

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-2018-02, and should be submitted on or before March 5, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>52</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82644; File No. SR-ISE-2018-10]

### Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Schedule of Fees To Modify Complex Order Fees and Rebates

February 6, 2018.

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 January 30, 2018, Nasdaq ISE, LLC ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the Exchange's Schedule of Fees.

The text of the proposed rule change is available on the Exchange's website at <http://ise.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

The purpose of the proposed rule change is to amend the Exchange's Schedule of Fees to modify certain complex order fees and rebates in Section II, and to make a number of non-substantive changes to update certain section headings. Each change is described below.<sup>3</sup>

##### Priority Customer Complex Order Rebate for Select Symbols

Currently as set forth in Section II of the Schedule of Fees, the Exchange provides rebates to Priority Customer<sup>4</sup> complex orders that trade with Non-Priority Customer<sup>5</sup> complex orders in the complex order book or trade with quotes and orders on the regular order

<sup>3</sup> The Exchange initially filed the proposed pricing changes on January 2, 2018 (SR-ISE-2018-02). On January 11, 2018, the Exchange withdrew that filing and submitted SR-ISE-2018-05. On January 22, 2018, the Exchange withdrew SR-ISE-2018-05 and submitted SR-ISE-2018-08. On January 30, 2018, the Exchange withdrew SR-ISE-2018-08 and submitted this filing.

<sup>4</sup> A "Priority Customer" is a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), as defined in ISE Rule 100(a)(37A).

<sup>5</sup> Non-Priority Customer includes Market Maker, Non-Nasdaq GEMX Market Maker, Firm Proprietary, Broker-Dealer, and Professional Customer.

book. Rebates are tiered based on a member's average daily volume ("ADV") executed during a given month as follows: 0 to 14,999 contracts ("Tier 1"), 15,000 to 44,999 contracts ("Tier 2"), 45,000 to 59,999 contracts ("Tier 3"), 60,000 to 74,999 contracts ("Tier 4"), 75,000 to 99,999 contracts ("Tier 5"), 100,000 to 124,999 contracts ("Tier 6"), 125,000 to 224,999 contracts ("Tier 7"), and 225,000 or more contracts ("Tier 8"). In Select Symbols,<sup>6</sup> the rebate is \$0.26 per contract for Tier 1, \$0.30 per contract for Tier 2, \$0.36 per contract for Tier 3, \$0.41 per contract for Tier 4, \$0.42 per contract for Tier 5, \$0.44 per contract for Tier 6, \$0.46 per contract for Tier 7, and \$0.49 per contract for Tier 8. The Exchange now proposes to increase the rebate amounts to \$0.45 in Tier 6 and \$0.50 in Tier 8.

##### Non-Priority Customer Complex Order Taker Fee for Select Symbols

Currently, the Exchange charges a complex order taker fee for Select Symbols that is \$0.47 per contract for Market Maker<sup>7</sup> orders (or \$0.44 per contract for Market Makers with total affiliated Priority Customer Complex ADV of 150,000 or more contracts),<sup>8</sup> and \$0.48 per contract for Non-Nasdaq ISE Market Maker,<sup>9</sup> Firm Proprietary<sup>10</sup>/ Broker-Dealer,<sup>11</sup> and Professional Customer<sup>12</sup> orders. Priority Customer orders are not charged a complex order taker fee for Select Symbols. The Exchange now proposes to increase the complex order taker fee to \$0.50 per contract for Non-Priority Customer orders in Select Symbols. As proposed, Market Makers with total affiliated Priority Customer Complex ADV of

<sup>6</sup> "Select Symbols" are options overlying all symbols listed on ISE that are in the Penny Pilot Program.

<sup>7</sup> The term "Market Makers" refers to "Competitive Market Makers" and "Primary Market Makers" collectively.

<sup>8</sup> Nasdaq ISE Market Makers making or taking liquidity receive a discount of \$0.02 when trading against Priority Customer orders preferenced to them in the Complex Order Book in equity options that are able to be listed and traded on more than one options exchange. This discount does not apply to FX Options Symbols or to option classes designated by the Exchange to receive a guaranteed allocation pursuant to Nasdaq ISE Rule 722(b)(3)(i)(B).

<sup>9</sup> A "Non-Nasdaq ISE Market Maker" is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended, registered in the same options class on another options exchange.

<sup>10</sup> A "Firm Proprietary" order is an order submitted by a member for its own proprietary account.

