

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-66369; File No. SR-NASDAQ-2012-024)

February 10, 2012

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify NASDAQ's Pre-Market Investor 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 February 1, 2012, The NASDAQ Stock Market LLC ("NASDAQ" or "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 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

NASDAQ is proposing to modify its NASDAQ's Pre-Market Investor Program. NASDAQ proposes to implement the proposed rule change on February 1, 2011. The text of the proposed rule change is available at <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, 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

Last year, NASDAQ introduced a Pre-Market Investor Program to encourage greater use of NASDAQ's facilities for trading before the market open at 9:30 a.m. and through the trading day.<sup>3</sup> The goal of the program is to encourage the development of a deeper, more liquid trading book during pre-market hours, while also recognizing the correlation observed by NASDAQ between levels of liquidity provided during pre-market hours and levels provided during regular trading hours. While maintaining the structure of the existing program, NASDAQ is now proposing to modify the program to also encourage greater use of NASDAQ's facilities for trading after the market close at 4:00 p.m. In connection with the change, NASDAQ will also rename the program as the "Extended Hours Investor Program" ("EHIP").

Under the program, a member is required to designate one or more market participant identifiers ("MPIDs") for use under the program.<sup>4</sup> The member will then qualify for an extra rebate of \$0.0002 per share executed<sup>5</sup> with respect to all displayed liquidity provided through a

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<sup>3</sup> Securities Exchange Act Release No. 65717 (November 9, 2011), 76 FR 70784 (November 15, 2011) (SR-NASDAQ-2011-150).

<sup>4</sup> After the initial designation of NASDAQ MPIDs for EHIP use, a member may add or remove such EHIP designations for existing MPIDs, provided that NASDAQ must be appropriately notified of such a change on or before the first trading day of the month when the change is to become effective. A newly established MPID may be designated for EHIP use immediately upon establishment.

<sup>5</sup> Originally, the rebate was set at \$0.0001 per share executed, but effective February 1, 2012, NASDAQ increased the rate to \$0.0002 per share executed. See SR-NASDAQ-2012-020 (January 27, 2012).

designated MPID that executes at a price of \$1 or more during the month if the following conditions are met:

(1) the MPID's "EHIP Execution Ratio"<sup>6</sup> for the month is less than 10. The EHIP Execution Ratio is defined as "the ratio of (A) the total number of liquidity-providing orders entered by a member through an EHIP-designated MPID during the specified time period to (B) the number of liquidity-providing orders entered by such member through such EHIP-designated MPID and executed (in full or partially) in the Nasdaq Market Center during such time period; provided that: (i) no order shall be counted as executed more than once; and (ii) no Pegged Orders, odd-lot orders, or MIOC or SIOC orders<sup>7</sup> shall be included in the tabulation." Thus, the requirement stipulates that a high proportion of potentially liquidity-providing orders entered through the MPID actually execute and provide liquidity. This requirement is designed to focus the availability of the program on members representing retail and institutional customers.

(2) Currently, the member must provide an average daily volume of 2 million or more shares of liquidity during the month using orders that are executed prior to NASDAQ's Opening Cross. NASDAQ has observed that members that provide higher volumes of liquidity-providing orders during the pre-market hours generally do so throughout the rest of the trading day. Accordingly, the program pays a credit with respect to all liquidity-providing orders, but only in the event that comparatively large volumes of such orders execute in pre-market hours. To broaden the focus of the program to include after-hours trading, NASDAQ is proposing to modify this provision to provide an alternative criterion for participation in the program, but without removing or modifying the existing criteria. Specifically, a member may also satisfy the volume requirement if the member provides an average daily volume of 3 million or more shares

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<sup>6</sup> Formerly, the PMI Execution Ratio.

<sup>7</sup> "Market Hours Immediate-or-Cancel" or "System Hours Immediate-or-Cancel" orders.

of liquidity during the month using orders that are entered through its designated MPID and executed prior to the Nasdaq Opening Cross and/or after the Nasdaq Closing Cross. Thus, the modified volume criteria may be satisfied either through substantial activity during pre-market trading hours, or by substantial activity spread across the pre-market and after-hours trading sessions.

