however, the Exchange does not use this authority to exclude days where the Exchange closes early for holiday observance because the Exchange desires to incentivize Market Makers to continue making quality markets where the Exchange is not experiencing an unanticipated event and merely closes early for holiday observance.

### Proposal

In Options 7, Section 1, the Exchange proposes to renumber the first paragraph as subsection (a) with the title “Removal of Days for Purposes of Pricing Tiers,” and renumber the second paragraph in Section 1 (relating to fee disputes) as subsection (b). The Exchange also proposes to adopt language in subsection (a) to replace current rule text for excluding days with language that is substantially similar to language currently in place on Phlx,<sup>6</sup> and have this language apply to volume tier calculations.<sup>7</sup> Specifically, as proposed:

(1)(A) Any day that the Exchange announces in advance that it will not be open for trading will be excluded from the options tier calculations set forth in its Pricing Schedule; and (B) any day with a scheduled early market close (“Scheduled Early Close”) may be excluded from the options volume tier calculations only pursuant to paragraph (3) below.

(2) The Exchange may exclude the following days (“Unanticipated Events”) from the options volume tier calculations only pursuant to paragraph (3) below, specifically any day that: (A) the market is not open for the entire trading day, (B) the Exchange instructs members in writing to route their orders to other markets, (C) the Exchange is

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<sup>6</sup> See note 3 above.

<sup>7</sup> As discussed further below, Market Maker Plus tiers, which are based on quoting (time spent at the NBBO) and not on executed volume, will continue to be set forth separately in Section 3 of the Exchange’s Pricing Schedule. Phlx does not have a similar quoting-based program, and all of its pricing tiers are volume-based calculations.

inaccessible to members during the 30-minute period before the opening of trade due to an Exchange system disruption, or (D) the Exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours.

(3) If a day is to be excluded as a result of paragraph (1)(B) or (2) above, the Exchange will exclude the day from any member's monthly options volume tier calculations as follows:

(A) the Exchange may exclude from the ADV calculation any Scheduled Early Close or Unanticipated Event; or

(B) the Exchange may exclude from any other applicable options volume tier calculation provided for in its Pricing Schedule (together with (3)(A), "Volume Tier Calculations") any Scheduled Early Close or Unanticipated Event.

provided, in each case, that the Exchange will only remove the day for members that would have a lower Volume Tier Calculation with the day included.

The proposed language would: (i) expand upon the existing scenarios where the Exchange may remove a day to adopt two additional situations related to Exchange systems disruptions, (ii) categorize the potential excluded days into days that are known in advance (i.e., days in proposed paragraph (1), including Scheduled Early Closes) and days that are not (i.e., Unanticipated Events in proposed paragraph (2)), (iii) clarify how the potential excluded days proposed above would be removed from the ADV and other applicable volume based tier calculations in the Pricing Schedule, and (iv) generally add more detail to clarify the application of the better of rule.

In connection with the changes to Section 1(a), the Exchange proposes in Section 3, note 5 to similarly expand the scope of the current rule for excluding days from the Market Maker Plus tier calculation such that the Exchange would be allowed to exclude the two additional Exchange systems disruption-related scenarios described above. Specifically, the current language would be replaced with the following: “The Exchange may exclude from any member’s monthly Market Maker Plus tier calculation any Unanticipated Event; 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 language for Market Maker Plus would continue to not exclude days where the Exchange closes early for holiday observance, which would now be categorized as a Scheduled Early Close under this proposal.

As it relates to Unanticipated Events, the Exchange will inform all members if any such day will be excluded from its Volume Tier Calculations and Market Maker Plus tier calculations through a system status message disseminated to all members. The Exchange notes that it is not proposing to amend the thresholds a member must achieve to become eligible for, or the dollar amount associated with, the tiered rebates or fees.

