*Electronic Comments*

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CBOE–2022–051 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–CBOE–2022–051. This file number should be included on the subject line if email 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 (*https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CBOE–2022–051 and should be submitted on or before July 13, 2023.

## V. Accelerated Approval of Amendment Nos. 1 and 2

As discussed above, in Amendment Nos. 1 and 2, the Exchange amended the proposed rule change by eliminating the Priority Queue functionality. The Exchange also amended Cboe Rule 5.25 by specifying in the rule text the auctions to which the proposed auction response processing functionality would apply and stating that the Exchange will announce the length of the proposed additional auction response processing period with reasonable advance notice via Exchange Notice. The Exchange also provided additional detail regarding the order and auction response process and further justification and support for its modified proposal. Finally, the Exchange made a grammatical change to the proposed rule text to make clear that at the conclusion of an auction response or exposure period, the System will continue to process any messages in its inbound queue that were received by the system before the end of such period.

The Commission believes that the Exchange's proposal to eliminate the Priority Queue, which the Exchange has never implemented, is reasonable because the proposed auction response processing functionality is designed to achieve the same goal of increasing the number of submitted auction responses that participate in auctions where there is a deep queue of message traffic. The Commission also believes that stating in the text of Rule 5.25 (1) the auctions to which the proposed auction response processing functionality would apply; (2) that at the end of an auction response or exposure period, the System will continue to process any messages in its inbound queue that were received before the end of such period; and (3) that the Exchange will provide reasonable advance notice of the Exchange-determined period of time of additional processing via Exchange Notice should provide additional clarity to the proposed rule text and additional transparency to TPHs. The Commission therefore believes that Amendment Nos. 1 and 2 provide useful specificity to the proposal regarding its application and notice to TPH Holders. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[36] to approve the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

## VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,[37] that the proposed rule change (SR–CBOE–2022–051), as modified by Amendment Nos. 1 and 2, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

[FR Doc. 2023–13212 Filed 6–21–23; 8:45 am]

**BILLING CODE 8011–01–P**

[36] 15 U.S.C. 78s(b)(2).

[37] *Id.*

[38] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97736; File No. SR–ISE–2023–12]**

## Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 7, Sections 3 and 6

June 15, 2023.

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 June 1, 2023, Nasdaq ISE, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

## I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule at Options 7, Section 3, Regular Order Fees and Rebates and Options 7, Section 6, Other Options Fees and Rebates.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/ise/rules,* 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 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Pricing Schedule at Options 7, Section 3, Regular Order Fees and Rebates, and Options 7, Section 6, Other Options Fees and Rebates.

Options 7, Section 3

Currently, for Regular Orders [3] in Select [4] and Non-Select Symbols,[5] the Exchange assesses all Non-Priority Customer [6] market participants a Fee for PIM [7] Orders of $0.10 per contract.[8] Additionally, today, for Regular Orders in Select Symbols, the Exchange assesses all market participants a Fee for Responses to PIM Orders of $0.50 per contract. Finally, today, for Regular Orders in Non-Select Symbols, the Exchange assesses all market participants a Fee for Responses to PIM Orders of $1.10 per contract.[9]

Today, the Exchange pays Electronic Access Members [10] that utilize PIM to execute more than 0.75% of Priority Customer [11] volume of Regular Orders, calculated as a percentage of Customer Total Consolidated Volume (''TCV'') per day in a given month, a PIM Break-Up Rebate of $0.26 per contract for Select Symbols and $0.60 per contract for Non-Select Symbols for Priority Customer Regular Orders under 100 contracts that are submitted to PIM and do not trade with their contra order except when those contracts trade against unrelated quotes or orders.[12]

At this time, the Exchange proposes to amend the incentive in note 19 of Options 7, Section 3 to increase the 100 contract requirement to 250 contracts. The Exchange seeks to continue to incentivize Electronic Access Members to submit a greater amount of smaller, more typically sized Priority Customer orders into PIM for price improvement with the proposed pricing. The Exchange believes the 100 contract threshold may be too narrow to represent all small-sized orders and would like to expand the contract size to 250 contracts to capture a greater amount of smaller sized orders. All Electronic Access Members may participate in a PIM.[13] Accordingly, the rebates, as amended, are designed to incentivize Electronic Access Members to submit a greater amount of Regular Orders executed in PIM to the Exchange, particularly Priority Customer PIM volume.

