

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59786; File No. SR-NASDAQ-2009-033]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish InterACT, a New Service, and Related Fees.

April 17, 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 April 9, 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. Nasdaq has designated the proposed rule change as effecting a change described under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders the proposal effective upon filing with the Commission. 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 adopt new Rule 7049 to establish fees for InterACT,<sup>4</sup> a tool to help member firms avoid reporting violations on the FINRA/NASDAQ Trade Reporting Facility (“TRF”) and Regulation NMS trade throughs.

The text of the proposed rule change is below. Proposed new language is *underlined*; proposed deletions are in brackets.<sup>5</sup>

\* \* \* \* \*

#### 7049. Nasdaq InterACT

*Nasdaq InterACT is a surveillance tool that provides summaries of a subscribing member’s trade activity for the FINRA/NASDAQ Trade Reporting Facility. Such summaries include the total number of trades that have been reported to the Facility, various statistics associated with those trades reported (including: declines, cancels, step-outs, as-ofs, etc), the total number of trades that must be reviewed for acceptance, and the total number of Regulation NMS trade throughs.*

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> The Commission notes that Nasdaq is also establishing the InterACT service with this proposed rule change.

<sup>5</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaqomx.cchwallstreet.com>. The Commission notes that there are no deletions.

*InterACT is available to each member firm at no cost for a 60 day trial period.*

*Thereafter, InterACT is available for a subscription fee of \$300 per month, per user, for the first three users, and \$100 per month, per user, for each additional user, with a maximum fee of \$1,500 per month, per member firm.*

\* \* \* \* \*

#### 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 proposes to establish a new add-on service to the Nasdaq Workstation and Weblink ACT 2.0, and establish related fees. InterACT is a new compliance tool that allows member firms to supervise in real-time trade activity required to be reported to the TRF. The TRF is a transaction reporting facility managed by the Financial Industry Regulatory Authority, Inc. (“FINRA”). FINRA Rule 7230A(b) details how and when trade reports are to be submitted to the TRF. Specifically, FINRA Rule 7230A(b) requires that transactions in reportable securities be reported to the TRF within ninety seconds after execution by a party to the transaction.<sup>6</sup> FINRA Rule 7230A(b) further requires that member firms accept or decline transactions entered into the TRF by the reporting counterparty to a transaction within twenty minutes. InterACT provides subscribers with real-time totals of the number of trades that have exceeded the ninety second or twenty minute thresholds. This proactive alerting tool will allow subscribers to quickly identify violations of FINRA Rule 7230A(b) and take action to remediate the source of the violation. In this regard, InterACT provides a link to query the trades, which will allow users to gain full access to the details of the

trades identified.<sup>7</sup> InterACT also provides subscribers with the number of trade reports that are nearing the twenty minute threshold to accept or decline the reported transaction, which will assist firms in identifying any backlogs and allocating resources necessary to avoid a violation of FINRA Rule 7230A(b).

In addition to aiding member firms with their TRF reporting compliance, InterACT provides subscribers with tools to assist in complying with Rule 611 of Regulation NMS<sup>8</sup>. Rule 611 under the Act<sup>9</sup> requires trading centers, which include certain broker-dealers and market makers,<sup>10</sup> to, among other things, avoid trading through protected orders and regularly surveil to ascertain the effectiveness of the policies and procedures designed to prevent trade throughs.<sup>11</sup> Such firms must take prompt action to remedy deficiencies in their policies and procedures.<sup>12</sup> To assist member firms with compliance with these requirements, InterACT provides real time totals of the number of a subscribing member firm’s trade throughs during the day. The totals differentiate between the number of trade throughs marked as exempt and the number of trade throughs that are not.<sup>13</sup> As such, these reports provide a useful tool with which subscribers are able to quickly identify occurrences of trade throughs, determine whether such trade throughs are marked exempt, and, when appropriate, to take action to remediate the cause of any non-exempt trade throughs.<sup>14</sup>

InterACT can only be accessed using an existing Nasdaq Workstation or Weblink ACT 2.0 user account. Members subscribing to InterACT are charged a monthly fee per user, which provides InterACT access for each Nasdaq Workstation and Weblink ACT 2.0 user account selected for subscription to InterACT. Nasdaq proposes to offer InterACT to each subscribing member firm initially at no cost for a sixty-day trial period, after which Nasdaq proposes to charge a subscription fee of \$300 per month, per user for the first three users, and \$100

<sup>7</sup> Detailed information regarding each trade that exceeded the applicable deadline is available for fee through Nasdaq’s Regulation Reconnaissance service.

