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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-84465 File No. SR-ISE-2018-86]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 303 (Approval to Operate Multiple Memberships)

October 22, 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 October 10, 2018, Nasdaq ISE, LLC (“ISE” or the “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 Rule 303 (Approval to Operate Multiple Memberships).

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

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

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

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 Rule 303 to permit ISE, instead of ISE's Board of Directors ("Board"), to grant waivers to allow its members to operate multiple Primary Market Maker ("PMM") Memberships<sup>3</sup> and Competitive Market Maker ("CMM") Memberships (together, "Market Maker Memberships"). As explained below, the Exchange is seeking to streamline the process by which its members may be approved to operate multiple Market Maker Memberships (hereinafter, "waiver process"). No changes to the Market Maker Membership structure itself are being contemplated by this rule change filing.

Background

PMM Rights and CMM Rights (together, "Market Maker Rights") are owned today by Exchange members or non-member owners (collectively, "holders").<sup>4</sup> This ownership interest gives holders the ability to transfer or lease their Market Maker Rights to other members for trading pursuant to Rule 307 (Sale and Transfer of Market Maker Rights) or Rule 308 (Leasing Memberships), respectively. As such, the Exchange's rules provide holders with limited voting

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<sup>3</sup> The term "Membership" refers to the trading privileges associated with PMM Rights, CMM Rights, and EAM Rights. See Rules 100(a)(21) and 100(a)(31).

<sup>4</sup> "Non-member owners" are individuals and organizations that are not members of the Exchange or that are otherwise members, but do not seek to exercise trading privileges associated with such Market Maker Rights. See Rule 300(a). Non-member owners are required to lease the trading privileges associated with the Market Maker Rights (i.e., the Membership) to Exchange members. See Rule 300(b).

rights (in addition to the trading rights) to protect their ownership over these trading rights.<sup>5</sup> This structure is a remnant of ISE's original membership structure, where the original Market Maker Rights provided the holders with an equity ownership interest in ISE as well as trading rights on the Exchange.<sup>6</sup> Today, Market Maker Rights do not convey equity ownership in ISE, and the ownership and operation of trading rights associated with Market Maker Rights continue to exist separately. Despite this separation, ISE's rules still contain certain limited voting rights and restrictions related to the Market Maker Rights. The voting rights that remain in place today for the holders of Market Maker Rights are as follows: (i) the right to vote on any increase in the number of authorized PMM Rights or CMM Rights, which must be approved by the affirmative vote of the holders of at least a majority of the outstanding PMM Rights, voting as a class, and the affirmative vote of the holders of at least a majority of the outstanding CMM Rights, voting

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<sup>5</sup> As discussed more fully later in the filing, these voting rights are in paragraphs (d) and (e) of Rule 300.

<sup>6</sup> Under ISE's original membership structure, the original Market Maker Rights provided the holders with an equity ownership interest in ISE as well as trading rights on the Exchange. As such, those rights were transferable or leasable to approved persons or entities (i.e., Exchange members or non-member owners), subject to ownership and voting limitations, as well as concentration limits on exercising the trading rights associated with multiple Market Maker Rights. Additionally, the original Market Maker Rights conferred broader voting rights to protect the holder's equity interest, such as the right to vote on corporate actions like mergers or consolidations, and the right to vote on changes to the ownership structure of ISE like increasing the number of memberships in a class. From the beginning, the holders of EAM Rights had no equity interests in the Exchange and only had rights to trade on the Exchange. Those rights were not transferable by the holders, and could only be held by Exchange members. See Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (Order Granting Registration as a National Securities Exchange). ISE has since demutualized and reorganized, resulting in the separation of the two functions of Market Maker Rights. Today, equity ownership in ISE is held by ISE Holdings as the sole LLC member; the ownership and operation of trading rights associated with the Market Maker Rights (along with the ability to transfer or lease such rights) continue to exist separately, as held by member or non-member owners.

as a class (such voting rights, “Core Rights”);<sup>7</sup> and (ii) the right to vote on any amendments to ISE’s LLC Agreement or By-Laws that would alter or change the powers, preferences, or special rights of one or more series of PMM Rights or CMM Rights, which must be approved by the holders of a majority of such PMM Rights or CMM Rights, as applicable.<sup>8</sup> As noted above, these narrow voting rights exist today to protect the ownership interests associated with the Market Maker Rights (i.e., the ability to transfer or lease to other members for trading on ISE), whether as a safeguard against potential dilution in value as noted above, or as the right to vote on any impactful changes to ISE’s governing documents that would alter the nature of their interests. Also, one limitation, which has existed without change since ISE’s inception, is a mandatory cap that prohibits the holder or lessee of Market Maker Rights, together with any affiliates, from gaining ownership or voting rights in excess of 20% of the outstanding PMM Rights or CMM Rights, as applicable.<sup>9</sup>

