

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61103; File No. SR-NSX-2009-07)

December 3, 2009

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to amend the Fee and Rebate Schedule to increase transaction rebates to \$.0024 per share and implement a 50% market data rebate for displayed Order Delivery orders of certain ETP Holders, and to adopt a new Rule 16.4 that would use “Liquidity Adding ADV” to determine the volume eligibility for all rebate tiers in Order Delivery.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 24, 2009, National Stock Exchange, Inc. 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 the Exchange. The Commission is publishing this notice to solicit comment on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

National Stock Exchange, Inc. (“NSX<sup>®</sup>” or “Exchange”) is proposing a rule change, operative at commencement of trading on December 1, 2009, which proposes to amend the NSX Fee and Rebate Schedule (the “Fee Schedule”) and adopt a new Rule 16.4. In summary, the rule change results in the use of the measurement “Liquidity Adding ADV” to determine volume eligibility for all Order Delivery mode of order interaction (“Order Delivery”)<sup>3</sup> rebate tiers, as well as an increase in transaction rebates to \$.0024 per share and implementation of a 50% market data rebate for displayed Order Delivery orders of ETP Holders that achieve at least 5

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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> The Exchange’s two modes of order interaction are described in NSX Rule 11.13(b).

million in Liquidity Adding ADV.

The text of the proposed rule change is available on the Exchange's website at <http://www.nsx.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 parts of such statements.

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

1. Purpose

With this rule change, the Exchange is proposing to modify the Fee Schedule and establish a new Exchange Rule 16.4 that would result in the use of "Liquidity Adding ADV", a measurement currently in use elsewhere in the Fee Schedule, to determine volume eligibility for all rebate tiers in Order Delivery. In addition, for ETP Holders that achieve at least five million in Liquidity Adding ADV, the proposed modifications would increase rebates for displayed orders of securities priced at or above one dollar in Order Delivery to \$.0024 per share and provide a 50% market data rebate for displayed Order Delivery orders.

Liquidity Adding Rebate in Order Delivery

Currently, for liquidity adding displayed order executions of securities trading at one dollar or higher in Order Delivery, the Fee Schedule provides a progressively higher rebate (of

\$0.0008, \$0.0010 or \$0.0012 per share) determined by the number of such shares an ETP Holder has executed on average per day (at least one million and less than ten million, at least ten million and less than 20 million, and at least 20 million, respectively) (the number of such shares being referred to in the Fee Schedule as “Liquidity Adding ADV (O/D Displayed)”). Similarly, for liquidity adding Zero Display Order<sup>4</sup> executions of securities trading at one dollar or higher in Order Delivery, eligibility for rebates for such orders is based on the average daily number of such shares an ETP Holder has executed (“Liquidity Adding ADV (O/D Dark)”).

With the proposed rule change, with respect to rebates for providing liquidity in Order Delivery (in both displayed orders and Zero Display Orders) of securities one dollar and higher, the eligibility measurements of “Liquidity Adding ADV (O/D Displayed)” and “Liquidity Adding ADV (O/D Dark)” would be deleted and replaced with the measurement “Liquidity Adding ADV.” This measurement is used elsewhere in the Fee Schedule and means, with respect to an ETP Holder, the number of shares such ETP Holder has executed as a liquidity provider on average per trading day (excluding partial trading days) across all tapes on NSX for the calendar month (or partial month, as applicable) in which the executions occurred.<sup>5</sup>

“Liquidity Adding ADV” is a broader measurement than the two measurements proposed to be deleted in that it captures all liquidity providing shares executed on the Exchange, including sub-dollar shares, both displayed and non-displayed orders, and executions in both Order Delivery and the Automatic Execution mode of order interaction (“AutoEx”).<sup>6</sup>

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<sup>4</sup> “Zero Display Orders” as used herein and in the Fee Schedule means “Zero Display Reserve Orders” as specified in NSX Rule 11.11(c)(2)(A).

<sup>5</sup> See Explanatory Endnote 3 to the Fee Schedule.

<sup>6</sup> See supra, footnote 3.

In addition, with respect to liquidity adding displayed order executions of securities trading at one dollar or higher in Order Delivery, the proposed rule change would retain the first tier currently in effect (rebating \$0.0008 per share if an ETP Holder's relevant volume is at least one million and less than ten million) but reduce the high end of such tier from ten million to five million. Further, the proposed rule change would eliminate the two higher eligibility tiers (rebating \$0.0010 or \$0.0012 at 10 million and 20 million, respectively) and, in their place, provide a rebate of \$0.0024 per share if an ETP Holder achieves a Liquidity Adding ADV of at least five million shares during the measurement period.

#### Market Data Rebate in Order Delivery

Currently, market data revenues attributable to quoting and trading in Order Delivery (regardless of whether displayed or Zero Display Orders) are not shared with ETP Holders.

The proposed rule change would provide a rebate to each ETP Holder equal to fifty percent (50%) of the market data revenue attributable to such ETP Holder's trading and quoting of displayed orders priced at one dollar or higher in Order Delivery, provided that the ETP Holder achieves a Liquidity Adding ADV of at least five million shares during the measurement period. As is currently the case, no market data revenue will be shared where attributable to trading or quoting in AutoEx, Zero Display Orders, or sub-dollar securities.

