

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78380; File No. SR-NASDAQ-2016-090)

July 21, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Affiliated Entities

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 July 11, 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 NASDAQ Options Market LLC’s (“NOM”) pricing at Chapter XV to permit certain affiliated market participants to aggregate eligible volume for pricing in Chapter XV, Sections 2(1) and 2(6), for which a volume threshold or volume percentage is required to obtain the pricing.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 purpose of the proposed rule change is to permit certain affiliated market participants to aggregate volume in Chapter XV, Sections 2(1) and 2(6), for which a volume threshold or volume percentage is required to qualify for various pricing incentives. The Exchange's proposal is intended to incentivize Participants to submit for execution a greater amount of order flow on NOM to obtain more advantageous pricing.

Affiliated Entity

The Exchange proposes to add three definitions to Chapter XV of NOM Rules. The Exchange proposes to define the terms "Appointed MM," "Appointed OFP," and "Affiliated Entity."

The Exchange proposes to define the term "Appointed MM" as a NOM Market Maker³ who has been appointed by an Order Flow Provider ("OFP") for purposes of qualifying as an Affiliated Entity. An OFP is a Participant, other than a NOM Market Maker, that submits orders, as agent or principal, to the Exchange.⁴

³ 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 pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security.

⁴ Market Makers submitting quotes through SQF or orders through OTTO to the Exchange shall not be considered Appointed OFPs for the purpose of becoming an Affiliated Entity.

The Exchange proposes to define the term “Appointed OFP” as an OFP who has been appointed by a NOM Market Maker for purposes of qualifying as an Affiliated Entity.

The Exchange proposes to define the term “Affiliated Entity” as a relationship between an Appointed MM and an Appointed OFP for purposes of aggregating eligible volume for pricing in Chapter XV, Sections 2(1) and 2(6), for which a volume threshold or volume percentage is required to qualify for higher rebates or lower fees.

In order to become an Affiliated Entity, NOM Market Makers and OFPs will be required to send an email to the Exchange to appoint their counterpart, at least 3 business days prior to the last day of the month to qualify for the next month.⁵ For example, with this proposal, market participants may submit emails to the Exchange to become Affiliated Entities eligible to qualify for discounted pricing starting August 1, 2016, provided the emails are sent at least 3 business days prior to the first business day of August 2016. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity is eligible for applicable pricing in Chapter XV, Section 2(1) and (6).

Each Affiliated Entity relationship will commence on the 1st of a month and may not be terminated prior to the end of any month. An Affiliated Entity relationship will terminate after a one (1) year period, unless either party terminates earlier in writing by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Affiliated Entity relationships must be renewed annually. For example, if the start date of the Affiliated Entity relationship is August 1, 2016, the counterparties may determine to commence a new relationship as of August 1, 2017 by sending two new emails by July 27, 2017

⁵ The Exchange shall issue an Options Trader Alert specifying the email address and details required to apply to become an Affiliated Entity. Once the Exchange receives both emails, from the Affiliated [sic] MM and the Affiliated [sic] OFP, the Exchange will send a confirming email with the date of approval of the one (1) year term.

(3 business days prior to the end of the month). Participants under Common Ownership⁶ may not qualify as a counterparty comprising an Affiliated Entity. Each Participant may qualify for only one (1) Affiliated Entity relationship at any given time.

As proposed, an Affiliated Entity shall be eligible to aggregate their volume for purposes of qualifying for certain pricing in Chapter XV, Sections 2(1) and 2(6) for which a volume threshold or volume percentage is required to obtain a higher rebate or lower fee. With this proposal, Affiliated Entities will be eligible to aggregate pricing in Chapter XV, Section 2(1) in both Penny and Non-Penny Pilot Options⁷ and also aggregate MARS Payments in Chapter XV, Section 2(6).

Chapter XV, Section 2(1) - Penny Pilot and Non-Penny Pilot Options Pricing

Currently, the Exchange offers Customers,⁸ Professionals⁹ and NOM Market Makers the ability to obtain higher Penny Pilot Options Rebates to Add Liquidity with tiered pricing models.¹⁰ The Exchange offers additional volume incentives to Customers and Professionals in

⁶ The term “Common Ownership” means Participants under 75% common ownership or control. See Chapter XV. Participants that are under 75% common ownership or control shall be considered under Common Ownership for purposes of pricing.

⁷ See NOM Rules at Section 2(1) of Chapter XV.

⁸ 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 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)).

⁹ 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.