Options 7, Section 6

Today, the Exchange offers a PIM Rebate within Options 7, Section 6, Other Options Fees and Rebates. Specifically, Options 7, Section 6.C, PIM and Facilitation Rebate, pays a rebate of $0.11 per contract to Electronic Access Members that utilize PIM to execute more than 0.75% of Priority Customer volume in Regular Orders, calculated as a percentage of TCV per day in a given month.[14] The rebate is paid for Priority Customer Regular Orders under 100 contracts that are submitted to PIM.[15]

At this time, the Exchange proposes to amend the PIM Rebate within Options 7, Section 6.C to increase the 100 contract requirement to 250 contracts. The Exchange seeks to continue to incentivize Electronic Access Members to submit a greater amount of smaller, more typically sized Priority Customer orders into PIM for price improvement with the proposed pricing. The Exchange believes the 100 contract threshold may be too narrow to represent all small-sized orders and would like to expand the contract size to 250 contracts to capture a greater amount of smaller sized orders. All Electronic Access Members may participate in a PIM.[16] Accordingly, the rebate, as amended, is designed to incentivize Electronic Access Members to submit a greater amount of Regular Orders executed in PIM to the Exchange, particularly Priority Customer PIM volume.

The Exchange also proposes to amend the sentence that states, ''Provided this rebate is higher than other rebates within Options 7, Section 6B, this rebate will be paid in lieu of other rebates within this Section B.'' The references to section ''B'' should be to section ''C''.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,[17] in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act,[18] 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 Proposal Is Reasonable

The proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission* [19] (''NetCoalition''), the D.C. Circuit stated, ''[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

[3] A ''Regular Order'' is an order that consists of only a single option series and is not submitted with a stock leg.

[4] ''Select Symbols'' are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Interval Program. *See* Options 7, Section 1(c).

[5] ''Non-Select Symbols'' are options overlying all symbols excluding Select Symbols. *See* Options 7, Section 1(c).

[6] ''Non-Priority Customers'' include Market Makers, Non-Nasdaq ISE Market Makers (FarMMs), Firm Proprietary/Broker-Dealers, and Professional Customers.

[7] PIM is the Exchange's Price Improvement Auction as described in Options 3, Section 13. A PIM is comprised of the order the Electronic Access Member represents as agent (the ''Agency Order'') and a counter-side order for the full size of the Agency Order (the ''Counter-Side Order''). Responses, including the Counter-Side Order, and Improvement Orders may be entered during the exposure period. *See* Options 3, Section 13.

[8] Priority Customers are not assessed a Fee for PIM Orders. Also, Fees for PIM Orders apply to the originating and contra order. Further, other than for Priority Customer orders, this fee is $0.05 per contract for orders executed by Members that execute an ADV of 7,500 or more contracts in the PIM in a given month. Members that execute an ADV of 12,500 or more contracts in the PIM are charged $0.02 per contract. The discounted fees are applied retroactively to all eligible PIM volume in that month once the threshold has been reached. *See* notes 2 and 13 within the Pricing Schedule at Options 7, Section 3.

[9] PIM pricing is specified in Options 7, Section 3, Regular Order Fees and Rebates.

[10] The term ''Electronic Access Member'' or ''EAM'' means a Member that is approved to exercise trading privileges associated with EAM Rights. *See* General 1, section 1(a)(6).

[11] 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 Options 1, section 1(a)(37). Unless otherwise noted, when used in this Pricing Schedule the term ''Priority Customer'' includes ''Retail'' as defined below. *See* Options 7, Section 1(c).

[12] *See* note 19 of Options 7, Section 3. Also, the Exchange notes that the applicable fee is applied to any contracts for which a rebate is provided.