As referenced in Explanatory Endnote 8 of the proposed Fee Schedule, proposed new Exchange Rule 16.4 describes the market data revenue rebate program. Rule 16.4 is based on prior Exchange Rule 16.2(b), which was deleted from the NSX Rules pursuant to a rule change effective November 6, 2008<sup>7</sup>. Proposed Rule 16.4(a) makes explicit that no market data rebates

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<sup>7</sup> See Securities Exchange Act Release No. 58935 (November 13, 2008), 73 FR 69703 (November 19, 2008) (NSX-2008-19). The Exchange had previously, pursuant to one of several iterations of then-current Rule 16.2(b) in effect and approved by the Commission,

will be provided with respect to orders in AutoEx. Proposed Rule 16.4(b) provides that ETP Holders that have achieved Liquidity Adding ADV of at least five million shares shall receive a rebate of fifty percent (50%) of Tape A, B and C market data revenue attributable to such ETP Holder's trading and quoting of non-Zero Display Reserve Orders priced at or above one dollar in Order Delivery mode<sup>8</sup>. For purposes of clarity, Rule 16.4(b) further states that ETP Holders shall receive no rebate for market data revenue attributable to securities in Order Delivery priced under one dollar or Zero Display Orders.

Proposed Rule 16.4 also specifies that such rebates shall be paid quarterly and that, notwithstanding the foregoing, an ETP Holder shall not be eligible for market data revenue rebates which aggregate less than \$250 per quarter with respect to such ETP Holder. This exception for de minimis payments is based on the Exchange's belief that the monetary value of such rebate is outweighed by the associated administrative burden both to the Exchange and to the recipient ETP Holders.<sup>9</sup> Finally, proposed Rule 16.4(c) establishes that market data rebates paid or payable to ETP Holders may be modified based on market data revenue adjustments applicable to the Exchange that may be made from time to time by the securities information processors.

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established a rebate program (similar to the proposed rule change) that shared 50% of trade and quote market data revenue in Order Delivery; see Securities Exchange Act Release No. 56890 (December 4, 2007), 72 FR 70360 (December 11, 2007) (NSX-2007-13).

<sup>8</sup> The Allocation Amendment of Regulation NMS provides that market data revenue will be received by self-regulatory organizations such that 50% of the revenue is based on the reporting of quotes and 50% is based on the reporting of transactions. See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

<sup>9</sup> See Securities Exchange Act Release No. 57316 (February 12, 2008), 73 FR 9379 (February 20, 2008) (NSX-2008-01).

The proposed rule change would not modify other rebate calculations, volume tiers, fees or rebates that are currently included in the Fee Schedule, including fees or rebates applicable to orders in AutoEx or regarding securities priced under one dollar in Order Delivery.

#### Rationale

The Exchange has determined that these changes are necessary to create incentives for ETP Holders to submit increased volumes of orders in Order Delivery and, ultimately, to increase the revenues of the Exchange for the purpose of continuing to adequately fund its regulatory and general business functions. The Exchange has further determined that the Exchange's reintroduction of a market data rebate program in Order Delivery is necessary for competitive reasons.<sup>10</sup> The Exchange believes that these rebate changes, and in particular the reintroduced market data rebate program pursuant to proposed Exchange Rule 16.4, will not impair its ability to carry out its regulatory responsibilities.

The proposed modifications are reasonable and equitably allocated to those ETP Holders that opt to provide displayed orders and Zero Display Orders in Order Delivery, and is not discriminatory because ETP Holders are free to elect whether or not to send displayed orders or Zero Display Orders via Order Delivery or AutoEx. In addition, the proposed modifications, by providing a market data rebate for displayed orders only and by reducing the volume eligibility thresholds for displayed orders in Order Delivery which results in an increased (and highest available in Order Delivery) rebate amount of \$0.0024, will tend to incentivize ETP Holders to submit displayed orders over Zero Display Orders in Order Delivery. Based upon the information above, the Exchange believes that the proposed rule change is consistent with the protection of investors and the public interest.

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<sup>10</sup> Market data rebates in order delivery are currently provided by at least one competitor of the Exchange.

## Operative Date and Notice

The Exchange intends to make the proposed modifications, which are effective on filing of this proposed rule, operative for trading on December 1, 2009. Pursuant to Exchange Rule 16.1(c), the Exchange will “provide ETP Holders with notice of all relevant dues, fees, assessments and charges of the Exchange” through the issuance of a Regulatory Circular of the changes to the Fee Schedule and Rule 16.4 and will post a copy of the rule filing on the Exchange’s website ([www.nsx.com](http://www.nsx.com)).

### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,<sup>11</sup> in general, and Section 6(b)(4) of the Act,<sup>12</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using the facilities of the Exchange. Moreover, the proposed rule change is not discriminatory in that all ETP Holders are eligible to submit (or not submit) trades and quotes in Order Delivery or AutoEx in all tapes and as either displayed or undisplayed, and may do so at their discretion in the daily volumes they choose during the course of the measurement period.

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

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

#### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule

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<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(4).

change.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has taken effect upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>13</sup> and subparagraph (f)(2) of Rule 19b-4<sup>14</sup> thereunder, because, as provided in (f)(2), it changes “a due, fee or other charge applicable only to a member” (known on the Exchange as an ETP Holder). At any time within sixty (60) days of the filing of such 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.

### 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](mailto:rule-comments@sec.gov). Please include File Number SR-NSX-2009-07 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-NSX-2009-07. This file number should be

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>14</sup> 17 CFR 240.19b-4.

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 the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. 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-NSX-2009-07 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.<sup>15</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).