SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-67843; File No. SR-NASDAQ-2012-104)

September 12, 2012

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Customer Rebate to Add Liquidity and Non-Customer Fees for Removing Liquidity in Penny Pilot Options

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 31, 2012, 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 prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. <u>Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change</u>

The NASDAQ Stock Market LLC proposes to modify Chapter XV, entitled "Options Pricing," at Section 2 governing pricing for NASDAQ members using the NASDAQ Options Market ("NOM"), NASDAQ's facility for executing and routing standardized equity and index options. Specifically, NOM proposes to amend the Customer Rebate to Add Liquidity and Non-Customer Fees for Removing Liquidity in Penny Pilot[3] Options.

---

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 The Penny Pilot was established in March 2008 and in October 2009 was expanded and extended through June 30 [sic], 2012. <u>See</u> Securities Exchange Act Release Nos. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008)(SR-NASDAQ-2008-026)(notice of filing and immediate effectiveness establishing Penny Pilot); 60874 (October 23, 2009), 74 FR 56682 (November 2, 2009)(SR-NASDAQ-2009-091)(notice of filing and immediate effectiveness expanding and extending Penny Pilot); 60965 (November 9, 2009), 74 FR 59292 (November 17, 2009)(SR-NASDAQ-2009-097)(notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 61455 (February 1, 2010), 75 FR 6239 (February 8, 2010)(SR-NASDAQ-2010-013)(notice of filing and immediate

While the changes proposed herein are effective upon filing, the Exchange has designated these changes to be operative on September 4, 2012.

The text of the proposed rule change is available on the Exchange's Website at http://www.nasdaq.cchwallstreet.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. 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 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 proposes to modify Chapter XV, entitled "Options Pricing," at Section 2(1) governing the rebates and fees assessed for option orders entered into NOM. The Exchange is proposing to increase the Non-Customer Penny Pilot Options Fees for Removing Liquidity in order to offer additional Penny Pilot Options Customer Rebates to Add Liquidity to attract additional order flow to the Exchange to the benefit of all market participants.

---

effectiveness adding seventy-five classes to Penny Pilot); 62029 (May 4, 2010), 75 FR 25895 (May 10, 2010) (SR-NASDAQ-2010-053)(notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 65969 (December 15, 2011), 76 FR 79268 (December 21, 2011) (SR-NASDAQ-2011-169) (notice of filing and immediate effectiveness extension and replacement of Penny Pilot); and 67325 (June 29, 2012), 77 FR 40127 (July 6, 2012) (SR-NASDAQ-2012-075) (notice of filing and immediate effectiveness extension and replacement of Penny Pilot through December 31, 2012). See also NOM Rules, Chapter VI, Section 5.

Specifically, the Exchange is proposing to modify the five tier structure for paying Customer Rebates to Add Liquidity in Penny Pilot Options. Today, the Exchange pays Rebates to Add Liquidity in Penny Pilot Options as follows:

[***] The Customer Rebate to Add Liquidity in Penny Pilot Options will be paid as noted below. Each Customer order of 5,000 or more, displayed or non-displayed contracts, which adds liquidity in Penny Pilot Options, will qualify for an additional rebate of $0.01 per contract provided the NOM Participant has qualified for a rebate in Tier 2, 3, 4 or 5 for that month.

	Monthly Volume	**Rebate to Add Liquidity**
Tier 1	Participant adds Customer liquidity of up to 14,999 contracts per day in a month	$0.26
Tier 2	Participant adds Customer liquidity of 15,000 to 49,999 contracts per day in a month	$0.38
Tier 3	Participant adds Customer liquidity of 50,000 to 74,999 contracts per day in a month	$0.43
Tier 4 [a]	Participant adds Customer liquidity of 75,000 or more contracts per day in a month or has Total Volume of 100,000 or more contracts per day in a month	$0.44
Tier 5 [b]	Participant adds (1) Customer liquidity of 25,000 or more contracts per day in a month, (2) the Participant has certified for the Investor Support Program set forth in Rule 7014; and (3) the Participant executed at least one order on NASDAQ's equity market	$0.42

[a] For purposes of Tier 4, "Total Volume" shall be defined as Customer, Professional, Firm, NOM Market Maker and Non-NOM Market Maker volume in Penny Pilot Options which either adds or removes liquidity.

