

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58275; File No. SR-NASDAQ-2008-025)

July 31, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of a Proposed Rule Change, and Amendment No. 2 Thereto, Relating to the Establishment of the Equity Value Indicator Cross

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 March 20, 2008, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) 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 substantially prepared by the Exchange. On July 23, 2008, 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. Amendment No. 2 replaces the original filing in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq is proposing to establish a crossing mechanism for EVI securities, which is designed to allow issuers of employee stock options a market-based way of measuring the cost of such options. The text of the proposed rule change is below. Proposed new language is underlined; deletions are bracketed.³

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6300. [RESERVED] Nasdaq Equity Value Indicator Cross

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Changes are marked to the rules of The NASDAQ Stock Market LLC found at <http://nasdaq.complinet.com>.

(a) Definitions. For the purposes of this rule the term:

(1) "Imbalance" shall mean the amount of Eligible Interest that may not be matched with other orders at a particular price at any given time.

(2) "Order Imbalance Indicator" shall mean a message disseminated by electronic means containing information about Eligible Interest and the price at which such interest would execute at the time of dissemination. The Order Imbalance Indicator shall disseminate the following information:

(A) "Current Reference Price" shall mean the highest price at which the maximum amount of Eligible Interest can be paired.

(B) the amount of Eligible Interest that is paired at the Current Reference Price;

(C) the size of any Imbalance at the Current Reference Price; and

(D) the buy/sell direction of any Imbalance.

(3) "Nasdaq EVI Cross" shall mean the process for determining the price at which Eligible Interest shall be executed. All prices referred to in this rule shall be in minimum increments of one penny.

(4) "Eligible Interest" shall mean any priced order that may be entered into the system for the EVI Cross.

(5) "EVI" shall mean any Equity Value Indicator Tracking Security which is issued for the purpose of generating a market-based value of employee stock options for purposes of FASB Statement of Financial Accounting Standards No. 123(R), Share-Based Payment. The number of EVIs made available via the EVI Cross, the limit price, if any, of the EVIs, and the terms of the EVIs shall be determined by the EVI issuer which shall make that information available to the public at the earliest time practicable.

(b) Processing of Nasdaq EVI Cross.

(1) (A) No later than 4:00 p.m. EST on the day of the scheduled EVI Cross, a Nasdaq member authorized to act for the EVI Issuer shall direct in writing that Nasdaq enter into the System a single sell order with the quantity and limit price if any of EVI Eligible Interest. The sell order may not be modified after 4:00p.m. and may be cancelled after 4:00 p.m. only in connection with a cancellation of the EVI Cross as set forth in subsection (c) below.

(B) Beginning at 8:00 a.m. and continuing until 4:59:59 p.m. Nasdaq members may enter buy orders into the System. Except as provided below, once entered, buy orders may be cancelled but may not be modified.

(C) The EVI Cross shall occur at 5:00 p.m. EST. in the manner set forth below unless the time of execution is extended. The time of execution of the EVI Cross shall be extended only if the Current Reference Price of the EVI security changes by 1 percent or more between 4:59 p.m. and 5:00 p.m, in which case the time of the EVI Cross will be extended by 2 minutes. The time of execution of the EVI Cross shall be extended for an additional 2 minutes if the Current Reference Price of the EVI Security changes by 1 percent or more in the final minute of a two-minute extension. The time of execution of the EVI Cross shall be extended no more than 30 times. If the time of execution of the EVI Cross has been extended 10 times, order cancellation will be prohibited.

(2) At 4:00 p.m. and continuing through the execution of the EVI Cross, Nasdaq shall disseminate by electronic means an Order Imbalance Indicator every minute for the first 45 minutes and every 15 seconds thereafter.

(3) The Nasdaq EVI Cross shall occur at the highest price that maximizes the

amount of Eligible Interest to be executed.

(4) If the Nasdaq EVI Cross price is selected and less than all Eligible Interest that is available would be executed, all Eligible Interest shall be executed at the Nasdaq EVI Cross price in price/time priority.

(5) All Eligible Interest executed in the Nasdaq EVI Cross shall be executed at the Nasdaq EVI Cross price, trade reported to the National Securities Clearing Corporation and disseminated via a data feed.

(c) The EVI Cross shall be cancelled if:

- (i) The issuer determines prior to 4:45 p.m. on the date scheduled for the EVI Cross to cancel its participation; or
- (ii) The common stock of the issuer is in a halted state at 4:45 p.m. on the date scheduled for the EVI Cross.