<sup>8</sup> 17 CFR 242.611.

<sup>9</sup> *Id.*

<sup>10</sup> 17 CFR 242.600(b)(78).

<sup>11</sup> 17 CFR 242.611(a).

<sup>12</sup> *Id.*

<sup>13</sup> Certain transactions are eligible for an exception to the trade through rule. 17 CFR 242.611(b).

<sup>14</sup> Detailed information regarding each trade through is available for an additional fee through Nasdaq’s Regulation Reconnaissance service.

<sup>6</sup> FINRA Rule 7230A(c) details the reporting responsibilities of the parties to the transaction.

per month, per user for each additional user. Nasdaq proposes to limit the maximum fee charged to a subscriber to \$1,500 per month, per member firm. Nasdaq believes the subscription fee fairly reflects the value of this product. Use of InterACT is voluntary and the subscription fee will be imposed on all purchasers equally based on the number of users selected. The proposed fee will cover the costs associated with establishing the service, responding to customer requests, configuring Nasdaq's systems, programming to user specifications, and administering the service, among other things.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>15</sup> in general, and Section 6(b)(4) of the Act,<sup>16</sup> in particular, because 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 that the Nasdaq operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers. As noted, use of InterACT is voluntary and the subscription fees will be imposed on all purchasers equally based on the number of users, with a maximum fee of \$1,500 per month, per member firm. The proposed fees will cover the costs associated with establishing the service, responding to customer requests, configuring Nasdaq's systems, programming to user specifications, and administering the service, among other things.<sup>17</sup>

Nasdaq also believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act<sup>18</sup> because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. InterACT will assist subscribing member firms to quickly identify violations of FINRA Rule 7230A(b) and Rule 611 under the Act,<sup>19</sup> in turn

allowing member firms to quickly remediate the cause of the violation and stem subsequent violations. InterACT will also provide subscribers with real time totals of open trades awaiting review and acceptance within the twenty minute period required by FINRA Rule 7230A(b). As a consequence, the subscriber will be aware of any review backlog and may take action to avoid a violation.

### 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.

### 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

Pursuant to Section 19(b)(3)(A) of the Act<sup>20</sup> and Rule 19b-4(f)(6) thereunder,<sup>21</sup> Nasdaq has designated this proposal as one that effects a change that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for thirty days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Nasdaq has provided the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change. Nasdaq believes that the filing may appropriately be designated for filing under Rule 19b-4(f)(6) because the filing provides a useful enhancement to an existing facility of Nasdaq that is designed to assist members in detecting and avoiding rule violations, and establishes a reasonable fee for such enhancement.

## 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2009-033 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2009-033. 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 such filing also will be available for inspection and copying at the principal office of Nasdaq. 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-2009-033 and should be submitted on or before May 15, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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

<sup>16</sup> 15 U.S.C. 78f(b)(4).

<sup>17</sup> The Commission notes that in setting these fees, Nasdaq has also allowed for a profit margin of some amount, although that amount has not been disclosed to the Commission. Telephone conversation on April 15, 2009 among Sean Bennett, Nasdaq, Katherine England, SEC, and Joseph Morra, SEC.

<sup>18</sup> 15 U.S.C. 78f(b)(5).

<sup>19</sup> 17 CFR 242.611.

<sup>20</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>21</sup> 17 CFR 240.19b-4(f)(6).

<sup>22</sup> 17 CFR 200.30-3(a)(12).