

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-75072; File No. SR-NASDAQ-2015-057)

May 29, 2015

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Rule 4626(b)(3)

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 May 19, 2015, The NASDAQ Stock Market LLC (“NASDAQ” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a 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 the Substance of the Proposed Rule Change

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.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Introduction

On March 22, 2013, the Commission approved a proposal by Nasdaq to establish a one-time voluntary accommodation policy for claims arising from system difficulties that Nasdaq experienced during the initial public offering (“IPO”) of Facebook, Inc. (“Facebook” or “FB”) on May 18, 2012.³ Rule 4626 limits the liability of Nasdaq and its affiliates with respect to any losses, damages, or other claims arising out of the Nasdaq Market Center or its use and provides for limited accommodations under the conditions specified in the rule.⁴ Rule 4626(b)(1) provides that for the aggregate of all claims made by market participants related to the use of the Nasdaq Market Center during a single calendar month, Nasdaq’s payments under Rule 4626 shall not exceed the larger of \$500,000 or the amount of the recovery obtained by Nasdaq under any applicable insurance policy. Rule 4626(b)(2) states that for the aggregate of all claims made by market participants related to systems malfunctions or errors of the Nasdaq Market Center concerning locked/crossed compliance, trade through protection, market maker quoting, order protection, or firm quote compliance, during a single calendar month Nasdaq’s payments under

³ Securities Exchange Act Release No. 69216 (March 22, 2013), 78 FR 19040 (March 28, 2013) (SR-NASDAQ-2012-090) (“Approval Order”). See also Securities Exchange Act Release No. 67507 (July 26, 2012), 77 FR 45706 (August 1, 2012) (SR-NASDAQ-2012-090) (“Proposing Release”).

⁴ Rule 4626(a) provides that except as set forth in the accommodation portion of the rule, “Nasdaq and its affiliates shall not be liable for any losses, damages, or other claims arising out of the Nasdaq Market Center or its use. Any losses, damages, or other claims, related to a failure of the Nasdaq Market Center to deliver, display, transmit, execute, compare, submit for clearance and settlement, adjust, retain priority for, or otherwise correctly process an order, Quote/Order, message, or other data entered into, or created by, the Nasdaq Market Center shall be absorbed by the member, or the member sponsoring the customer, that entered the order, Quote/Order, message, or other data into the Nasdaq Market Center.”

Rule 4626 shall not exceed the larger of \$3,000,000 or the amount of the recovery obtained by Nasdaq under any applicable insurance policy. Rule 4626(b)(3) established a methodology for submission, evaluation, and payment of claims associated with the Facebook IPO. The purpose of this proposed rule change is to amend Rule 4626(b)(3) to permit a limited reopening of the process for submitting, evaluating, and paying such claims, in accordance with the terms and conditions described herein.

On May 18, 2012, Nasdaq experienced system difficulties during the Nasdaq Halt and Imbalance Cross Process (the “Cross”) for the FB IPO. These difficulties delayed the completion of the Cross from 11:05 a.m. until 11:30 a.m.⁵ Based on its assessment of the information available at the time, Nasdaq concluded that the system issues would not have any effects beyond the delay itself. In an exercise of its regulatory authority, Nasdaq determined to proceed with the IPO at 11:30 a.m. rather than postpone it.

As a result of the system difficulties, however, certain orders for FB stock that were entered between 11:11:00 a.m. and 11:30:09 a.m. in the expectation of participating in the Cross – and that were not cancelled prior to 11:30:09 a.m. – either did not execute or executed after 1:50 p.m. at prices other than the \$42.00 price established by the Cross. (Other orders entered between 11:11:00 a.m. and 11:30:09 a.m., including cancellations, buy orders below \$42.00, and sell orders above \$42.00, were handled without incident.) System issues also delayed the dissemination of Cross transaction reports from 11:30 a.m. until 1:50 p.m. At 1:50 p.m., Nasdaq system difficulties were completely resolved.