¹⁰ For Customers and Professionals, there are currently 8 Penny Pilot Options Rebate to Add Liquidity Tiers for Customers and Professionals with rebates that range from \$0.20 to \$0.48 per contract. Additionally, notes c and d in Chapter XV, Section 2(1) permit additional incentives based on volume in the Customer and Professional Penny Pilot Options Rebate to Add Liquidity tiers. For NOM Market Makers, there are currently 6

note 1 of Chapter XV, Section 2(1) to increase the Non-Penny Pilot Options Rebate to Add Liquidity, provided certain qualifications are met.¹¹ The Exchange also offers NOM Market Makers the ability to obtain higher Penny Pilot Options Rebates to Add Liquidity.¹²

Additionally, the Exchange also offers additional volume incentives to NOM Market Makers in note 2 of Chapter XV, Section 2(1) to lower the Penny Pilot Options Fee for Removing

Penny Pilot Options Rebate to Add Liquidity Tiers with rebates ranging from \$0.20 to \$0.42 per contract.

¹¹ Note 1 of Chapter XV, Section 2(1) states that a Participant that qualifies for Customer or Professional Penny Pilot Options Rebate to Add Liquidity 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. A Participant that qualifies for Customer or Professional Penny Pilot Options Rebate to Add Liquidity 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.

¹² There are currently 6 Penny Pilot Options Rebate to Add Liquidity Tiers for NOM Market Makers with rebates that range from \$0.20 to \$0.42 per contract.

Liquidity.¹³ Note “c” of Chapter XV, Section 2(1)¹⁴ offers Participants an opportunity to

¹³ Note 2 of Chapter XV, Section 2(1) states that Participants that add 1.30% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month will be subject to the following pricing applicable to executions: a \$0.48 per contract Penny Pilot Options Fee for Removing Liquidity when the Participant is (i) both the buyer and the seller or (ii) the Participant removes liquidity from another Participant under Common Ownership. Participants that add 1.50% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and meet or exceed the cap for the NASDAQ Stock Market Opening Cross during the month will be subject to the following pricing applicable to executions less than 10,000 contracts: a \$0.32 per contract Penny Pilot Options Fee for Removing Liquidity when the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership. Participants that add 1.75% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month will be subject to the following pricing applicable to executions less than 10,000 contracts: a \$0.32 per contract Penny Pilot Options Fee for Removing Liquidity when the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership

¹⁴ Note “c” of Chapter XV, Section 2(1) provides, “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) 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

increase the Tier 8 Customer and Professional Penny Pilot Options rebate, provided certain qualifications are met. This pricing is reflected at Chapter XV, Section 2(1) and would be subject to aggregation by Affiliated Entities.

The Exchange's proposal would incentivize certain Participants, who are not by definition under Common Ownership, to enter into an Affiliated Entity relationship for the purpose of aggregating volume to qualify for higher rebates and lower fees. With this proposal the Exchange is offering Affiliated [sic] OFPs the ability to obtain higher rebates and is also offering Appointed MMs the ability to obtain lower fees by aggregating volume at Chapter XV, Section 2(1).

Chapter XV, Section 2(6) – MARS Pricing

The Exchange currently offers a Market Access and Routing Subsidy or "MARS" to qualifying NOM Participants in Chapter XV, Section 2(6).¹⁵ NOM Participants that have System Eligibility and have executed the requisite number of Eligible Contracts in a month are paid rebates based on average daily volume in a month. There is a 3 tiered rebate schedule today for such MARS rebates.¹⁶ MARS Payments are made to NOM Participants that have System

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."

¹⁵ The Participant remains solely responsible for implementing and operating its System, as that term is defined in note 17 below.

¹⁶ NOM Participants that qualify for Customer and Professional Penny Pilot Options Rebate to Add Liquidity Tier 8 are eligible to receive \$0.09 per contract in addition to any MARS Payment tier on MARS Eligible Contracts the NOM Participant qualifies for in a given month. Also, note 4 of Chapter XV, Section 2(1) permits NOM Participants that qualify for MARS Payment Tiers 1, 2 or 3 to receive a Customer and Professional Penny

Eligibility and have routed the requisite number of Eligible Contracts daily in a month, which were executed on NOM, for the purpose of qualifying for the MARS Payment.¹⁷

In note “d” of Chapter XV, Section 2(1), the Exchange also offers NOM Participants that qualify for MARS Payment Tiers 1, 2 or 3 an additional \$0.03 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, in addition to qualifying Penny Pilot Options Customer and/or Professional Rebate to Add Liquidity Tiers 1 through 8. NOM Participants that qualify for a note “c” incentive receive the greater of the note “c” or note “d” incentive.¹⁸

The Exchange’s proposal would incentivize certain Participants, who are not by definition under Common Ownership, to enter into an Affiliated Entity relationship for the purpose of aggregating volume to qualify for higher MARS rebates. With this proposal the Exchange is offering Affiliated [sic] OFPs the ability to obtain higher MARS rebates by aggregating volume with an Affiliated [sic] MM with whom they are qualified as an Affiliated

Pilot Options Fee for Removing Liquidity of \$0.48 per contract when removing Customer and Professional liquidity in Penny Pilot Options, excluding SPY.

