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Page 1 of \* 20

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

File No. \* SR 2023 - \* 36

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 fees for options on the Nasdaq 100 Index in the Exchanges Pricing Schedule at Options 7.

**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 duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 12/08/2023

(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: 2023.12.08 11:14:56 -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 EDFS website.

**Form 19b-4 Information \***

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SR-ISE-2023-36 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-2023-36 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-2023-36 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend the fees for Nasdaq 100 Index options in the Exchange’s Pricing Schedule at Options 7, Section 5A. While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on December 1, 2023.

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

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

<sup>2</sup> 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 fees for NDX<sup>3</sup> in Options 7, Section 5A. The Exchange initially filed the proposed pricing changes on November 30, 2023 (SR-ISE-2023-34). On December 8, 2023, the Exchange withdrew that filing and submitted this filing.

Today, the Exchange assesses a transaction fee of \$0.75 per contract for all Non-Priority Customer<sup>4</sup> regular NDX orders. Priority Customers<sup>5</sup> currently receive free executions in regular NDX orders. In accordance with note 1 of Options 7, Section 5.A, the applicable complex order fees for Non-Select Symbols<sup>6</sup> in Options 7, Section 4 apply to all executions in complex NDX orders.<sup>7</sup> As such, Priority Customers currently receive free executions in complex NDX orders.<sup>8</sup>

The Exchange now proposes to begin assessing all Priority Customer NDX executions (i.e., regular and complex) a \$0.25 per contract transaction fee. In connection with this change, the Exchange also proposes to amend note 1 of Options 7, Section 5.A

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<sup>3</sup> For purposes of the Pricing Schedule, “NDX” means A.M. or P.M. settled options on the full value of the Nasdaq 100® Index. See Options 7, Section 1(c).

<sup>4</sup> “Non-Priority Customers” include Market Makers, Non-Nasdaq ISE Market Makers (FarMMs), Firm Proprietary / Broker-Dealers, and Professional Customers.

<sup>5</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 Nasdaq ISE Options 1, Section 1(a)(37).

<sup>6</sup> “Non-Select Symbols” are options overlying all symbols excluding Select Symbols. “Select Symbols” are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Interval Program.

<sup>7</sup> See generally Options 7, Section 4 (setting forth maker/taker fees for Non-Select Symbols, including NDX, pursuant to which Priority Customers are assessed no fees today). In addition, the Exchange does not offer the tiered Priority Customer complex order rebates in Section 4 for orders in NDX. See Options 7, Section 4, note 4.

<sup>8</sup> Id.

to exclude Priority Customer complex NDX executions from the Section 4 complex fees, and to make clear that Priority Customer complex NDX executions will now be assessed a \$0.25 per contract fee instead. As amended, note 1 will provide that for all executions in complex NDX orders for Non-Priority Customers, the applicable complex order fees for Non-Select Symbols in Section 4 will apply. Further, for all executions in complex NDX orders for Priority Customers, the fee will be \$0.25 per contract. The Exchange notes that the proposed \$0.25 per contract fee amount is in line with customer transaction fees assessed on other index products.<sup>9</sup> The Exchange also proposes to assess a surcharge of \$0.25 per contract to all Priority Customer complex executions in NDX.<sup>10</sup> As such, Priority Customer complex executions in NDX will be assessed a total of \$0.50 per contract (i.e., the base \$0.25 per contract fee plus the \$0.25 per contract surcharge). The Exchange notes that the proposed surcharge amount is within the range of surcharges assessed for customer transactions in other products at other options exchanges.<sup>11</sup>

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>13</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and

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<sup>9</sup> For example, Cboe Options (“Cboe”) currently assesses a \$0.25 per contract customer transaction fee for MXEA and MXEF options, \$0.35 per contract for OEX and XEO options, and \$0.36 per contract (if premium < \$1.00) or \$0.45 per contract (if premium >= \$1.00) for SPX and SPESG options. See Cboe Fees Schedule.

<sup>10</sup> See proposed note 2 of Options 7, Section 5.A.

<sup>11</sup> For example, Cboe currently assesses customers a \$0.25 per contract exotic surcharge and a \$0.21 per contract execution surcharge in SPX and SPESG options. See Cboe Fees Schedule. In addition, the Exchange’s affiliate, Nasdaq Phlx LLC (“Phlx”) current assesses customers a \$0.25 per contract complex surcharge for executions in singly-listed U.S. dollar-settled foreign currency options. See Phlx Options 7, Section 5.D.