#### Exchange Systems Disruptions

The Exchange proposes to adopt two additional scenarios as “Unanticipated Events” that the Exchange may determine to exclude from its Volume Tier Calculations. First, the Exchange proposes to exclude days where the Exchange is inaccessible to members during the 30-minute period before the opening of trade (i.e., between 9:00 a.m. to 9:30 a.m. Eastern Time) due to an Exchange system disruption, even if the Exchange does not instruct members to route away to other markets. As discussed above, the Exchange’s current ability to remove days is limited to days where the market is not open for the entire trading day, and where the Exchange instructs members to route away to other markets. This allows the Exchange to exclude days, for

example, where the Exchange honors a market-wide trading halt declared by another market, closes early for holiday observance, or instructs members to route away to other markets because of a systems issue in the morning, which ultimately does not carry over into the trading day. The Exchange notes, however, that it may not always instruct members to route away. For instance, the Exchange may be inaccessible to members in the morning due to a systems disruption but the Exchange resolves the issue shortly before 9:30 a.m. and as a result, the Exchange does not instruct members to route away. In such cases, the Exchange is not permitted to exclude the day from its ADV calculations. The Exchange generally experiences a high volume of member participation within the 30-minute window leading up to the opening of trade from members who submit eligible interest<sup>8</sup> be included in the Exchange's opening process. As a result, days where members are precluded from submitting eligible interest during this 30-minute time period due to an Exchange systems disruption, even if the issue is ultimately resolved by the Exchange before the market opens (and members therefore are not instructed to route away), are likely to have lower member participation. Including such days in calculations of ADV will therefore make it more difficult for members to achieve particular pricing tiers for that month. Accordingly, excluding such days will diminish the likelihood of a cost increase occurring because a member is not able to reach a pricing tier on that date that it would reach on other trading days during the month. Phlx currently has identical language allowing it to remove such days from its volume based tiers.<sup>9</sup>

Second, the Exchange proposes to exclude days where there is an Exchange system disruption that lasts for more than 60 minutes during regular trading hours (i.e., 9:30 a.m. to 4:00 p.m. Eastern Time), even if such disruption would not be categorized as a complete outage of the

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<sup>8</sup> Eligible interest includes quotes and orders. See Rule 701(b).

<sup>9</sup> See note 3 above at paragraph 2(C).

Exchange's system. Such a disruption may occur where a certain options series traded on the Exchange is unavailable for trading due to an Exchange systems issue, or where the Exchange may be able to perform certain functions with respect to accepting and processing orders, but may have a failure to another significant process, such as routing to other market centers, that would lead members who rely on such processes to avoid using the Exchange until the Exchange's entire system was operational. The Exchange believes that certain system disruptions that are not complete system outages could preclude some members from sending order flow to the Exchange. The Exchange notes that this proposal is consistent with the rules of Phlx and other options exchanges.<sup>10</sup>

The Exchange believes that the two scenarios proposed above are reasonable and equitable because the intent of the current rule has always been to avoid penalizing members that might otherwise qualify for certain tiered pricing but that because of aberrant low volume days resulting, for instance, from Exchange systems disruptions, did not participate on the Exchange to the extent they might have otherwise participated.

In addition, to avoid penalizing members that step up and trade on a day with artificially low volume, the Exchange currently only removes days for members that would have a lower ADV calculation with the day included (i.e., the better of rule). The Exchange believes that applying the better of rule to the proposed system disruption-related scenarios would be similarly helpful as it would ensure that members that continue to execute a large volume of contracts on such days are not inadvertently disadvantaged when the Exchange removes a systems disruption-

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<sup>10</sup> See note 3 above at paragraph 2(D). See also BATS [sic] BZX Options Exchange Fee Schedule (defining an "Exchange System Disruption" as any day that the exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours); and NYSE Arca Options Fee Schedule (defining an "Exchange System Disruption" as a disruption affects an Exchange system that lasts for more than 60 minutes during regular trading hours).



related day from its calculations of ADV. This is consistent with the treatment of such days on Phlx.<sup>11</sup>

#### Categories of Excluded Days

Similar to Phlx, the Exchange seeks to restructure the existing rule by separating out the different scenarios between days that are known in paragraph (1) and days that are not in paragraph (2), and define the latter as Unanticipated Events.

For planned days, the Exchange proposes to further distinguish between days that the Exchange announces in advance that it will not be open for trading in paragraph (1)(A) (e.g., Thanksgiving), and Scheduled Early Closes in paragraph (1)(B) (e.g., the trading day after Thanksgiving). The Exchange notes that it currently considers Scheduled Early Closes as a subset of days that the market is not open for the entire trading day. The Exchange believes it would be more clear to distinguish Scheduled Early Closes in paragraph (1) as a day that is planned for in advance, and separately consider days that are not open for the entire trading day as Unanticipated Events in paragraph (2)(A). As proposed, (2)(A) would continue to cover unplanned days where the Exchange declares a trading halt in all securities or honors a market-wide trading halt declared by another market. The other scenarios that will be categorized as Unanticipated Events in paragraph (2) are the two systems-related disruptions proposed above, and days that the Exchange instructs members in writing to route their orders to other markets, which is an existing scenario covered under the current rule as described above.