<sup>11</sup> A "Broker-Dealer" order is an order submitted by a member for a broker-dealer account that is not its own proprietary account.

<sup>12</sup> A "Professional Customer" is a person or entity that is not a broker/dealer and is not a Priority Customer.

<sup>52</sup> 17 CFR 200.30-3(a)(12).

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

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

150,000 or more contracts will continue to receive the discounted fee of \$0.44. Additionally, preferred Market Makers will continue to receive the applicable discount of \$0.02 per contract when trading against Priority Customer order preferenced to them in the complex order book.<sup>13</sup>

#### Non-Priority Customer Complex Surcharge for Non-Select Symbols

The Exchange proposes to amend Section II of the Schedule of Fees to adopt a surcharge of \$0.03 per contract on Non-Priority Customer complex orders in Non-Select Symbols<sup>14</sup> that take liquidity from the complex order book. For clarification, the proposed Non-Priority Customer complex surcharge will not apply to orders executed or submitted in the Exchange's various auction mechanisms.<sup>15</sup>

#### Update Fee Schedule Headings

Currently, the Exchange's Schedule of Fees contains a number of section headings that are not currently reflected in the Table of Contents. The Exchange added or eliminated these headings as parts of previous rule changes, and inadvertently did not make the corresponding updates to the Table of Contents.<sup>16</sup> Accordingly, the Exchange proposes to update the Table of Contents to make its Schedule of Fees easier to read. The Exchange also proposes to renumber Section VIII.J to Section VIII.K in connection with these clean-up changes.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>17</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>18</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other

persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

#### Priority Customer Complex Order Rebate for Select Symbols

The Exchange believes that it is reasonable to increase the rebates provided to Priority Customer complex orders in the manner discussed above, as these proposed rebates are designed to attract additional Priority Customer complex order volume to the Exchange. The Exchange already provides volume-based tiered rebates for Priority Customer complex orders, and believes that increasing the rebates will incentivize members to send additional order flow to ISE in order to achieve these rebates for their Priority Customer complex order volume, creating additional liquidity to the benefit of all members that trade complex orders on the Exchange.

The Exchange notes that Priority Customer orders will continue to receive complex order rebates,<sup>19</sup> while other market participants will continue to pay a fee. The Exchange does not believe that this is unfairly discriminatory as a Priority Customer is by definition not a broker or 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). This limitation does not apply to participants whose behavior is substantially similar to that of market professionals, including Professional Customers, who will generally submit a higher number of orders (many of which do not result in executions) than Priority Customers.

#### Non-Priority Customer Complex Order Taker Fee for Select Symbols

The Exchange believes that it is reasonable to increase the complex order taker fee to \$0.50 per contract for Non-Priority Customer orders in Select Symbols because the increased taker fees are designed to offset the enhanced Priority Customer rebates discussed above. Furthermore, the proposed taker fees are set at levels that the Exchange believes will continue to be attractive to market participants that trade on ISE. As noted above, Market Makers with total affiliated Priority Customer Complex ADV of 150,000 or more contracts will continue to receive the discounted fee of \$0.44 under this proposal. Additionally, preferred Market Makers will continue to receive the applicable

discount of \$0.02 per contract when trading against Priority Customer order preferenced to them in the complex order book.<sup>20</sup>

The Exchange's proposal to increase the Non-Priority Customer complex order taker fee is equitable and not unfairly discriminatory because the increased fee will apply to all similarly-situated market participants. As noted above, Priority Customers will continue to receive complex order rebates, while other market participants will continue to pay a fee. The Exchange does not believe that this is unfairly discriminatory for the reasons discussed above. The Exchange also notes that Market Maker orders will continue to be eligible for lower fees than other non-Priority Customer orders. The Exchange does not believe that it is unfairly discriminatory provide lower fees to Market Maker orders as Market Makers are subject to additional requirements and obligations (such as quoting requirements) that other market participants are not.

