

participate in the same transactions. Is widening the differential in this manner equitable as that term is used in Section 6(b)(4) of the Act? At what point would the differential become so large as to be inequitable?

4. Does it impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act and prohibited under Section 6(b)(4) of the Act to charge firms facilitating a customer order no fees and charge other non-customer members? If so, please explain how.

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-NYSEAmex-2009-38 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-NYSEAmex-2009-38. 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, 100 F Street, NE., Washington, DC 20549, 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-NYSEAmex-2009-38 and should be submitted on or before August 21, 2009.

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

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-18271 Filed 7-30-09; 8:45 am]

**BILLING CODE 8010-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-60384; File No. SR-NASDAQ-2009-071]**

### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Its Optional Anti-Internalization Functionality**

July 24, 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 July 22, 2009, The NASDAQ Stock Market LLC (the "Exchange" or "Nasdaq") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange 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 Substance of the Proposed Rule Change**

The Exchange is filing with the Commission a proposed rule change to modify its optional anti-internalization functionality.

The text of the proposed rule change is below. Proposed new language is underlined and proposed deletions are in brackets.

\* \* \* \* \*

#### 4757. Book Processing

(a) System orders shall be executed through the Nasdaq Book Process set forth below:

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

<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).

(1)-(3) No Change.

(4) Exception: Anti-Internalization—Market participants may direct that quotes/orders entered into the System not execute against quotes/orders entered under the same MPID. [In such a case, the later entered of the quote/orders will be cancelled back to the entering party.] *In such a case, if the interacting orders from the same MPID are equivalent in size, both orders will be cancelled back to their entering parties. If the interacting orders from the same MPID are not equivalent in size, share amounts equal to size of the smaller of the two orders will be cancelled back to their originating parties with the remainder of the larger order being retained by the System for potential execution.*

\* \* \* \* \*

(b) and (c) Not applicable. [sic]

#### **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 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. 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 is proposing to modify its voluntary anti-internalization functionality. Under the proposal, market participants entering quotes/orders under a specific market participant identifier ("MPID") may voluntarily direct that they not execute against other quotes/orders entered into the System under the same MPID. In such a case, if the orders from the same MPID are equivalent in size, both orders will be cancelled back to their entering parties. If the orders from the same MPID are not equivalent in size, share amounts equal to [sic] size of the smaller of the two orders will be cancelled back to their respective originating parties with the remainder of the larger order being retained by the System for potential execution.

The above replaces Nasdaq's currently approved, but not yet operational, anti-internalization functionality that would

cancel the later entered of interacting orders from the same MPID. Nasdaq is modifying its anti-internalization functionality based on additional input from system users as well as the Commission's recent approval of various versions of anti-internalization functionality for the BATS and NYSE Arca exchanges.<sup>4</sup>

Anti-internalization functionality is designed to assist market participants in complying with certain rules and regulations of the Employee Retirement Income Security Act ("ERISA") that preclude and/or limit managing broker-dealers of such accounts from trading as principal with orders generated for those accounts. It can also assist market participants in reducing execution fees potentially resulting from the interaction of executable buy and sell trading interest from the same firm. Nasdaq notes that use of the functionality does not relieve or otherwise modify the duty of best execution owed to orders received from public customers. As such, market participants using anti-internalization functionality will need to take appropriate steps to ensure that public customer orders that do not execute because of the use of anti-internalization functionality ultimately receive the same execution price (or better) they would have originally obtained if execution of the order was not inhibited by the functionality.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>5</sup> in general, and with Sections [sic] 6(b)(5) of the Act,<sup>6</sup> in particular, in that the proposal 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Nasdaq notes that similar functionality has previously [sic] approved for other markets.<sup>7</sup>

<sup>4</sup> See SR-BATS-2009-022 and SR-NYSEArca-2009-058. Nasdaq's proposed anti-internalization functionality is similar to BAT's MMTP Decrement and Cancel and NYSE Arca's STP Decrement and Cancel.

<sup>5</sup> 15 U.S.C. 78f.

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

<sup>7</sup> See SR-BATS-2009-022 and SR-NYSEArca-2009-058.

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

The Exchange 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 on the proposed rule change were neither solicited nor received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>8</sup> and Rule 19b-4(f)(6) thereunder.<sup>9</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with 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, or such shorter time as designated by the Commission. However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay as well as the five business-day pre-filing requirement so that the benefits of this functionality to Nasdaq market participants expected from the rule change can be implemented on August 3, 2009, when the Exchange expects to have the technological changes in place to support the proposed rule change. The Commission believes that waiving the 30-day operative delay<sup>10</sup> to make

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

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

<sup>10</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the

this functionality available without delay is consistent with the protection of investors and the public interest.<sup>11</sup> The Commission notes that the proposal is similar to rules of other exchanges and thus does not raise any novel regulatory issues.<sup>12</sup> The Commission designates the proposal operative upon filing to allow the Exchange to implement the functionality without delay.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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.

