

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 24

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. * SR 2023 - * 05

Amendment No. (req. for Amendments *)

Filing by Nasdaq ISE, LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>
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Rule

<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
<input checked="" type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010
Section 806(e)(1) *

Section 806(e)(2) *

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 3C(b)(2) *

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

A proposal to amend the ISE Pricing Schedule at Options 7, Section 6 to modify the Crossing Fee Cap.

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Sun Last Name * Kim

Title * Associate General Counsel

E-mail * Sun.Kim@nasdaq.com

Telephone * (646) 420-7816 Fax

Signature

Pursuant to the requirements of the Securities Exchange of 1934, Nasdaq ISE, LLC has duty caused this filing to be signed on its behalf by the undersigned thereunto duty authorized.

Date 02/01/2023

(Title *)

By John Zecca (Name *)

EVP and Chief Legal Officer

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

 Date: 2023.02.01 15:28:08 -05'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information *

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SR-ISE-2023-05 19b-4.doc

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

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SR-ISE-2023-05 Exhibit 1.doc

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2- Notices, Written Comments, Transcripts, Other Communications

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

Exhibit 3 - Form, Report, or Questionnaire

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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SR-ISE-2023-05 Exhibit 5.doc

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) Nasdaq ISE, LLC (“ISE” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend the Exchange’s Pricing Schedule at Options 7, Section 6.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors (the “Board”). Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Sun Kim
Associate General Counsel
Nasdaq, Inc.
646-420-7816

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

a. Purpose

The purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7, Section 6.H to increase the Crossing Fee Cap.

As set forth in Options 7, Section 6.H, the Exchange presently offers a Crossing Fee Cap of \$150,000 per month, per Member, on all Firm Proprietary³ transactions that are part of the originating or contra-side of a Crossing Order.⁴ Fees charged by the Exchange for Responses to Crossing Orders⁵ are not included in the calculation of the monthly fee cap. Surcharge fees charged by the Exchange for licensed products and the fees for index options as set forth in Section 5 are not included in the calculation of the monthly fee cap.⁶ For purposes of the Crossing Fee Cap, the Exchange will attribute eligible volume to the Member on whose behalf the Crossing Order was executed.

³ A Firm Proprietary order is an order submitted by a member for its own proprietary account.

⁴ Crossing Orders are contracts that are submitted as part of a Facilitation, Solicitation, PIM, Block or QCC order. All eligible volume from affiliated Members is aggregated for purposes of the Crossing Fee Cap, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A.

⁵ "Responses to Crossing Order" is any contra-side interest submitted after the commencement of an auction in the Exchange's Facilitation Mechanism, Solicited Order Mechanism, Block Order Mechanism or PIM. See Options 7, Section 1(c).

⁶ In addition, a service fee of \$0.00 per side currently applies to all order types that are eligible for the fee cap. The service fee would apply once a Member reaches the fee cap level and would apply to every contract side above the fee cap. A Member who does not reach the monthly fee cap is not charged the service fee. Once the fee cap is reached, the service fee shall apply to eligible Firm Proprietary orders in all Nasdaq ISE products. The service fee is not calculated in reaching the cap.

At this time, the Exchange proposes to increase the Crossing Fee Cap from \$150,000 to \$200,000. The Exchange also proposes that once a Member exceeds the fee cap level, the Member will be subject to a reduced transaction fee of \$0.02 per capped contract. Thus, if a Member exceeds the \$200,000 Crossing Fee Cap in a given month, the Member would be charged a reduced fee of \$0.02 per contract for their Crossing Orders instead of \$0.20 (for Crossing Orders except orders submitted in the Price Improvement Mechanism (“PIM”))⁷ or \$0.10 (for PIM orders). The Exchange notes that Members may also currently qualify for discounted fees (or qualify for free executions) on their Firm Proprietary PIM orders if they meet certain PIM volume requirements.⁸ The Exchange therefore proposes to stipulate that the Member will be subject to a reduced transaction fee of \$0.02 per capped contract, **unless the Member also qualifies for free executions**. The Exchange further proposes to delete all references to the

⁷ As described in Options 3, Section 13, PIM is a process by which an EAM can provide price improvement opportunities for a “Crossing Transaction,” which is comprised of the order the EAM represents as agent (the “Agency Order”) and a counter-side order for the full size of the Agency Order (the “Counter-Side Order”). Upon the entry of a Crossing Transaction into the PIM, PIM responses (i.e., “Improvement Orders”) may be entered during the auction exposure period.

