

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78634; File No. SR-NASDAQ-2016-113)

August 22, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Options Pricing

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹, and Rule 19b-4 thereunder,² notice is hereby given that on August 9, 2016, The NASDAQ Stock Market LLC ("Nasdaq" 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 Chapter XV, entitled "Options Pricing," at Section 2, which governs pricing for Exchange members using the NASDAQ Options Market LLC ("NOM"), the Exchange's facility for executing and routing standardized equity and index options. The Exchange proposes to amend certain Penny Pilot Options³ pricing.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Penny Pilot was established in March 2008 and was last extended in 2016. See Securities Exchange Act Release Nos. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008) (SR-NASDAQ-2008-026) (notice of filing and immediate effectiveness establishing Penny Pilot); and 78037 (June 10, 2016), 81 FR 39299 (June 16, 2016) (SR-NASDAQ-2016-052) (notice of filing and immediate effectiveness extending the Penny Pilot through December 31, 2016). All Penny Pilot Options listed on the Exchange can be found at <http://www.nasdaqtrader.com/MicroNews.aspx?id=OTA2016-15>

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 Exchange proposes to amend NOM pricing at Chapter XV, Section 2(1) to increase the Customer⁴ or Professional⁵ Penny Pilot Options Fee for Removing Liquidity in SPY Options.⁶ The proposed change is discussed below.

Change 1 –Penny Pilot Options: Change Fee for Removing Customer and Professional Liquidity in SPY Options

The Exchange currently assesses Customers, Professionals, Firms,⁷ Non-NOM Market

⁴ The term “Customer” or (“C”) applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation which is not for the account of broker or dealer or for the account of a “Professional” (as that term is defined in Chapter I, Section 1(a)(48)).

⁵ The term “Professional” or (“P”) means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) pursuant to Chapter I, Section 1(a)(48). All Professional orders shall be appropriately marked by Participants.

⁶ Options overlying Standard and Poor’s Depository Receipts/SPDRs (“SPY”) are based on the SPDR exchange-traded fund (“ETF”), which is designed to track the performance of the S&P 500 Index.

⁷ The term “Firm” or (“F”) applies to any transaction that is identified by a Participant for clearing in the Firm range at The Options Clearing Corporation.

Makers,⁸ NOM Market Makers,⁹ and Broker-Dealers¹⁰ a \$0.50 per contract Penny Pilot Options Fee for Removing Liquidity in all NOM Penny Pilot Options, except SPY options. Today, the Exchange assesses a Customer or Professional that removes liquidity in SPY options a Penny Pilot Options Fee for Removing Liquidity of \$0.47 per contract.¹¹ The Exchange proposes to amend note “3” of Chapter XV, Section 2(1) to increase the Customer or Professional Penny Pilot Options Fee for Removing Liquidity in SPY options from \$0.47 to \$0.48 per contract. While the Exchange is proposing to increase this fee, the Exchange believes that the lower fee, as compared to \$0.50 per contract in other Penny Pilot Options, will continue to incentivize Participants to send Customer and Professional order flow in SPY.¹²

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹³ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁴ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its

⁸ The term “Non-NOM Market Maker” or (“O”) is a registered market maker on another options exchange that is not a NOM Market Maker. A Non-NOM Market Maker must append the proper Non-NOM Market Maker designation to orders routed to NOM.

⁹ The term “NOM Market Maker” or (“M”) is a Participant that has registered as a Market Maker on NOM pursuant to Chapter VII, Section 2, and must also remain in good standing pursuant to Chapter VII, Section 4. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security.

¹⁰ The term “Broker-Dealer” or (“B”) applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category.

¹¹ Firms, Non-NOM Market Makers, NOM Market Makers and Broker-Dealers are assessed a \$0.50 per contract Penny Pilot Options Fee for Removing Liquidity in SPY options, similar to other Penny Pilot Options.

¹² SPY options are the largest volume Penny Pilot Options traded on the Exchange.

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(4) and (5).

members and issuers and other persons using its facilities, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁵

Likewise, in NetCoalition v. Securities and Exchange Commission¹⁶ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.¹⁷ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”¹⁸

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution

¹⁵ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁶ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹⁷ See NetCoalition, at 534 - 535.

¹⁸ Id. at 537.

of order flow from broker dealers'"¹⁹ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

Change 1 –Penny Pilot Options: Change Fee for Removing Customer and Professional Liquidity in SPY Options

The Exchange's proposal to amend note "3" of Chapter XV, Section 2(1) to increase the Customer or Professional Penny Pilot Options Fee for Removing Liquidity in SPY from \$0.47 to \$0.48 per contract is reasonable because the Customer and Professional Penny Pilot Options Fee for Removing Liquidity continues to be lower for SPY as compared to other Penny Pilot Options. The lower fee of \$0.48 in SPY, as compared to \$0.50 per contract in other Penny Pilot Options, will continue to incentivize Participants to send Customer and Professional order flow in SPY.

