

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59455; File No. SR-NASDAQ-2009-013)

February 25, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Fees for Members Using the NASDAQ Market Center

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 February 19, 2009, 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.

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

Nasdaq proposes to modify pricing for NASDAQ members using the NASDAQ Market Center. NASDAQ will implement this rule change on March 2, 2009. The text of the proposed rule change is attached as Exhibit 5⁵ and is available at <http://www.cchwallstreet.com/nasdaq>.

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 C.F.R. 240.19b-4(f)(2).

⁵ The Commission notes that while provided in Exhibit 5 to the filing, the text of the proposed rule change is not attached to this notice but is available at the Commission’s Public Reference Room and at <http://www.cchwallstreet.com/nasdaq>.

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 several changes to its fees for order execution and routing through the NASDAQ Market Center. The changes are primarily a response to pricing changes that were recently announced by the New York Stock Exchange ("NYSE") that affect the fees paid by NASDAQ when it routes orders to NYSE.⁶ As a result, NASDAQ is changing its routing fees to ensure that its members are not disadvantaged when their orders are routed to NYSE.

The changes in fees for routing to NYSE apply to securities other than exchange-traded funds. An order that attempts to execute in the NASDAQ Market Center for the full size of the order prior to routing and being executed at NYSE will receive a \$0.0010 rebate if the order adds liquidity at the NYSE after routing, to pass through the rebate that NYSE itself will pay. Other orders that attempt to execute in the NASDAQ Market Center for the full size of the order prior

⁶ See NYSE and NYSE Arca Announce Changes in Equities Transaction Pricing, Effective March 1 (February 2, 2009) (available at <http://www.nyse.com/press/1233573357875.html>). The key features of NYSE's changes are the introduction of a liquidity provider rebate and an increase in order execution fees.

to routing will be assessed a fee of \$0.0018 to reflect the NYSE's new fee to access liquidity.⁷ For orders that do not attempt to execute in the NASDAQ Market Center for the full size of the order prior to routing, the fee will generally be \$0.0020 per share executed. However, the fee will be \$0.0019 per share executed for members with an average daily volume through the NASDAQ Market Center in all securities during the month of more than 35 million shares of liquidity provided, in the case of orders of such members that do not attempt to execute in the NASDAQ Market Center and are not designated as intermarket sweep orders. The corresponding fees are currently \$0.0010 and \$0.0009, respectively. A pricing tier for members with an average daily volume of more than 50 million shares of liquidity routed to NYSE is being removed, since NASDAQ has concluded that members would not generally qualify for this tier unless they also qualify for the tier for members with an average daily volume of more than 35 million shares of liquidity provided. In addition, obsolete language regarding orders that add liquidity to the NYSE book but do not attempt to execute in NASDAQ prior to routing is being removed, since all orders that post to the NYSE book must check the NASDAQ book prior to routing.⁸

The fee for an order that executes in the NYSE closing process as a "market-at-the-close" or "limit-at-the-close" order is being increased from \$0.0004 to \$0.0005, and fee for orders that execute at the NYSE as an odd lot transaction (including the odd lot portion of a partial round lot order) is being increased from \$0.0004 to \$0.0010, to reflect corresponding changes by NYSE.

⁷ The current fees are \$0.0008 if the order is designated as eligible only to remove liquidity from the NASDAQ book prior to routing, and \$0.00075 if the order is eligible to post back to the NASDAQ book if not executable at the NYSE. There is currently no charge or credit for orders that add liquidity at NYSE after routing.

⁸ See Securities Exchange Act Release No. 58721 (October 2, 2008), 73 FR 59696 (October 9, 2008) (SR-NASDAQ-2008-079).

