

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-80744; File No. SR-ISE-2017-47]

### Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees To Decrease Member Order Routing Program Rebates

May 23, 2017.

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 May 16, 2017, 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.<sup>3</sup> 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 its Schedule of Fees to decrease rebates for members that participate in the Member Order Routing Program.

The text of the proposed rule change is available on the Exchange’s Web site at [www.ise.com](http://www.ise.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 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 Exchange operates the Member Order Routing Program (“MORP”),<sup>4</sup> which is a program that provides enhanced rebates to order routing firms that select the Exchange as the default routing destination for unsolicited Crossing Orders.<sup>5</sup> On March 10, 2017, the Exchange made changes to the program to allow members to opt in to MORP for specific sessions rather than on a member-wide basis, and to increase MORP rebates for members that participate in the program.<sup>6</sup> As described in more detail below, the Exchange now proposes to decrease MORP rebates consistent with the previous rebates provided prior to that proposed rule change.<sup>7</sup> Members will continue to be able to opt in to MORP

<sup>4</sup> See Securities Exchange Act Release No. 74706 (April 10, 2016), 80 FR 20522 (April 16, 2016) (SR-ISE-2015-11).

<sup>5</sup> 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 the fee schedule, orders executed in the Block Order Mechanism are also considered Crossing Orders.

<sup>6</sup> See Securities Exchange Act Release No. 80267 (March 17, 2017), 82 FR 14929 (March 23, 2017) (SR-ISE-2017-24). As provided in the above filing, a member may designate one or more sessions to be eligible for MORP. A session is connection to the exchange over which a member submits orders. See Section V.C. of the Schedule of Fees. If a session is designated as eligible for MORP all requirements for the program must be met for that session. To be eligible to participate in MORP an EAM must: (1) Designate, in writing, to the Exchange which sessions are MORP eligible according to the criteria below; (2) provide to its clients, systems that enable the 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.

On the Schedule of Fees, the requirement to designate which sessions are MORP eligible ends in a period. As a non-substantive conforming change, the Exchange proposes to change this to a semi-colon.

<sup>7</sup> The Exchange initially filed the proposed pricing changes on April 27, 2017 (SR-ISE-2017-38). On May 5, 2017, the Exchange withdrew that filing and submitted this filing [sic].

for specific sessions rather than on a member-wide basis.

#### Rebate for Unsolicited Crossing Orders

Currently, an EAM that is MORP eligible receives a rebate for all unsolicited Crossing Orders of \$0.065 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 though their MORP designated sessions. This rebate is increased 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.<sup>8</sup> The Exchange proposes to decrease the MORP rebate for eligible members that execute from 30,000 to 99,999 originating contract sides to \$0.05 per originating contract side. The MORP rebate for eligible members that execute 100,000 or more originating contract sides will remain \$0.07 per originating contract side.

#### Facilitation and Solicitation Break-Up Rebate

In addition, any EAM that qualifies for the MORP rebate by executing an ADV of 30,000 originating contract sides or more on their MORP designated sessions is also eligible for increased Facilitation and Solicitation break-up rebates<sup>9</sup> for their Non-ISE Market Maker,<sup>10</sup> Firm Proprietary,<sup>11</sup> Broker-Dealer,<sup>12</sup> Professional Customer,<sup>13</sup> and

<sup>8</sup> The rebate for the highest tier achieved is applied retroactively to all eligible contracts traded in a given month. For purposes of determining whether the member meets the above ADV thresholds, any day that the Exchange 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 such calculation; provided that the Exchange will only remove the day for members that would have a lower ADV with the day included.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> A “Firm Proprietary” order is an order submitted by a member for its own proprietary account.

<sup>12</sup> A “Broker-Dealer” order is an order submitted by a member for a broker-dealer account that is not its own proprietary account.

<sup>13</sup> A “Professional Customer” is a person or entity that is not a broker/dealer and is not a Priority Customer.

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

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

<sup>3</sup> The Exchange initially filed the proposed rule change as SR-ISE-2017-38 on April 27, 2017. On May 5, 2017, the Exchange withdrew SR-ISE-2017-38 and submitted SR-ISE-2017-43 as a replacement. On May 16, 2017, the Exchange withdrew SR-ISE-2017-43 and submitted this filing. The Exchange has designated the proposed changes to be operative on May 1, 2017.