In addition to the ownership and voting limitations, Rule 303(b) contains trading concentration limits that restrict an applicant or approved member, together with any affiliates, from operating more than one (1) PMM Membership or more than ten (10) CMM Memberships. Today, the Board may waive the limitations contained in this rule if it determines that good cause has been shown and such action is, in its judgment, in the best interests of the Exchange.<sup>10</sup>

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<sup>7</sup> See Rule 300(d). Presently, the number of outstanding PMM Rights and CMM Rights are 10 and 160, respectively. See Rule 100(a)(13) and (46). Due to this limited number, the Core Rights effectively serve as a protection against the potential dilution of the value of the PMM and CMM Rights resulting from subsequent increases in the number of those rights.

<sup>8</sup> See Rule 300(e).

<sup>9</sup> See Supplementary Material .02 to Rule 303. The Exchange is not proposing any changes to the ownership and voting limitations.

<sup>10</sup> When making its determination whether good cause has been shown to waive the limitations contained in Rule 303(b), the Board will consider whether an operational,

The Board is not permitted, however, to waive this requirement if such waiver would result in the applicant or approved member (together with any of its affiliates) being approved to exercise trading privileges associated with more than 20% of the outstanding CMM Memberships.<sup>11</sup> The foregoing limitations serve to minimize potential concerns arising from a member owning or operating multiple memberships, and the Commission has previously noted that a regulatory concern can arise if a member's interest in an exchange becomes so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member. For example, a member that directly or indirectly controls an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from diligently monitoring and surveilling the member's conduct or diligently enforcing its rules and the federal securities laws with respect to conduct by the member that violates such provisions.<sup>12</sup>

Rule 303 is implicated in the context of a transfer or lease of Market Maker Rights pursuant to Rule 307 (Sale and Transfer of Market Maker Rights) or Rule 308 (Leasing Memberships), respectively, and the approval of such transfer or lease would result in a member

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business or regulatory need to exceed the limits has been demonstrated. In those cases where such a need is demonstrated, the Board also will consider any operational, business or regulatory concerns that might be raised if such a waiver were granted. See Supplementary Material .01 to Rule 303.

<sup>11</sup> A similar strict 20% concentration cap was previously in place for operating multiple PMM Memberships, but the Exchange has over the years relaxed and later eliminated this strict cap. See Securities Exchange Act Release Nos. 53271 (February 10, 2006), 71 FR 8625 (February 17, 2006) (SR-ISE-2005-46) ("2005 Proposal"); and 77410 (March 21, 2016), 81 FR 16248 (March 25, 2016) (SR-ISE-2016-07) ("2016 Proposal"). In justifying the 2016 Proposal, the Exchange cited to other exchanges like CBOE and NYSE Arca that did not have mandatory caps on the number of issues or trading rights that could be allocated to their designated primary market-maker or lead market makers. See 2016 Proposal at 16249. It should also be noted that both CBOE and NYSE Arca provide for allocations to be done at the exchange, not board, level. See CBOE Rule 8.84 and NYSE Arca Rule 6.82-O.

<sup>12</sup> See 2005 Proposal at 8625 and 8626.

exceeding the limits contained in Rule 303(b) (i.e., the transfer or lease would result in the member operating more than 1 PMM Membership or more than 10 CMM Memberships). The Exchange notes that a transfer or lease of Market Maker Rights can occur when an ISE Market Maker exits the options market making community, and thus ceases operating their Market Maker Membership, resulting in a decrease of the number of ISE Market Makers.<sup>13</sup> In such cases, the Board may find it appropriate to waive the trading concentration limit in Rule 303(b) after determining that good cause has been shown and if doing so would be in the best interest of the Exchange to allow, for instance, a qualified PMM to operate more than 1 PMM Membership. In making this determination, the Board would also take into account whether the waiver to allow a member to operate multiple Market Maker Memberships would enable the member to exercise direct or indirect control over ISE in a manner that would cast doubt on whether ISE can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.<sup>14</sup> In this respect, the Board serves as an independent check on potential undue influence concerns.

