

longer available to regulators or the investing public.

Under Rule 2130, FINRA must be named as a party when a respondent is seeking confirmation from a court of an expungement award. FINRA can waive its right to be named as a party in the court confirmation process, if it makes an affirmative determination consistent with Rule 2130.<sup>50</sup> The Commission believes that FINRA should use its authority to review expungement requests to ensure that expungement is an extraordinary remedy.<sup>51</sup>

With respect to the issue of whether an associated person or member will be able to use the arbitrators' written findings on expungement as collateral estoppel in a subsequent legal proceeding against the customer, FINRA believes that the high evidentiary standard that applies in such cases, and the fact that most customers are represented by legal counsel, should address this issue. The Commission believes that this is a reasonable assessment and conclusion regarding this potential situation.

As discussed, the Commission believes that having accurate and complete information in the CRD is vital; information that has regulatory value or that could assist investors in protecting themselves should not be removed from CRD.<sup>52</sup> Because of the central role that arbitrators have in the expungement process, the Commission believes that it is critical for arbitrators to be well-informed regarding FINRA's rules governing expungement. FINRA stated that this proposal is part of its "continuing effort to ensure that arbitrators evaluate fully each request

for expungement."<sup>53</sup> The Commission believes that the training and education FINRA provides in conjunction with the proposed rule change will be critical to the implementation and proper application of the rules. Proper training of arbitrators should help make expungement the extraordinary remedy that it was meant to be and should convey to the arbitrators the importance of their role in maintaining the integrity of the CRD.

FINRA noted that it has requested comment on amendments to address the issue of complaints that do not name a registered representative as a party. FINRA stated that it expects to file these changes with the Commission shortly.<sup>54</sup> The Commission does not believe that it would be in the interest of investors to delay approval of the instant proposal while that rule change is being considered by FINRA; however given the interrelationship of the issues, the Commission urges FINRA to submit this filing as soon as possible so that this information will be recorded in CRD.

In conclusion, the Commission believes that the proposed rule is consistent with the Act and will help assure that accurate information will remain in CRD and inaccurate information will be expunged. Given the importance of CRD for regulators and to customers who want to get information about registered persons or member firms before they do business with them, the Commission urges FINRA in its regulatory role to monitor how this rule is applied by arbitrators to assure that it is achieving its goals, and to propose additional changes, if needed.

## V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to FINRA, and, in particular, with Section 15A(b)(6) of the Act.<sup>55</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>56</sup> that the proposed rule change (SR-FINRA-2008-010) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>57</sup>

**Florence E. Harmon,**  
Acting Secretary.

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<sup>53</sup> See Second Response.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 15 U.S.C. 78s(b)(2).

<sup>57</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58891; File No. SR-NASDAQ-2008-072]]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change To Establish a PORTAL Reference Database and Related Fees

October 30, 2008.

#### I. Introduction

On September 16, 2008, The NASDAQ Stock Market LLC ("Nasdaq" or "Exchange"), filed with the Securities and Exchange Commission ("SEC" or "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 establish a PORTAL Reference Database and related fees. The proposed rule change was published for comment in the **Federal Register** on September 30, 2008.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

Nasdaq has created, and has proposed to make publicly available, for a fee, a consolidated fully-electronic reference database of information culled from PORTAL offering documents and applications submitted to Nasdaq since 1990.<sup>4</sup> Nasdaq has represented that access to the database would be available to all market participants. The database would allow users to determine a PORTAL issue's name and offering description, CUSIP, country of incorporation, security class, maturity class and date, currency denomination, applicable interest and credit rating, convertibility and call provisions, total number of shares offered, and date of PORTAL designation, in addition to other information. On an ongoing basis, data regarding securities that obtain PORTAL designation would be added to the database.

Nasdaq has proposed that users of the PORTAL Reference Database would pay both an annual fee and an access fee per year of data desired. Annual fees would range between \$20,000 and \$100,000 and would be based on the number of users and are per calendar year. Access

<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. 58622 (September 23, 2008), 73 FR 56876 (September 30, 2008)(the "Notice").

<sup>4</sup> For more information related to the background of the PORTAL Market, see Securities Exchange Act Release No. 55669 (April 25, 2007), 72 FR 23874 (May 1, 2007).

<sup>50</sup> Rule 2130(b)(2), however, does allow for exceptions under extraordinary circumstances.