[13] Any solicited Counter-Side Orders submitted by an Electronic Access Member to trade against Agency Orders may not be for the account of a Nasdaq ISE Market Maker assigned to the options class. *See* Supplementary Material .06 to Options 3, Section 13.

[14] Eligible volume from Affiliated Members will be aggregated in calculating the percentage.

[15] The rebate is paid to the Agency Order as that term is defined within Options 3, Section 13. In the event a Crossing Transaction consists of two Priority Customer Orders, the Exchange would not pay this rebate.

[16] Any solicited Counter-Side Orders submitted by an Electronic Access Member to trade against Agency Orders may not be for the account of a Nasdaq ISE Market Maker assigned to the options class. *See* Supplementary Material .06 to Options 3, Section 13.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(4) and (5).

[19] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

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'. . . ."[20]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. Within the foregoing context, the proposal represents a reasonable attempt by the Exchange to attract additional order flow to the Exchange and increase its market share relative to its competitors.

Options 7, Section 3

The Exchange's proposal to amend the incentive in note 19 of Options 7, Section 3 to increase the 100 contract requirement to 250 contracts with respect to the Priority Customer PIM Break-Up Rebate is reasonable because it is designed to incentivize additional participation in PIM by encouraging market participants to send additional order flow to the Exchange in order to benefit from the increased rebates. In particular, the Exchange believes that this proposal will incentivize Electronic Access Members to submit a greater amount of Regular Orders executed in PIM to the Exchange, particularly Priority Customer PIM volume. The Exchange believes it is reasonable to pay the rebate for orders of 250 contracts or less because the current 100 contract threshold may be too narrow to represent all small-sized orders. The Exchange would like to expand the contract size to 250 contracts to capture a greater amount of smaller sized Priority Customer orders for purposes of the rebate. The Exchange believes the increased contract size will incentivize a greater amount of small-sized Priority Customer orders to be solicited for entry into PIM for price improvement.

The Exchange's proposal to amend the incentive in note 19 of Options 7, Section 3 to increase the 100 contract requirement to 250 contracts with respect to the Priority Customer PIM Break-Up Rebate is equitable and not unfairly discriminatory because any Electronic Access Member may participate in a PIM.[21] While only Electronic Access Members may initiate a PIM, Market Makers may respond to a PIM. While this incentive is specifically targeted towards Priority Customer orders, the Exchange does not believe that this is unfairly discriminatory. Of note, today, Priority Customers pay no Fees for PIM Orders. Priority Customer liquidity benefits all market participants by providing more trading opportunities which attracts market makers. An increase in the activity of these market participants (particularly in response to pricing) in turn facilitates tighter spreads which may cause an additional corresponding increase in order flow from other market participants. Attracting more liquidity from Priority Customers will benefit all market participants that trade on the ISE. Also, the 250 contracts threshold would be uniformly applied in paying the rebate.

Options 7, Section 6

The Exchange's proposal to amend the PIM rebate in Options 7, Section 6.C to increase the 100 contract requirement to 250 contracts with respect to Priority Customer Regular Orders is reasonable because it is designed to incentivize additional participation in PIM by encouraging market participants to send additional order flow to the Exchange in order to benefit from the increased rebates. In particular, the Exchange believes that this proposal will incentivize Electronic Access Members to submit a greater amount of Regular Orders executed in PIM to the Exchange, particularly Priority Customer PIM volume. The Exchange believes it is reasonable to pay the rebate for orders of 250 contracts or less because the current 100 contract threshold may be too narrow to represent all small-sized orders. The Exchange would like to expand the contract size to 250 contracts to capture a greater amount of smaller sized Priority Customer orders for purposes of the rebate. The Exchange believes the increased contract size will incentivize a greater amount of small-sized Priority Customer orders to be solicited for entry into PIM for price improvement.