#### Exclusion of Days by Volume Tier Calculation

The Exchange proposes to further amend the existing rule to align with the Phlx rule by specifying how the days in paragraphs (1) and (2) will be excluded from its Volume Tier

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<sup>11</sup> See note 3 above at paragraph 3.

Calculations. As it relates to days where the Exchange announces in advance that it will not be open for trading, the Exchange notes that it will exclude those days from all options tier calculations set forth in its Pricing Schedule.<sup>12</sup> This is also the case today since no trading activity occurs on those days, and the Exchange is only clarifying its current practice within the proposed rule text in paragraph (1)(A).

As discussed above, the Exchange currently removes Scheduled Early Closes as provided in paragraph (1)(B), and the Unanticipated Events in paragraphs (2)(A) and (2)(B), from its calculations of ADV only for members that would have a lower ADV with the day included. The Exchange is not changing how it currently excludes these days from the ADV calculations. And as further discussed above, the Exchange is proposing to adopt the same principle-based approach for excluding the two Unanticipated Events related to Exchange system disruptions as provided in paragraphs (2)(C) and (2)(D). Accordingly, the proposed language in paragraph (3)(A) will clarify for the ADV calculation that the Exchange may exclude any Scheduled Early Close or Unanticipated Event, subject to the better of rule.<sup>13</sup>

Similar to Phlx, the proposal also adds a “catch-all” provision in paragraph (3)(B) that would apply to other applicable Volume Tier Calculations that are set forth in its Pricing Schedule, but are not specified within paragraph (3)(A) (i.e., not an ADV calculation).<sup>14</sup> This catch-all provision will provide the Exchange with flexibility to apply the better of rule going forward to all pricing programs administered by the Exchange that are based on volume calculations. The Exchange believes that adopting a similar principle-based approach for its options volume calculations would ensure that days are removed from such calculations only if

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<sup>12</sup> See id. at paragraph (1)(A) for similar language on Phlx.

<sup>13</sup> See id. at paragraph (3)(A) for similar language on Phlx.

<sup>14</sup> See id. at paragraph (3)(C) for similar language on Phlx.

doing so would be beneficial for the member. Accordingly, the proposed language will not apply to straight volume accumulations, as is the case today, and the Exchange will continue to not exclude days from such calculations as members do not benefit when volume executed on an excluded day is removed from straight volume accumulations.

#### Clarifying Changes

The Exchange proposes to add further details similar to Phlx's rule to bring greater transparency as to how the Exchange will apply the better of rule when removing days from its Volume Tier Calculations. In particular, the Exchange proposes to make clear that it will only remove days pursuant to the better of rule by specifying in paragraphs (1)(B) and (2) that such days may be excluded from the Volume Tier Calculations only pursuant to paragraph (3).<sup>15</sup> Paragraph (3) will then provide that if a day is to be excluded as a result of paragraph (1)(B) or (2), the Exchange will be required to exclude the day from any member's monthly options volume tier calculations as detailed within paragraph (3).<sup>16</sup> With the proposed changes, the Exchange seeks to clarify that it will exclude days from any member's Volume Tier Calculations in a uniform manner to ensure that days are removed only in situations where the member benefits. The Exchange will look at each potential excluded day in a month and determine for every member their ADV or other applicable volume calculation based on their trading volume on that day. If any member would have a lower Volume Tier Calculation with the particular day included, the Exchange will exclude that day for that member. This is how the Exchange applies the better of rule today for ADV calculations. As such, the proposed changes are intended to make clear that the Exchange will apply the better of rule in a uniform manner for all members, and that there is no arbitrary selection of "winners" or "losers" when the Exchange excludes

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<sup>15</sup> See id. at paragraphs (1)(B) and (2) for similar language on Phlx.