¹⁷ To qualify for MARS, the NOM Participant’s routing system (“System”) would be required to meet the following criteria: (1) enable the electronic routing of orders to all of the U.S. options exchanges, including NOM; (2) provide current consolidated market data from the U.S. options exchanges; and (3) be capable of interfacing with NOM’s API to access current NOM match engine functionality. Also, the Participant’s System would also need to cause NOM to be the one of the top three default destination exchanges for individually executed marketable orders if NOM is at the national best bid or offer (“NBBO”), regardless of size or time, but allow any user to manually override NOM as a default destination on an order-by-order basis (“System Eligibility”). Any NOM Participant would be permitted to avail itself of this arrangement, provided that its order routing functionality meets the requirements described herein and satisfies NOM that it appears to be robust and reliable. Eligible Contracts do not include Mini Option orders. A NOM Participant is not be entitled to receive any other revenue for the use of its System specifically with respect to orders routed to NOM.

¹⁸ See note 14 above.

Entity and also be able to aggregate volume for purposes of qualifying for the Chapter XV, Section 2(1) note “d” rebate.

2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act,¹⁹ in general, and furthers the objectives of Section 6(b)(4) and (b)(5) of the Act,²⁰ 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 the Exchange operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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.”²¹

Likewise, in NetCoalition v. Securities and Exchange Commission²² (“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

¹⁹ 15 U.S.C. 78f(b).

²⁰ 15 U.S.C. 78f(b)(4), (5).

²¹ Securities Exchange Act Release No. 51808 (June 29, 2005), 70 FR 37496 at 37499 (File No. S7-10-04) (“Regulation NMS Adopting Release”).

²² NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

approach.²³ 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.”²⁴

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 of order flow from broker dealers’”²⁵ 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’s proposal to amend Chapter XV to add the definitions of “Appointed MM,” “Appointed OFP” and “Affiliated Entity” is reasonable because the Exchange is proposing to identify the applicable market participants that may qualify to aggregate volume as an Affiliated Entity. Further the Exchange seeks to make clear the manner in which Participants may participate on the Exchange as Affiliated Entities by setting timeframes for communicating agreements among market participants and terms of early termination. The Exchange also clearly states that no Participant under Common Ownership may become a counterparty to an Affiliated Entity. Any Participant who meets the definition of Common Ownership shall not be eligible to become an Affiliated Entity. The Exchange believes that these terms are reasonable

²³ See id. at 534-535.

²⁴ See id. at 537.

²⁵ See id. at 539 (quoting Securities Exchange Act Commission at Release No. 59039 (December 2, 2008), 73 FR 74770 at 74782-74783 (December 9, 2008) (SR-NYSEArca-2006-21)).

because they would allow Participants to elect to become a counterparty to an Affiliated Entity, provided they are not under Common Ownership.

The Exchange's proposal to amend Chapter XV to add the definitions of "Appointed MM," "Appointed OFP" and "Affiliated Entity" is equitable and not unreasonably discriminatory because all Participants that are not under Common Ownership by definition may choose to enter into an Affiliated Entity relationship.

Chapter XV, Section 2(1) - Penny Pilot and Non-Penny Pilot Options Pricing

The Exchange's proposal to permit Affiliated Entities to aggregate volume for purposes of qualifying Appointed OFPs for higher Penny Pilot and Non-Penny Pilot Options rebates¹ and qualifying Appointed MMs for lower fees in Chapter XV, Section 2(1) and the note "c" incentive is reasonable because it will attract additional Customer and non-Customer order flow to the Exchange. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts NOM 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. Also, the Exchange is incentivizing Participants to send non-Customer order flow to NOM, which order flow will benefit all Participants because they may interact with the liquidity. Market participants directing order flow as OFPs may be eligible to qualify for higher rebates with this proposal as a result of aggregating volume with an Appointed MM and thereby qualifying for higher rebates. Permitting Participants to affiliate for purposes of qualifying Appointed OFPs for higher rebates and qualifying Appointed MMs for lower fees may also encourage Affiliated Entities to incentivize each other to attract and seek to execute more volume on NOM. In turn, market participants would benefit from the increased liquidity with which to interact, potentially tighter

spreads on orders. Overall, incentivizing market participants with increased opportunities to earn higher or lower fees may increase the quality of the liquidity available on NOM.