The Exchange's proposal to amend the PIM rebate in Options 7, Section 6.C to increase the 100 contract requirement to 250 contracts with respect to Priority Customer Regular Orders is equitable and not unfairly discriminatory because any Electronic Access Member may participate in a PIM.[22] While only Electronic Access Members may initiate a PIM, Market Makers may respond to a PIM. While this incentive is specifically targeted towards Priority Customer orders, the Exchange does not believe that this is unfairly discriminatory. Of note, today, Priority Customers pay no Fees for PIM Orders. Priority Customer liquidity benefits all market participants by providing more trading opportunities which attracts market makers. An increase in the activity of these market participants (particularly in response to pricing) in turn facilitates tighter spreads which may cause an additional corresponding increase in order flow from other market participants. Attracting more liquidity from Priority Customers will benefit all market participants that trade on the ISE. Also, the 250 contracts threshold would be uniformly applied in paying the rebate.

*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.

Intermarket Competition

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 routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited because other options exchanges offer similar price improvement auctions as well as break-up rebates and customer order rebates.

Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in

[20] *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)).

[21] Any solicited Counter-Side Orders submitted by an Electronic Access Member to trade against Agency Orders may not be for the account of a Nasdaq ISE Market Maker assigned to the options class. *See* Supplementary Material .06 to Options 3, Section 13.

[22] Any solicited Counter-Side Orders submitted by an Electronic Access Member to trade against Agency Orders may not be for the account of a Nasdaq ISE Market Maker assigned to the options class. *See* Supplementary Material .06 to Options 3, Section 13.

reaction to fee and rebate changes. 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.

Intramarket Competition

The proposal is designed to attract additional liquidity to ISE. Specifically, amending the incentives to obtain greater PIM Break-Up Rebates will incentivize market participants to direct liquidity to ISE's PIM. All market participants will benefit from any increase in market activity that the proposal effectuates.

Options 7, Section 3

The Exchange's proposal to amend the incentive in note 19 of Options 7, Section 3 to increase the 100 contract requirement to 250 contracts with respect to the Priority Customer PIM Break-Up Rebate does not impose an undue burden on competition because any Electronic Access Member may enter orders into PIM. While only Electronic Access Members may initiate a PIM, the Exchange does not believe that this creates an undue burden on competition because Market Makers may respond to a PIM. While this incentive is specifically targeted towards Priority Customer orders, the Exchange does not believe that this is unfairly discriminatory. Today, Priority Customers pay no fees for PIM Orders. Priority Customer liquidity benefits all market participants by providing more trading opportunities which attracts market makers. An increase in the activity of these market participants (particularly in response to pricing) in turn facilitates tighter spreads which may cause an additional corresponding increase in order flow from other market participants. Attracting more liquidity from Priority Customers will benefit all market participants that trade on the ISE. Also, the 250 contracts threshold would be uniformly applied in paying the rebate.

Options 7, Section 6

The Exchange's proposal to amend the PIM rebate in Options 7, Section 6.C to increase the 100 contract requirement to 250 contracts with respect to Priority Customer Regular Orders does not impose an undue burden on competition because any Electronic Access Member may participate in a PIM. While only Electronic Access Members may initiate a PIM, Market Makers may respond to a PIM. While this incentive is specifically targeted towards Priority Customer orders, the Exchange does not believe that this is unfairly discriminatory. Of note, today, Priority Customers pay no Fees for PIM Orders. Priority Customer liquidity benefits all market participants by providing more trading opportunities which attracts market makers. An increase in the activity of these market participants (particularly in response to pricing) in turn facilitates tighter spreads which may cause an additional corresponding increase in order flow from other market participants. Attracting more liquidity from Priority Customers will benefit all market participants that trade on the ISE. Also, the 250 contracts threshold would be uniformly applied in paying the rebate.

*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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–ISE–2023–12 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–2023–12.* This file number should be included on the subject line if email 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 (*https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–ISE–2023–12 and should be submitted on or before July 13, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

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[23] 15 U.S.C. 78s(b)(3)(A)(ii).

[24] 17 CFR 240.19b–4(f)(2).

[25] 17 CFR 200.30–3(a)(12).