#### Non-Priority Customer Complex Surcharge for Non-Select Symbols

The Exchange believes that its proposal to adopt a surcharge of \$0.03 per contract on Non-Priority Customer complex orders in Non-Select Symbols that take liquidity from the complex order book is reasonable, equitable and not unfairly discriminatory. Assessing this surcharge to only those orders that take liquidity from the market is reasonable because the Exchange wants to continue to encourage market participation for those participants that seek to add liquidity on ISE. In addition, the Exchange believes that excluding complex orders executed in the Exchange's various auction mechanisms from the proposed Non-Priority Customer complex surcharge is reasonable for the reasons that follow. The proposed complex surcharge will not apply to complex orders executed in the Facilitation Mechanism, Solicited Order Mechanism and Price Improvement Mechanism as such orders have separate pricing in Section II of the Schedule of Fees, and the Exchange wants to continue to encourage participation within these auction mechanisms. The Exchange also believes that the exclusion of "exposure" auctions pursuant to ISE Rule 722(b)(3)(iii) from the Non-Priority Customer complex surcharge is reasonable because the Exchange wants to encourage participation in this auction and have it continue to be attractive to market participants who

<sup>13</sup> See note 8 above.

<sup>14</sup> "Non-Select Symbols" are options overlying all symbols excluding Select Symbols.

<sup>15</sup> Today, the complex order auctions consist of the Facilitation Mechanism, Solicited Order Mechanism, Price Improvement Mechanism and "exposure" auctions pursuant to ISE Rule 722(b)(3)(iii).

<sup>16</sup> In particular, the Exchange deleted Sections V.C, VI.B, and VII.D, and added Sections V.D, VI.C, VI.E-VI.I, and VIII.J as parts of previous rule changes to amend ISE's Schedule of Fees. See Securities Exchange Release No. 68324 (November 30, 2012), 77 FR 72901 (December 6, 2012) (SR-ISE-2012-89); Securities Exchange Release No. 81095 (July 7, 2017), 82 FR 32409 (July 13, 2017) (SR-ISE-2017-62); Securities Exchange Release No. 81903 (October 19, 2017), 82 FR 49450 (October 25, 2017) (SR-ISE-2017-91); and Securities Exchange Release No. 82446 (January 5, 2018), 83 FR 1446 (January 11, 2018) (SR-ISE-2017-112).

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

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

<sup>19</sup> With the exception of responses to complex crossing orders, including complex PIM orders, where Priority Customers are charged a fee like other market participants.

<sup>20</sup> See note 8 above.

will be assessed the lower fee. The Exchange believes that the complex fee structure as proposed will remain attractive to market participants, who will continue to be charged lower fees for adding liquidity to the complex order book than for removing liquidity. ISE notes that other options exchanges assess similar surcharges on complex orders that remove liquidity from the complex order book.<sup>21</sup>

The Exchange's proposal to adopt the \$0.03 per contract Non-Priority Customer complex order surcharge in the manner discussed above is equitable and not unfairly discriminatory because the surcharge will apply to all similarly-situated market participants.

#### Update Fee Schedule Headings

The Exchange believes that the clean-up changes to update the section headings in its Schedule of Fees is reasonable, equitable and not unfairly discriminatory because these are non-substantive changes intended to make the Schedule of Fees more transparent to members and investors.

#### *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. The proposed fees and rebates are designed to attract additional order flow to ISE, and the Exchange believes that its complex order pricing remains attractive to market participants. The Exchange operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

<sup>21</sup> Nasdaq PHLX ("Phlx"), CBOE Options ("CBOE"), and MIAX Options ("MIAX") assess similar surcharges for complex order executions that remove liquidity from the complex order book for non-penny classes. See Phlx Pricing Schedule, Section II, note 7; CBOE Fees Schedule, Complex Surcharge, and note 35; and MIAX Fee Schedule, Sections (1)(a)(i) and (ii).

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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>22</sup> and Rule 19b-4(f)(2)<sup>23</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

#### **IV. Solicitation of Comments**

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

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2018-10 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-2018-10. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<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-2018-10 and should be submitted on or before March 5, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>24</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-82643; File No. SR-CboeBZX-2017-012]**

### **Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the LHA Market State<sup>®</sup> Tactical U.S. Equity ETF, a Series of the ETF Series Solutions, Under Rule 14.11(i), Managed Fund Shares**

February 6, 2018.

On December 7, 2017, Cboe BZX Exchange, Inc. ("Exchange" or "BZX") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade the shares of the LHA Market State<sup>®</sup> Tactical U.S. Equity ETF ("Fund") under BZX Rule 14.11(i). The proposed rule change was published for comment in the **Federal**

<sup>24</sup> 17 CFR 200.30-3(a)(12).

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

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

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

<sup>23</sup> 17 CFR 240.19b-4(f)(2).