

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63984; File No. SR-NASDAQ-2011-027)

February 28, 2011

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Make Clarifying Changes to Rule 7002 Concerning the Application and Collection of the Sales Fee

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 February 16, 2011, 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. 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

NASDAQ is proposing to make clarifying changes to Rule 7002 concerning the application and collection of the Sales Fee.

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.

7002. Sales Fee

A Sales Fee is assessed by Nasdaq to each member for sales of securities through Nasdaq transaction execution systems in the following circumstances:

(a) When a sale in equity securities occurs with respect to which Nasdaq is obligated to pay a fee to the SEC under Section 31 of the Act;

(b) When a sale in option securities occurs with respect to which Nasdaq is obligated to pay a fee

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

to the SEC under Section 31 of the Act;

(c) When a sell order in equity securities is routed for execution at a market other than Nasdaq, resulting in a covered sale on that market and an obligation of the routing facility of Nasdaq to pay the related sales fee of that market;

(d) When a sell order in option securities is routed for execution at a market other than the Nasdaq Options Market, resulting in a covered sale on that market and an obligation of the routing facility of Nasdaq to pay the related sales fee of that market;

[with respect to which Nasdaq is obligated to pay a fee to the SEC under Section 31 of the Act.]

The Sales Fee is collected indirectly from members through their clearing firms by a designated clearing agency, as defined by the Act,[NSCC] on behalf of Nasdaq. The amount of the Sales

Fee is equal to (i) the Section 31 fee rate multiplied by (ii) the member's aggregate dollar amount of covered sales resulting from transactions through Nasdaq transaction execution systems during any computational period.

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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 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. 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 proposing amendments to Rule 7002 to make clear the circumstances that

trigger application of the Sales Fee, and to make other clarifying changes. Rule 7002 permits NASDAQ to collect a fee from its members for sales of securities through NASDAQ transaction execution systems with respect to which NASDAQ is obligated to pay a fee to the SEC pursuant to Section 31 of the Act³ and Rule 31, thereunder.⁴ Each national securities exchange and association is required to calculate the aggregate dollar amount of “covered sales” occurring on the exchange or through a member of the national securities association and to pay fees based on those covered sales to the Commission (“Section 31 fees”). A covered sale is a “sale of a security, other than an exempt sale or a sale of a security future, occurring on a national securities exchange or by or through any member of a national securities association otherwise than on a national securities exchange.”⁵ Pursuant to Rule 7002, NASDAQ assesses a member the Sales Fee for an executed sell order entered into NASDAQ transaction execution systems that results in a covered sale. The Sales Fee defrays the cost of the Section 31 fee triggered by the covered sale. In this regard, the Sales Fee assessed a member is equal to the Section 31 fee assessed by the Commission for the covered sale. Further, NASDAQ adjusts the Sales Fee in lock step with changes to the Section 31 fee made by the Commission.⁶ Assessing a sales fee is common practice among the national securities exchanges and associations.⁷

As noted above, the Sales Fee defrays the cost of the Section 31 fee. The Sales Fee is triggered by the fulfillment of a members [sic] sell order in equity or options securities entered

³ 15 U.S.C. 78ee.

⁴ 17 CFR 240.31.

⁵ 17 CFR 240.31(a)(6).

⁶ NASDAQ OMX issues Regulatory Alerts to provide its equities and options markets’ members with notice of Sales Fee changes. See e.g., <http://www.nasdaqtrader.com/TraderNews.aspx?id=ERA2011-01>.

⁷ See e.g., CBOE Fees Schedule (January 3, 2011), Item 6 “Sales Value Fee,” ISE Rule 212, NYSE Rule 440H, and NYSE Amex Rule 393.

into NASDAQ transaction execution systems that results in a covered sale. If the member's sell order is fulfilled on NASDAQ's equity or options trading markets, NASDAQ incurs a Section 31 fee obligation. Sell orders in equity or options securities entered into NASDAQ transaction execution systems that are routed to another market for execution, however, do not result in a covered sale on NASDAQ. Execution of such routed orders is facilitated by NASDAQ's routing brokers,⁸ which act as the selling member for a routed order on the away market on behalf of the NASDAQ member. Such routed sell orders result in a covered sale on the away market, which incurs a Section 31 fee obligation. Like NASDAQ, the away market assesses a sales fee on the member that entered the sell order, in this case NASDAQ Execution Services or NASDAQ Options Services, to defray the cost of the Section 31 fee obligation. In turn, NASDAQ assesses its member, the original selling party, a Sales Fee pursuant to Rule 7002 to defray the cost of the Section 31 fee passed on by the away exchange pursuant to its sales fee. As such, NASDAQ's Sales Fee offsets the sales fee it is assessed by the away market, the result of which is to place the parties involved in the transaction in the same position as if the covered sale had occurred on NASDAQ.