<sup>16</sup> See id. at paragraph (3) for similar language on Phlx.

days. In addition, the Exchange proposes to make two technical changes within the better of rule; first, to clarify that the rule applies in each case of the tier calculations specified in paragraph (3), and second, to use the defined term Volume Tier Calculations instead of ADV to reflect the changes proposed herein.

#### Market Maker Plus

In light of the foregoing proposal in Section 1(a), the Exchange proposes in Section 3, note 5 to make corresponding changes to the current rule for excluding days from the Market Maker Plus tier calculation. Specifically, the proposed rule text will expand upon the existing scenarios to encompass the two systems-related disruptions proposed above such that the Exchange would be permitted to exclude these Unanticipated Events from its calculations of Market Maker Plus tiers. As is the case today, the Exchange would only be permitted to remove such days in situations where the member benefits. Similar to the treatment described above for the Volume Tier Calculations, the Exchange likewise believes that it is appropriate to remove the two proposed systems-related disruptions from the Market Maker Plus calculation to avoid penalizing Market Makers on days that the Exchange is experiencing an unforeseen issue. Unlike the proposed rule for Volume Tier Calculations, however, the proposed rule for Market Maker Plus tier calculations will continue to include known events, such as days where the Exchange closes early for holiday observance, in the Market Maker Plus calculation to continue incentivizing Market Makers to make quality markets on such days. As is true of the existing scenarios that may be excluded today, the Exchange believes that permitting the exclusion for the two Exchange systems disruption-related scenarios will provide 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 in this manner, and further believes that it

is appropriate to incentivize Market Makers to continue making quality markets where the Exchange is not experiencing an unforeseen issue and merely closes early for a known event for which they can plan in advance.

Finally, the proposed language will specify that Unanticipated Events may be excluded from any member's monthly Market Maker Plus tier calculation for the same reasons discussed above for Volume Tier Calculations. The Exchange similarly seeks to make clear that it will apply the better of rule in a uniform manner for all members who qualify for Market Maker Plus, and that there is no arbitrary selection of "winners" or "losers" when days are excluded from a member's calculation of Market Maker Plus tiers.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>17</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>18</sup> 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 rule change 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 and consistent with similar provisions already in place on Phlx, except for the differences discussed above to account for Market Maker Plus. The proposed rule change would permit the Exchange to remove a day from its pricing tiers in more circumstances, and ensures that the Exchange will only do so in circumstances where beneficial

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<sup>17</sup> 15 U.S.C. 78f(b).

<sup>18</sup> 15 U.S.C. 78f(b)(4) and (5).

for the member because the member would have a lower volume calculation or lower time at the NBBO with the day included.

The Exchange believes it is reasonable and equitable to exclude a day from its Volume Tier Calculations when the Exchange's system experiences a disruption during the 30-minute period prior to the opening of trade that renders the Exchange inaccessible to members as this preserves the Exchange's intent behind adopting tiered pricing. Without this change, members that are precluded from submitting eligible interest during the 30-minute window before the opening of trade may be negatively impacted, even if the Exchange resolves the issue before the market opens and as a result, does not instruct members to route away. The proposed change to exclude such days will diminish the likelihood of a cost increase occurring because a member is not able to reach a pricing tier on that date that it would reach on other trading days during the month.

Similarly, excluding a day where the Exchange's system experiences a disruption that lasts for more than 60 minutes intra-day is reasonable and equitable because the proposal seeks to avoid penalizing members that might otherwise qualify for certain tiered pricing but that, because of an Exchange systems disruption, did not participate on the Exchange to the extent they might have otherwise participated. The Exchange believes that certain systems disruptions could preclude some members from sending order flow to the Exchange even if such issue is not actually a complete systems outage.

In addition, the Exchange believes that it is reasonable and equitable to apply the better of rule to both systems disruption-related scenarios. Without these changes, members that step up and trade significant volume on excluded trading days may be negatively impacted, resulting in an effective cost increase for those members. The proposal would align the Exchange's

approach to how it applies this rule today for days where the market is not open for the entire trading day or where the Exchange instructs members to route away.