The Exchange's proposal to amend note "3" of Chapter XV, Section 2(1) to increase the Customer or Professional Penny Pilot Options Fee for Removing Liquidity in SPY options from \$0.47 to \$0.48 per contract is equitable and not unfairly discriminatory because the Customer and Professional Penny Pilot Options Fee for Removing Liquidity continues to be lower for SPY as compared to other Penny Pilot Options. This lower fee for these market participants is equitable and not unfairly discriminatory because Customer liquidity benefits all market participants by providing more trading opportunities, which 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 from other market participants. The Exchange believes that offering a lower fee to Professionals is equitable and not unfairly discriminatory

¹⁹ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

because it serves to attract more liquidity to NOM to the benefit of other market participants. By offering Professionals, as well as Customers, lower fees, the Exchange hopes to simply remain competitive with other venues so that it remains a choice for market participants when posting orders and the result may be additional Professional order flow for the Exchange, in addition to increased Customer order flow. Further, the Exchange initially established Professional pricing in order to “...bring additional revenue to the Exchange.”²⁰ The Exchange noted in the Professional Filing that it believes “...that the increased revenue from the proposal would assist the Exchange to recoup fixed costs.”²¹ The Exchange does not believe that providing Professionals with the opportunity to obtain lower remove fee in SPY, equivalent to that of a Customer, creates a competitive environment where Professionals would be necessarily advantaged on NOM as compared to NOM Market Makers, Firms, Broker-Dealers or Non-NOM Market Makers.

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. In such an environment, the Exchange must continually adjust its fees to remain

²⁰ See Securities Exchange Act Release No. 64494 (May 13, 2011), 76 FR 29014 (May 19, 2011) (SR-NASDAQ-2011-066) (“Professional Filing”). In this filing, the Exchange addressed the perceived favorable pricing of Professionals who were assessed fees and paid rebates like a Customer prior to the filing. The Exchange noted in that filing that a Professional, unlike a retail Customer, has access to sophisticated trading systems that contain functionality not available to retail Customers.

²¹ See Securities Exchange Act Release No. 64494 (May 13, 2011), 76 FR 29014 (May 19, 2011) (SR-NASDAQ-2011-066).

competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to 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.

The proposed fee changes are competitive and do not impose a burden on inter-market competition. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

Change 1 –Penny Pilot Options: Change Fee for Removing Customer and Professional Liquidity in SPY Options

The Exchange's proposal to amend note "3" of Chapter XV, Section 2(1) to increase the Customer or Professional Penny Pilot Options Fee for Removing Liquidity in SPY options from \$0.47 to \$0.48 per contract does not create an undue burden on intra-market competition, rather the proposal will incentivize market participants to send additional SPY order flow to NOM, because Participants sending Customer and Professional order flow will continued to be charged a lower rate of \$0.48 in SPY as compared to \$0.50 per contract in other Penny Pilot Options. Customer liquidity benefits all market participants by providing more trading opportunities, which 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 from other market participants. The Exchange believes that offering a lower fee to Professionals does not create an undue burden on intra-market competition because it serves to attract more liquidity to NOM to the benefit of other market participants. By offering Professionals, as well

as Customers, lower fees, the Exchange hopes to simply remain competitive with other venues so that it remains a choice for market participants when posting orders and the result may be additional Professional order flow for the Exchange, in addition to increased Customer order flow. Further, the Exchange initially established Professional pricing in order to “...bring additional revenue to the Exchange.”²² The Exchange noted in the Professional Filing that it believes “...that the increased revenue from the proposal would assist the Exchange to recoup fixed costs.”²³ The Exchange does not believe that providing Professionals with the opportunity to obtain lower remove fee in SPY, equivalent to that of a Customer, creates a competitive environment where Professionals would be necessarily advantaged on NOM as compared to NOM Market Makers, Firms, Broker-Dealers or Non-NOM Market Makers.

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.²⁴

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

²² See Securities Exchange Act Release No. 64494 (May 13, 2011), 76 FR 29014 (May 19, 2011) (SR-NASDAQ-2011-066) (“Professional Filing”). In this filing, the Exchange addressed the perceived favorable pricing of Professionals who were assessed fees and paid rebates like a Customer prior to the filing. The Exchange noted in that filing that a Professional, unlike a retail Customer, has access to sophisticated trading systems that contain functionality not available to retail Customers.

²³ See Securities Exchange Act Release No. 64494 (May 13, 2011), 76 FR 29014 (May 19, 2011) (SR-NASDAQ-2011-066).

²⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

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 e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2016-113 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-NASDAQ-2016-113. 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-2016-113 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.²⁵

Robert W. Errett
Deputy Secretary

²⁵ 17 CFR 200.30-3(a)(12).