The Exchange's proposal to permit Affiliated Entities to aggregate volume for purposes of qualifying Appointed OFPs for higher Penny Pilot and Non-Penny Pilot Options rebates and qualifying Appointed MMs for lower fees in Chapter XV, Section 2(1) and the note "c" incentive is equitable and not unfairly discriminatory because all NOM Participants, other than those that meet the definition of Common Ownership, may elect to become an Affiliated Entity as either an Appointed MM or an Appointed OFP.²⁶ Also, each NOM Participant may participate in only one Affiliated Entity relationship at a given time, which imposes a measure of exclusivity among market participants, allowing each party to rely on the other's executed volume on NOM to receive a corresponding benefit in terms of a higher rebate or lower fee. Any market participant that by definition is not under Common Ownership may elect to become a counterparty of an Affiliated Entity. Also, NOM Market Makers are valuable market participants that provide liquidity in the marketplace and incur costs that other market participants do not incur. NOM Market Makers are subject to burdensome quoting obligations²⁷ to the market that do not apply to other market participants. Incentivizing these market participants to execute volume on NOM may result in tighter spreads.

²⁶ Both Participants must elect each other to qualify as an Affiliated Entity for one year. Participation is effected by an agreement of both parties. One party may elect terminate the agreement at any time.

²⁷ Pursuant to NOM Rules at Chapter VII, Section 5, entitled "Obligations of Market Makers", in registering as a market maker, an Options Participant commits himself to various obligations. Transactions of a NOM Market Maker must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and Market Makers should not make bids or offers or enter into transactions that are inconsistent with such course of dealings. Further, all Market Makers are designated as specialists on NOM for all purposes under the Act or rules thereunder. See Chapter VII, Section 2.

The Exchange's proposal to exclude Participants that are under Common Ownership from qualifying as an Affiliated Entity is reasonable because Participants under Common Ownership may aggregate volume today for purposes of Chapter XV, Section 2(1) pricing.²⁸ The Exchange's proposal to exclude Participants that by definition are under Common Ownership from qualifying as an Affiliated Entity is equitable and not unfairly discriminatory because the Exchange will apply all qualifications in a uniform manner when approving Affiliated Entities. Excluding Participants under Common Ownership from also qualifying as an Affiliated Entity is equitable and not unfairly discriminatory because they are able to aggregate volume today and qualify for higher rebates or lower fees.

Chapter XV, Section 2(6) – MARS Pricing

The Exchange's proposal to permit NOM Participants that provide certain order routing functionalities to other NOM Participants and/or use such functionalities themselves, and meet certain System Eligibility, to aggregate volume as an Affiliated Entity for purposes of receiving MARS Payments including the note "d" incentive is reasonable because NOM Participants will be incentivized to send more order flow to NOM. MARS Payments are made on Firm, Non-NOM Market Maker, Broker-Dealer and JBO equity option orders that add liquidity and are electronically delivered and executed. All Participants may benefit from the increased order flow because they may interact with this liquidity. Permitting NOM Participants to affiliate for purposes of qualifying Appointed OFPs for higher MARS rebates may also encourage Affiliated Entities to incentivize each other to attract and seek to execute more volume on NOM. The Affiliated Entity relationship would permit the Appointed OFP to benefit from orders executed

²⁸ See NOM Rules at Chapter XV for Common Ownership.

on NOM in terms of qualifying for higher MARS rebates. In turn, market participants would benefit from the increased liquidity with which to interact, potentially tighter spreads on orders.

The Exchange's proposal to permit NOM Participants that provide certain order routing functionalities to other NOM Participants and/or use such functionalities themselves, and meet certain System Eligibility, to aggregate volume as an Affiliated Entity for purposes of receiving MARS Payments including the note "d" incentive is equitable and not unfairly discriminatory because all NOM Participants, other than those that meet the definition of Common Ownership, may qualify as an Affiliated Entity as either an Appointed MM or an Appointed OFP. Also, all NOM Participants may qualify for a MARS Payment provided they meet applicable System Eligibility requirements. NOM Participants may participate in only one Affiliated Entity relationship at a given time, which imposes a measure of exclusivity among market participants, allowing each party to rely on the other's executed volume on NOM to receive a corresponding benefit in terms of a rebate. The Exchange will apply all qualifications in a uniform manner to all market participants that elect to become counterparties of an Affiliated Entity.