<sup>51</sup> FINRA also provides the states with all requests for expungement and petitions so that the states have an opportunity to review them and/or participate in the hearing. The ability for FINRA and the states to participate in the expungement process is critical so that information that should remain in CRD is not expunged. The Commission expects that all regulators will take these responsibilities seriously and work cooperatively as the new rule is implemented, and thereafter. See, e.g., *UBS Financial Services, Inc. v. Gibson*, 851 N.Y.S.2d 75 (N.Y. Sup. Ct.) (consolidated with *Johnson v. Summit Equities, Inc.*, 238 N.Y.L.J. 109 (Nov. 15, 2007)); *Zaferiou v. Holgado*, Index No. 102996/07 (N.Y. Sup. Ct. April 14, 2008); *Matter of Kay v. Abrams*, 853 N.Y.S.2d 862 (N.Y. Sup. Ct. Feb. 21, 2008); and *Karsner v. Lothian*, 532 F.3d 876 (D.C. Cir. July 15, 2008).

<sup>52</sup> FINRA routinely advises investors to check CRD before they decide to do business with a firm or a broker. See e.g., <http://www.finra.org/Investors/SmartInvesting/GettingStarted/SelectingInvestmentProfessional/index.htm>; <http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/FraudsAndScams/P01492>; and <http://www.finra.org/Investors/ProtectYourself/BeforeYouInvest/AvoidProblemsWithYourBroker/index.htm>.

fees, which also range from \$20,000 to \$100,000, would be tiered based on the number of users authorized for access and the number of the years for which data is requested. The total cost of access to the full database would be capped based on the number of users at a particular firm.

### III. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>5</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>6</sup> which requires that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using any facility or system which the exchange operates or controls.

Nasdaq represented that it incurred hardware and software costs, as well as personnel and other technology costs, to establish the PORTAL Reference Database. Establishing the database required the retrieval, review, conversion, and organization of large volumes of documents. Nasdaq stated that there will be ongoing costs to maintain and update the database, as well. The Commission notes that the pricing structure should allow users to align and control the costs of access with their data needs, and that the information will be available to any participant that pays the fees. The Commission believes that the PORTAL Reference Database will make historical information about issuances of restricted equity and debt more available, which should assist market participants to make better-informed investment decisions regarding such securities.

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>7</sup> that the proposed rule change, (SR-NASDAQ-2008-072), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

Florence E. Harmon,

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58889; File No. SR-NYSE-2008-110]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Implementing a Financial Rebate of \$.0015 per Share to the SLP That Posts Liquidity in Its Assigned Securities That Results in an Execution, Provided the SLP Meets Its Monthly Quoting Requirement for Rebates Averaging at Least 3% at the National Best Bid or the National Best Offer in Its Assigned Securities in Round Lots

October 30, 2008.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act"),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on October 28, 2008, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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

The Exchange proposes to offer a financial rebate of \$.0015 per share to the SLP that posts liquidity in its assigned securities that results in an execution, provided the SLP meets its monthly quoting requirement for rebates averaging at least 3% at the National Best Bid ("NBB") or the National Best Offer ("NBO") in its assigned securities in round lots.

The text of the proposed rule change is available on the Exchange's Web site (<http://www.nyse.com>), at NYSE's principal office, and at the Commission's Public Reference Room.

<sup>8</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

#### 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 self-regulatory organization 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 those 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 parts of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange has proposed a six-month pilot program ("Pilot" or "program") to establish a new class of NYSE market participants that will be referred to as "Supplemental Liquidity Providers" ("SLPs") and will be designated as Exchange Rule 107B.<sup>4</sup> The proposed pilot program will commence on the date upon which the SEC will approve the New Market Model and will continue for six months thereafter ending on April 30, 2009. During this proposed pilot program, the Exchange will offer a financial rebate of \$.0015 per share to the SLP that posts liquidity in its assigned securities that results in an execution, provided the SLP meets its monthly quoting requirement for rebates averaging at least 3% at the National Best Bid ("NBB") or the National Best Offer ("NBO") in its assigned securities in round lots.

##### SLP Obligations

In a given calendar month, an SLP is required to maintain a bid or an offer at the NBB or NBO on the Exchange averaging at least 5% of the trading day in round lots for each assigned security (see Rule 107B(a)). If an SLP fails to meet the 5% quoting requirement for three consecutive calendar months in any assigned security, the SLP Liaison Committee may, in its discretion, take the following non-regulatory action: (1) Revoke the assignment of the affected security(ies); (2) revoke the assignment of an additional, unaffected security from an SLP; and (3) disqualify a member organization's status as an SLP (see Rule 107B(i)(1)(B), (C)(i)-(iii)).

In order for an SLP to be entitled to a rebate, an SLP must post liquidity on

<sup>4</sup> See SR-NYSE-2008-108 (NYSE Rule 107B. Supplemental Liquidity Providers).

<sup>5</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>6</sup> 15 U.S.C. 78f(b)(4).

<sup>7</sup> 15 U.S.C. 78s(b)(2).