Rule 4626(b)(3) provides that, as a result of these unique circumstances, Nasdaq would accommodate members for losses attributable to the system difficulties on May 18, 2012 in an

⁵ All times in this filing are Eastern Time.

amount not to exceed \$62 million. Rule 4626(b)(3)(A) provides that all claims for such accommodation must arise solely from realized or unrealized direct trading losses arising from the following specific Cross orders:

- (i) SELL Cross orders that were submitted between 11:11 a.m. and 11:30 a.m. on May 18, 2012, that were priced at \$42.00 or less, and that did not execute;
- (ii) SELL Cross orders that were submitted between 11:11 a.m. and 11:30 a.m. on May 18, 2012, that were priced at \$42.00 or less, and that executed at a price below \$42.00;
- (iii) BUY Cross orders priced at exactly \$42.00 and that were executed in the Cross but not immediately confirmed; and
- (iv) BUY Cross orders priced above \$42.00 and that were executed in the Cross but not immediately confirmed, but only to the extent entered with respect to a customer that was permitted by the member to cancel its order prior to 1:50 p.m. and for which a request to cancel the order was submitted to Nasdaq by the member, also prior to 1:50 p.m.

As originally approved, Rule 4626(b)(3)(D) provided that all claims related to the FB IPO must be submitted in writing not later than 7 days after formal approval of the FB accommodation proposal by the Commission, which occurred on March 22, 2013. In recognition of the fact that the Passover and Good Friday holidays occurred during the week when claim submissions would otherwise be due, Nasdaq submitted an immediately effective proposed rule change to extend the deadline for claim submission until 11:59 p.m. on April 8, 2013.⁶ Nasdaq received claims with respect to 75 market participant identifiers (“MPIDs”) within the deadline (the “2013 Claims”). Nasdaq did not receive any claims after the deadline.

Rule 4626(d)(3)(D) further provides that all claims shall be processed and evaluated by the Financial Industry Regulation Authority (“FINRA”), applying the standards set forth in Rule

⁶ Securities Exchange Act Release No. 69250 (March 28, 2013), 78 FR 20160 (April 3, 2013) (SR-NASDAQ-2013-055).

4626. FINRA is authorized to request such supplemental information as it deems necessary to assist its evaluation of claims.

Rule 4626(b)(3)(E) required FINRA to provide to the Nasdaq Board of Directors and the Board of Directors of NASDAQ OMX an analysis of the total value of eligible 2013 Claims, and further provided that Nasdaq would file with the Commission a rule proposal setting forth the amount of eligible 2013 Claims under the standards set forth in Rule 4626 and the amount proposed to be paid to members by Nasdaq. This process was completed in 2013,⁷ and all valid 2013 Claims were paid on December 31, 2013.

Basis for Reopening the Claim Process under Rule 4626(b)(3)

On March 15, 2013, UBS Securities LLC (“UBS”), a member of Nasdaq within the meaning of Rule 4626, filed a demand for arbitration against NASDAQ with the American Arbitration Association (“AAA”). In its demand, UBS sought to recover damages alleged to have been caused by Nasdaq in connection with the Facebook IPO. UBS cited provisions of the Services Agreement between Nasdaq and UBS as the basis for pursuing a claim in arbitration.⁸ UBS did not file a claim under Rule 4626(b)(3).

On April 4, 2013, Nasdaq filed an action in the Southern District of New York against UBS seeking declaratory and injunctive relief with respect to UBS’s demand for arbitration. On April 16, 2013, NASDAQ moved preliminarily to enjoin UBS from proceeding with arbitration, arguing, inter alia, that the Services Agreement did not reflect an agreement by Nasdaq to arbitrate claims covered by Rule 4626. UBS cross-moved to dismiss NASDAQ’s complaint and

⁷ See Securities Exchange Act Release No. 71098 (December 17, 2013), 78 FR 77540 (December 23, 2013) (SR-NASDAQ-2013-152) (the “Results Filing”).

⁸ The Services Agreement is a contract that users of certain NASDAQ OMX systems (including, but not limited to, the Nasdaq Market Center) are required to enter into as a condition of using such systems.

opposed the preliminary injunction motion. On June 18, 2013, the district court granted NASDAQ's motion for a preliminary injunction and denied UBS's cross-motion to dismiss.⁹ UBS appealed this decision to the United States Court of Appeals for the Second Circuit (the "Court of Appeals").