(d). The issuer of an EVI Security shall become eligible to participate in the NASDAQ EVI Cross by paying a fee as follows:

- (i) Two percent of the total value of the EVI offering up to a maximum of \$10,000,000 of total value, plus
- (ii) One and one half percent of the total value of the EVI offering above \$10,000,000 of total value, and
- (iii) The maximum fee shall be \$1,500,000.

This fee shall be refunded if no EVI Cross is executed. This fee shall include all processing of the EVI Cross, including order entry, order execution, imbalance information dissemination, and transmission to the appropriate clearing agency. Nasdaq members not issuing securities shall pay no fees to participate in the NASDAQ EVI Cross.

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The text of the proposed rule change is also available at Nasdaq, the Commission's Public Reference Room, and www.nasdaqomx.cchwallstreet.com.

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 to establish a crossing mechanism for EVI securities, which is designed to allow issuers of employee stock options a market-based way of measuring the cost of such options. In this filing, Nasdaq is seeking Commission approval under Section 19(b) of the Act only for its proposed rules relating to the EVI cross. The registration of any particular EVI securities with the Commission is the responsibility of the issuer and would be subject to separate review by the Commission and its Division of Corporation Finance.⁴ Similarly, the

⁴ Nasdaq anticipates that each EVI tracking security will entitle the holder to specified payments upon the exercise of stock options comprising a reference pool of stock options that have been previously granted to employees by the issuer. The securities will represent a payment obligation of the issuer, but will not represent any direct ownership interest in the issuing company or in any of the reference pool stock options. The specific features of the securities, including how payments are calculated, maturity dates and form of payment, will be determined by each issuer. The price and allocation of the securities for each issuance will be determined by the results of the auction. The issuer will make available to the public the terms and features of its EVI tracking security.

extent to which an issuer may use a price derived from a particular EVI crossing auction to measure the cost of employee stock options may be subject to separate review by the Commission and its staff.

The EVI Cross is a market pricing mechanism modeled on Nasdaq's industry leading crossing technology currently used for the Nasdaq Opening and Closing Crosses, the Nasdaq Crossing Network, and the Nasdaq IPO and Halt Crosses, set forth in Nasdaq Rules 4752, 4753, 4754, and 4770. As a facility of Nasdaq,⁵ the EVI Cross will utilize the existing technology network that links more than 100,000 market participants with NASDAQ and provide broad access for investors to participate in price discovery for EVI instruments. The EVI Cross will provide price discovery, equal access, and fair executions at a single price that is fully reflective of market demand for EVI instruments. The EVI Cross will be the appropriate mechanism to determine a fair market price for EVI instruments which issuers may utilize to determine their options expense.

Like Nasdaq's current crosses, the EVI Cross will have three elements: (1) a defined order entry period, (2) information dissemination, and (3) a single price execution according to a fixed algorithm. For the EVI Cross, order entry will begin at 8:00 am and end at 5:00 pm EST on date of issuance, typically the first trading day following an options grant date. Nasdaq members will access the EVI Cross system through existing interfaces for order entry, although the EVI Cross system will be entirely separate from the Nasdaq Market Center execution system (the Single Book). The EVIs available for sale in the EVI Cross will be entered into the System

⁵ Nasdaq does not currently expect that EVI securities will be listed on Nasdaq or any other national securities exchange. In the event an EVI issuer desires to list its EVIs on Nasdaq or another exchange, the issuer will be required to meet applicable listing requirements. In the event no such requirements exist, the exchange would be required to file a proposed rule change under Section 19(b) seeking approval of appropriate listing requirements.

in a single sell order. A Nasdaq member authorized to act on behalf of the EVI Issuer shall direct Nasdaq to enter the single sell order into the System, including the quantity of EVIs and the limit price, if any. Once entered, the sell order cannot be modified after 4:00 p.m. and my [sic] be cancelled after 4:00 pm. only in connection with a cancellation of the EVI Cross as set forth in subsection (c) of Rule 6300. All buy orders must be for a fixed price and size; all EVIs will be offered by the issuer for sale on identical terms to individual bidders. Entered buy orders can be cancelled until 5:00 pm, and no executions will occur prior to the auction close.

As with Nasdaq's current crosses, Nasdaq will facilitate price discovery for the EVI Cross. First, Nasdaq will facilitate price discovery prior to the start of the EVI Cross. As set forth in the proposed rule, Nasdaq will require issuers to make available to the public at the earliest possible time information regarding the number of EVIs made available via the EVI Cross, the reserve price, if any, of the EVIs, and the terms and conditions of the EVIs. This requirement will reinforce the issuers' inherent interest in attracting the maximum number of bidders to the EVI Cross by providing potential bidders with the information they need to determine their willingness to participate and the price and size of their orders.

