

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-63628; File No. SR-NASDAQ-2010-154)

January 3, 2011

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by The NASDAQ Stock Market LLC to Enhance the Investor Support Program

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 21, 2010, The NASDAQ Stock Market LLC (“NASDAQ” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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

NASDAQ proposes changes to the fee provisions of Rule 7014 (Investor Support Program) to enhance the Investor Support Program in respect of: certain assumed Baseline Participation Ratio values for firms that did not add liquidity in August 2010; the addition of liquidity through Indirect Order Flow; liquidity executed at or above \$1; and a certification provision.

The text of the proposed rule change is available at [nasdaq.cchwallstreet.com](http://nasdaq.cchwallstreet.com), at NASDAQ’s principal office, 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, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

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

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

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing changes to the fee provisions of Rule 7014 to enhance the Investor Support Program in respect of: certain assumed Baseline Participation Ratio values for firms that did not add liquidity in August 2010; the addition of liquidity through Indirect Order Flow; liquidity executed at or above \$1; and a certification provision.

The Exchange established an Investor Support Program (“ISP”) that enables NASDAQ members to earn a monthly fee credit for providing additional liquidity to NASDAQ and increasing the NASDAQ-traded volume of what are generally considered to be retail and institutional investor orders in exchange-traded securities (“targeted liquidity”).<sup>3</sup> The goal of the ISP is to incentivize members to provide such targeted liquidity to the NASDAQ Market Center.<sup>4</sup> The Exchange noted in the ISP Filing that maintaining and increasing the proportion of

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<sup>3</sup> For a detailed description of the Investor Support Program, see Securities Exchange Act Release No. 63270 (November 8, 2010), 75 FR 69489 (November 12, 2010) (NASDAQ-2010-141) (notice of filing and immediate effectiveness)(the “ISP Filing”). See also Securities Exchange Act Release No. 76505 (December 2, 2010), 75 FR 76505 (December 8, 2010) (NASDAQ-2010-153)(notice of filing and immediate effectiveness regarding exclusion of partial trading days from certain ISP calculations).

<sup>4</sup> The Commission has recently expressed its concern that a significant percentage of the orders of individual investors are executed at over the counter (“OTC”) markets, that is, at off-exchange markets; and that a significant percentage of the orders of institutional investors are executed in dark pools. Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (Concept Release on Equity Market Structure, “Concept Release”). In the Concept Release, the Commission has recognized the strong policy preference under the Act in favor of price transparency and displayed markets. The Commission published the Concept Release to invite public comment on a

orders in exchange-listed securities executed on a registered exchange (rather than relying on any of the available off-exchange execution methods) would help raise investors' confidence in the fairness of their transactions and would benefit all investors by deepening NASDAQ's liquidity pool, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The Exchange now proposes several adjustments to the Investor Support Program. The primary objective in making these adjustments is to moderate the ability of members (firms), on a prospective basis, from gaining ISP fee credits without effectively adding targeted liquidity to NASDAQ. This proposal clearly furthers the ISP goal of incentivizing members to provide targeted liquidity to the Exchange.

First, the ISP generally compares a member's Participation Ratio for the current month to the same member's Participation Ratio in August 2010 (known as the "Baseline Participation Ratio").<sup>5</sup> This ratio is determined by measuring the number of shares in liquidity-providing

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wide range of market structure issues, including high frequency trading and un-displayed, or "dark," liquidity. See also Mary L. Schapiro, Strengthening Our Equity Market Structure (Speech at the Economic Club of New York, Sept. 7, 2010) ("Schapiro Speech," available on the Commission website)(comments of Commission Chairman on what she viewed as a troubling trend of reduced participation in the equity markets by individual investors, and that nearly 30 percent of volume in U.S.-listed equities is executed in venues that do not display their liquidity or make it generally available to the public).