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(4) and (5).

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 it is reasonable to begin assessing a \$0.25 per contract transaction fee to all Priority Customer executions (i.e., regular and complex) in NDX and a \$0.25 per contract surcharge to complex Priority Customer executions in NDX because the proposed pricing reflects the proprietary nature of this product. Similar to other proprietary products like options overlying the Nasdaq 100 Reduced Value Index (“NQX”) and the Nasdaq 100 Micro Index (“XND”), the Exchange seeks to recoup the operational costs of listing proprietary products.<sup>14</sup> Also, pricing by symbol is a common practice on many U.S. options exchanges as a means to incentivize order flow to be sent to an exchange for execution in particular products. Other options exchanges price by symbol.<sup>15</sup> Further, the Exchange notes that market participants are offered different ways to gain exposure to the Nasdaq 100 Index, whether through the Exchange’s proprietary products like options overlying NDX, NQX, or XND, or separately through multi-listed options overlying Invesco QQQ Trust (“QQQ”).<sup>16</sup> Offering such products provides market participants with a variety of choices in selecting the product they desire to utilize in order to gain exposure to the Nasdaq 100 Index. When exchanges are able to recoup costs associated with offering proprietary products, it incentivizes growth and competition for the innovation of additional products.

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<sup>14</sup> By way of example, in analyzing an obvious error, the Exchange would have additional data points available in establishing a theoretical price for a multiply listed option as compared to a proprietary product, which requires additional analysis and administrative time to comply with Exchange rules to resolve an obvious error.

<sup>15</sup> See supra note 9.

<sup>16</sup> QQQ is an exchange-traded fund based on the same Nasdaq 100 Index as NDX, NQX, and XND.

The Exchange further believes that the proposed pricing described above is reasonable because the proposal is designed to update fees for the Exchange's services to reflect their current value—rather than their value when the Exchange last updated NDX pricing five years ago<sup>17</sup>—based on the Exchange's ability to deliver value to its customers by offering proprietary products on its market like NDX.

While the pricing for Priority Customer NDX orders is increasing under this proposal, the Exchange believes that the proposal is reasonable and would continue to incentivize market participants to transact in Priority Customer NDX orders because Priority Customers would continue to be charged at a lower rate for NDX than Non-Priority Customers. As a result, the Exchange believes that the proposed pricing is structured in a way that continues to encourage market participants, especially Priority Customers, to transact in NDX on ISE. An increase in Priority Customer order flow would benefit all market participants through quality of order interaction and increased trading opportunities. As noted above, the proposed fee and surcharge amounts are in line with customer fees and surcharges assessed on other index products at other options exchanges.<sup>18</sup>

The Exchange's proposal to assess a \$0.25 per contract transaction fee to all Priority Customer NDX orders and to assess a \$0.25 per contract surcharge to complex Priority Customer NDX orders is equitable and not unfairly discriminatory it will apply uniformly to all similarly situated market participants. The Exchange believes it is

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<sup>17</sup> The Exchange has not amended NDX transaction fees since 2018, so the fees have remained at \$0.75 per contract for Non-Customers and \$0.00 for Priority Customers during this time. See Securities Exchange Act Release No. 83144 (May 1, 2018), 83 FR 20107 (May 7, 2018) (SR-ISE-2018-38).

<sup>18</sup> See supra note 9 and 11.

equitable and not unfairly discriminatory to continue charging Priority Customers NDX orders at a generally lower rate than Non-Priority Customers NDX orders<sup>19</sup> as the Exchange has historically provided more favorable pricing to Priority Customers in its Pricing Schedule.<sup>20</sup> Priority Customer orders bring valuable liquidity to the market by providing more trading opportunities, which, in turn, attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow to the benefit of 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 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. As noted above, market participants are offered an opportunity to transact in NDX, NQX, or XND, or separately execute options overlying QQQ. Offering these products provides market participants with a variety of