### Proposal

The Exchange now proposes to amend Rule 303 to permit the Exchange to grant waivers to allow members to operate multiple Market Maker Memberships, instead of the Board. As

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<sup>13</sup> While Exchange receives applications for new ISE Market Makers as well, this decrease is parallel to the continued consolidation in the options market making community and resulting decrease in the number of market makers, which served as an impetus for the both the 2005 Proposal and 2016 Proposal as discussed in note 11 above.

<sup>14</sup> Pursuant to the Exchange's By-Laws, the Board is responsible for ensuring that the Exchange complies with its self-regulatory obligations to protect investors, maintain fair and orderly markets, and advance the public interest. In carrying out this responsibility, the Board is further required to appoint a Regulatory Oversight Committee, composed solely of Board members each of whom must be a Public Director (i.e., has no material business relationship with a broker or dealer or with the Exchange or its affiliates) and an "independent director" as defined in Rule 5605 of the Rules of The Nasdaq Stock Market, LLC, to assist the Board in overseeing the adequacy and effectiveness of ISE's regulatory and self-regulatory responsibilities. See Exchange By-Law Article III, Sections 3(b) and 5(c).

such, the limitations on members exercising the trading privileges associated with more than one (1) PMM Membership or more than ten (10) CMM Memberships may be waived by the Exchange if the member shows good cause, which will be determined by the Exchange pursuant to the standards set forth in Supplementary Material .01 to Rule 303. The Exchange is not proposing any changes to the Market Maker Rights ownership structure itself, or to the Exchange's corporate governance by bringing the waiver authority from the Board to the Exchange. As proposed, holders will continue to have the ability to transfer or lease their rights to other members for trading on ISE as well as voting rights on certain limited matters to protect their ownership over these trading rights.<sup>15</sup> Furthermore, the Market Maker Rights will still be subject to the same ownership, voting, and concentration limits in place today. Specifically, the 20% ownership and voting limitations in Supplementary Material .02 to Rule 303 will remain under this proposal. The trading concentration limits in Rule 303(b), including the strict cap that prohibits the Board from approving a member to operate more than 20% of the outstanding CMM Memberships, will likewise remain under this proposal. The Exchange is only proposing to change the manner in which the 1 PMM Membership and 10 CMM Membership concentration limits in Rule 303(b) may be waived (i.e., from the Board to the Exchange).

The Exchange believes that this change will help with the administration and application of Rule 303 by bringing the Exchange's membership transfer process more in line with other exchanges.<sup>16</sup> The current practice often results in a long and lengthy process to organize a Board

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<sup>15</sup> See notes 7 and 8 above, and accompanying text.

<sup>16</sup> See note 11 above. Furthermore, the Exchange notes that its affiliates, Phlx and BX, similarly allow for transfers of allocated options classes at the exchange, and not board, level. See Phlx Rule 508, which requires exchange approval of any proposed agreement between specialists to transfer one or more options classes already allocated to a specialist. See also BX Chapter VII, Section 13(D), which governs requested transfers of options classes between BX lead market makers, and also provides for an exchange-

meeting to consider such applications, and the Exchange is concerned that there may be a deterioration of market quality in the interim. Furthermore, Exchange staff has been involved in all aspects of the waiver process through its work with the Board, including gathering and assessing relevant information on the member applying to operate multiple Market Maker Memberships for purposes of determining whether or not there is good cause shown under Rule 303.<sup>17</sup> Given that PMM and CMM Rights are, for all practical purposes, rights to trade on the Exchange as described above, the Exchange believes that the process in Rule 303, specifically making the determination whether good cause has been shown to waive the limitations in Rule 303(b) to allow a member to operate multiple trading privileges associated with a PMM or CMM Right, is a proper function of the Exchange. As noted above, the Exchange's proposal does not change the Market Maker Rights ownership structure, nor does it change the Exchange's governance. Holders will continue to have the same ability to transfer and lease their rights to other members for trading on ISE as well as voting rights on certain limited matters to protect their ownership over these trading rights.

The Exchange recognizes that allowing a member to operate multiple Market Maker Memberships could raise issues regarding concentration of market making expertise, including regulatory concerns around undue influence, as discussed above. In this regard, Rule 303 is still only an enabling rule. With the proposed change, the Exchange will still need to find good cause

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driven process. On ISE, a Market Maker Membership manifests itself as a group of options classes allocated to the member, so a transfer of the membership is similar to the way transfers of options classes are handled on Phlx and BX.

