

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63648; File No. SR-NASDAQ-2011-003]

### 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

January 5, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 3, 2011, 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. 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 the Substance of the Proposed Rule Change

NASDAQ proposes to modify pricing for NASDAQ members using the NASDAQ Market Center. NASDAQ will implement the proposed change on January 3, 2011. The text of the proposed rule change is available at <http://nasdaq.cchwallstreet.com/>, at NASDAQ's principal office, 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, 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 amending Rule 7018 to make modifications to its pricing schedule for execution and routing of

orders through the NASDAQ Market Center. With respect to execution of securities priced at less than \$1, NASDAQ is increasing the charge to access liquidity from 0.2% of the total transaction cost to 0.3% of the total transaction cost. The change is designed to offset some of the fee decreases that are also being adopted in this proposed rule change.

With respect to execution of securities priced at \$1 or more, NASDAQ is making a number of changes. The first set of changes relate to pricing changes that NASDAQ OMX BX, Inc. ("BX") has proposed to implement on January 3, 2011.<sup>3</sup> Currently, BX offers a credit of \$0.0002 per share executed for orders that access liquidity on BX, and NASDAQ charges \$0.0002 per share executed for directed orders sent to BX. Effective January 3, 2011, BX will raise the credit for orders that access liquidity to \$0.0014 per share executed. Accordingly, with respect to orders directed to BX, NASDAQ will now pay a credit of \$0.0005 per share executed, thereby passing on some of the higher credit provided by BX with respect to such orders.

Second, in response to recently announced changes to pricing at the New York Stock Exchange ("NYSE"),<sup>4</sup> NASDAQ is modifying several of its fees associated with routing orders to NYSE. To reflect the increase in the NYSE credit for orders that add liquidity, NASDAQ is increasing its credit for routed orders using the DOTI, STGY, SCAN, SKNY, or SKIP routing strategies and that add liquidity at NYSE from \$0.0013 to \$0.0015 per share executed. To reflect the increase in NYSE's charge for orders that access liquidity, NASDAQ is increasing its charge for routed orders using the DOTI, STGY, SCAN, SKNY, or SKIP routing strategies that access liquidity at NYSE from \$0.0021 to \$0.0023 per share executed. Similarly, for directed Intermarket Sweep Orders that access liquidity at NYSE, NASDAQ's fee will increase from \$0.0023 to \$0.0025 per share executed; for other directed orders that access liquidity at NYSE, NASDAQ's fee will increase from \$0.0022 to \$0.0024 per share executed for members that provide an average daily volume of more than 35 million shares of liquidity through NASDAQ Market Center during the month, or from \$0.0023 to \$0.0025 per share executed for other members; and for MOPP orders that access liquidity at NYSE, NASDAQ's fee will

increase from \$0.0023 to \$0.0025 per share executed.<sup>5</sup>

Third, NASDAQ is modifying the fees applicable to its SAVE routing strategy.<sup>6</sup> Under the SAVE strategy, at the option of the entering party, orders either route to NASDAQ OMX BX ("BX") and NASDAQ OMX PSX ("PSX"), check the NASDAQ book, and then route to other destinations on the routing table for SAVE, or check the NASDAQ book first and then route to routing table destinations, which may include BX and PSX. For orders pursuing this routing approach, NASDAQ passes through all fees assessed and rebates offered by BX and PSX, charges \$0.0010 per share executed for orders that execute at NYSE, charges \$0.0026 per share executed for orders that execute at other away venues, and charges the normal NASDAQ execution charge of \$0.0030 per share executed for shares that execute at NASDAQ. Under the change, NASDAQ will increase the fee for orders that execute at NYSE to \$0.0022 per share executed, while decreasing the fee for orders that execute at NASDAQ to \$0.0027 per share executed. The change is designed to encourage greater use of the SAVE routing strategy, while at the same time bringing the routing fee charged by NASDAQ closer to the \$0.0023 per share executed fee charged by NYSE for orders routed to it.<sup>7</sup>

Fourth, NASDAQ is introducing a new liquidity provider rebate tier for members that provide an average daily volume of 3 million shares or more of liquidity through quotes/orders that are not displayed. Although NASDAQ believes that transparent markets should be encouraged whenever possible, it allows members to provide non-displayed liquidity to offer an alternative to trading venues that are entirely dark. For members qualifying for this tier, the rebate for non-displayed quotes/orders will be \$0.0015 per share

<sup>5</sup> NASDAQ is also deleting fee language stipulating fees charged for odd-lot orders and the odd-lot portion of round lot orders executed at NYSE. As provided in Securities Exchange Act Release No. 62302 (June 16, 2010), 75 FR 35856 (June 23, 2010) (SR-NYSE-2010-43), NYSE eliminated its special rules for processing of odd lots during 2010. As a result, odd lots now receive the same treatment as other orders for billing purposes as well as order processing purposes. By eliminating its fee language relating to odd lots, NASDAQ ensures that its fees for routing such orders to NYSE also follow NYSE's fee increase, which applies to all orders.