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<sup>19</sup> As described above, regular Priority Customer NDX executions will be assessed \$0.25 per contract under this proposal, and complex Priority Customer NDX executions will be assessed a total of \$0.50 per contract under this proposal (i.e., base fee plus complex surcharge). Regular Non-Priority Customer NDX executions will continue to be assessed \$0.75 per contract. As it relates to complex Non-Priority Customer NDX executions, the Exchange notes that in certain instances, Non-Priority Customers may be assessed a lower complex fee in Section 4 than the \$0.50 complex fee proposed for Priority Customers. Specifically, Non-Priority Customers could be assessed the \$0.20 per contract complex Maker Fee for Non-Select Symbols (NDX is a Non-Select Symbol). However, the Non-Priority Customer complex Taker Fee for Non-Select Symbols still remains at a much higher level (\$1.10) than the \$0.50 complex fee proposed for Priority Customer NDX executions. See Options 7, Section 4.

<sup>20</sup> For example, Priority Customers presently receive free executions in regular and complex orders, as discussed earlier in this filing.



choices in selecting the product they desire to use to gain exposure to the Nasdaq 100 Index. Furthermore, the proposed fee amounts are in line with customer transaction fees and surcharges assessed on other products at another options exchange.<sup>21</sup>

Further, the Exchange does not believe that its proposal to begin assessing a \$0.25 per contract transaction fee for all Priority Customer NDX orders and \$0.25 per contract surcharge for complex Priority Customer NDX orders will impose an undue burden on intra-market competition because Priority Customers will continue to be assessed more favorable pricing than Non-Priority Customers for NDX orders, which is in line with how the Exchange historically assessed fees for these market participants. As discussed above, Priority Customer order flow enhances liquidity on the Exchange for the benefit of all market participants.

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,<sup>22</sup> 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.

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<sup>21</sup> See supra notes 9 and 11.

<sup>22</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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.

**EXHIBIT 1**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. \_\_\_\_\_ ; File No. SR-ISE-2023-36)

December \_\_, 2023

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Fees for Options on the Nasdaq 100 Index in the Exchange's Pricing Schedule at Options 7

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 8, 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 fees for Nasdaq 100 Index options in the Exchange's Pricing Schedule at Options 7, Section 5A. While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on December 1, 2023.

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.

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

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

## 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 fees for NDX<sup>3</sup> in Options 7, Section 5A. The Exchange initially filed the proposed pricing changes on November 30, 2023 (SR-ISE-2023-34). On December 8, 2023, the Exchange withdrew that filing and submitted this filing.

Today, the Exchange assesses a transaction fee of \$0.75 per contract for all Non-Priority Customer<sup>4</sup> regular NDX orders. Priority Customers<sup>5</sup> currently receive free executions in regular NDX orders. In accordance with note 1 of Options 7, Section 5.A, the applicable complex order fees for Non-Select Symbols<sup>6</sup> in Options 7, Section 4 apply

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<sup>3</sup> For purposes of the Pricing Schedule, “NDX” means A.M. or P.M. settled options on the full value of the Nasdaq 100® Index. See Options 7, Section 1(c).

<sup>4</sup> “Non-Priority Customers” include Market Makers, Non-Nasdaq ISE Market Makers (FarMMs), Firm Proprietary / Broker-Dealers, and Professional Customers.

<sup>5</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 Nasdaq ISE Options 1, Section 1(a)(37).

<sup>6</sup> “Non-Select Symbols” are options overlying all symbols excluding Select Symbols. “Select Symbols” are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Interval Program.

to all executions in complex NDX orders.<sup>7</sup> As such, Priority Customers currently receive free executions in complex NDX orders.<sup>8</sup>

The Exchange now proposes to begin assessing all Priority Customer NDX executions (i.e., regular and complex) a \$0.25 per contract transaction fee. In connection with this change, the Exchange also proposes to amend note 1 of Options 7, Section 5.A to exclude Priority Customer complex NDX executions from the Section 4 complex fees, and to make clear that Priority Customer complex NDX executions will now be assessed a \$0.25 per contract fee instead. As amended, note 1 will provide that for all executions in complex NDX orders for Non-Priority Customers, the applicable complex order fees for Non-Select Symbols in Section 4 will apply. Further, for all executions in complex NDX orders for Priority Customers, the fee will be \$0.25 per contract. The Exchange notes that the proposed \$0.25 per contract fee amount is in line with customer transaction fees assessed on other index products.<sup>9</sup> The Exchange also proposes to assess a surcharge of \$0.25 per contract to all Priority Customer complex executions in NDX.<sup>10</sup> As such, Priority Customer complex executions in NDX will be assessed a total of \$0.50 per contract (i.e., the base \$0.25 per contract fee plus the \$0.25 per contract surcharge).