NASDAQ is also introducing a new per order fee for members that make inefficient use of certain features of NASDAQ's routing facility. When NASDAQ members route to the NYSE after having their orders check the NASDAQ book, they may designate their orders as eligible for posting to the NASDAQ book after accessing available liquidity at NYSE and elsewhere, or they may designate their orders for posting the NYSE book. The new fee will apply to round lot or mixed lot orders that attempt to execute in the NASDAQ Market Center for the full size of the order prior to routing, but that are designated as not eligible to post in the NASDAQ Market Center ("DOTI Orders"). If a member sends an average of more than 10,000 DOTI Orders per day during the month, and the ratio between total DOTI Orders and DOTI Orders that are fully or partially executed (either at NASDAQ or NYSE) exceeds 300 to 1, then the member will be charged a fee of \$0.01 for each order that exceeds the ratio. For example, if a member sends 200,000 DOTI Orders during the month and only 100 of the orders result in executions, a ratio of 300 to 1 would equate to 30,000 DOTI Orders. Accordingly, the 170,000 DOTI Orders in excess of this level would each be assessed a fee of \$0.01, resulting in a charge of \$1,700.

NASDAQ is introducing this new fee to address the practice of members routing an order to the NYSE book through NASDAQ and quickly cancelling the order and resubmitting it at a different price if it does not execute within a short period of time. The practice offers no benefits in terms of liquidity posted to the NASDAQ book or execution or routing revenues, and could place unwarranted burdens on NASDAQ routing systems. Members wishing to continue to use this routing strategy may do so through other means of routing to NYSE, but will be discouraged from doing so through NASDAQ systems.

NASDAQ is also changing its fee for routing directed orders (including directed intermarket sweep orders) to NASDAQ OMX BX, Inc. ("BX"), decreasing the applicable fee

from \$0.0035 per share executed to \$0.0016 per share executed. The change reflects the fact that effective March 2, 2009, BX will reduce its fee for order executions to \$0.0014.⁹ Accordingly, the current fee for routing to BX is disproportionate to the fee that NASDAQ will be charged by BX when conducting such routing. In this respect, the change is similar to pricing in effect at NYSE Arca, whose fees to route to NYSE are lower than its fees to route to other venues, to reflect the lower fees charged by NYSE itself.¹⁰

Finally, with respect to executions of securities listed on exchanges other than NASDAQ and NYSE, NASDAQ is decreasing the liquidity provider rebate it pays to members with an average daily volume through the NASDAQ Market Center in all securities during the month of more than 35 million shares of liquidity provided, from \$0.0031 per share to \$0.0028 per share. The change reverses an “inverted” pricing structure that had previously been in effect for this group of members with respect to these securities, under which the rebate for providing liquidity exceeded the charge of \$0.0029 to access liquidity.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹¹ in general, and with Section 6(b)(4) of the Act,¹² 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 NASDAQ operates or controls. The impact of the changes upon the net fees paid by a particular market participant will depend upon a number of variables, including its monthly volume, the order types it uses, and the prices

⁹ See SR-BX-2009-012 (February 19, 2009), Securities Exchange Act Release No. 59452 (February 25, 2009).

¹⁰ See http://www.nyse.com/pdfs/NYSEArca_Equities_Fees.pdf.

¹¹ 15 U.S.C. 78f.

¹² 15 U.S.C. 78f(b)(4).

of its quotes and orders (i.e., its propensity to add or remove liquidity). NASDAQ notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. In general, the proposed changes are designed to ensure that the fees charged by NASDAQ to route to NYSE and BX reflect the fees charged to, and rebates received by, NASDAQ in connection with such routing. The proposal also reduces the rebate paid to certain members with respect to providing liquidity in stocks listed on venues other than NYSE and NASDAQ. NASDAQ believes, however, that its fees for trading such stocks remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to those members that opt to direct orders to NASDAQ rather than competing venues.

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.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act¹³ and subparagraph (f)(2) of Rule 19b-4 thereunder.¹⁴ At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if

¹³ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁴ 17 CFR 240.19b-4(f)(2).

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-NASDAQ-2009-013 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-NASDAQ-2009-013. 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 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-NASDAQ-2009-013 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.¹⁵

Florence E. Harmon
Deputy Secretary

¹⁵ 17 CFR 200.30-3(a)(12).