

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79532; File No. SR-NASDAQ-2016-166)

December 12, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Transaction Fees at Chapter XV, Section 2

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 December 1, 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 the Exchange's transaction fees at Chapter XV, Section 2, entitled "NASDAQ Options Market – Fees and Rebates," which governs pricing for Nasdaq members using the NASDAQ Options Market ("NOM"), Nasdaq's facility for executing and routing standardized equity and index options. Nasdaq proposes to implement a new rebate for adding liquidity for Customer and Professional orders in Penny and Non-Penny Pilot Options as described further below.

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 Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 create an alternative method for earning a rebate for adding liquidity for both Customers³ and Professionals⁴ in Penny Pilot⁵ and Non-Penny Pilot Options. For Customers and Professionals transacting in Penny Pilot Options, the Exchange currently pays a volume-based tiered rebate to add liquidity. That rebate consists of 8 tiers, ranging from \$0.20 per contract to \$0.48 per contract, with the volume requirements increasing with each tier. Thus, a NOM Participant would qualify for a rebate of \$0.20 per contract in Tier 1 for Customers and Professionals if it added Customer, Professional, Firm, Non-NOM Market Maker and/or

³ 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 (“OCC”) 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)).

⁴ 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.

⁵ The Penny Pilot was established in March 2008. See Securities Exchange Act Release No. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008) (SR-NASDAQ-2008-026) (notice of filing and immediate effectiveness establishing Penny Pilot). Since that date, the Penny Pilot has been expanded and is currently extended through December 31, 2016 or the date of permanent approval, if earlier. See Securities Exchange Act Release No. 78037 (June 10, 2016), 81 FR 39299 (June 16, 2016) (SR-NASDAQ-2016-052).

Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of up to 0.10% of total industry customer equity and ETF option average daily volume (“ADV”) contracts per day in a month. In comparison, a Participant would qualify for a rebate of \$0.48 in Tier 8 for Customers and Professionals if it adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.75% or more of total industry customer equity and ETF option ADV contracts per day in a month, or if the Participant adds: (1) Customer and/or Professional liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 0.25% or more of total industry customer equity and ETF option ADV contracts per day in a month, and (2) has added liquidity in all securities through one or more of its Nasdaq Market Center MPIDs that represent 1.00% or more of Consolidated Volume in a month or qualifies for MARS.⁶

Currently, Customers and Professionals transacting in Non-Penny Pilot Options on NOM receive a \$0.80 per contract Rebate to Add Liquidity. In addition, a Participant that qualifies for a Customer or Professional Penny Pilot Options Rebate to Add Liquidity in Tiers 2, 3, 4, 5 or 6 in a month will receive an additional \$0.10 per contract Non-Penny Pilot Options Rebate to Add Liquidity for each transaction which adds liquidity in Non-Penny Pilot Options in that month. Furthermore, a Participant that qualifies for a Customer or Professional Penny Pilot Options Rebate to Add Liquidity in Tiers 7 or 8 in a month will receive an additional \$0.20 per contract Non-Penny Pilot Options Rebate to Add Liquidity for each transaction which adds liquidity in Non-Penny Pilot Options in that month.

⁶ MARS refers to the Market Access and Routing Subsidy, which is set forth in Chapter XV, Section 6 [sic]. The MARS payment comprises four volume-based tiers, and is paid to NOM Participants that route eligible contracts to NOM through a participating NOM Participant’s System. The MARS Payment will be paid on all executed Eligible Contracts that add liquidity. See Chapter XV, Section 6 [sic].

The Exchange now proposes to add an additional rebate to Customers and Professionals for adding liquidity in both Penny Pilot and Non-Penny Pilot Options. Specifically, a NOM Participant will receive a \$0.53 per contract Rebate to Add Liquidity in Penny Pilot Options as a Customer or Professional, and \$1.00 per contract Rebate to Add Liquidity in Non-Penny Pilot Options as a Customer or Professional, if that NOM Participant transacts on the NASDAQ Stock Market through one or more of its Nasdaq Market Center MPIDs in the same month, and such transactions in all securities on the NASDAQ Stock Market that month through all of its Nasdaq Market Center MPIDs represent 3.00% or more of Consolidated Volume.⁷ Participants that qualify for this rebate would not be eligible for any other rebates in Tiers 1-8 or other rebate incentives on NOM for Customer and Professional order flow in Chapter XV, Section 2(1).

For purposes of calculating the NOM Participant's total volume, the Exchange will add the NOM Participant's total volume transacted on the NASDAQ Stock Market in a given month across its Nasdaq Market Center MPIDs, and will divide this number by the total industry Consolidated Volume.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁸ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁹ 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.

⁷ Consolidated Volume would be determined as set forth in Nasdaq Rule 7018(a).

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(4) and (5).

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.”¹⁰

Likewise, in NetCoalition v. Securities and Exchange Commission¹¹ (“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.¹² 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.”¹³

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

¹⁰ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹¹ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹² See NetCoalition, at 534 - 535.

