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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-94427; File No. SR-ISE-2022-06]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Market Maker Plus Tier 1b Rebate for SPY, QQQ, and IWM

March 16, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on March 1, 2022, 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 its Pricing Schedule at Options 7, Section 3 to increase the Market Maker Plus Tier 1b rebate for SPY, QQQ, and IWM.

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

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

2 17 CFR 240.19b-4.

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7, Section 3 to increase the Market Maker Plus Tier 1b rebate for SPY, QQQ, and IWM.

Today, the Exchange operates a Market Maker Plus program for regular orders in Select Symbols[3] and Non-Select Symbols[4] that provides tiered incentives to Market Makers[5] based on time spent quoting at the National Best Bid or National Best Offer ("NBBO").[6] This program is designed to reward Market Makers that contribute to market quality by maintaining tight markets in symbols traded on the Exchange. In particular, Market Makers that qualify for this program will not pay the maker fee of $0.18 per contract (in Select Symbols) or $0.70 per contract (in Non-Select Symbols), and will instead receive incentives based on the applicable Market Maker Plus Tier for which they qualify. 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. 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.[7]

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3 "Select Symbols" are options overlying all symbols listed on the Exchange that are in the Penny Interval Program.

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

5 The term "Market Makers" refers to Competitive Market Makers and Primary Market Makers, collectively.

6 See Options 7, Section 3, note 5.

7 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.

For SPY, QQQ, and IWM, the Exchange currently provides the below marker rebates based on the applicable Market Maker Plus tier for which the Market Maker qualifies.

SPY, QQQ, and IWM		
Market Maker Plus Tier (Specified Percentage)	**Regular Maker Rebate**	**Linked Maker Rebate**
Tier 1a (50% to less than 65%)	($0.00)	N/A
Tier 1b (65% to less than 80%) or (over 50% and adds liquidity in the qualifying symbol that is executed at a volume of greater than 0.10% of Customer Total Consolidated Volume)	($0.05)	N/A
Tier 2 (80% to less than 85%) or (over 50% and adds liquidity in the qualifying symbol that is executed at a volume of greater than 0.20% of Customer Total Consolidated Volume)	($0.18)	($0.15)
Tier 3 (85% to less than 90%) or (over 50% and adds liquidity in the qualifying symbol that is executed at a volume of greater than 0.25% of Customer Total Consolidated Volume)	($0.22)	($0.19)
Tier 4 (90% or greater) or (over 50% and adds liquidity in the qualifying symbol that is executed at a volume of greater than 0.50% of Customer Total Consolidated Volume)	($0.26)	($0.23)

The Exchange now proposes to increase the Market Maker Plus Tier 1b rebate from $0.05 to $0.10 per contract. No other changes are being made to the Market Maker Plus program under this proposal.

By increasing the Tier 1b rebate, the Exchange seeks to further incentivize Market Makers to participate in the Market Maker Plus program for SPY, QQQ, and IWM. By fortifying participation in this program, the Exchange believes that the proposed changes will continue to encourage Market Makers to post quality markets in SPY, QQQ, and IWM, thereby improving trading conditions for all market participants through narrower bid-ask spreads and increased depth of liquidity available at the inside market.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[9] 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's 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 securities 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, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' … As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange

8 15 U.S.C. 78f(b).

9 15 U.S.C. 78f(b)(4) and (5).

possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'…."[10]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."[11]

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security 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. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

In particular, the Exchange's proposal to increase the SPY, QQQ, and IWM Tier 1b rebate from $0.05 to $0.10 per contract is a reasonable attempt to fortify participation in the Market Maker Plus program and improve market quality on ISE. The Exchange will apply the proposed changes to SPY, QQQ, and IWM as they are three of the most actively traded symbols on ISE, so the Exchange believes that further incentivizing liquidity in these three names will have a significant and beneficial impact on market quality on ISE.

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10 NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

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

The Exchange also believes that the proposed changes are equitable and not unfairly discriminatory as all Market Makers would be eligible to receive the increased Tier 1b rebate in SPY, QQQ, and IWM by meeting the quoting requirements described above. Furthermore, the Exchange continues to believe that it is not unfairly discriminatory to offer this program's incentives to Market Makers only. Market Makers, and in particular, those Market Makers that participate in and qualify for the Market Maker Plus program, add value through continuous quoting, and are subject to additional requirements and obligations (such as quoting obligations) that other market participants are not. Lastly, the proposed changes will further encourage Market Makers to maintain tight markets in SPY, QQQ, and IWM, thereby increasing liquidity and attracting additional order flow to the Exchange, which will benefit all market participants in the quality of order interaction.

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.

In terms of intra-market competition, while the proposed increase to the SPY, QQQ, and IWM Tier 1b rebate would apply directly to Market Makers that participate in the Market Maker Plus program, the Exchange believes that the proposed changes will further strengthen participation in the program, ultimately to the benefit of all market participants. As discussed above, continuing to encourage participation in the Market Maker Plus program will improve market quality by incentivizing Market Makers to provide significant quoting at the NBBO. This, in turn, improves trading conditions for all market participants through narrower bid-ask spreads and increased depth of liquidity available at the inside market, thereby attracting additional order flow to the Exchange.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates 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.

In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[12] and Rule 19b-4(f)(2)[13] 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:

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12 15 U.S.C. 78s(b)(3)(A)(ii).

13 17 CFR 240.19b-4(f)(2).

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-ISE-2022-06 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-2022-06. 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-2022-06 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

J. Matthew DeLesDernier,

Assistant Secretary.

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14 17 CFR 200.30-3(a)(12).