

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58509; File No. SR-NASDAQ-2008-025)

September 10, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 2 Thereto, to Establish a System for the Purchase of Equity Value Indicator Securities

I. Introduction

On March 20, 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 Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to establish an Equity Value Indicator (“EVI”) Cross. On July 23, 2008, the Nasdaq filed Amendment No. 1 to the proposed rule change. On July 30, 2008, Nasdaq withdrew Amendment No. 1 and filed Amendment No. 2 to the proposed rule change.³ On August 7, 2008, the proposed rule change, as modified by Amendment No. 2, was published for comment in the Federal Register.⁴ The Commission received no comments on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 2.

II. Background

Nasdaq has proposed to establish a system that will allow its members to purchase “EVI Securities,” which Nasdaq anticipates will entitle holders thereof to specified payments based on the exercise of stock options previously granted to employees of the issuer. This system – designated by Nasdaq the “EVI Cross” – is designed to generate a market-based value of employee stock options for purposes of FASB Statement of Financial Accounting Standards No.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 2 replaced the original filing in its entirety.

⁴ See Securities Exchange Act Release No. 58275 (July 31, 2008), 73 FR 46129.

123(R). EVI Securities will represent a payment obligation of the issuer, but will not represent any direct ownership interest in the issuing company or in the associated employee stock options. The issuer will make available to the public the number of EVI Securities available in the EVI Cross, the limit price (if any), and the terms and features of its EVI Securities, such as how payments are calculated, maturity dates, and form of payment.

Nasdaq is not proposing to list or provide a secondary market for EVI Securities. An issuer will be able to sell, and Nasdaq members will be able to buy, EVI Securities in a single auction. Nasdaq members would access the EVI Cross system through existing interfaces for order entry, although the EVI Cross system will be separate from the Nasdaq Market Center execution system. The EVI Cross system is modeled on the technology used for Nasdaq's existing crossing mechanisms such as its Opening and Closing Crosses, the Nasdaq Crossing Network, and its Halt Cross. Nasdaq anticipates that an issuer, if it chose to use the EVI Cross, would do so on the first trading day following the grant of employee stock options.

To initiate an auction, a Nasdaq member authorized to act on behalf of the issuer of EVI Securities would enter an order specifying a quantity of EVI Securities to sell; a limit price is optional. After 4:00 p.m. on the day of the auction, the sell order could not be modified but could be cancelled as late as 4:45 p.m. On the day of the auction, any Nasdaq member could submit a limit order to buy with a designated size. Beginning at 4:00 p.m. and periodically thereafter, Nasdaq would disseminate information about the anticipated execution price, which is the single highest price at which the maximum amount of interest could be paired. Based on this information, prospective buyers could submit new orders and potentially increase the anticipated execution price. Executions would occur at 5:00 p.m., unless the system extends the auction process because the anticipated execution price changes by a designated amount in the minute

before the designated time of execution. If the remaining size of the sell order cannot fill all the buy orders at the execution price, allocations would be made based on time priority. All executions would be reported to the National Securities Clearing Corporation and disseminated via a data feed.

Nasdaq would charge an issuer tiered fees depending on the total value of the EVI offering. The fee would be 2 percent of the first \$10,000,000 of the total value of an EVI offering. If the value of the EVI offering is above \$10,000,000, Nasdaq would charge an additional fee of 1.5 percent of the value of the EVI offering above \$10,000,000. The total fees, however, would not exceed \$1,500,000. Nasdaq would not assess a fee if the EVI Cross is not carried out. Nasdaq members would be required to establish a new port for connectivity to access the EVI Cross system. However, Nasdaq would not assess a fee for that port, and Nasdaq has not proposed to assess any transaction fees for purchases of EVI Securities.

III. Discussion

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.⁵ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,⁶ which requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; and, in general, to protect investors and the public interest; and are not

⁵ 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).

⁶ 15 U.S.C. 78f(b)(5).

designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposal offers a potentially useful service to issuers and does not appear to raise any issue under the Exchange Act.

The Commission believes that the proposed trading rules are consistent with the Act and notes that they are based on those of Nasdaq's crossing platforms that have previously been approved by the Commission.⁷ The Commission finds that the proposed fees for the EVI Cross are consistent with Section 6(b)(4) of the Act,⁸ which requires that the rules of an exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Commission notes that an issuer will not be charged a fee unless an auction is carried out, and that Nasdaq has not proposed any transaction fees on members that purchase EVI Securities in an auction.

This order addresses only whether Nasdaq's rules and fees relating to the EVI Cross are consistent with the Act. The Commission is offering no opinion here as to whether prices of EVI Securities derived from auctions conducted pursuant to this proposal may be employed to value

⁷ See, e.g., Securities Exchange Act Release No. 50405 (September 16, 2004), 69 FR 57118 (September 23, 2004) (SR-NASD-2007-071) (approving Nasdaq's Opening Cross); Securities Exchange Act Release No. 49406 (March 11, 2004), 69 FR 12879 (March 18, 2004) (SR-NASD-2003-173) (approving Nasdaq's Closing Cross); Securities Exchange Act Release No. 53687 (April 20, 2006), 71 FR 24878 (April 27, 2006) (SR-NASD-2006-015) (approving the Nasdaq Halt Cross); Securities Exchange Act Release No. 54101 (July 5, 2006), 71 FR 39382 (July 12, 2006) (SR-NASD-2005-140) (approving the Nasdaq Crossing Network).

⁸ 15 U.S.C. 78f(b)(4).

employee stock options consistent with FASB Statement of Financial Accounting Standards No. 123(R), or whether the offering of any particular EVI Securities is consistent with the federal securities laws.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁹ that the proposed rule change (SR-NASDAQ-2008-025), as modified by Amendment No. 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Florence E. Harmon
Acting Secretary

⁹ 15 U.S.C. 78s(b)(2).

¹⁰ 17 CFR 200.30-3(a)(12).