

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60862; File No. SR-NASDAQ-2009-088]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Modify Fees for Members Using the NASDAQ Market Center

October 22, 2009.

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 October 13, 2009, 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 and II below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

#### 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 proposes to implement this rule change as of October 1, 2009. The text of the proposed rule change is available at <http://nasdaqomx.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 III 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 changes to the fees associated with the use of the NASDAQ Market Center. First, NASDAQ is proposing to modify the level of activity required to receive NASDAQ’s most favorable rate for accessing liquidity in securities listed on NASDAQ or the New York Stock Exchange (“NYSE”). During the months of August and September 2009, members paid a fee of \$0.0027 per share executed if they had an average daily volume during the month of (i) more than 140 million shares of liquidity routed, removed and/or provided, and (ii) more than 35 million shares of liquidity provided. On October 1, 2009, the level of liquidity routed, removed and/or provided needed to receive the favorable rate had been scheduled to revert automatically to its pre-August level of 150 million shares. The 140 million share level for August and September 2009 had been established to reflect lower trading volumes anticipated during those months. Instead of allowing the rate to revert to 150 million shares, however, NASDAQ proposes to set the level at 145 million shares. As trading volumes revert to higher levels with the end of the summer, the change will make it easier for members to receive the favorable “take” rate. NASDAQ is also deleting obsolete fee language referencing NASDAQ Rule 4758(a)(1)(A), portions of which had formerly governed “flash” orders and were recently deleted.<sup>3</sup> NASDAQ discontinued flash orders at the beginning of September 2009.

Commission approval is required to make the change retroactive to the beginning of the month of October. NASDAQ notes that the change to the level of liquidity routed, removed and/or provided needed to receive a favorable take rate will make it easier for members to obtain this rate than would have been the case in the absence of the change. Thus, the change effectively constitutes a price reduction for members that are able to achieve the 145 million share level but not able to achieve the 150 million share level. Accordingly, NASDAQ believes that the Commission should approve the filing on an accelerated basis to allow the change to be effective for the month of October 2009.

##### 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>4</sup> in general, and with Section 6(b)(4) of the Act,<sup>5</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. NASDAQ is adjusting the level of activity in NASDAQ required to receive its most favorable rate for accessing liquidity, making it easier for members to receive this rate.

The impact of the change upon the net fees paid by a particular market participant will depend upon a number of variables, including the availability of liquidity at the NASDAQ Market Center, the prices of the market participant’s quotes and orders, and its overall volume of liquidity routed, removed and/or provided through NASDAQ. 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. NASDAQ believes that its fees remain competitive with other venues and are reasonable and equitably allocated to those members on the basis of whether they opt to direct orders to NASDAQ.

#### 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. 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

<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. 60570 (August 26, 2009), 74 FR 45504 (September 2, 2009) (SR-NASDAQ-2009-079).

<sup>4</sup> 15 U.S.C. 78f.

<sup>5</sup> 15 U.S.C. 78f(b)(4).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2009-088 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-2009-088. 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, on official business days between the hours of 10 a.m. and 3 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-2009-088 and should be submitted on or before November 19, 2009.

#### IV. Commission's Findings and Order Granting Accelerated Approval of a Proposed Rule Change

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.<sup>6</sup> In particular, approval of the retroactive application of the proposal is consistent with Section 6(b)(4) of the Act,<sup>7</sup> which requires that the rules of a national securities exchange provide for

the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities.

The Commission notes that the changes outlined in this proposed rule change were also contained in an September 30, 2009 submission by NASDAQ for immediate effectiveness pursuant to Section 19(b)(3)(A)<sup>8</sup> of the Act and Rule 19b-4(f)(2)<sup>9</sup> thereunder; however that submission was rejected because it was not filed in accordance with the requirements of the Act and the rules and regulations thereunder.<sup>10</sup> The proposed fee changes would otherwise qualify for immediate effectiveness pursuant to Section 19(b)(3)(A)<sup>11</sup> of the Act and Rule 19b-4(f)(2).<sup>12</sup> However, because the proposed rule change seeks retroactive application of a fee change, NASDAQ filed pursuant to Section 19(b)(2) of the Act.<sup>13</sup>

The Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>14</sup> for approving the proposed rule change before the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register** with such approval retroactive to October 1, 2009. Retroactive approval of this proposal allows the proposed rule change to take effect for the month of October 2009.

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NASDAQ-2009-088) is hereby approved on an accelerated basis.

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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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60863; File No. SR-BX-2009-055]

#### Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving a Proposed Rule Change To Retroactively Correct an Error in Rule 7018

October 22, 2009.

On August 28, 2009, NASDAQ OMX BX, Inc. (the "Exchange" or "BX") 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 to apply retroactively to the period from April 1, 2009 through August 16, 2009 the correction made by SR-BX-2009-049<sup>3</sup> of an error formerly in Rule 7018. BX believes that all of its members that trade on the NASDAQ OMX BX Equities System are cognizant of the correct fee. BX has been billing members in accordance with the correct fee since the effective date of April 1, 2009 in a previous BX proposed rule change,<sup>4</sup> but due to an error the credit incorrectly appeared as "\$0.006" in Exhibit 5 to the BX Fee Filing. Notice of the proposed rule change was published for comment in the **Federal Register** on September 17, 2009.<sup>5</sup> The Commission received no comments on the proposal.

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.<sup>6</sup> In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,<sup>7</sup> which requires, among other things, that the rules of a national securities exchange remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Commission believes the proposed rule change matches both the

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

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

<sup>3</sup> See Securities Exchange Act Release No. 60603 (September 1, 2009), 74 FR 46266 (September 8, 2009) (SR-BX-2009-049).

<sup>4</sup> See Securities Exchange Act Release No. 59682 (April 1, 2009), 74 FR 16015 (April 8, 2009) (SR-BX-2009-018) ("BX Fee Filing").

<sup>5</sup> See Securities Exchange Act Release No. 60634 (September 8, 2009), 74 FR 47849.

<sup>6</sup> 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).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(6).

<sup>10</sup> See 19 CFR 240.19b-4 and 19 CFR 249.819 Appendix A.

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> 15 U.S.C. 78s(b)(2).

<sup>14</sup> *Id.*

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

<sup>6</sup> 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).

<sup>7</sup> 15 U.S.C. 78f(b)(4).