Priority Customer orders.<sup>14</sup> 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 \$0.42 per contract for regular and complex orders in Select Symbols,<sup>15</sup> \$0.20 per contract for regular orders in Non-Select Symbols,<sup>16</sup> \$1.08 per contract for complex orders in Non-Select Symbols, and \$0.15 per contract for regular and complex orders in foreign exchange option classes ("FX Options"). The Exchange proposes to decrease these Facilitation and Solicitation break-up rebates for MORP-eligible members to \$0.35 per contract for regular and complex orders in Select Symbols, \$0.15 per contract for regular orders in Non-Select Symbols, and \$0.80 per contract for complex orders in Non-Select Symbols. Regular and complex orders in FX Options will continue to receive a Facilitation and Solicitation break-up rebate of \$0.15 per contract.

## 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 the proposed decreases to MORP rebates, including the rebate for unsolicited Crossing Orders, and the Facilitation and Solicitation break-up rebate, are reasonable and equitable because the proposed rebates are set at amounts previously offered and will continue to be attractive to members that participate in the program.<sup>19</sup> Under MORP, which is a voluntary rebate program, the Exchange currently provides enhanced rebates to EAMs that connect directly to the Exchange and provide their clients with order routing functionality that includes all U.S. options exchanges,

including ISE. Although the Exchange proposes to decrease the rebates, the Exchange still believes that members will continue to be incentivized to participate in the program. The Exchange believes that the proposed rebates will be attractive to members to opt in to MORP.

In addition, the Exchange believes that the proposed rebates are not unfairly discriminatory as they apply to all EAMs that meet the program requirements and opt in to the program. Any EAM that participates in the program will be provided the rebates on an equal and non-discriminatory basis based on the order flow executed on the Exchange. While MORP is targeted towards unsolicited Crossing Order flow, the Exchange offers other incentive programs to promote and encourage growth in other business areas, including, for example, rebates for Market Makers that routinely quote at the national best bid or offer,<sup>20</sup> and volume-based Priority Customer complex order rebates.<sup>21</sup> Furthermore, solicited Crossing Orders benefit from the QCC and Solicitation Rebate, which applies to all QCC and/or other solicited Crossing Orders, including solicited orders executed in the Solicitation, Facilitation or Price Improvement Mechanisms. The Exchange believes that MORP is appropriately tailored to the order flow that the Exchange is seeking to attract, and will benefit all market participants that trade on ISE by encouraging additional liquidity.

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

In accordance with Section 6(b)(8) of the Act,<sup>22</sup> the Exchange does not believe that the proposed rule change will impose any burden on intermarket or intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Order routing firms that participate in MORP and select the Exchange as the default routing destination for unsolicited Crossing Orders will continue to receive enhanced rebates that are set at levels consistent with those previously offered on ISE. 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>23</sup> and Rule 19b-4(f)(2)<sup>24</sup> 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2017-47 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISE-2017-47. 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 Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent

<sup>14</sup> 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).

<sup>15</sup> "Select Symbols" are options overlying all symbols listed on the ISE that are in the Penny Pilot Program.

<sup>16</sup> "Non-Select Symbols" are options overlying all symbols excluding Select Symbols.

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

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

<sup>19</sup> See *supra* note 3.

<sup>20</sup> See Schedule of Fees, Section I, Regular Order Fees and Rebates, Market Maker Plus.

<sup>21</sup> See Schedule of Fees, Section II, Complex Order Fees and Rebates.

<sup>22</sup> 15 U.S.C. 78f(b)(8).

<sup>23</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>24</sup> 17 CFR 240.19b-4(f)(2).

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 Web site 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2017-47 and should be submitted on or before June 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-80745; File No. SR-NASDAQ-2017-033]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the First Trust California Municipal High Income ETF

May 23, 2017.

#### I. Introduction

On March 24, 2017, The NASDAQ Stock Market LLC ("Exchange" or "Nasdaq") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to list and trade shares ("Shares") of the First Trust California Municipal High Income ETF ("Fund") of First Trust Exchange-Traded Fund III ("Trust") under Nasdaq

Rule 5735. The proposed rule change was published for comment in the **Federal Register** on April 10, 2017.<sup>3</sup> On May 12, 2017, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> On May 16, 2017, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>5</sup> The Commission has received no comments on the proposal. The Commission is granting approval of the proposed rule change, as modified by Amendments No. 1 and 2.