<sup>17</sup> Specifically, Exchange staff, including from the options business team, market operations, and regulatory department, gather relevant information on the applicant member that includes the number of Market Maker Memberships that the member currently operates and other market quality data as appropriate. This information is then compiled into a report that is sent to the Board to assist them in making the good cause determination under Rule 303.



to approve any member to operate more than one PMM Membership or more than ten CMM Memberships, and could consider the number of Memberships already operated by the member in determining whether or not there is good cause shown. Thus, the Exchange will need to weigh each potential application on its own merits, balancing the potential benefits of allowing a member to exercise more than one PMM Memberships, or more than ten CMM Memberships, against any concentration concern.

In addition, the Exchange's internal procedures will stipulate that all such determinations will be made in consultation with the Exchange's Chief Regulatory Officer ("CRO").<sup>18</sup> It is already the Exchange's current practice to involve the CRO as part of the waiver process in that the CRO weighs in on any regulatory concerns that could arise from a member operating multiple Market Maker Memberships, so the Exchange would effectively make current practice a requirement. Furthermore, the CRO reports directly to the Regulatory Oversight Committee ("ROC"), a Board committee composed solely of Public Directors that are also independent directors, and ultimately to the Board, on a regular basis.<sup>19</sup> As proposed, to the extent any determinations are made under Rule 303(b), such determinations will be reported to the ROC and the Board on a regular basis. In addition, the Exchange's regulatory staff, which will continue to be involved in the waiver process, operates under the direction of the ROC, and works separately and independently from the Exchange's business units. Given the foregoing,

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<sup>18</sup> Specifically, Exchange staff, including regulatory staff, in consultation with the CRO, would make this determination based on relevant information on the applicant member, including the number of Memberships already operated by the member and other market quality data that the Exchange deems appropriate.

<sup>19</sup> See note 14 above. See also Nasdaq ISE By-Law Article IV, Section 7. The Board receives reports from the ROC during its regularly scheduled Board meetings, where the ROC members as well as the CRO are all present to answer any questions from the Board.

the Exchange believes that the proposed process serves an appropriate independent safeguard in assessing and protecting against regulatory concerns around undue influence.

The Board will therefore still be informed of determinations made under Rule 303 under the proposed process through the CRO's regular reports to the ROC and will, through this process, review and assess against potential undue influence concerns.<sup>20</sup> Accordingly, the Exchange believes that the Board will still have meaningful oversight notwithstanding the proposed changes to the waiver process itself. Ultimately, the Exchange believes that the proposed changes should significantly improve the flow and efficiency of the waiver process while retaining the regulatory independence of the waiver process through the both the ROC's and Board's oversight.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>21</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>22</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. As discussed above, the Exchange is not seeking to amend any of the rights or limitations associated with the Market Maker Rights ownership structure, or to Exchange's corporate governance by bringing the waiver authority from the Board to the Exchange. Overall, the proposed rule change is intended to streamline the Exchange's waiver process by allowing the Exchange, instead of the Board, to waive the trading concentration limits in Rule 303(b). As discussed above, the current practice often results in a long and lengthy

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<sup>20</sup> See notes 14 and 19 above, with accompanying text.

<sup>21</sup> 15 U.S.C. 78f(b).

<sup>22</sup> 15 U.S.C. 78f(b)(5).

process to organize a Board meeting to consider such applications, and the Exchange is concerned that there may be a deterioration of market quality in the interim. The Exchange views the waiver process as a proper function of the Exchange given that the PMM and CMM Rights are, for all practical purposes, rights to trade on the Exchange. Furthermore, the proposed changes will bring the Exchange's waiver process more in line with other exchanges, where the transfer of a market maker's allocated options classes are handled at the exchange, and not the board, level.<sup>23</sup> As discussed above, Exchange staff, including regulatory staff, has been involved in all aspects of the waiver process through its work with the Board, and will continue to be involved by gathering and assessing relevant information on the member applying to operate multiple Market Maker Memberships for purposes of determining whether or not there is good cause shown under Rule 303. Furthermore, the CRO will be directly involved in all such determinations as described above, as is the case today, and will report to the ROC and Board on such matters. Accordingly, the Exchange believes that the proposed changes will help with the administration and application of Rule 303 while retaining the regulatory independence of the waiver process through both the ROC's and Board's oversight, as discussed above.

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 rule change is designed to streamline the waiver process for allowing a member to operate multiple Market Maker Memberships, and does not have a competitive effect. Furthermore, all similarly situated members will be subject to the same requirements and processes proposed hereunder.

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<sup>23</sup> See notes 11 and 16 above, with accompanying text.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>24</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>25</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 necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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

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<sup>24</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>25</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2018-86 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-2018-86. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such 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-2018-86, 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.<sup>26</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>26</sup> 17 CFR 200.30-3(a)(12).