⁸ See Options 7, Section 3 (note 13) (providing that other than for Priority Customer orders, the \$0.10 PIM 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 will be 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); and Options 7, Section 4 (note 9) (providing that other than for Priority Customer orders, the \$0.10 PIM 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 will not be charged a fee.** The discounted fees are applied retroactively to all eligible PIM volume in that month once the threshold has been reached). As emphasized in the foregoing, a Member could potentially qualify for free executions on their PIM orders and also exceed the Crossing Fee Cap in a given month.

service fee in this Section 6.H. As noted above, the Exchange currently does not charge any service fees in relation to the Crossing Fee Cap as this fee is set to \$0.00, and the Exchange therefore proposes to delete this obsolete fee.

While the Crossing Fee Cap will increase under this proposal and Members will be charged a nominal transaction fee of \$0.02 per capped contract once the fee cap level is exceeded, the Exchange believes that Members will continue to be incentivized to bring Firm Proprietary Crossing Order flow to ISE to achieve the benefits of the cap on their Crossing Order transactions fees.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ 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,

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’....”¹¹

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.”¹²

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.

¹¹ 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)).

¹² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

The Exchange believes that its proposal to increase the Crossing Fee Cap from \$150,000 to \$200,000 is reasonable. The Crossing Fee Cap was established to reward Members for executing a higher volume of Firm Proprietary Crossing Orders on the Exchange by capping the associated fees. The Exchange believes that the increased fee cap will be set at a level that continues to appropriately reward Members for executing high volumes of such Crossing Orders. Despite the proposed increase, the Exchange believes that Members will continue to be incentivized to bring Firm Proprietary Crossing Order flow to ISE to receive the benefits of capped fees for their Crossing Order transactions. In that vein, the Exchange believes that its proposal to begin charging a transaction fee of \$0.02 per capped contract once the Member has exceeded the Crossing Fee Cap level is reasonable because it is a nominal amount compared to the \$0.20 fee for Crossing Orders (except PIM orders) and the \$0.10 fee for PIM orders normally assessed to Members for their Firm Proprietary orders. As such, the Exchange believes that the Crossing Fee Cap, as amended, still serves to lower fees for Members that transact certain qualifying Firm Proprietary Crossing Order volume on ISE, thus enabling these Members the ability to lower costs. The Exchange further believes that it is reasonable to assess no fees instead of assessing the reduced \$0.02 transaction fee for capped contracts in the event the Member exceeds the Crossing Fee Cap level in a given month and also qualifies for free executions under a separate incentive program. Given the interactions of various incentive programs that apply to Crossing Orders (and in this case, PIM orders) as noted above, the Exchange wants to ensure that Members get the most favorable incentive they qualify for under its Pricing Schedule. The Exchange also believes that the proposed changes to remove all references to the service fee in the Crossing Fee Cap is reasonable.

As noted above, the Exchange currently does not charge any service fees in relation to the Crossing Fee Cap as this fee is set to \$0.00. The Exchange therefore proposes to delete this fee to avoid potential confusion by market participants.

The Exchange believes that the proposed changes described above to the Crossing Fee Cap are equitable and not unfairly discriminatory because the changes will apply uniformly to all Members engaged in Firm Proprietary trading in options classes traded on the Exchange. The Exchange does not believe that it is unfairly discriminatory to offer the Crossing Fee Cap to Firm Proprietary transactions as differentiated pricing already exists on the Exchange's Pricing Schedule to encourage different segments of order flow. For instance, the Exchange generally provides Priority Customer¹³ orders more favorable pricing through lower or no transaction fees, including Priority Customer Crossing Orders that are presently assessed no fees, and through rebate opportunities like the Priority Customer rebate currently provided for adding liquidity in Non-Select Symbols.¹⁴ Professional Customer¹⁵ orders are presently charged a lower transaction fee for executed QCC orders and for orders executed in the Solicited Order Mechanism (\$0.10 for Professional Customers versus \$0.20 for all other non-Priority Customers).¹⁶

¹³ 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).

¹⁴ See Options 7, Sections 3 and 4. Non-Select Symbols are options overlying all symbols that are not included in the Penny Interval Program.

¹⁵ A "Professional Customer" is a person or entity that is not a broker/dealer and is not a Priority Customer.

¹⁶ See Options 7, Sections 3 (note 16) and Section 4 (note 14).