<sup>5</sup> The term "Participation Ratio" is defined as: for a given member in a given month, the ratio of (i) the number of shares of liquidity provided in orders entered by the member through any of its NASDAQ ports and executed in the NASDAQ Market Center during such month to (ii) the consolidated volume of shares of System Securities in executed orders reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during such month. Rule 7014 (d)(4). Using the consolidated volume language of subsection (d)(4)(ii), the term "Consolidated Volume" is defined as the consolidated volume of shares of System Securities in executed orders reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during such month. Rule 7014(d)(5). The term Consolidated Volume is substituted for current consolidated volume language throughout the rule.

orders entered by the member (through any NASDAQ port) and executed on NASDAQ and dividing this number by the consolidated (across all trading venues) share volume of System Securities<sup>6</sup> traded in the given month.<sup>7</sup>

The Exchange recognizes that some current members may not be able to establish a Baseline Participation Ratio for August 2010 (e.g. they did not add liquidity in August, or were not members). For such members, the Exchange proposes to add a provision that assumes a specified value in the Participation Ratio for August 2010. Specifically, the Exchange proposes new language in subsection (d)(2) stating that in calculating the August 2010 Participation Ratio, if the result is zero (no liquidity was added), the Baseline Participation Ratio shall be deemed to be 0.485% (when rounded to three decimal places<sup>8</sup>), which corresponds to an average daily volume (“adv”) of 35 million shares in August 2010 (the “deemed ratio”).<sup>9</sup> The Exchange believes that 35 million adv is reasonable in light of the daily trading volumes in the competitive equity trading market. The Exchange believes further that the deemed ratio (which would be uniformly applicable to all members that did not contribute liquidity in August) is fair and equitable in that it should minimize such members gaining an advantage over members that contributed liquidity in August, and would not tend to unfairly exclude members adding targeted liquidity to the Exchange from the ISP.

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<sup>6</sup> The term “System Securities” is defined as all securities listed on NASDAQ and all securities subject to the Consolidated Tape Association Plan and the Consolidated Quotation Plan. Rule 4751(b).

<sup>7</sup> See Proposed Rule 7014(d)(2).

<sup>8</sup> The Exchange notes that while the Baseline Participation Ratio is rounded to three decimal places in the rule for ease of notation, for ISP billing purposes the Baseline Participation Ratio will not be rounded in this manner.

<sup>9</sup> The .485% Baseline Participation Ratio is calculated as follows:  
 $(22 * 35 \text{ million shares}) / (\text{August consolidated volume} * 22)$ . There were 22 trading days in the month of August 2010. The consolidated volume for August 2010 was 165.846 billion (rounded).

Second, the Baseline Participation Ratio now captures the number of shares of liquidity provided in orders that are entered by the member directly through any of its NASDAQ ports and executed in the NASDAQ Market Center in August 2010. A member might have provided liquidity to NASDAQ, however, through means other than directly through its own NASDAQ ports (e.g. indirectly through other members). The Exchange proposes an amendment to capture this indirect liquidity (indirect order flow) when establishing a member's Participation Ratio for the month of August 2010. Specifically, the Exchange proposes new language in subsection (d)(2) stating that in calculating the August 2010 Participation Ratio, the numerator shall be increased by the amount (if any) of the member's August 2010 Indirect Order Flow.

Indirect Order Flow is defined in new subsection (d)(5), for purposes of the rule, as the number of shares of liquidity provided in orders entered into the NASDAQ Market Center at the member's direction by another member with minimal substantive intermediation by such other member and executed in the NASDAQ Market Center during such month. NASDAQ will assess whether a member entering orders provided substantive intermediation to another member based on how much discretion the entering member had in selecting such key order attributes as symbol, price, size and time in force.

The Exchange believes that including Indirect Order Flow when calculating the August 2010 ratio should discourage (and properly account for) members simply changing how, or through whom (e.g. via aggregation) they send liquidity to the Exchange to gain ISP fee payment without effectively increasing the amount of targeted liquidity sent to the Exchange. This proposal, which is equally applicable to all, is directly conducive to the goal of adding new liquidity to the Exchange. As such, the Indirect Order Flow proposal is fair and equitable to all members. Moreover, the Exchange believes that it is decidedly non-discriminatory because it

promotes accurate accounting of flow from all sources, thus minimizing the ability of any particular group of members from gaining an advantage over others.<sup>10</sup>

Third, to determine the amount of the ISP credit pursuant to the program, NASDAQ would multiply \$0.0003 by the lower of: the number of shares of displayed liquidity provided in orders entered by the member through its ISP-designated ports and executed in the NASDAQ Market Center during the given month; or the amount of Added Liquidity<sup>11</sup> for the given month. The established goal of the ISP is to attract certain targeted retail and institution liquidity. The Exchange believes that this type of retail and institutional liquidity would generally be executed at or above \$1. The Exchange therefore proposes to amend the definition of shares of displayed liquidity in subsection (b)(1) to clarify that such liquidity must be executed at a price at or above \$1 in the NASDAQ Market Center in order to qualify for the ISP.