¹³ Id. at 537.

of order flow from broker dealers'"¹⁴ 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.

The Exchange notes that the purpose of the proposed rebates is to incentivize NOM Participants to transact greater volume on the NASDAQ Stock Market in order to qualify for a higher rebate on NOM. The Exchange believes that the amount of the rebate (\$0.53 per contract for Penny Pilot Options and \$1.00 per contract for Non-Penny Pilot Options) and the volume threshold for qualifying for the rebate (3.00% or more of Consolidated Volume) are reasonable. With respect to the rebate for Penny Pilot Options, the Exchange notes that the proposed \$0.53 per contract rebate is the same as the highest rebate currently available to Customers and Professionals for adding liquidity in Penny Pilot Options.¹⁵ The Exchange believes the proposed

¹⁴ 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)).

¹⁵ As noted above, a NOM Participant will receive a rebate of \$0.48 per contract for adding liquidity as a Customer or Professional in Penny Pilot Options if it qualifies for Tier 8. In addition, as noted in footnote c of Chapter XV, Section 2, a NOM Participant may receive an additional rebate of up to \$0.05 per contract in Penny Pilot Options, for a total rebate of \$0.53 per contract. Specifically, Participants that: (1) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 1.15% or more of total industry customer equity and ETF option ADV contracts per day in a month will receive an additional \$0.02 per contract Penny Pilot Options Customer and/or Professional Rebate to Add Liquidity for each transaction which adds liquidity in Penny Pilot Options in that month; or (2) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 1.30% or more of total industry customer equity and ETF option ADV contracts per day in a month will receive an additional \$0.05 per contract Penny Pilot Options Customer and/or Professional Rebate to Add Liquidity for each transaction which adds liquidity in Penny Pilot Options in that month; or (3) (a) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.80% of total industry customer equity and ETF option ADV contracts per day in a month, (b) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Non-Penny Pilot Options above 0.15% of total industry customer equity and ETF option ADV contracts per day in a month, and (c)

rebate of \$0.53 per contract is reasonable when compared to the highest rebate currently available to Customers and Professionals for adding liquidity in Penny Pilot Options, as the proposed rebate imposes comparable requirements on NOM Participants in order to qualify for that rebate. Similarly, the Exchange believes the proposed \$1.00 rebate per contract for Non-Penny Pilot Options is reasonable because it is comparable to the rebates that a NOM Participant currently receives for adding liquidity in Non-Penny Pilot Options as a Customer or Professional, which range from \$0.80 per contract to \$1.00 per contract.

The Exchange believes that the requirement that a NOM Participant transact 3.00% or more in Consolidated Volume on the NASDAQ Stock Market is reasonable because this requirement, while more stringent than other volume-based requirements that currently apply to NOM Participants that transact as Customers or Professionals in Penny Pilot and Non-Penny Pilot Options, reflects the fact that NOM Participants that qualify for this rebate would generally receive a larger rebate (for Penny Pilot Options, \$0.53 per contract versus \$0.20 - \$0.53 per contract and, for Non-Penny Pilot Options, \$1.00 per contract versus \$0.80 - \$1.00 per contract) than they would currently receive for transactions as Customer or Professionals in Penny Pilot and Non-Penny Pilot Options.

execute greater than 0.04% of Consolidated Volume (“CV”) via Market-on-Close/Limit-on-Close (“MOC/LOC”) volume within the NASDAQ Stock Market Closing Cross within a month will receive an additional \$0.05 per contract Penny Pilot Options Customer and/or Professional Rebate to Add Liquidity for each transaction which adds liquidity in Penny Pilot Options in a month. Consolidated Volume shall mean the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of an equity member's trading activity, expressed as a percentage of or ratio to Consolidated Volume, the date of the annual reconstitution of the Russell Investments Indexes shall be excluded from both total Consolidated Volume and the member's trading activity.

The Exchange believes it is reasonable to make this rebate exclusive of any other rebates in Tiers 1-8 or other rebate incentives on NOM for Customer and Professional order flow in Chapter XV, Section 2(1). As noted above, the proposed rebates are generally higher, and in some cases significantly higher, than the rebates that a NOM Participant may currently receive for adding liquidity in Penny Pilot and Non-Penny Pilot Options as a Customer or Professional. Given the size of the proposed rebates, the Exchange believes it is reasonable to make these rebates exclusive of other rebates on NOM for Customer and Professional order flow.

The Exchange also believes the other aspects of this proposal are also reasonable, equitable and not unfairly discriminatory. First, the Exchange notes that the proposed rebates apply to both transactions in Penny Pilot and Non-Penny Pilot Options.