In addition, Nasdaq will facilitate price discovery by disseminating indicative auction price information via the Order Imbalance Indicator which is available on NASDAQTrader.com and as a data feed. Indicative price information includes: (1) the Current Reference Price, an indicative auction price at which all EVI instruments would be sold based on current bids; (2) paired units, the number of units matched for execution at the Current Reference Price; and (3) the Imbalance, the total imbalance and the size of executable units at the Current Reference Price. Indicative information will be disseminated starting at 4:00 pm once per minute for the first 45 minutes, and every 15 seconds thereafter.

Disseminating indicative information will help both issuers and purchasers. It will assist issuers by informing them whether the EVI Cross is likely to culminate in a successful auction. Indicative information will enable the issuer determine that the EVI Cross is unlikely to succeed due to, for example, insufficient buying interest, market volatility, or buying interest below the issuer's reserve price. Thus, issuers can use the indicative information to exercise their option under the proposed rule to cancel the EVI Cross any time prior to 4:45 p.m. Indicative information assists buyers by enabling them to gauge the level of buying interest and the likely outcome of the EVI Cross. Thus, buyers can use indicative information to exercise their options under the rule to enter or cancel orders in the EVI Cross. Nasdaq understands that the transparency created by the dissemination of indicative information has been a major factor in the success of Nasdaq's Opening, Closing, and Intra-Day Crosses.

To protect against volatility, Nasdaq will extend the quote-only period if a price change greater than one percent occurs between 4:59 pm and 5:00 pm. In that case, Nasdaq will extend the quote-only period by two minutes. If during the final minute of a two-minute extension, a price change greater than one percent occurs, the quote-only period will be extended for an additional two minutes. If the quote-only period is extended more than 10 times, members will be prohibited from canceling orders. There will be no more than 30 extensions of the quote-only period.

The EVI Cross will occur at 5:00 pm eastern time or at such time that the quote-only period ends, as described above. The EVI Cross will occur at the highest price that maximizes the amount of Eligible Interest to be executed. Final auction information disseminated to all participants and all executions will clear through National Securities Clearing Corporation.

Nasdaq has unique technology and expertise in creating liquid markets and efficient price discovery. The EVI Cross will utilize the existing technology network that links more than 100,000 market participants with NASDAQ and provides broad access for investors to participate in price discovery of an options valuation security. Market data vendors and participants will have access to imbalance information for the EVI Cross by purchasing the Net Order Imbalance Indicator data feed which is available on the Nasdaq TotalView data feed and also through the Nasdaq Workstation and Nasdaq Data Store at the current filed fee.⁶ As with other NASDAQ trading platforms, the EVI Cross will provide an open process in which all investors have the ability to enter orders and participate in price discovery. The EVI Cross mechanism will be regulated by FINRA and NASDAQ.

Fees Applicable to the EVI Cross

Nasdaq will assess a single fee for the EVI Cross equal to a percentage of the total value of the issuance of the EVI Security up to a maximum of \$1,500,000. This cost will be borne by the issuer of the EVI instrument and will cover the entire cost of the processing of the EVI Cross, including the entry and execution of orders, the dissemination of indicative information, and the transmission of execution information to cross participants and to NSCC. The fee will be based upon the total value of the EVI offering, regardless of whether all EVIs in the offering are executed in the EVI Cross, except that the fee shall be refunded if no EVI Cross occurs.

Nasdaq members will pay no fees to participate in the EVI Cross by entering orders and having them executed. Although members will be required to establish a new port for connectivity to access the EVI Cross, there will be no fee assessed for that port.

2. Statutory Basis

⁶ See Nasdaq Rule 7023.

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁷ in general, and with Section 6(b)(5) of the Act,⁸ in particular, in that the proposal is 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, 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. Nasdaq believes this proposal supports the goals of the Exchange Act by creating a new, efficient, liquid, and transparent market for interested investors. The proposed functionality is completely voluntary with respect to all potential participants, including issuers, members, and customers. Nasdaq believes that the proposed fee is fair, reasonable and non-discriminatory, in that it must remain responsive to competitive market forces.

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. To the contrary, by offering an innovative new product, Nasdaq is demonstrating the proper functioning of the competitive framework established under the Exchange Act and administered by the Commission.

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

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78f(b)(5).

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be 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-2008-025 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-NASDAQ-2008-025. 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 10:00 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-2008-025 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.⁹

Florence E. Harmon
Acting Secretary

⁹ 17 CFR 200.30-3(a)(12).