Fourth, the Exchange adds a methodology by which members can demonstrate their compliance with the requirements of Rule 7014 and the ISP. The Exchange proposes to add new subsection (e) to state that a member will certify to the reasonable satisfaction of the Exchange its Baseline Participation Ratio and its compliance with any other sections or requirements of this

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<sup>10</sup> The Exchange notes that the Indirect Order Flow proposal is not discriminatory against anyone, but to the contrary affords the Exchange a clearer picture of how all ISP participants provided flow in August. The Exchange notes further that while the Baseline Participation Ratio by definition always refers to August 2010, Indirect Order Flow was not applied during the ISP's initial months of operation (November and December) and will be applied prospectively.

<sup>11</sup> The term "Added Liquidity" is defined as: for a given member in a given month, the number of shares calculated by (i) subtracting from such member's Participation Ratio for that month the member's Baseline Participation Ratio, and then (ii) multiplying the resulting difference by the average daily consolidated volume of shares of System Securities in executed orders reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during such month; provided that if the result is a negative number, the Added Liquidity amount shall be deemed zero. Rule 7014(d)(1). The term "System Securities" is defined as: all securities listed on NASDAQ and all securities subject to the Consolidated Tape Association Plan and the Consolidated Quotation Plan. Rule 4751(b).

Rule if requested by NASDAQ. The Exchange limits such certification, which would be applicable to all program participants, to not more often than once a month during a member's participation in the ISP. The Exchange believes that the certification provision would particularly help to ensure that all ISP participants may participate in the program on an equal, verifiable basis.

## 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>12</sup> in general, and with 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 or system which NASDAQ operates or controls, and 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, in general, to protect investors and the public interest.

The Investor Support Program encourages members to add targeted liquidity that is executed in the NASDAQ Market Center. The rule change enhances the Investor Support Program by proposing minor changes regarding certain assumed Participation Rate values for firms that did not add liquidity in August 2010; the addition of liquidity through Indirect Order Flow; liquidity executed at or above \$1; and a certification provision. The primary objective in making these enhancements to the Investor Support Program is to minimize the ability of members (firms), on a prospective basis, from gaining ISP fee credits while effectively adding little or no targeted liquidity to NASDAQ. The rule change proposals "are not designed to

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

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

permit unfair discrimination”<sup>14</sup> but, rather, are intended to promote submission of liquidity-providing orders to NASDAQ, which would benefit all NASDAQ members and all investors. Likewise, the program is consistent with the Act’s requirement “for the equitable allocation of reasonable dues, fees, and other charges.”<sup>15</sup> As explained in the immediately preceding paragraphs, the proposals enhance the goal of the ISP. Members who choose to increase the volume of ISP-eligible liquidity-providing orders that they submit to NASDAQ would be benefitting all investors, and therefore an additional credit, as contemplated in the proposed enhanced program, is equitable. Finally, NASDAQ notes that the intense competition among several national securities exchanges and numerous OTC venues effectively guarantees that fees and credits for the execution of trades in NMS securities remain equitable and are not unfairly discriminatory.<sup>16</sup>

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Written comments were neither solicited nor received.

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<sup>14</sup> See Section 6(b)(5) of the Act, 15 U.S.C. 78f(b)(5).

<sup>15</sup> See Section 6(b)(4) of the Act, 15 U.S.C. 78f(b)(4).

<sup>16</sup> See e.g., Concept Release (discusses the various venues where trades are executed).



### 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>17</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:

#### 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-NASDAQ-2010-154 on the subject line.

#### Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2010-154. 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

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<sup>17</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2010-154 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>18</sup>

Elizabeth M. Murphy  
Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).