

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63796; File No. SR-NASDAQ-2011-010)

January 28, 2011

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees

I. Introduction

On January 10, 2011, The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to discount certain market data fees and increase certain liquidity provider rebates for members that both (1) execute specified levels of transaction volume on NASDAQ as a liquidity provider, and (2) purchase specified levels of market data from NASDAQ. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ Notice of filing of the proposed rule change was published in the Federal Register on January 27, 2011.⁴

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ See Securities Exchange Act Release No. 63745 (January 20, 2011) 76 FR 4970 (“Notice”). The Commission has received one comment letter on the proposed rule change to date. See Letter dated January 13, 2011 from William O’Brien, Chief Executive Officer, Direct Edge to Florence E. Harmon, Deputy Secretary, Commission (the “Direct Edge Letter”). The commenter suggested that the proposed rule change should be suspended and that the Commission should institute proceedings to determine whether to approve or disapprove the proposal.

Under Section 19(b)(C)(3) of the Act, the Commission is (1) hereby temporarily suspending File No. SR-NASDAQ-2011-010, and (2) instituting proceedings to determine whether to approve or disapprove File No. SR-NASDAQ-2011-010.

II. Summary of the Proposed Rule Change

NASDAQ proposes to provide a discount on non-professional market data fees for NASDAQ Depth Data⁵ (“NASDAQ Depth Data Product Fees”) charged to a member that provides displayed liquidity through the NASDAQ Market Center and incurs NASDAQ Depth Data Product Fees at certain specified levels.⁶ Specifically, a member would qualify as a:

- “Tier 1 Firm” for purposes of pricing during a particular month if it (i) has an average daily volume of 12 million shares or more of liquidity provided through the NASDAQ Market Center in all securities during the month; and (ii) incurs NASDAQ Depth Data Product Fees during the month of \$150,000 or more.
- “Tier 2 Firm” for purposes of pricing during a particular month if it (i) has an average daily volume of 35 million or more shares of liquidity provided through the NASDAQ Market Center in all securities during the month; and (ii) incurs NASDAQ Depth Data Product Fees during the month of \$300,000 or more.
- “Tier 3 Firm” for purposes of pricing during a particular month if it (i) has an average daily volume of 65 million or more shares of liquidity provided through the NASDAQ Market Center in all securities during the month; and (ii) incurs NASDAQ Depth Data Product Fees during the month of \$500,000 or more.

⁵ NASDAQ Depth Data includes National Quotation Data Service (individual market maker quotation data), TotalView (depth-of-book data for NASDAQ-listed securities), and OpenView (depth-of-book data for non-NASDAQ-listed securities) data products.

⁶ For a more detailed description of the proposed rule change, see Notice, supra note 4.

Tier 1 Firms would receive a 15% discount on NASDAQ Depth Data Product Fees charged to them, Tier 2 Firms would receive a 35% discount on NASDAQ Depth Data Product Fees charged to them, and Tier 3 Firms would receive a 50% discount on NASDAQ Depth Data Product Fees charged to them.⁷ In addition, Tier 1 Firms would receive an increased liquidity provider rebate for transactions executed on NASDAQ. Specifically, Tier 1 Firms would receive a rebate of \$0.0028 per share for displayed liquidity and \$0.0015 per share for undisplayed liquidity, compared to the current liquidity provider credit of \$0.0020 per share of displayed liquidity and \$0.0010 per share of non-displayed liquidity applicable to these firms. There is no enhancement to the liquidity provider credits at this time for Tier 2 and Tier 3 firms.

III. Summary of Comment Letters

To date, the Commission has received one comment letter on NASDAQ's proposed rule change.⁸ In its comment letter, Direct Edge argues, among other things, that the proposed rule change should be suspended because, in its view, offering discounts on NASDAQ's market data fees only to customers who meet specified minimum order flow thresholds and provide such data to non-professional users does not meet the "fair and reasonable" standard for market data fees under the Exchange Act.

⁷ A NASDAQ member incurs non-professional fees when it offers NASDAQ Depth Data to natural persons that are not acting in a capacity that subjects them to financial industry regulation (e.g., retail customers).

⁸ See Direct Edge Letter supra, note 4.

IV. Suspension of SR-NASDAQ-2011-010

Pursuant to Section 19(b)(3)(C) of the Act,⁹ at any time within 60 days of the date of filing a proposed rule change pursuant to Section 19(b)(1) of the Act,¹⁰ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization 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.