[b] For purposes of Tier 5, the Exchange will allow a NOM Participant to qualify for the rebate if a NASDAQ member under common ownership with the NOM Participant has certified for the Investor Support Program and executed at least one order on NASDAQ's equity market. Common ownership is defined as 75 percent common ownership or control.

The Exchange proposes to add a Tier 6 to the Penny Pilot Options Customer Rebates to Add Liquidity and pay Customers a rebate of $0.45 per contract when a Participant has Total Volume of 130,000 or more contracts per day in month. Total Volume is defined as Customer, Professional, Firm, NOM Market Maker and Non-NOM Market Maker volume in Penny Pilot

Options and Non-Penny Pilot Options which either adds or removes liquidity. In addition, NOM Participants under common ownership will be permitted to aggregate their volume to qualify for the Tier 6 rebate. The Exchange defines common ownership as 75 percent common ownership or control.[4]

In connection with offering the Tier 6 rebate, the Exchange proposes to eliminate the current incentive for Customer orders of 5,000 or more, displayed or non-displayed contracts, which add liquidity in Penny Pilot Options provided the NOM Participant has qualified for Tier 2, 3, 4 or 5 for that month. The Exchange believes that the Tier 6 incentive will encourage NOM Participants to send additional order flow to the Exchange and is therefore eliminating the incentive at this time.

The Exchange also proposes to amend Tier 4 which currently provides that a NOM Participant that adds Customer liquidity of 75,000 or more contracts per day in a month or has Total Volume of 100,000 or more contracts per day in month qualifies for a $0.44 per contract rebate. The Exchange proposes to amend Tier 4 to state that only a NOM Participant that adds Customer liquidity of 75,000 or more contracts per day in a month qualifies for a $0.44 per contract rebate.[5] The Exchange would eliminate the qualifier of 100,000 or more contracts of Total Volume because it is instead offering the Tier 6 rebate. The Exchange would also eliminate note "a," which is no longer relevant because it applied to Total Volume in Tier 4. The remainder of the notes would change lettering.

---

4 NOM Participants may be requested by the Exchange's Membership Department to demonstrate that they are under 75% common ownership if the information is not readily available in Web CRD.

5 The Exchange is not proposing to amend the amount of the $0.44 per contract rebate at this time.

The Exchange also proposes to amend the Fees for Removing Liquidity in Penny Pilot Options. Professionals, Firms, Non-NOM Market Makers and NOM Market Makers who are currently assessed a $0.45 per contract fee would be assessed a $0.47 per contact Fee for Removing Liquidity in a Penny Pilot Option.[6] In addition, the Exchange proposes to reduce the Professional, Firm, Non-NOM Market Maker and NOM Market Maker Penny Pilot Option Fees for Removing Liquidity by $0.01 per contract for transactions in which the same participant is the buyer and the seller to further incentivize these NOM Participants to add and remove liquidity in the market.

2. Statutory Basis

NASDAQ believes that the proposed rule changes are consistent with the provisions of Section 6 of the Act,[7] in general, and with Section 6(b)(4) of the Act,[8] in particular, in that they provide 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 Exchange believes that the proposed addition of Tier 6 is reasonable because it is part of an existing program[9] to encourage broker-dealers acting as agent for Customer orders to

---

6 The Customer Penny Pilot Fee for Removing Liquidity of $0.45 per contract is not being amended.

7 15 U.S.C. 78f.

8 15 U.S.C. 78f(b)(4).

9 The Exchange adopted these monthly volume achievement tiers in September 2011. See Securities Exchange Act Release Nos. 65317 (September 12, 2011), 76 FR 57778 (September 16, 2011) (SR-NASDAQ-2011-124), 65317 (September 12, 2011), 76 FR 61129 (October 3, 2011) (SR-NASDAQ-2011-127), 66126 (January 10, 2012), 77 FR 2335 (January 17, 2012) (SR-NASDAQ-2012-003), 66360 (February 8, 2012), 77 FR 8312 (February 14, 2012) (SR-NASDAQ-2012-022), 66768 (April 6, 2012), 77 FR 22015 (April 12, 2012) (SR-NASDAQ-2012-048) 67388 (July 10, 2012), 77 FR 42073 (July 17, 2012) (SR-NASDAQ-2012-083).