In light of the varying means by which a Sales Fee is incurred by members, as described above, NASDAQ believes that a more detailed description of the circumstances that trigger the Sales Fee is warranted. Accordingly, the new rule language proposed by NASDAQ expressly discusses covered sales in both equity and option securities. In addition, the proposed new rule language includes a description of sell orders entered into NASDAQ transaction execution systems that result in a covered sale on another exchange, expressly discussing the fee incurred

⁸ NASDAQ Execution Services and NASDAQ Options Services are NASDAQ's routing brokers for equity and option securities, respectively. See Rule 4758(b) and NOM Rules Chapter VI, Section 11(e).

by NASDAQ and the application of the Sales Fee in such circumstances.

NASDAQ also proposes deleting reference to the NSCC as the party that collects the Sales Fee and replacing it with the term “designated clearing agency,” which is defined by rules promulgated under the Act as a “clearing agency registered under section 17A of the Act...that clears and settles covered sales or covered round turn transactions.”⁹ NASDAQ is adopting the term “designated clearing agency” because it encompasses a broader range of clearing agencies than is currently noted under the rule. In this regard, Rule 7002 discusses the process by which the Sales Fee is collected from members for equity covered sales, noting that the fee is collected indirectly from members through their clearing firms by NSCC. NSCC is a designated clearing agency that clears transactions in equity securities. NASDAQ employs NSCC to collect the Sale Fee from members arising from their covered sales in equity securities. Sales Fees arising from options covered sales, however, are collected from members by the Options Clearing Corporation, another designated clearing agency that clears option securities.¹⁰ Consistent with the other changes proposed herein, NASDAQ believes the rule should be updated to more fully describe the parties and processes involved in collection of the Sales Fee. Accordingly, NASDAQ proposes to use a term defined by the rules promulgated under the Act,¹¹ which most accurately reflects all parties NASDAQ employs to collect the Sales Fee from its members.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with Section 6(b)(4) of the

⁹ 17 CFR 240.31(a)(9).

¹⁰ In addition to clearing transactions in options, the Options Clearing Corporation also clears security futures. See <http://www.optionsclearing.com>.

¹¹ Supra note 9.

Act¹² 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, and it does not unfairly discriminate between customers, issuers, brokers or dealers. The proposed clarifying language does not change the application and assessment of the Sales Fee under the rule, but rather provides greater detail on the transactions that trigger the fee and the process by which the fee is collected. NASDAQ applies Rule 7002 uniformly to all members' sell orders entered into NASDAQ's transaction execution systems resulting in covered sales.

NASDAQ also believes the proposed rule change is consistent with the provisions of Section 6 of the Act,¹³ in general and with Section 6(b)(5) of the Act,¹⁴ in particular, which requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest. NASDAQ believes that the proposed rule change is consistent with these requirements because the proposed amended rule text provides members with more detail regarding the circumstances under which NASDAQ assesses a Sales Fee, and the process by which the fee is collected. As such, the proposed changes will help avoid member confusion and foster better understanding of the application of the rule. Accordingly, NASDAQ believes the proposed rule change will promote just and equitable principles of trade, remove impediments to and perfect

¹² 15 U.S.C. 78f(b)(4).

¹³ 15 U.S.C. 78f.

¹⁴ 15 U.S.C. 78f(b)(5).

the mechanism of a free and open market and a national market system, and protect investors and the public interest.

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

Because the foregoing proposed rule change establishes or changes a due, fee or other charge applicable only to a member, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁵ and Rule 19b-4(f)(2) thereunder.¹⁶

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 necessary or appropriate in the public interest, for the protection of investors, or 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, as amended, is consistent with the

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f)(2).

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-2011-027 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-2011-027. 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 Web site 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 offices of NASDAQ. 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-2011-027, 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.¹⁷

Cathy H. Ahn
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).