## 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-2009-071 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-2009-071. 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

proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>11</sup> The Commission is also waiving the five business-day pre-filing requirement.

<sup>12</sup> See BATS Exchange Rule 11.9(f) and NYSE Arca Equities Rule 7.31(qq).

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, 100 F Street, NE., Washington, DC 20549, 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 the 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-2009-071 and should be submitted on or before August 21, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-18274 Filed 7-30-09; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60385; File No. SR-NYSEAmex-2009-26]

### Self-Regulatory Organizations; NYSE Amex LLC; Order Approving Proposed Rule Change To Charge a \$500 Monthly Fee to Recipients of the NYSE Amex Order Imbalance Information Datafeed

July 24, 2009.

#### I. Introduction

On June 5, 2009, the NYSE Amex LLC ("NYSE Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to charge a \$500 monthly fee to recipients of the NYSE Amex Order Imbalance Information datafeed. The proposed rule change was published for comment in the **Federal Register** on June 24, 2009.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

The Exchange proposes to charge a \$500 monthly fee to recipients of the NYSE Amex Order Imbalance Information datafeed. NYSE Amex Order Imbalance Information provides real-time order imbalances that accumulate prior to the opening of trading on the Exchange and prior to the close of trading on the Exchange. The Exchange provides this information for issues that are likely to be of particular trading interest at the opening or closing.

Currently, the Exchange provides this datafeed at no cost. The instant filing is submitted to establish a \$500 monthly fee for receipt of the NYSE Amex Order Imbalance Information datafeed. This proposed \$500 monthly fee to recipients of the NYSE Amex Order Imbalance Information datafeed applies whether the recipient receives the datafeed directly from the Exchange or indirectly from an intermediary. The fee entitles the datafeed recipient to make displays of that information available to an unlimited number of subscribers for no extra charge. The Exchange is not proposing to impose an end-user or display service fee on those subscribers.

The Exchange states that the \$500 monthly fee would allow vendors to redistribute NYSE Amex Order Imbalance Information: (1) Without having to differentiate between professional subscribers and nonprofessional subscribers; (2) without having to account for the extent of access to data; (3) without having to procure contracts with its subscribers for the benefit of the Exchange; and (4) without having to report the number of its subscribers.

The Exchange believes that the fee enables the investment community that has an interest in the receipt of order imbalance information to contribute to the Exchange's operating costs in a manner that is appropriate for this market data product.

In setting the level of the NYSE Amex Order Imbalance Information Product fee, the Exchange states that it took into consideration several factors, including:

- (1) The fees that other Exchanges are charging for similar services<sup>4</sup>;
- (2) consultation with some of the entities that the Exchange anticipates

<sup>4</sup> New York Stock Exchange LLC imposes an access fee of \$500 per month for its order imbalance datafeed. Nasdaq OMX includes order imbalance information in its Nasdaq TotalView datafeed. Nasdaq OMX imposes end-user charges on both professional and nonprofessional subscribers that receive TotalView, as well as an array of monthly distribution charges that are significantly higher than the charge that NYSE Amex is proposing in this proposed rule change.

will be the most likely to take advantage of the proposed service;

(3) the contribution of market data revenues that the Exchange believes is appropriate for entities that provide market data to large numbers of investors, which are the entities most likely to take advantage of the proposed service; and

(4) the contribution that revenues accruing from the proposed fee will make to meet the overall costs of the Exchange's operations.

The Exchange believes that the proposed NYSE Amex Order Imbalance Information fee would reflect an equitable allocation of its overall costs to users of its facilities.

The Exchange believes that the level of the fee is consistent with the approach set forth in the approval order issued by the Commission related to ArcaBook fees.<sup>5</sup> The Exchange submits that the NYSE Amex Order Imbalance Information datafeed constitutes "non-core data"; *i.e.*, the Exchange does not require a central processor to consolidate and distribute the product to the public pursuant to joint-SRO plans. Rather, the Exchange distributes this product voluntarily. In addition, the Exchange believes that both types of the competitive forces that the Commission described in the NYSE Arca Order are present: (i) The Exchange has a compelling need to attract order flow; and (ii) the product competes with a number of alternative products.

The Exchange states that it must compete vigorously for order flow to maintain its share of trading volume. This requires the Exchange to act reasonably in setting market data fees for non-core products such as the NYSE Amex Order Imbalance Information datafeed. The Exchange hopes that NYSE Amex Order Imbalance datafeed will enable vendors to distribute NYSE Amex order imbalance information widely among investors, and thereby provide a means for promoting the Exchange's visibility in the marketplace.

#### III. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change and 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

<sup>5</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) ("NYSE Arca Order").

<sup>6</sup> In approving this proposed rule change, the Commission notes that it has considered the

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<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. 60122 (June 17, 2009), 74 FR 30184.