

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 CBOE 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 7, 2008, the Securities and Exchange Commission approved a proposed rule change by the CBOE to establish a Voluntary Professional³ designation.⁴ This designation permits non-broker-dealer customers to voluntarily have their orders categorized as broker-dealer orders for order handling, order execution, and cancel fee calculation purposes. In the aforementioned filing, the Exchange represented that it intends to establish, via a separate rule filing, a transaction fee applicable to Voluntary Professionals.

In accordance with that representation, the Exchange now proposes to amend its fees schedule to establish the transaction fees that would be applicable to Voluntary Professional orders. Specifically, the Exchange proposes to charge Voluntary Professional orders a \$0.20 per contract transaction fee in all equity options and options on indexes, exchange-traded funds and holding company depository receipts (except those listed below). The Exchange proposes a \$0.30 per contract transaction fee in XEO options, a \$0.40 per contract transaction fee in DXL options and all volatility index options, and a \$0.85 per contract transaction fee in credit default and credit default basket options.

As reflected in Exhibit 5, the Exchange proposes to amend footnote 14 (index option surcharge fee) to clarify that the Surcharge fee would apply to Voluntary Professionals.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act,⁵ in general, and furthers the objectives of Section 6(b)(4)⁶ of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members. The proposed

fee change would enable the Exchange to implement the Voluntary Professional designation.

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

The CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

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

The Exchange neither solicited nor received comments on the proposal.

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 charged imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act⁷ and Rule 19b-4(f)(2)⁸ thereunder. At any time within 60 days of the filing of the proposed rule change the Commission may summarily abrogate such proposed 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. Please include File Number SR-CBOE-2008-86 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. All submissions should refer to File Number SR-CBOE-2008-86. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CBOE. 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-CBOE-2008-86 and should be submitted on or before September 25, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹

Florence E. Harmon,

Acting Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58432; File No. SR-NASDAQ-2008-062]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change To Clarify the Application of Nasdaq Rules When a Listed Company Combines With a Non-Nasdaq Entity

August 27, 2008.

I. Introduction

On July 10, 2008, 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 ("Act")¹ and Rule

³ See CBOE Rule 1.1(fff).

⁴ See Securities Exchange Act Release No. 58327 (August 7, 2008), 73 FR 47988 (August 15, 2008).

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4).

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 19b-4(f)(2).

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

19b-4 thereunder,² a proposed rule change to clarify the application of certain Nasdaq listing rules when a Nasdaq-listed company combines with a non-Nasdaq entity. The proposed rule change was published for comment in the **Federal Register** on July 23, 2008.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Nasdaq Rule 4340(a) requires that an issuer must apply for initial listing in connection with a transaction whereby the issuer combines with a non-Nasdaq entity, resulting in a change of control of the issuer and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing. The current Rule refers to such a transaction as a "Reverse Merger" and provides a non-exclusive list of factors that Nasdaq will consider to determine if a transaction should be considered a Reverse Merger for purposes of the Rule.⁴

Nasdaq notes that Rule 4340(a) was originally adopted in 1993 to address concerns associated with non-Nasdaq entities seeking a "backdoor listing" on Nasdaq through a business combination involving a Nasdaq issuer.⁵ In these combinations, a non-Nasdaq entity would purchase a Nasdaq issuer in a transaction that would result in the non-Nasdaq entity obtaining a Nasdaq listing without qualifying for initial listing or being subject to the background checks and scrutiny normally applied to issuers seeking initial listing.

While this Rule was originally adopted to deal with companies seeking a "backdoor listing" by acquiring a listed shell company, its language is not limited in that regard. Accordingly, Nasdaq states that it has applied the rule to any transaction where there is a change of control potentially allowing a non-Nasdaq entity to obtain a Nasdaq listing. For example, Nasdaq has applied the rule to mergers involving operating companies in substantially similar businesses and, in appropriate cases, to mergers of "equals," where the

companies are approximately the same size.⁶ This allows Nasdaq staff to review the post-transaction entity, including any new officers, directors and control persons, before the transaction is consummated, thereby allowing staff to confirm that the post-transaction entity will meet all initial listing criteria and that there are no public interest concerns.

However, given the use of the term "Reverse Merger" within Rule 4340(a), and the existence of a footnote in IM-4350-1 referring to "backdoor listings,"⁷ Nasdaq states that companies have expressed confusion as to the scope of the Rule. Nasdaq therefore proposes to remove these references from Rule 4340(a) and IM-4350-1 and instead refer simply to business combinations with non-Nasdaq entities resulting in a change of control.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with Section 6(b)(5) of the Act,⁸ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.⁹

The Commission believes that the proposed rule change will provide clarity to, and eliminate any ambiguity over, the scope of application of Nasdaq Rule 4340. In particular, the revised rule language will make clear that an issuer must satisfy the initial listing requirements whenever it enters into any transaction with a non-Nasdaq entity, resulting in a change of control of the listed company and potentially allowing the non-Nasdaq entity to obtain a Nasdaq listing. The Commission notes that the Rule will continue to apply to "backdoor listings" or "reverse mergers," but that the proposed rule change will clarify that

the Rule also applies to a broader category of business combinations that result in a change of control of the issuer. The Commission believes that, in the case of any transaction resulting in such a change of control, which includes a backdoor listing, it is important for Nasdaq to ensure that the company meets all initial listing criteria and is subject to the scrutiny normally applied to issuers seeking initial listing. Accordingly, the Commission finds that the proposed rule change is consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-NASDAQ-2008-062) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Florence E. Harmon,

Acting Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58435; File No. SR-NASDAQ-2008-070]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Fees and Credits for Members Using the Nasdaq Crossing Network

August 27, 2008.

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 August 15, 2008, 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 Act³ and Rule 19b-4(f)(2) thereunder,⁴ Nasdaq has designated this proposal as establishing or changing a due, fee, or other charge, which renders the proposed rule change effective upon filing. This rule proposal, which is effective upon filing with the

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 42848 (July 17, 2008), 73 FR 42848.

⁴ Specifically, the rule provides that, in determining whether a Reverse Merger has occurred, Nasdaq will consider all relevant factors including, but not limited to, changes in the management, board of directors, voting power, ownership, and financial structure of the issuer, as well as the nature of the businesses and relative size of the Nasdaq issuer and non-Nasdaq entity. Securities Exchange Act Release No. 44067 (March 13, 2001), 66 FR 15515 (March 19, 2001) (SR-NASD-01-01).

⁵ Securities Exchange Act Release No. 32264 (May 4, 1993), 58 FR 27760 (May 11, 1993) (SR-NAS-93-07).

⁶ See, e.g., Decision 2002/2003-9 of the Nasdaq Listing and Hearing Review Council (December 2002), available at: <http://www.nasdaq.com/about/NLHRCDecisions20022003.pdf>.

⁷ See Nasdaq IM-4350-1, footnote 4.

⁸ 15 U.S.C. 78f(b)(5).

⁹ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).