(3) The ratio between shares of liquidity provided through the MPID and total shares accessed, provided, or routed through the MPID during the month is at least 0.80. This requirement reflects the program's goal of encouraging members that provide high levels of liquidity in the pre-market and/or after-hours trading sessions to also do so during the rest of the trading day.

The modified program is similar to a fee provision of the EDGX Exchange under which a favorable execution fee and rebate are offered to members that make significant use of the EDGX Exchange's facilities during pre-market and/or post-market hours.<sup>8</sup>

## 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>9</sup> in general, and with Sections 6(b)(4) and (5) of the Act,<sup>10</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 is not designed to permit unfair discrimination between customers, issuers, brokers or dealers. All similarly situated members are subject to the same fee structure, and access to NASDAQ is offered on fair and non-discriminatory terms.

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<sup>8</sup> <http://www.directedge.com/Membership/FeeSchedule/EDGXFeeSchedule.aspx>.

<sup>9</sup> 15 U.S.C. 78f.

<sup>10</sup> 15 U.S.C. 78f(b)(4) and (5).

The Pre-Market Investor Program, now renamed with Extended Hours Investment Program, is designed to attract greater liquidity to NASDAQ, with a particular emphasis on encouraging a deeper and more liquid book during pre-market and post-market hours and recognizing and further encouraging the observed correlation between liquidity provision during pre-market and post-market hours and throughout the trading day. The EHIP provides an additional credit to members that satisfy criteria designed to be indicative these patterns of market participation. Thus, a participant in the program is required to designate MPIDs with a low ratio between orders entered and executions; to provide a specified volume of liquidity during pre-market hours, or pre-market and/or post-market hours; and to maintain a high ratio of liquidity provision to order execution throughout the month.

The EHIP is not unfairly discriminatory because it is intended to promote submission of liquidity-providing orders to NASDAQ, which benefits all NASDAQ members and all investors. Likewise, the EHIP is consistent with the Act's requirement for the equitable allocation of reasonable dues, fees, and other charges. Members who choose to significantly increase the volume of EHIP-eligible liquidity-providing orders that they submit to NASDAQ would be benefitting all investors, and therefore providing credits to such members, as contemplated in the proposed enhanced program, is equitable. Moreover, NASDAQ believes that the level of the credit – \$0.0002 per share, in addition to credits ranging from \$0.0020 to \$0.00295 per share for displayed liquidity under NASDAQ regular transaction execution fee and rebate schedule – is reasonable.

NASDAQ further believes that expanding the program to incentivize greater participation in the after-hours trading session is not unfairly discriminatory, because it will promote still further the provision of liquidity, which benefits all market participants, and will broaden the

availability of the offered rebate to a greater number of market participants. Similarly, NASDAQ believes that the expansion of the program is consistent with the equitable allocation of fees, because it will further incentivize members to provide liquidity. NASDAQ further believes that the expansion is reasonable, because it will reduce the fees paid by a larger number of market participants.

Finally, NASDAQ notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, NASDAQ must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. NASDAQ believes that all aspects of the proposed rule change reflect this competitive environment because the change is designed to increase the credits provided to members that enhance NASDAQ's market quality through liquidity provision.

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. Because the market for order execution is extremely competitive, members may readily opt to disfavor NASDAQ's execution services if they believe that alternatives offer them better value. The proposed changes will enhance competition by offering a higher rebate to more market participants. In addition, the change will enhance competition with the EDGX Exchange, which encourages participation in its pre-market and post-market trading sessions by means of

favorable pricing offered to members that are active during pre-market and/or post-market hours.<sup>11</sup>

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.

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>12</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder.<sup>13</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-2012-024 on the subject line.

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<sup>11</sup> <http://www.directedge.com/Membership/FeeSchedule/EDGXFeeSchedule.aspx>.

<sup>12</sup> 15 U.S.C. 78s(b)(3)(a)(ii)[sic].

<sup>13</sup> 17 CFR 240.19b-4(f)(2).

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-2012-024. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should



submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2012-024 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>14</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).