Broker-Dealer¹⁷ and Firm Proprietary orders are incentivized in the Exchange's PIM and Facilitation Rebate program.¹⁸ Market Makers¹⁹ are offered rebates through the Exchange's Market Maker Plus program.²⁰ The Exchange further believes there is nothing impermissible about offering the Crossing Fee Cap solely to Firm Proprietary transactions given that this practice is consistent with firm fee caps in place on other options exchanges.²¹ To the extent the amended Crossing Fee Cap continues to encourage additional Firm Proprietary Crossing Order flow to ISE, such increased order flow brings increased liquidity and additional opportunities for interaction with this order flow, which ultimately benefits all market participants.

4. 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, the Exchange does not believe that this proposal will place any category of market participant at a competitive disadvantage. As discussed above, the proposed changes to the Crossing Fee Cap will apply uniformly to all Members engaged in Firm Proprietary trading in options classes traded on the

¹⁷ A "Broker-Dealer" order is an order submitted by a member for a broker-dealer account that is not its own proprietary account.

¹⁸ See Options 7, Sections 6.C.

¹⁹ The term "Market Makers" refers to Competitive Market Makers and Primary Market Makers, collectively. See Options 1, Section 1(a)(21).

²⁰ See Options 7, Sections 3 (note 5).

²¹ See, e.g., Monthly Firm Fee Cap in Nasdaq Phlx Options 7, Section 4; and Firm and Broker Dealer Monthly Fee Cap in NYSE Arca Options Fees and Charges at https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf.

Exchange. To the extent the amended Crossing Fee Cap continues to provide an incentive for Members to bring additional Firm Proprietary Crossing Order flow to the Exchange, such order flow brings increased liquidity to the benefit of all market participants.

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 to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

5. 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.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Pursuant to Section 19(b)(3)(A)(ii) of the Act,²² the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.

5. Text of the proposed rule change.

²² 15 U.S.C. 78s(b)(3)(A)(ii).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. _____ ; File No. SR-ISE-2023-05)

February __, 2023

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend ISE Pricing Schedule at Options 7, Section 6 to Modify the Crossing Fee Cap

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 February 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, 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 ISE Pricing Schedule at Options 7, Section 6 to modify the Crossing Fee Cap.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Pricing Schedule at Options 7, Section 6.H to increase the Crossing Fee Cap.

As set forth in Options 7, Section 6.H, the Exchange presently offers a Crossing Fee Cap of \$150,000 per month, per Member, on all Firm Proprietary³ transactions that are part of the originating or contra-side of a Crossing Order.⁴ Fees charged by the Exchange for Responses to Crossing Orders⁵ are not included in the calculation of the monthly fee cap. Surcharge fees charged by the Exchange for licensed products and the fees for index options as set forth in Section 5 are not included in the calculation of the monthly fee cap.⁶ For purposes of the Crossing Fee Cap, the Exchange will attribute eligible volume to the Member on whose behalf the Crossing Order was executed.

³ A Firm Proprietary order is an order submitted by a member for its own proprietary account.

⁴ Crossing Orders are contracts that are submitted as part of a Facilitation, Solicitation, PIM, Block or QCC order. All eligible volume from affiliated Members is aggregated for purposes of the Crossing Fee Cap, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A.

⁵ "Responses to Crossing Order" is any contra-side interest submitted after the commencement of an auction in the Exchange's Facilitation Mechanism, Solicited Order Mechanism, Block Order Mechanism or PIM. See Options 7, Section 1(c).

⁶ In addition, a service fee of \$0.00 per side currently applies to all order types that are eligible for the fee cap. The service fee would apply once a Member reaches

At this time, the Exchange proposes to increase the Crossing Fee Cap from \$150,000 to \$200,000. The Exchange also proposes that once a Member exceeds the fee cap level, the Member will be subject to a reduced transaction fee of \$0.02 per capped contract. Thus, if a Member exceeds the \$200,000 Crossing Fee Cap in a given month, the Member would be charged a reduced fee of \$0.02 per contract for their Crossing Orders instead of \$0.20 (for Crossing Orders except orders submitted in the Price Improvement Mechanism (“PIM”))⁷ or \$0.10 (for PIM orders). The Exchange notes that Members may also currently qualify for discounted fees (or qualify for free executions) on their Firm Proprietary PIM orders if they meet certain PIM volume requirements.⁸

the fee cap level and would apply to every contract side above the fee cap. A Member who does not reach the monthly fee cap is not charged the service fee. Once the fee cap is reached, the service fee shall apply to eligible Firm Proprietary orders in all Nasdaq ISE products. The service fee is not calculated in reaching the cap.

