

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60352; File No. SR-NASDAQ-2009-059)

July 21, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Modifying Fees for Members Using the NASDAQ Options Market

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 July 1, 2009, The NASDAQ Stock Market LLC ("NASDAQ") 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 NASDAQ. Pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> a proposed rule change to modify pricing for NASDAQ members using the NASDAQ Options Market ("NOM"), Nasdaq's facility for the trading of standardized equity and index options [sic]. 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 to modify pricing for NASDAQ members using the Nasdaq Market Center. This proposed rule change, which is effective upon filing, will become operative on July 1, 2009. The text of the proposed rule change is available at <http://nasdaqomx.cchwallstreet.com/>, at NASDAQ's principal office, and at the Commission's Public Reference Room.

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

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

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

<sup>4</sup> 17 C.F.R. 240.19b-4(f)(2).

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. 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is modifying NASDQ Rule 7050, the fee schedule for NOM, in several ways. *First*, Nasdaq is making changes that apply to orders with an account type of "Customer." Specifically, Nasdaq is ending its pricing program to eliminate the fee for the execution of options orders with an account type of "Customer" that take liquidity<sup>5</sup> in certain Penny Pilot options. In April, Nasdaq expanded the application of that rule to all options that are included in the Options Penny Pilot Program. Nasdaq continued to monitor the trading of options on these equities to ensure that the proposal is operating in a fashion that promotes the interests of investors. Nasdaq has concluded that the reduction of fees is no longer attracting new order flow to NOM and, therefore, Nasdaq is establishing a fee of \$0.20 per executed contract for Customer orders in Penny Pilot options.

*Second*, Nasdaq is also changing the fee structure for "Customer" orders in options not included in the Options Penny Pilot Program. Currently, Nasdaq charges no execution fees for members providing liquidity through the NASDAQ Options Market with an account type "Customer." Nasdaq also offers a credit of \$0.20 per executed contract to members entering

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<sup>5</sup> An order that "takes" or "removes" liquidity is one that is entered into NOM and that executes against an order resting on the NOM book.

orders in options with an account type "Customer" that execute and remove liquidity entered by another member in options that are not included in the Options Penny Pilot Program. Nasdaq is proposing to eliminate the payment of this credit when an order with an account type of Customer executes against another order with an account type of Customer. Nasdaq determined that the previous rule resulted in disproportionate payment for Customer orders relative to order volume growth.

*Third*, Nasdaq is modifying NASDAQ Rule 7050 to lower from \$0.45 to \$0.20 the fees applicable to orders from Firms that remove liquidity in non-Penny Pilot stocks. Nasdaq believes that lowering this fee will attract more order flow to NOM and improve its overall competitiveness.

Nasdaq believes that the proposed fees are competitive, fair and reasonable, and non-discriminatory in that they apply equally to all similarly situated members and customers. As with all fees, Nasdaq may adjust these proposed fees in response to competitive conditions by filing a new proposed rule change.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>6</sup> in general, and with Section 6(b)(5) of the Act,<sup>7</sup> in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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.

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<sup>6</sup> 15 U.S.C. 78f.

<sup>7</sup> 15 U.S.C. 78f(b)(5).

NASDAQ also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>8</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. The proposed change identifies a class of person subject to transaction execution fees based on the role of that class in bringing order flow to NASDAQ. With respect to options markets, the Commission has found comparable pricing distinctions to be consistent with the Act. For example, in SR-ISE-2006-26,<sup>9</sup> the Commission approved a fee schedule under which orders of professional customers were charged higher fees than orders of non-professional customers. A Firm rate that is lower than other participant rates is not uncommon. In fact, ISE charges the same differential rate that NASDAQ is proposing: \$0.20 per contract for Proprietary Firm executions and \$0.45 per contract for non-ISE-Market Makers.<sup>10</sup>

NASDAQ also believes it is equitable to rebate customer executions in non-penny pilot options when the customer removes liquidity, unless the customer removes liquidity from a resting customer order. In that case, neither side of the trade is charged a fee or given a rebate. In other words, customer-to-customer transactions will be free to both sides of the trade (as is the case on most options markets) and therefore in NASDAQ's view it is not justifiable to pay an additional rebate. NASDAQ understands that on exchanges that engage in payment-for-order-flow and that have less transparent fee schedules, customer orders that interact with other customer orders do not receive payment whereas customer orders that interact with a market maker do receive payment for order flow.

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<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> Securities Exchange Act Release No. 59287 (January 23, 2009), 74 FR 5694 (January 30, 2009) (SR-ISE-2006-26).

<sup>10</sup> See [http://www.ise.com/assets/documents/optionsExchange/legal/fee/fee\\_schedule](http://www.ise.com/assets/documents/optionsExchange/legal/fee/fee_schedule).

The impact of the changes upon the net fees paid by a particular market participant will depend upon a number of variables, including its monthly volume, the order types it uses, and the prices of its quotes and orders (i.e., its propensity to add or remove liquidity and to set the best bid and offer), and the extent to which it acts as an agent for retail customers. NASDAQ notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. NASDAQ is modifying fees to remain competitive with those charged by other venues and therefore strongly believes that its fees are reasonable and equitably allocated to those members that opt to direct orders to NASDAQ rather than competing venues.

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.

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>11</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder.<sup>12</sup> At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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.

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

<sup>12</sup> 17 CFR 240.19b-4(f)(2).

#### 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. In addition, the Commission seeks comment generally on whether the proposed assessment of transaction fees is consistent with the Act, in particular whether the proposal provides for an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities under Section 6(b)(4) of the Act or whether the proposal permits unfair discrimination between customers, issuers, brokers, or dealers under Section 6(b)(5) of the Act. Specifically:

1. The Exchange has determined that the previous \$0.20 rebate for a Customer account for removing liquidity resulted in disproportionate payment for Customer orders relative to order volume growth. Do commenters believe that eliminating the rebate to Customers removing liquidity in non-Penny Pilot options when that Customer trades against a Customer order, while retaining the rebate to Customers that trade against a Firm or Market Maker order is consistent with the Act, including whether it is an equitable allocation of fees under Section 6(b)(4) and not unfairly discriminatory under Section 6(b)(5)? Why or why not?

2. The Commission notes that the fee schedules of some options exchanges provide for different levels of transaction fees for different categories of market participants. Generally, if there is a distinction between transaction fees for market makers and other non-customers (e.g. broker-dealers, firms), the market maker transaction fee is less than the non-customer fee. However, the Exchange notes that one exchange charges away market makers more than non-customer orders.<sup>13</sup> The Exchange proposes to charge Market Makers \$0.45 per contract to

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<sup>13</sup> See supra note 10 and accompanying text.

remove orders in non-Penny Pilot options and to charge Firms \$0.20 per contract to remove such orders. Is this fee differential consistent with the Act, including whether it is an equitable allocation of fees under Section 6(b)(4) and not unfairly discriminatory under Section 6(b)(5)? Why or why not?

3. In non-Penny Pilot options, the Exchange proposes to lower the fees charged to firms that remove liquidity from \$0.45 to \$0.20. The Exchange, however, maintains the fee of \$0.45 for sending orders via the Options Intermarket Linkage that execute on NOM. Is creating a differential in this manner consistent with the Act, including whether it is an equitable allocation of fees under Section 6(b)(4) and not unfairly discriminatory under Section 6(b)(5)? Why or why not?

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-2009-059 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-2009-059. 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 Web site (<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 inspection and copying 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 No. SR-NASDAQ-2009-059 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

Florence E. Harmon  
Deputy Secretary

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