select the Exchange as a venue to post Customer orders. The Exchange believes that its success at attracting Customer order flow benefits all market participants by improving the quality of order interaction and executions at the Exchange. Also, the Exchange believes the existing monthly volume thresholds have incentivized firms that route Customer orders to send additional Customer order flow to the Exchange. The Exchange desires to continue to encourage firms that route Customer orders to increase Customer order flow to the Exchange by providing an additional opportunity to qualify for a Customer Rebate. The Exchange would allow a NOM Participant to total both Penny Pilot Option Volume and Non-Penny Pilot Option volume that adds or removes liquidity to qualify for the $0.45 per contract Customer Rebate to Add Liquidity in Penny Pilot Options proposed in Tier 6. The Exchange believes that additional NOM Participants would be able to qualify for this tier, including NOM Participants who do not qualify for rebates today, as long as the 130,000 volume requirement was met. Proposed Tier 6 is a broader category because it includes Non-Penny Pilot Option volume to qualify for the rebate. The proposed Tier 6 Total Volume qualifier is similar to pricing currently in place on BATS Exchange, Inc. ("BATS").[10]

The Exchange believes that proposed Tier 6 is equitable and not unfairly discriminatory because the Exchange is proposing to offer an even higher Customer rebate in Penny Pilot Options of $0.45 per contract to NOM Participants which will be based on Total Volume. NOM Participants may total all Penny Pilot Option and Non-Penny Pilot Option volume that either

---

[10] BATS pays rebates for certain Customer Penny Pilot orders based on, among other factors, total consolidated volume. BATS defines total consolidated volume as the volume reported by all exchanges to the consolidated transaction reporting plan for the month for which the fees apply. See BATS BZX Exchange Fee Schedule. The Exchange is proposing to utilize Total Volume which would include Penny Pilot Option and Non-Penny Pilot Option volume which either adds or removes liquidity to qualify for the Customer Rebate to Add Liquidity in Penny Pilot Options.

adds or removes liquidity to qualify for this new tier. The Exchange believes that this added incentive would allow additional NOM Participants to qualify and receive the Customer rebate. All NOM Participants that transact Customer orders in Penny Pilot Options are eligible for the Customer rebates.[11] The Exchange believes that allowing NOM Participants to qualify for proposed Tier 6 by totaling Penny and Non-Penny Option volume that adds or removes liquidity would enable a greater number of NOM Participants to qualify for the rebate because NOM Participants can utilize either Penny or Non-Penny Pilot volume to reach the 130,000 volume requirement. All NOM Participants may transact orders in both Penny and Non-Penny Pilot Options and the Exchange would equally apply the criteria for Tier 6 to all NOM Participants.

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to permit NOM Participants under common ownership to aggregate their volume for purposes of qualifying for the Tier 6 rebate. Certain NOM Participants chose to segregate their businesses into different legal entities for purposes of conducting business. The Exchange believes that these NOM Participants should be treated as one entity for purposes of qualifying for the Tier 6 rebate as long as there is at least 75% common ownership or control present among the NOM Participants. The Exchange currently permits a similar aggregation for the Tier 5 Total Volume calculation.

The Exchange believes that its proposal to eliminate the $0.01 per contract rebate incentive for Customer orders of 5,000 or more, displayed or non-displayed, contracts that add liquidity in Penny Pilot Options for NOM Participants that qualified for certain tiers is reasonable because the Exchange has proposed an alternative incentive for NOM Participants in

---

11 Tier 1 pays a rebate for NOM Participants that add Customer liquidity of up to 14,999 contracts per day in a month of Penny Pilot Options. There is no required minimum volume of Customer orders to qualify for a Customer Rebate to Add Liquidity.

its proposal to adopt Tier 6 with a higher rebate. The Exchange believes the Tier 6 rebate will increase order flow to the Exchange because all Penny Pilot Option and Non-Penny Pilot Option volume that either adds or removes liquidity would count toward the 130,000 volume requirement to qualify for the rebate.

The Exchange believes that the proposal to eliminate the $0.01 incentive is equitable and not unfairly discriminatory because it is being replaced with the Tier 6 rebate which offers a higher rebate to NOM Participants who may currently qualify for other tiers or a new rebate for NOM Participants that currently do not qualify for a rebate. Today, the $0.01 incentive is applicable to NOM Participants that qualified for Tiers 2, 3, 4 and 5. Proposed Tier 6 would be applicable to the Total Volume of contracts in Penny and Non-Penny Pilot Options which either adds or removes liquidity for any market participant. The Exchange believes a greater number of NOM Participants may qualify for proposed Tier 6 as compared to other tiers which are limited to Customer volume in Penny Pilot Options.