⁷ As described in Options 3, Section 13, PIM is a process by which an EAM can provide price improvement opportunities for a “Crossing Transaction,” which is comprised of the order the EAM represents as agent (the “Agency Order”) and a counter-side order for the full size of the Agency Order (the “Counter-Side Order”). Upon the entry of a Crossing Transaction into the PIM, PIM responses (i.e., “Improvement Orders”) may be entered during the auction exposure period.

⁸ See Options 7, Section 3 (note 13) (providing that other than for Priority Customer orders, the \$0.10 PIM 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 will be 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); and Options 7, Section 4 (note 9) (providing that other than for Priority Customer orders, the \$0.10 PIM 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 will not be charged a fee.** The discounted fees are applied retroactively to all eligible PIM volume in that month once the threshold has been reached). As emphasized in the foregoing, a Member could potentially qualify for free executions on their PIM orders and also exceed the Crossing Fee Cap in a given month.

The Exchange therefore proposes to stipulate that the Member will be subject to a reduced transaction fee of \$0.02 per capped contract, **unless the Member also qualifies for free executions**. The Exchange further proposes to delete all references to the service fee in this Section 6.H. As noted above, the Exchange currently does not charge any service fees in relation to the Crossing Fee Cap as this fee is set to \$0.00, and the Exchange therefore proposes to delete this obsolete fee.

While the Crossing Fee Cap will increase under this proposal and Members will be charged a nominal transaction fee of \$0.02 per capped contract once the fee cap level is exceeded, the Exchange believes that Members will continue to be incentivized to bring Firm Proprietary Crossing Order flow to ISE to achieve the benefits of the cap on their Crossing Order transactions fees.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ 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

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

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 possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹¹

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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

¹¹ 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)).

¹² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

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.

The Exchange believes that its proposal to increase the Crossing Fee Cap from \$150,000 to \$200,000 is reasonable. The Crossing Fee Cap was established to reward Members for executing a higher volume of Firm Proprietary Crossing Orders on the Exchange by capping the associated fees. The Exchange believes that the increased fee cap will be set at a level that continues to appropriately reward Members for executing high volumes of such Crossing Orders. Despite the proposed increase, the Exchange believes that Members will continue to be incentivized to bring Firm Proprietary Crossing Order flow to ISE to receive the benefits of capped fees for their Crossing Order transactions. In that vein, the Exchange believes that its proposal to begin charging a transaction fee of \$0.02 per capped contract once the Member has exceeded the Crossing Fee Cap level is reasonable because it is a nominal amount compared to the \$0.20 fee for Crossing Orders (except PIM orders) and the \$0.10 fee for PIM orders normally assessed to Members for their Firm Proprietary orders. As such, the Exchange believes that the Crossing Fee Cap, as amended, still serves to lower fees for Members that transact certain qualifying Firm Proprietary Crossing Order volume on ISE, thus enabling these Members the ability to lower costs. The Exchange further believes that it is reasonable to assess no fees instead of assessing the reduced \$0.02 transaction fee for capped contracts in the event the Member exceeds the Crossing Fee Cap level in a given month and also qualifies for free executions under a separate incentive program. Given the interactions of various incentive programs that apply to Crossing Orders (and in this case, PIM orders) as noted

above, the Exchange wants to ensure that Members get the most favorable incentive they qualify for under its Pricing Schedule. The Exchange also believes that the proposed changes to remove all references to the service fee in the Crossing Fee Cap is reasonable. As noted above, the Exchange currently does not charge any service fees in relation to the Crossing Fee Cap as this fee is set to \$0.00. The Exchange therefore proposes to delete this fee to avoid potential confusion by market participants.

The Exchange believes that the proposed changes described above to the Crossing Fee Cap are equitable and not unfairly discriminatory because the changes will apply uniformly to all Members engaged in Firm Proprietary trading in options classes traded on the Exchange. The Exchange does not believe that it is unfairly discriminatory to offer the Crossing Fee Cap to Firm Proprietary transactions as differentiated pricing already exists on the Exchange's Pricing Schedule to encourage different segments of order flow. For instance, the Exchange generally provides Priority Customer¹³ orders more favorable pricing through lower or no transaction fees, including Priority Customer Crossing Orders that are presently assessed no fees, and through rebate opportunities like the Priority Customer rebate currently provided for adding liquidity in Non-Select Symbols.¹⁴ Professional Customer¹⁵ orders are presently charged a lower transaction fee for executed QCC orders and for orders executed in the Solicited Order Mechanism

¹³ 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).