<sup>6</sup> Securities Exchange Act Release No. 61460 (February 1, 2010), 75 FR 6077 (February 5, 2010) (SR-NASDAQ-2010-018).

<sup>7</sup> Similarly, NASDAQ is increasing the fee for orders using the TTTY routing strategy that route to NYSE from \$0.0020 per share executed to \$0.0022 per share executed to reflect NYSE's changes.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Securities Exchange Act Release No. 63617 (December 29, 2010) (SR-BX-2010-092).

<sup>4</sup> See SR-NYSE-2010-87 (December 22, 2010).

executed, and the rebate for displayed quotes/orders will be \$0.0020 per share executed (unless the member otherwise qualifies for a higher rebate due to other characteristics of its trading volume).<sup>8</sup>

Finally, NASDAQ is deleting obsolete rule text describing fees for NASDAQ's crossing network functionality, which was recently discontinued.<sup>9</sup>

## 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>10</sup> in general, and with Section 6(b)(4) of the Act,<sup>11</sup> 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 price changes upon the net fees paid by a particular market participant will depend upon a number of variables, including the prices of the market participant's quotes and orders relative to the national best bid and offer (i.e., its propensity to add or remove liquidity), the prices of securities that it trades, its usage of non-displayed quotes/orders, its trading volumes, and its use of particular routing strategies to which the fee change applies.

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. Accordingly, if particular market participants object to the proposed fee changes, they can avoid paying the fees by directing orders to other venues. NASDAQ believes that its fees continue to be reasonable and equitably allocated to members on the basis of whether they opt to direct orders to NASDAQ.

While the changes increase fees for stocks trading below \$1, with respect to other stocks, the changes either reduce fees or reflect increased charges

associated with routing orders to NYSE. Specifically, in the case of DOTI, STGY, SCAN, SKNY, SKIP, MOPP, TFTY, directed orders, and odd-lot orders, NASDAQ is merely increasing its applicable fee and rebate by \$0.0002 per share executed to reflect the corresponding changes made to the fees and rebates charged and offered to NASDAQ. NASDAQ believes that it is reasonable and equitable to pass on these fee changes to its members. In the case of the changes to the fees associated with the SAVE routing strategy, NASDAQ is reducing the fee charged to portions of SAVE orders that are executed at NASDAQ, as a means to encourage greater use of this strategy, which is available to all NASDAQ members on equal terms. In addition, NASDAQ is increasing the fee for SAVE orders routed to NYSE, from \$0.0010 per share executed to \$0.0022 per share executed, but this fee remains lower than the \$0.0023 per share executed fee charged to NASDAQ by NYSE for these orders. Accordingly, the change allows a better reflection of NASDAQ's routing costs while still offering members a routing strategy designed to provide low-cost executions of orders at BX, PSX, NASDAQ, and NYSE.

The change for directed orders sent to BX reflects recent pricing changes by that venue, and allows NASDAQ to pass on a portion of the enhanced rebate that BX is paying for orders that access liquidity, while still reflecting the value offered by NASDAQ to its members by providing routing services. In this regard, the fees charged and rebates offered by NASDAQ for routing orders to BX are reasonable and equitable, in that the decision to use NASDAQ as a router is entirely voluntarily, and members can avail themselves of numerous other means of directing orders to BX, including becoming members of BX or using any of a number of competitive routing services offered by other exchanges and brokers.

The addition of a new, volume-based pricing tier for liquidity provision will provide members with an additional means to obtain a favorable rate of \$0.0015 per share executed for non-displayed liquidity, in addition to the volume-based tiers already in effect. Volume-based discounts such as the enhanced rebate proposed here have been widely adopted in the cash equities markets, and are equitable because they are open to all members on an equal basis and provide discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of liquidity provision.

Finally, NASDAQ is increasing its fees for orders in stocks priced under \$1 as a means to offset some of the fee decreases that are also being adopted in this proposed rule change. The fee is reasonable and equitable in that it applies equally to all members trading stocks priced below \$1, and is consistent with Rule 610(c) under Regulation NMS,<sup>12</sup> which found that a fee cap set at that level would promote the objectives of equal regulation and preventing excessive fees. As the Commission determined in that matter, competition is best able to determine whether a strategy of charging fees set at higher levels, or of charging a lower fee and paying a higher rebate, will be most successful.<sup>13</sup>

## 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. Because the market for order execution and routing is extremely competitive, members may readily direct orders to NASDAQ's competitors if they believe that the competitors offer more favorable pricing.