Second, the Exchange believes that linking rebates on NOM to activity on the NASDAQ Stock Market is reasonable, equitable, and not unfairly discriminatory. The Exchange notes that previous and current rebates offered by NOM relate to activity on the NASDAQ Stock Market.¹⁶ Similarly, the NASDAQ Stock Market offers reduced transaction fees that are based on activity

¹⁶ For example, in SR-NASDAQ-2015-047, the Exchange proposed to make NOM Participants that added liquidity in Penny Pilot Stocks [sic] as a Customer or Professional eligible for the Tier 8 rebate if, among other things, the Participant has certified for the Investor Support Program set forth in Rule 7014, or if the Participant qualified for rebates under the Qualified Market Maker (“QMM”) Program set forth in Rule 7014. See Securities Exchange Act Release No. 74931 (May 12, 2015), 80 FR 28308 (May 18, 2015) (SR-NASDAQ-2015-047).

Currently, footnote c of the NOM fee schedule provides that Participants that (1) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options above 0.80% of total industry customer equity and ETF option ADV contracts per day in a month, (2) add Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Non-Penny Pilot Options above 0.15% of total industry customer equity and ETF option ADV contracts per day in a month, and (3) execute greater than 0.04% of Consolidated Volume (“CV”) via Market-on-Close/Limit-on-Close (“MOC/LOC”) volume within the NASDAQ Stock Market Closing Cross within a month will receive an additional \$0.05 per contract Penny Pilot Options Customer and/or Professional Rebate to Add Liquidity for each transaction which adds liquidity in Penny Pilot Options in a month.

on NOM.¹⁷ Moreover, the Exchange notes that any NOM Options Participant may trade equities on the NASDAQ Stock Market because they are approved members.¹⁸

Third, while the requirements for qualifying for the proposed rebates may be more stringent than other requirements for qualifying for other rebates currently offered by NOM, the Exchange believes that these requirements are proportionate to the amount of the proposed rebates and equitably reflect the purpose of the proposed rebates, which is to incentivize NOM Participants to transact greater volume on the NASDAQ Stock Market. Moreover, all similarly-situated NOM Participants, e.g., those that add liquidity in either Penny Pilot or Non-Penny Pilot Options as either Customers or Professionals and also transact on the NASDAQ Stock Market, are equally capable of qualifying for the proposed rebates, and the same rebates will be paid to all NOM Participants that qualify for them.

Fourth, the Exchange believes that it is reasonable, equitable and not unfairly discriminatory to offer this rebate to NOM Participants that add liquidity as Customers or Professionals, and not to offer this rebate to NOM Participants that add liquidity as Firms,¹⁹ NOM Market Makers,²⁰ non-NOM Market Makers, or Broker-Dealers.²¹ Nasdaq notes that

¹⁷ For example, Nasdaq charges a reduced transaction fee of \$0.00295 if the member adds Customer, Professional, Firm, Non-NOM Market Maker and/or Broker-Dealer liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 1.15% or more of total industry ADV in the customer clearing range for Equity and ETF option contracts per day in a month on NOM. See Nasdaq Rule 7018.

¹⁸ Although a NOM Participant may incur additional labor and/or costs to establish connectivity to the NASDAQ Stock Market, there are no additional membership fees for NOM Participants that want to transact on the NASDAQ Stock Market.

¹⁹ The term “Firm” or (“F”) applies to any transaction that is identified by a Participant for clearing in the Firm range at OCC.

²⁰ 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

Customer liquidity offers unique benefits to the market which benefits all market participants by providing more trading opportunities, which attracts Specialists and 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 encouraging Participants to add Professional liquidity is similarly beneficial, as the rebates may cause market participants to select NOM as a venue to send Professional order flow, increasing competition among the exchanges. As with Customer liquidity, the Exchange believes that increased Professional additional order flow should benefit other market participants.

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 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.

pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security.

²¹ 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.

The Exchange does not believe that the proposed rebates will impose any burden on competition that is not necessary or appropriate. The Exchange notes that the purpose of the proposed rebate is to incentivize NOM Participants to transact on the NASDAQ Stock Market. All similarly-situated NOM Participants, e.g., those that add liquidity in either Penny Pilot or Non-Penny Pilot Options as either Customers or Professionals and also transact the requisite volumes on the NASDAQ Stock Market, are equally capable of qualifying for the proposed rebates. Additionally, the Exchange will pay the same rebates to all NOM Participants that qualify for them. The Exchange believes that Customer and Professional order flow provides unique benefits to all participants on the Exchange and may even facilitate inter-market competition, and is therefore offering the proposed rebates to NOM Participants that add liquidity as either a Customer or a Professional accordingly. With respect to linking the proposed rebates to a participant's activity on the NASDAQ Stock Market, NOM currently offers rebates that are based on activity on the NASDAQ Stock Market. Similarly, the NASDAQ Stock Market currently offers reduced transaction fees that are based on activity on NOM. Finally, because they are approved members, any NOM Options Participant may trade equities on the NASDAQ Stock Market and therefore attempt to qualify for the proposed rebates.

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.²²

²² 15 U.S.C. 78s(b)(3)(A)(ii).

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 e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2016-166 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2016-166. 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-2016-166 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.²³

Eduardo A. Aleman
Assistant Secretary

²³ 17 CFR 200.30-3(a)(12).