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<sup>7</sup> See generally Options 7, Section 4 (setting forth maker/taker fees for Non-Select Symbols, including NDX, pursuant to which Priority Customers are assessed no fees today). In addition, the Exchange does not offer the tiered Priority Customer complex order rebates in Section 4 for orders in NDX. See Options 7, Section 4, note 4.

<sup>8</sup> Id.

<sup>9</sup> For example, Cboe Options (“Cboe”) currently assesses a \$0.25 per contract customer transaction fee for MXEA and MXEF options, \$0.35 per contract for OEX and XEO options, and \$0.36 per contract (if premium < \$1.00) or \$0.45 per contract (if premium >= \$1.00) for SPX and SPESG options. See Cboe Fees Schedule.

<sup>10</sup> See proposed note 2 of Options 7, Section 5.A.

The Exchange notes that the proposed surcharge amount is within the range of surcharges assessed for customer transactions in other products at other options exchanges.<sup>11</sup>

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>13</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 it is reasonable to begin assessing a \$0.25 per contract transaction fee to all Priority Customer executions (i.e., regular and complex) in NDX and a \$0.25 per contract surcharge to complex Priority Customer executions in NDX because the proposed pricing reflects the proprietary nature of this product. Similar to other proprietary products like options overlying the Nasdaq 100 Reduced Value Index (“NQX”) and the Nasdaq 100 Micro Index (“XND”), the Exchange seeks to recoup the operational costs of listing proprietary products.<sup>14</sup> Also, pricing by symbol is a common practice on many U.S. options exchanges as a means to incentivize order flow to be sent to an exchange for execution in particular products. Other options exchanges price by

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<sup>11</sup> For example, Cboe currently assesses customers a \$0.25 per contract exotic surcharge and a \$0.21 per contract execution surcharge in SPX and SPESG options. See Cboe Fees Schedule. In addition, the Exchange’s affiliate, Nasdaq Phlx LLC (“Phlx”) current assesses customers a \$0.25 per contract complex surcharge for executions in singly-listed U.S. dollar-settled foreign currency options. See Phlx Options 7, Section 5.D.

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>14</sup> By way of example, in analyzing an obvious error, the Exchange would have additional data points available in establishing a theoretical price for a multiply listed option as compared to a proprietary product, which requires additional analysis and administrative time to comply with Exchange rules to resolve an obvious error.

symbol.<sup>15</sup> Further, the Exchange notes that market participants are offered different ways to gain exposure to the Nasdaq 100 Index, whether through the Exchange's proprietary products like options overlying NDX, NQX, or XND, or separately through multi-listed options overlying Invesco QQQ Trust ("QQQ").<sup>16</sup> Offering such products provides market participants with a variety of choices in selecting the product they desire to utilize in order to gain exposure to the Nasdaq 100 Index. When exchanges are able to recoup costs associated with offering proprietary products, it incentivizes growth and competition for the innovation of additional products.

The Exchange further believes that the proposed pricing described above is reasonable because the proposal is designed to update fees for the Exchange's services to reflect their current value—rather than their value when the Exchange last updated NDX pricing five years ago<sup>17</sup>—based on the Exchange's ability to deliver value to its customers by offering proprietary products on its market like NDX.

While the pricing for Priority Customer NDX orders is increasing under this proposal, the Exchange believes that the proposal is reasonable and would continue to incentivize market participants to transact in Priority Customer NDX orders because Priority Customers would continue to be charged at a lower rate for NDX than Non-Priority Customers. As a result, the Exchange believes that the proposed pricing is structured in a way that continues to encourage market participants, especially Priority Customers, to transact in NDX on ISE. An increase in Priority Customer order flow

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<sup>15</sup> See supra note 9.

<sup>16</sup> QQQ is an exchange-traded fund based on the same Nasdaq 100 Index as NDX, NQX, and XND.