Under the proposal, the level of fees that a market participant would be charged for obtaining NASDAQ market data would be tied to the extent of that market participant's trading in the NASDAQ market. In addition, the level of transaction rebates that a market participant receives for trading on NASDAQ would be tied to the level of NASDAQ market data that it purchases. The Commission is concerned that such a tying arrangement may not be consistent with the statutory requirements applicable to a national securities exchange under the Act, as described below. For instance, the Commission is concerned that the proposal may fail to satisfy the standards under the Exchange Act and the rules thereunder that require market data fees to be equitable, fair, and not unreasonably discriminatory.¹¹

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.

⁹ 15 U.S.C. 78s(b)(3)(C).

¹⁰ 15 U.S.C. 78s(b)(1).

¹¹ See infra, notes 17-24.

V. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2011-010

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)¹² and 19(b)(2) of the Act¹³ to determine whether NASDAQ's proposed rule change should be approved or disapproved. Pursuant to Section 19(b)(2)(B) of the Act,¹⁴ the Commission is providing notice of the grounds for disapproval under consideration. Under the proposal, the level of fees that a market participant would be charged for obtaining NASDAQ market data would be tied to the extent of that market participant's trading in the NASDAQ market. The Exchange Act and the rules thereunder require that market data fees must be equitable, fair, reasonable, and not unreasonably discriminatory.¹⁵ In this regard, the Commission has stated previously that the Exchange Act precludes exchanges from adopting terms for market data distribution that unfairly discriminate by favoring participants in an exchange's market or penalizing participants in other markets.¹⁶ The Commission is concerned that NASDAQ's

¹² 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *Id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding. *Id.*

¹⁵ See infra, notes 17-24.

¹⁶ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 at 74791 (December 9, 2008) (SR-NYSEArca-2006-21) (Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data) ("NYSE Arca Order"), vacated and remanded by NetCoalition v. SEC, No. 09-1042 (DC Cir. 2010).

proposal may be inconsistent with this standard. The Commission believes that the NASDAQ proposal raises significant legal and policy issues. Specifically, the Commission has serious concerns as to whether NASDAQ’s proposal to tie market data fees and execution fees is consistent with the Exchange Act. The Commission has similar concerns with respect to NASDAQ’s proposal to tie the level of transaction rebates paid to market participants to the amount of market data they purchase.

The Commission believes it is appropriate in the public interest to institute disapproval proceedings at this time in view of the significant legal and policy issues raised by the proposal. Institution of disapproval proceedings does not indicate, however, that the Commission has reached any conclusions with respect to the issues involved. The sections of the Act and the rules thereunder that are applicable to the proposed rule change include:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities”;¹⁷
- Section 6(b)(5) of the Act, which requires that the rules of a national securities exchange be designed to, among other things, “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” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;¹⁸

¹⁷ 15 U.S.C. 78f(b)(4).

¹⁸ 15 U.S.C. 78f(b)(5).

- Section 6(b)(8) of the Act,¹⁹ which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate” in furtherance of the Act;²⁰
- Section 11A(a) of the Act, in which Congress found that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure “economically efficient execution of securities transactions,” “fair competition among brokers and dealers and among exchange markets,” “the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities,” and “the practicability of brokers executing investors’ orders in the best market”;²¹
- Rule 603(a)(1) of Regulation NMS, which requires any exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock, as that term is defined in Rule 600(b) of Regulation NMS,²² to a securities information processor to “do so on terms that are fair and reasonable”;²³ and
- Rule 603(a)(2) of Regulation NMS, which requires a national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock

¹⁹ 15 U.S.C. 78f(b)(8).

²⁰ 15 U.S.C. 78f(b)(8).

²¹ 15 U.S.C. 78k-1(a)(1)(C)(i)-(iv).

²² See 17 CFR 242.600(b)(46) and (47), defining “NMS stock” as any NMS security other than an option and defining “NMS security” as any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.

²³ 17 CFR 242.603(a)(1).

to a securities information processor to “do so on terms that are not unreasonably discriminatory”.²⁴

VI. Commission’s Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 45 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 60 days from date of publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.²⁵

The Commission asks that commenters address the merit of NASDAQ’s statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, 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/other.shtml>); or

²⁴ 17 CFR 242.603(a)(2).

²⁵ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding -- either oral or notice and opportunity for written comments -- is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2011-010 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-2011-010. The 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/other.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 publicly available. All submissions should refer to File Number SR-NASDAQ-2011-010 and should be submitted on or before [insert date 45 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 60 days from date of publication in the Federal Register].

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,²⁶ that File No. SR-NASDAQ-2011-010, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

Elizabeth M. Murphy
Secretary

²⁶ 15 U.S.C. 78s(b)(3)(C).

²⁷ 17 CFR 200.30-3(a)(57) and (58).