## 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 Act.<sup>14</sup> 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,

<sup>8</sup> The \$0.0015 per share rebate for non-displayed quotes/orders is the same as the rebate for non-displayed quotes/orders offered to members qualifying for certain other favorable rebate tiers, and higher than the base rebate for non-displayed quotes/orders of \$0.0010 per share executed. The rebate of \$0.0020 per share executed for displayed quotes/orders is the same as the base rebate for displayed quotes/orders. In limited circumstances, a member qualifying for the new tier might also qualify for a tier that has a more favorable rebate for displayed quotes/orders but a less favorable rebate for non-displayed quotes/orders. In that case, the member qualifying for both tiers would receive the higher rebate for both types of quotes/orders.

<sup>9</sup> Securities Exchange Act Release No. 62735 (August 17, 2010), 75 FR 51859 (August 23, 2010) (SR-NASDAQ-2010-101).

<sup>10</sup> 15 U.S.C. 78f.

<sup>11</sup> 15 U.S.C. 78f(b)(4).

<sup>12</sup> 17 CFR 242.610(c).

<sup>13</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37596 (June 29, 2005).

<sup>14</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2011-003 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-2011-003. 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 Web site viewing and printing in the Commission's Public Reference Room 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 offices 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-2011-003, and should be submitted on or before February 2, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Elizabeth M. Murphy,**  
Secretary.

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**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63647; File No. SR-Phlx-2010-148]

### Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Granting Approval of a Proposed Rule Change Relating to Certain Membership Rules Including Affiliations and Lapse of Membership Applications

January 5, 2011.

#### I. Introduction

On November 5, 2010, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change relating to certain membership rules. The proposed rule change was published for comment in the **Federal Register** on November 22, 2010.<sup>3</sup> The Commission received no comment letters on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposed Rule Change

##### A. Affiliations

Currently, Phlx Rule 793 ("Affiliations—Dual or Multiple") allows a person that holds a Phlx trading permit to associate or affiliate with one or more Phlx members or a non-member that is engaged in the securities business if such affiliation is approved in writing by the member and disclosed to the Exchange.<sup>4</sup> However, no member may use his or her trading permit to qualify more than one member organization. Further, the rule provides that the Exchange could disapprove multiple affiliations that the Exchange believed were "inconsistent with Exchange standards of financial responsibility, operational capability, or compliance responsibility."

Among other things, Rule 793 allows a broker-dealer to seek an affiliation in order to obtain membership status

without the need to secure a membership seat (or, subsequent to the Exchange's demutualization, a trading permit). Such an arrangement would have been appropriate, for example, where a broker-dealer sought only electronic access to the Exchange, since the Exchange only requires one permit to qualify a member organization. Another example would be applicable in the case of access to the Phlx trading floor. Because Phlx requires each person associated with a member organization on the trading floor who functions in a trading capacity to have a permit, and every trader on the floor must possess a Series A-1 permit,<sup>5</sup> affiliation could allow floor traders to affiliate with another member organization to satisfy certain trading or staffing requirements.

The Exchange now proposes to eliminate Rule 793. In its place, the Exchange proposes to amend existing Rule 908 ("Rights and Privileges of A-1 Permits") to add a new paragraph (b)(i) to allow a trading permit holder on the Exchange's floor to affiliate with up to two member organizations that are under common ownership. Specifically, the proposed rule provides that: "[n]otwithstanding applicable By-Laws and Rules conditioning membership, a Series A-1 permit holder on the Exchange's trading floor may be affiliated with up to two (2) member organizations (a primary and a secondary member organization) that are under common ownership \* \* \*." The proposed rule would define "common ownership" to be at least 75% common ownership between the member organizations. Further, both the primary and secondary member organizations would need to notify the Phlx Membership Department of the affiliation, and such notification must include an attestation of common ownership, the names of the individuals responsible for supervision of the permit holder, and the Exchange account numbers for billing purposes. Under the proposed rule, a Series A-1 permit holder would have the ability to engage in trading activity on the Exchange's floor on behalf of either the primary or secondary member organization that the permit is affiliated with per Rule 908(b)(i).<sup>6</sup>

Despite the ability to affiliate with up to two member organizations, the

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Securities Exchange Act Release No. 63318 (November 16, 2010), 75 FR 71155 ("Notice").

<sup>4</sup> Specifically, the rule provides that "[n]o person shall at the same time be a partner, \* \* \* officer, director, stockholder, or associated person of more than one member or participant organization, nor shall he be affiliated in any manner with a non-member or non-participant organization which is engaged in the securities business, unless such affiliation has been disclosed to and approved in writing by the member and/or participant organizations and such approval has been filed with the Office of the Secretary."

<sup>5</sup> For example, a Series A-1 permit holder is required to display a badge when on the trading floor that identifies the member organization on whose behalf the trader is trading that day. A Series A-1 permit holder may not trade for more than one member organization on the same day.

<sup>6</sup> A Series A-1 permit holder may not trade for more than one member organization on the same day.

<sup>15</sup> 17 CFR 200.30-3(a)(12).