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. Specifically, the Exchange does not believe that permitting Affiliated Entities to aggregate volume to qualify for certain rebates and reduced fees will impose any undue burden on competition, as discussed below.

The Exchange operates in a highly competitive market in which many sophisticated and knowledgeable market participants can readily and do send order flow to competing exchanges if they deem fee levels or rebate incentives at a particular exchange to be excessive or inadequate. Additionally, new competitors have entered the market and still others are reportedly entering the

market shortly. These market forces ensure that the Exchange's fees and rebates remain competitive with the fee structures at other trading platforms.

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.

In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets. In terms of inter-market competition, the Exchange notes that other options markets have similar incentives in place to attract volume to their markets.²⁹

²⁹ See NYSE MKT LLC's ("NYSE Amex") pricing at NYSE Amex Options Fee Schedule). NYSE Amex permits aggregation of volume to qualify for the Amex Customer Engagement or ACE Program. See Bats BZX Exchange, Inc.'s ("BZX") fee schedule. BZX permits aggregation of volume to qualify for tiered pricing. See the Chicago Board Options Exchange Incorporated ("CBOE") Fees Schedule. CBOE permits aggregation of volume to qualify for credits available under an Affiliated Volume Plan or "AVP."

The Exchange's proposal to amend Chapter XV to add the definitions of "Appointed MM," "Appointed OFP," and "Affiliated Entity" does not impose an undue burden on competition because these definitions apply to all Participants uniformly.

Chapter XV, Section 2(1) - Penny Pilot and Non-Penny Pilot Options Pricing

In terms of intra-market competition, the Exchange does not believe that its proposal to permit counterparties of an Affiliated Entities to aggregate volume for purposes of qualifying for Chapter XV, Section 2(1) higher rebates and lower fees and the note "c" incentive imposes an undue burden on intra-market competition because all NOM Participants, other than those under Common Ownership, may qualify as an Affiliated Entity as either an Appointed MM or an Appointed OFP. Also, each NOM Participant may participate in only one Affiliated Entity relationship at a given time, which imposes a measure of exclusivity among market participants, allowing each party to rely on the other's executed NOM volume on NOM to receive a corresponding benefit in terms of a higher rebate or lower fee. The Exchange will apply all qualifications in a uniform manner to all market participants that elect to become counterparties of an Affiliated Entity. Any market participant that by definition is a Participant under Common Ownership may not become a counterparty of an Affiliated Entity.

Also, NOM Market Makers are valuable market participants that provide liquidity in the marketplace and incur costs that other market participants do not incur. NOM Market Makers are subject to burdensome quoting obligations³⁰ to the market that do not apply to other market participants. Incentivizing these market participants to execute Customer and Professional volume on NOM may result in tighter spreads. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding

³⁰ See note 27 above.

increase in order flow from other market participants. Appointed OFPs directing order flow to the Exchange may be eligible to qualify for a higher rebate and Appointed MMs may be eligible to qualify for lower fees, with this proposal, as a result of aggregating volume. Permitting Participants to affiliate for purposes of qualifying for Chapter XV, Section 2(1) higher rebates or lower fees may also encourage the counterparties that comprise the Affiliated Entities to incentivize each other to attract and seek to execute more volume on NOM.

The Exchange's proposal to exclude Participants that are under Common Ownership from becoming an Affiliated Entity does not impose and [sic] undue burden on intra-market competition because Participants under Common Ownership may aggregate volume today for purposes of qualifying for higher rebates or lower fees.

Chapter XV, Section 2(6) –MARS Pricing

In terms of intra-market competition, the Exchange does not believe that its proposal to permit Affiliated Entities to aggregate volume for purposes of qualifying for Chapter XV, Section 2(6) MARS rebates and the note "d" incentive imposes an undue burden on intra-market competition because all NOM Participants, other than those under Common Ownership, may qualify as an Affiliated Entity as either an Appointed MM or an Appointed OFP. Also, all NOM Participants may qualify for a MARS Payment provided they meet applicable System Eligibility requirements. NOM Participants may participate in only one Affiliated Entity relationship at a given time, which imposes a measure of exclusivity among market participants, allowing each party to rely on the other's executed volume on NOM to receive a corresponding benefit in terms of a rebate. The Exchange will apply all qualifications in a uniform manner to all market participants that elect to become counterparties of an Affiliated Entity.

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.³¹

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-2016-090 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.

³¹ 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to File Number [SR-NASDAQ-2016-090](#). 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-2016-090](#) 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.³²

Robert W. Errett
Deputy Secretary

³² 17 CFR 200.30-3(a)(12).