<sup>17</sup> The Exchange has not amended NDX transaction fees since 2018, so the fees have remained at \$0.75 per contract for Non-Customers and \$0.00 for Priority Customers during this time. See Securities Exchange Act Release No. 83144 (May 1, 2018), 83 FR 20107 (May 7, 2018) (SR-ISE-2018-38).

would benefit all market participants through quality of order interaction and increased trading opportunities. As noted above, the proposed fee and surcharge amounts are in line with customer fees and surcharges assessed on other index products at other options exchanges.<sup>18</sup>

The Exchange's proposal to assess a \$0.25 per contract transaction fee to all Priority Customer NDX orders and to assess a \$0.25 per contract surcharge to complex Priority Customer NDX orders is equitable and not unfairly discriminatory it will apply uniformly to all similarly situated market participants. The Exchange believes it is equitable and not unfairly discriminatory to continue charging Priority Customers NDX orders at a generally lower rate than Non-Priority Customers NDX orders<sup>19</sup> as the Exchange has historically provided more favorable pricing to Priority Customers in its Pricing Schedule.<sup>20</sup> Priority Customer orders bring valuable liquidity to the market by providing more trading opportunities, which, in turn, attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow to the benefit of all market participants.

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<sup>18</sup> See supra note 9 and 11.

<sup>19</sup> As described above, regular Priority Customer NDX executions will be assessed \$0.25 per contract under this proposal, and complex Priority Customer NDX executions will be assessed a total of \$0.50 per contract under this proposal (i.e., base fee plus complex surcharge). Regular Non-Priority Customer NDX executions will continue to be assessed \$0.75 per contract. As it relates to complex Non-Priority Customer NDX executions, the Exchange notes that in certain instances, Non-Priority Customers may be assessed a lower complex fee in Section 4 than the \$0.50 complex fee proposed for Priority Customers. Specifically, Non-Priority Customers could be assessed the \$0.20 per contract complex Maker Fee for Non-Select Symbols (NDX is a Non-Select Symbol). However, the Non-Priority Customer complex Taker Fee for Non-Select Symbols still remains at a much higher level (\$1.10) than the \$0.50 complex fee proposed for Priority Customer NDX executions. See Options 7, Section 4.

<sup>20</sup> For example, Priority Customers presently receive free executions in regular and complex orders, as discussed earlier in this filing.



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 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. As noted above, market participants are offered an opportunity to transact in NDX, NQX, or XND, or separately execute options overlying QQQ. Offering these products provides market participants with a variety of choices in selecting the product they desire to use to gain exposure to the Nasdaq 100 Index. Furthermore, the proposed fee amounts are in line with customer transaction fees and surcharges assessed on other products at another options exchange.<sup>21</sup>

Further, the Exchange does not believe that its proposal to begin assessing a \$0.25 per contract transaction fee for all Priority Customer NDX orders and \$0.25 per contract surcharge for complex Priority Customer NDX orders will impose an undue burden on intra-market competition because Priority Customers will continue to be assessed more favorable pricing than Non-Priority Customers for NDX orders, which is in line with how the Exchange historically assessed fees for these market participants. As discussed above, Priority Customer order flow enhances liquidity on the Exchange for the benefit of all market participants.

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.

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<sup>21</sup> See supra notes 9 and 11.

### 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>22</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

### IV. Solicitation of Comments

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

#### 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](mailto:rule-comments@sec.gov). Please include file number SR-ISE-2023-36 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-2023-36. This file number should be included on the subject line if email is used. To help the Commission process

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<sup>22</sup> 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 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-2023-36 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.<sup>23</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>23</sup> 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 5. Index Options Fees and Rebates**

**A. NDX Index Options Fees for Regular Orders<sup>(1)</sup>**

<b>Market Participant</b>	<b>Fee</b>
Market Maker	\$0.75
Market Maker (for orders sent by Electronic Access Members)	\$0.75
Non-Nasdaq ISE Market Maker (FarMM)	\$0.75
Firm Proprietary / Broker-Dealer	\$0.75
Professional Customer	\$0.75
Priority Customer	\$0.25[00] <sup>(2)</sup>

<sup>1</sup> For all executions in complex NDX orders for Non-Priority Customers, the applicable complex order fees for Non-Select Symbols in Section 4 will apply. For all executions in complex NDX orders for Priority Customers, the fee will be \$0.25 per contract.

<sup>2</sup> A surcharge of \$0.25 per contract will be assessed to all Priority Customer complex executions in NDX.

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