On October 31, 2014, the Court of Appeals issued a decision affirming the district court's decision.¹⁰ In doing so, the Court of Appeals found that the district court had not erred in (i) exercising federal question jurisdiction over the case; (2) determining that the arbitrability of UBS's claims is a question for decision by the court, rather than an arbitrator; and (3) concluding that UBS's claims are not subject to arbitration given the applicability of Rule 4626.¹¹ The ruling by the Court of Appeals does not, however, foreclose the possibility of further judicial proceedings by UBS against Nasdaq. Nevertheless, UBS has agreed to forego further proceedings in consideration of Nasdaq's agreement to submit a proposed rule change to amend Rule 4626(b)(3) for the purpose of allowing UBS to submit a claim thereunder. In the interest of ensuring that the administration of Rule 4626 continues to be as fair as possible to all members, Nasdaq is proposing a limited reopening of the claims process not only for UBS, but for all other members that did not file 2013 Claims.¹²

⁹ See NASDAQ OMX Grp., Inc. v. UBS Sec. LLC, 957 F. Supp. 2d 388 (S.D.N.Y. 2013).

¹⁰ See NASDAQ OMX Grp., Inc. v. UBS Sec. LLC, Docket No. 13-2657-cv (2d Cir. 2014).

¹¹ On December 29, 2014, the Second Circuit denied a petition for panel rehearing, or in the alternative, rehearing en banc.

¹² Members that did file 2013 Claims would not be entitled to file again or to seek reconsideration of their claims. Similarly, any member affiliated with a member that executed and delivered a release of claims under Rule 4626(b)(3)(H) would be barred from filing. See Rule 4626(b)(3)(H) (requiring "the execution and delivery to Nasdaq of a release by the member of all claims by it or its affiliates against Nasdaq or its affiliates for losses that arise out of, are associated with, or relate in any way to the Facebook, Inc. IPO Cross or to any actions or omissions related in any way to that Cross, including but

Structure of the Proposed Claim Process

Under the proposed process for submission of new claims, a member that did not submit a claim prior to 11:59 p.m. ET on April 8, 2013 and that is not subject to a release executed and delivered to Nasdaq under Rule 4626(b)(3)(H) may submit a claim under Rule 4626(b)(3) prior to 11:59 p.m. ET on June 19, 2015 (each, a “2015 Claim” and collectively, the “2015 Claims”). All 2015 Claims shall be processed and evaluated by FINRA applying the accommodation standards set forth in paragraphs (b)(3)(A), (B), and (C) of Rule 4626 and as fully described in the Proposing Release, the Approval Order, and the Results Filing.¹³ FINRA may request such supplemental information as FINRA deems necessary to assist FINRA's evaluation of 2015 Claims.

As was the case with 2013 Claims, FINRA will establish a working group consisting of FINRA Market Regulation Department analysts and managers (“FB Claims Team”). During the review process, the FB Claims Team will not perform any regulatory services for any Nasdaq market and will not own or have owned FB stock during the period since its IPO. A Steering Committee, composed of members of senior management of FINRA’s Market Regulation Department, may provide guidance to the FB Claims Team on the resolution of procedural and substantive issues arising during the course of the FB claim evaluation process, review the form and content of the review summary forms for each claim, and monitor the overall progress of the claim review effort. However, members of the Steering Committee will not participate in the FB

not limited to the execution or confirmation of orders in Facebook, Inc. on May 18, 2012”).

¹³ Nasdaq notes that the Results Filing describes the application of Rule 4626 to several questions that arose during FINRA’s review of 2013 Claims, particularly with respect to claims for orders entered under a sponsored access arrangement and claims for BUY Cross Orders priced at exactly \$42.00.

Claim Team’s assessment of and decisions to recommend the approval or disapproval of individual claims.