¹⁴ See Options 7, Sections 3 and 4. Non-Select Symbols are options overlying all symbols that are not included in the Penny Interval Program.

¹⁵ A "Professional Customer" is a person or entity that is not a broker/dealer and is not a Priority Customer.

(\$0.10 for Professional Customers versus \$0.20 for all other non-Priority Customers).¹⁶ Broker-Dealer¹⁷ and Firm Proprietary orders are incentivized in the Exchange's PIM and Facilitation Rebate program.¹⁸ Market Makers¹⁹ are offered rebates through the Exchange's Market Maker Plus program.²⁰ The Exchange further believes there is nothing impermissible about offering the Crossing Fee Cap solely to Firm Proprietary transactions given that this practice is consistent with firm fee caps in place on other options exchanges.²¹ To the extent the amended Crossing Fee Cap continues to encourage additional Firm Proprietary Crossing Order flow to ISE, such increased order flow brings increased liquidity and additional opportunities for interaction with this order flow, which ultimately benefits all market participants.

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, the Exchange does not believe that this proposal will place any category of market participant at a competitive disadvantage. As

¹⁶ See Options 7, Sections 3 (note 16) and Section 4 (note 14).

¹⁷ A "Broker-Dealer" order is an order submitted by a member for a broker-dealer account that is not its own proprietary account.

¹⁸ See Options 7, Sections 6.C.

¹⁹ The term "Market Makers" refers to Competitive Market Makers and Primary Market Makers, collectively. See Options 1, Section 1(a)(21).

²⁰ See Options 7, Sections 3 (note 5).

²¹ See, e.g., Monthly Firm Fee Cap in Nasdaq Phlx Options 7, Section 4; and Firm and Broker Dealer Monthly Fee Cap in NYSE Arca Options Fees and Charges at https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf.

discussed above, the proposed changes to the Crossing Fee Cap will apply uniformly to all Members engaged in Firm Proprietary trading in options classes traded on the Exchange. To the extent the amended Crossing Fee Cap continues to provide an incentive for Members to bring additional Firm Proprietary Crossing Order flow to the Exchange, such order flow brings increased liquidity to the benefit of all market participants.

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 to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.²² At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-ISE-2023-05 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-2023-05. This file number should be included on the subject line if e-mail is used. To help the Commission process

²² 15 U.S.C. 78s(b)(3)(A)(ii).

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 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; 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-2023-05 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

J. Matthew DeLesDernier
Assistant Secretary

²³ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

Deleted text is [bracketed]. New text is underlined.

NASDAQ ISE, LLC RULES

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OPTIONS 7 PRICING SCHEDULE

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Section 6. Other Options Fees and Rebates

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H. Crossing Fee Cap

Fees are capped at \$[150,000]200,000 per month, per Member on all Firm Proprietary transactions that are part of the originating or contra side of a Crossing Order. Once a Member exceeds the fee cap level the Member will be subject to a reduced transaction fee of \$0.02 per capped contract, unless the Member also qualifies for free executions.

Crossing Orders are contracts that are submitted as part of a Facilitation, Solicitation, PIM, Block or QCC order. All eligible volume from affiliated Members will be aggregated for purposes of the Crossing Fee Cap, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A. Fees charged by the Exchange for Responses to Crossing Orders are not included in the calculation of the monthly fee cap. Surcharge fees charged by the Exchange for licensed products and the fees for index options as set forth in Section 5 are not included in the calculation of the monthly fee cap. [A service fee of \$0.00 per side will apply to all order types that are eligible for the fee cap. The service fee shall apply once a Member reaches the fee cap level and shall apply to every contract side above the fee cap. A Member who does not reach the monthly fee cap will not be charged the service fee. Once the fee cap is reached, the service fee shall apply to eligible Firm Proprietary orders in all Nasdaq ISE products. The service fee is not calculated in reaching the cap.] For purposes of the Crossing Fee Cap the Exchange will attribute eligible volume to the ISE Member on whose behalf the Crossing Order was executed.

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