Furthermore, the Exchange believes that categorizing the potential excluded days is reasonable and equitable because it will bring greater transparency to the application of its rule. Specifically, the Exchange is distinguishing between planned and unplanned days in paragraphs (1) and (2), defining the latter as Unanticipated Events, and stipulating how the Exchange will exclude such days pursuant to this rule. Categorizing days in this manner will clarify the application of its rule in light of the Exchange's proposal to expand the rule to adopt additional days that may be excluded from its tier calculations. Providing in paragraph (1)(A) that the Exchange will always exclude from its tier calculations days that it announces in advance it will not be open for trading will clarify current practice. Furthermore, the Exchange believes that the proposed changes to specify how days in paragraphs (1) and (2) may be excluded from its tier calculations will bring greater transparency by delineating the various circumstances in which the better of rule will apply. Providing in paragraph (3) that the Exchange may exclude any Scheduled Early Close or Unanticipated Event from the ADV and other Volume Tier Calculations, subject to the better of rule, will make clear that the Exchange will take a consistent approach when excluding days for purposes of its volume based pricing tiers. In addition, having a catch-all in paragraph (3)(B) so that the better of rule applies to other options volume calculations than ADV to allow the Exchange to apply the rule going forward to all pricing programs based on volume calculations will further protect members. The Exchange notes that aberrant low volume days resulting from, for instance, an Unanticipated Event, impacts all volume calculations, and allowing the Exchange to exclude such days from any Volume Tier

Calculation if the member would have a lower calculation with the day included will further protect members from being inadvertently penalized.

Furthermore, the proposed changes specifying that the days in paragraphs (1)(B) and (2) may be excluded only pursuant to paragraph (3), and requiring the Exchange to exclude such days pursuant to the specifications in paragraph (3) will likewise make clear that the Exchange will take a consistent approach with respect to excluding days from its Volume Tier Calculations. As discussed above, these modifications will clarify that the Exchange will apply the better of rule in a uniform manner to all members, and that there is no arbitrary selection of “winners” or “losers.” The Exchange also believes that the two technical changes proposed in the better of rule to reflect the changes proposed herein will likewise bring greater clarity to its rule. Furthermore, the Exchange believes that the proposed language for Volume Tier Calculations is not unfairly discriminatory because it applies equally to all members and volume calculations.

The Exchange also believes that the proposed language for Market Maker Plus 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 proposes for its Volume Tier Calculations, and only when beneficial for the Market Maker. The Exchange believes that the proposed language is appropriate as it avoids penalizing Market Makers on days where the Exchange is experiencing a systems disruption. Without this change, Market Makers that are wary of participation on the Exchange following such issues could fall into a lower Market Maker Plus tier, resulting in an effective cost increase for those members. As discussed above, the proposed language will continue to include known events, such as days where the Exchange closes early for holiday observance, in the Market Maker Plus calculation. The Exchange desires



to incentivize Market Makers to send order flow to ISE to meet their tier requirements, and further believes that it is appropriate to incentivize Market Makers to continue making quality markets where the Exchange is not experiencing an issue and merely closes early for a known event. While Market Makers can plan for known events, they are unable to plan for events such as the proposed Exchange systems disruption-related scenarios, which may preclude Market Maker participation for that day. The Exchange therefore believes that permitting the exclusion for these Unanticipated Events will provide flexibility to Market Makers in anticipating where to send order flow. The Exchange further believes that the proposed changes to specify that Unanticipated Events may be excluded from any member's monthly Market Maker Plus tier calculation will bring greater transparency to the Exchange's rules by making clear that the Exchange will apply the better of rule in a uniform manner for all Market Makers, and that there is no arbitrary selection of "winners" or "losers" when days are excluded from a member's calculation of Market Maker Plus tiers.

Finally, the Exchange believes that the proposed language for Market Maker Plus tier calculations 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.

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 is designed to protect members from the possibility of a cost increase by excluding days when overall member participation might be significantly lower than a typical trading day. The Exchange believes that the proposed modifications to its tier calculations are pro-competitive and will result in lower total costs to end users, a positive outcome of competitive

markets. Furthermore, other options exchanges have adopted rules that are substantially similar to the Exchange's proposal.<sup>19</sup>

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>20</sup> 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>19</sup> See notes 3 and 10 above.

<sup>20</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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-2018-102 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-2018-102. 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-2018-102 and should be submitted on or before [insert date 15 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

Eduardo A. Aleman  
Deputy Secretary

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<sup>21</sup> 17 CFR 200.30-3(a)(12).