Following the completion of its analysis of 2015 Claims, FINRA shall provide to the Nasdaq Board of Directors and the Board of Directors of The NASDAQ OMX Group, Inc. an analysis of the total value of eligible 2015 Claims.¹⁴ Nasdaq will review FINRA’s determinations and determine whether it concurs in them or believes that any changes are required. Nasdaq will thereafter notify members of the value of 2015 Claims and pay valid 2015 Claims in accordance with the following parameters (which are functionally identical to the conditions associated with the payment of 2013 Claims):

- All payments of 2015 Claims will be contingent upon the submission to Nasdaq, not later than 7 days after the member’s receiving notice of the value its 2015 Claim, of an attestation detailing:
 - the amount of compensation, accommodation, or other economic benefit provided or to be provided by the member to its customers (other than customers that were brokers or dealers trading for their own account) in respect of trading in Facebook Inc. on May 18, 2012 (“Customer Compensation”), and
 - the extent to which the losses reflected in the “Member’s Share”¹⁵ with respect to the 2015 Claim were incurred by the member trading for its own account or for

¹⁴ In contrast to the process for 2013 Claims, Nasdaq is not proposing to submit a follow-on proposed rule change to report on the results of the 2015 Claim process. Nasdaq believes that such a proposed rule change is unnecessary because the 2015 Claim process will follow the parameters described herein and in the Proposing Release, the Approval Order, and the Report Filing.

¹⁵ As defined in Rule 4626(b)(3)(B), each member’s direct trading losses calculated in accordance with Rule 4626(b)(3)(A) and (B) is referred to in Rule 4626 and herein as the “Member’s Share”.

the account of a customer that was a broker or dealer trading for its own account (“Covered Proprietary Losses”).

Failure to provide the required attestation within the specified time limit will void the member's eligibility to receive an accommodation with respect to a 2015 Claim. Each member shall be required to maintain books and records that detail the nature and amount of Customer Compensation and Covered Proprietary Losses with respect to 2015 Claims.

- All payments of 2015 Claims will be contingent upon the execution and delivery to Nasdaq of a release by the member of all claims by it or its affiliates against Nasdaq or its affiliates for losses that arise out of, are associated with, or relate in any way to the Facebook, Inc. IPO Cross or to any actions or omissions related in any way to that Cross, including but not limited to the execution or confirmation of orders in Facebook, Inc. on May 18, 2012. The member’s failure to provide the required release within 14 days after receiving notice of the value its 2015 Claim will void the member's eligibility to receive an accommodation with respect to its 2015 Claim.

Nasdaq is requiring the submission of the attestation with respect to Customer Compensation because, as was the case with respect to 2013 Claims, Nasdaq believes that it is reasonable to make accommodation payments with respect to orders submitted on behalf of a member’s customers only if the member has compensated or will compensate its customers in an amount that is at least equal to the amount of the accommodation payment. In addition, Nasdaq will prioritize the payment of accommodation funds used to compensate a member’s customers above the payment of funds with respect to proprietary trading losses. However, Nasdaq notes that with respect to 2013 Claims, Nasdaq was able to pay the full amount the 2013 Claims, including proprietary trading losses. Moreover, based on Nasdaq’s records with respect to the

disposition of shares in the Cross, Nasdaq believes that it will likely be able to pay the full amount of 2015 Claims, including claims with respect to Covered Proprietary Losses.

Nevertheless, because Rule 4626 includes an absolute limit of \$62 million on the total value of accommodation payments with respect to the FB IPO, and because Nasdaq is not proposing to increase this limit, Nasdaq is proposing a proration mechanism that would be used in the event that the total value of 2015 Claims and 2013 Claims exceeds \$62 million.¹⁶ Specifically, accommodation payments for 2015 Claims will be made in two tranches of priority:

- First, if the member has provided Customer Compensation, the member will receive an amount equal to the lesser of the Member's Share or the amount of Customer Compensation (“Tranche A”);
- Second, the member will receive an amount with respect to Covered Proprietary Losses; provided, however, that the sum of payments to a member with respect to 2015 Claims shall not exceed the Member's Share (“Tranche B”).