#### II. Exchange's Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares of the Fund under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange. The Fund will be an actively-managed exchange-traded fund ("ETF"). The Trust, which was established as a Massachusetts business trust on January 9, 2008 and is registered with the Commission as an investment company, has filed with the Commission a registration statement on Form N-1A ("Registration Statement").<sup>6</sup>

<sup>3</sup> See Securities Exchange Act Release No. 80369 (April 4, 2017), 82 FR 17314.

<sup>4</sup> In Amendment No. 1, which amended and replaced the proposed rule change in its entirety, the Exchange: (a) Clarified the scope and definition of Municipal Securities (defined herein) and other municipal securities in which the Fund may invest; (b) represented that to the extent the Fund invests in Municipal Securities (as defined herein) that are asset-backed and mortgage-backed, those investments will not account, in the aggregate, for more than 20% of the fixed-income portion of the Fund's portfolio; (c) stated that the Fund may invest up to 20% of its net assets in the aggregate in OTC Derivatives (as defined herein) and represented that the Fund will only enter into transactions in OTC Derivatives with counterparties that the Adviser reasonably believes are capable of performing under the applicable contract or agreement; and (d) made certain technical amendments. Because Amendment No. 1 makes clarifying changes and does not unique or novel regulatory issues, it is not subject to notice and comment. Amendment No. 1 to the proposed rule change is available at: <https://www.sec.gov/comments/sr-nasdaq-2017-033/nasdaq2017033-1749423-151718.pdf>.

<sup>5</sup> In Amendment No. 2, which partially amended the proposed rule change, as modified by Amendment No. 1, the Exchange clarified that all statements and representations made in the filing regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, (c) dissemination and availability of the reference asset or intraday indicative values, or (d) the applicability of Exchange listing rules shall constitute continued listing requirements for listing the Shares on the Exchange. Because Amendment No. 2 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, it is not subject to notice and comment. Amendment No. 2 to the proposed rule change is available at: <https://www.sec.gov/comments/sr-nasdaq-2017-033/nasdaq2017033.htm>.

<sup>6</sup> See Post-Effective Amendment No. 65 to the Registration Statement for the Trust, dated March 24, 2017 (File Nos. 333-176976 and 811-22245). The Exchange represents that the Trust has obtained certain exemptive relief from the

First Trust Advisors L.P. will serve as the investment adviser ("Adviser") to the Fund. First Trust Portfolios L.P. will serve as the principal underwriter and distributor ("Distributor") of the Fund's Shares.<sup>7</sup> Brown Brothers Harriman & Co. will act as the administrator, accounting agent, custodian, and transfer agent to the Fund.

The Exchange has made the following representations and statements in describing the Fund and its investment strategies, including the Fund's portfolio holdings and investment restrictions.<sup>8</sup>

#### A. Exchange's Description of the Fund's Principal Investments

According to the Exchange, the primary investment objective of the Fund will be to seek to provide current income that is exempt from regular federal income taxes and California income taxes, and its secondary objective will be long-term capital appreciation. Under normal market conditions,<sup>9</sup> the Fund will seek to

Commission under the Investment Company Act of 1940 ("1940 Act"). See Investment Company Act Release No. 30029 (April 10, 2002) (File No. 812-13795).

<sup>7</sup> The Exchange represents that, while the Adviser is not a broker dealer, it is affiliated with the Distributor, a broker dealer. The Exchange states that the Adviser has implemented and will maintain a fire wall between the Adviser and the Distributor with respect to access to information concerning the composition of, and changes to, the Fund's portfolio. In the event (a) the Adviser or any sub adviser registers as a broker dealer or becomes newly affiliated with a broker dealer, or (b) any new adviser or sub adviser is a registered broker dealer or becomes affiliated with another broker dealer, it will implement and maintain a fire wall with respect to its relevant personnel and/or such broker dealer affiliate, as applicable, regarding access to information concerning the composition of, and/or changes to, the portfolio and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio.

<sup>8</sup> The Commission notes that additional information regarding the Trust, the Fund, and the Shares, including investment strategies, risks, net asset value ("NAV") calculation, creation and redemption procedures, fees, Fund holdings disclosure policies, distributions, and taxes, among other information, is included in the proposed rule change, as modified by Amendments No. 1 and 2, and the Registration Statement, as applicable. See Amendments No. 1 and 2 and Registration Statement, *supra* notes 4, 5, and 6, respectively, and accompanying text.

<sup>9</sup> The term "under normal market conditions" for purposes of the filing, includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or *force majeure* type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. The Exchange represents that, on a temporary basis, including for defensive

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<sup>25</sup> 17 CFR 200.30-3(a)(12).

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

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