The Exchange believes that the proposal to eliminate the text of Tier 4, which provides that NOM Participants may qualify for Tier 4 by achieving Total Volume of 100,000 or more contracts per day in a month, is reasonable, equitable and not unfairly discriminatory because the Exchange is proposing to offer a new Tier 6 rebate which would allow NOM Participants to achieve an even higher rebate if the NOM Participant is able to meet the increased volume requirement of 130,000 contracts per day in a month. The Exchange believes the new tier may further incentivize NOM Participants to send additional volume to the Exchange that either adds or removes liquidity in Penny or Non-Penny Pilot Options to qualify for the $0.45 per contract rebate.

The Exchange believes that the increased Fees for Removing Liquidity in Penny Pilot Options are reasonable because they permit the Exchange to offer an increased Tier 6 rebate to attract additional order flow to NOM. The Exchange believes that the increased Fees for Removing Liquidity in Penny Pilot Options are equitable and not unfairly discriminatory because all market participants, other than Customers, are being assessed the same Fees for Removing Liquidity in Penny Pilot Options. The Exchange believes that Customer order flow brings unique benefits to the market which benefits all market participants and therefore Customers are assessed lower fees as compared to other market participants. Additionally, the Exchange is offering NOM Participants, other than Customers, the ability to reduce the Fees for Removing Liquidity by $0.01 per contract when the same participant is the buyer and the seller. The Exchange believes that this additional fee reduction should further incentivize non-Customer NOM Participants to both add and remove liquidity in Penny Pilot Options on NOM. It is important to note that NOM Participants are unaware at the time the order is entered of the identity of the contra-party. Because contra-parties are anonymous, NOM Participants would aggressively pursue order flow in order to receive the benefit of the reduction. Providing the additional incentive is reasonable for this reason and also is equitable and not unfairly discriminatory because all NOM Participants are entitled to receive the fee reduction when they are both the buyer and seller. By way of example, if a NOM Participant that is assigned the firm code "ABC" by the Exchange posted an order utilizing its Customer order router, which order was removed by an ABC firm proprietary order, the NOM Participant would receive the $0.01 per contract fee reduction. The Exchange proposes to utilize the Exchange assigned firm code[12] to determine which NOM Participant executed an order and to apply the fee reduction to the

12 Each NOM Participant is assigned a firm code by the Exchange.

Penny Pilot Option Fee for Removing Liquidity if the same non-Customer NOM Participant was the buyer and the seller to a transaction.[13] The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to not offer the same fee reduction to Customers because the Customer fee is not being increased and will now be $0.02 per contract lower than the Penny Pilot Options Fees for Removing Liquidity applicable to all other market participants.

The Exchange operates in a highly competitive market comprised of ten U.S. options exchanges in which sophisticated and knowledgeable market participants can and do send order flow to competing exchanges if they deem fee levels at a particular exchange to be excessive or rebate opportunities to be inadequate. The Exchange believes that the proposed rebate scheme and fees are competitive and similar to other fees, rebates and tier opportunities in place on other exchanges. The Exchange believes that this competitive marketplace materially impacts rebates and fees present on the Exchange today and substantially influences the proposal set forth above.

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

NASDAQ does not believe that the proposed rule changes 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, NASDAQ has designed its rebates and fees to compete effectively for the execution and routing of options contracts and to reduce the overall cost to investors of options trading. The Exchange believes that incentivizing NOM Participants to transact greater Customer volume on the Exchange benefits all market participants because of the increased liquidity to the market.

---

[13] In this example, the same NOM Participant added and removed the order and would be entitled to the fee reduction because the NOM Participant was the buyer and seller on the transaction.

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

No written comments were either solicited or 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 Act.[14] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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-2012-104 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.

---

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to File Number SR-NASDAQ-2012-104. 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 website (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 website viewing and printing 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 such 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 publicly available. All submissions should refer to File Number SR-NASDAQ-2012-104 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]

Kevin M. O'Neill
Deputy Secretary

---

[15] 17 CFR 200.30-3(a)(12).