In the event that the amounts calculated under Tranche A, together with the amounts previously paid with respect to 2013 Claims, exceed \$62 million, the accommodation will be prorated among members eligible to receive accommodation under Tranche A based on the size of the amounts payable under Tranche A. In the event that Tranche A is paid in full and the amounts calculated under Tranche B, together with the amounts paid under Tranche A and the amounts previously paid with respect to 2013 Claims, exceed \$62 million, the accommodation will be prorated among members eligible to receive accommodation under Tranche B based on the size of the amounts payable under Tranche B. If a member's eligibility to receive funds is voided for

¹⁶ As reported in the Results Filing, the total value of 2013 Claims was \$44,029,901.61. Accordingly, the maximum amount available for the payment of 2015 Claims would be \$17,970,098.39.

any reason under this rule, and the funds payable to other members must be prorated hereunder, the funds available to pay other members will be increased accordingly.

Thus, if the portion of 2015 Claims with respect to Customer Compensation, plus the total amount paid with respect to 2013 Claims, exceeds \$62 million, the funds remaining under Rule 4626 will be prorated among members with 2015 Claims with respect to Customer Compensation. Similarly, if the portion of 2015 Claims with respect to Customer Compensation, plus the total amount paid with respect to 2013 Claims does not exceed \$62 million, but such amount, together with the portion of 2015 Claims with respect to Covered Proprietary Losses exceeds \$62 million, the funds remaining under Rule 4626 after payments with respect to Customer Compensation will be prorated among members with 2015 Claims with respect to Covered Proprietary Losses. Nasdaq believes that this proration mechanism is reasonable because members with 2013 Claims submitted timely claims under the terms of Rule 4626(b)(3) as originally proposed, while members with 2015 Claims are receiving the benefit of a subsequent amendment. Accordingly, to the extent that any proration is required to keep the overall cost of the program under the \$62 million limit originally proposed and approved by the Commission, the effects of the proration should be borne solely by members with 2015 Claims. As discussed above, however, Nasdaq believes that it is unlikely that any such proration will be required.

All payments of 2015 Claims shall be made in cash. Payments to a member shall be made as soon as practicable following the completion of all analysis and documents required under the rule.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with Section 6(b) of the Act¹⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act¹⁸ in particular, because the proposal 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. In the Approval Order, the Commission found that Rule 4626(b)(3) is consistent with the Act because it “sets forth objective and transparent processes to determine eligible claims and how such claims would be paid to Nasdaq members that elect to participate in the accommodation plan.” The Commission further determined that providing compensation pursuant to the rule would be in the public interest and that the rule would encourage members to compensate their customers. Similarly, Nasdaq believes that this proposed rule change is consistent with the Act because it will allow additional members to benefit from the accommodation plan. As originally adopted, Rule 4626(b)(3) contains time limits that bar claims submitted after April 8, 2013. These time limits were intended to, and were successful in, encouraging members to submit claims promptly after Commission approval of the proposal, thereby allowing for the efficient administration of the claim process. Although UBS opted to pursue arbitration rather than filing a claim under the rule, Nasdaq believes that it is reasonable to allow it to file a claim under the rule now to resolve the litigation between Nasdaq and UBS. In addition, by reopening the claim process to all members that did not file a 2013 Claim (or that are not otherwise covered by a release executed in connection with the 2013 Claim process), Nasdaq will ensure that the benefits of the proposal

¹⁷ 15 U.S.C. § 78f(b).

¹⁸ 15 U.S.C. § 78f(b)(5).

are available not only to UBS, but to also to other members that decided not to participate in the 2013 Claim process but that wish to do so now.

Nevertheless, although Nasdaq believes it is unlikely that proration of 2015 Claims in order to keep the total value of all claims within the \$62 million limit authorized under the rule will be required, it is reasonable that members making claims under the 2015 Claim process would be required to incur the burden of any such proration that would be required, since such members opted not to file claims within the period originally contemplated by the rule.

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

Nasdaq believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the proposed rule change does not relate to the provision of goods or services, nor does it impose regulatory restrictions on the ability of members to compete. Accordingly, the change does not affect competition in any respect.

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 Act¹⁹ and subparagraph (f)(6) of Rule 19b-4 thereunder.²⁰

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-2015-057 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.

¹⁹ 15 U.S.C. 78s(b)(3)(A)(iii).

²⁰ 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.

All submissions should refer to File Number SR-NASDAQ-2015-057. 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; 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-2015-057, 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.²¹

Brent J. Fields
Secretary

²¹ 17 CFR 200.30-3(a)(12).