OCC Rule 308-Audits, allows Canadian clearing members to elect to file their Joint Regulatory Financial Questionnaire and Reports (''JRFQR'') with OCC, instead of filing SEC Form X–17A–5, to discharge their financial reporting requirements to OCC. In addition, other provisions of OCC's rules (Rules 301, 302, 303, 304, 306 and 308) reference information Canadian clearing members report on their JRFQR. IIROC, the primary regulator of Canada's securities industry, replaced the JRFQR with ''Form 1'' of the International Financial Reporting Standards. OCC proposes to replace references to the JRFQR within its By-Laws and Rules with references to ''Form 1.'' [4] OCC also proposes to add an Interpretation and Policy to Rule 304 in response to a change in how IIROC requires regulated entities to report capital withdrawals.

OCC, as part of its financial surveillance program, requires Canadian clearing members to submit their JRFQR, a financial report similar to SEC Form X–17A–5, to OCC at the end of each month. OCC also monitors the financial health of such clearing members using the capital levels reported on their JRFQRs. In 2011, IIROC replaced the JRFQR with Form 1. Among other things, Form 1 aligns the reporting of certain financial liabilities to U.S. Generally Accepted Accounting Principles (''GAAP''). Canadian clearing members that use Form 1 report the same, and in some cases more conservative, amounts of regulatory capital to OCC as they had using the JRFQR. Moreover, OCC believes that the change does not impair OCC's ability to conduct diligent financial surveillance of Canadian clearing members. Accordingly, OCC proposes to replace references to the ''JRFQR'' within its By-Laws and Rules with references to ''Form 1.''

The IIROC also altered how its regulated entities report capital withdrawals. IIROC previously required capital withdrawals to be reported on monthly financial reports; however, IIROC amended its standards and now requires firms to obtain approval for withdrawals of capital following notice thereof. OCC had, when applicable, adjusted Canadian clearing member's reported capital levels in light of withdrawals reflected in financial reports in order to determine if the firm's capital falls within OCC's standards. With the change implemented by IIROC, that information is no longer be available to OCC via monthly financial reports submitted by Canadian clearing members. To ensure it is aware of such capital withdrawals, OCC proposes to add an Interpretation and Policy to Rule 304, which would require Canadian clearing members to submit capital withdrawal notifications to OCC when such requests are submitted to IIROC.

[4] OCC does not propose to amend Rule 310 since it does not specifically use the term, ''Joint Regulatory Financial Questionnaire and Reports.''

III. Discussion

Section 17A(b)(3) (F) of the Act [5] requires that, among other things, a clearing agency be organized and its rules designed to safeguard securities and funds in its custody or control or for which it is responsible. The proposed rule change will allow OCC to efficiently monitor the financial health of its clearing members and is intended to facilitate Canadian clearing members' compliance with OCC's By-Laws and Rules by aligning OCC's financial reporting requirements, as they pertain to Canadian clearing members, with those of the IIROC. It is also intended to ensure OCC has appropriate information about Canadian clearing members' capital withdrawals, which will no longer be reported to OCC on a monthly basis. As such, it will help OCC to safeguard the securities and funds in its custody or control or for which it is responsible.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act [6] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (File No. SR–OCC–2012–15) be, and hereby is, approved.[8]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–26856 Filed 11–1–12; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78q–1(b)(3)(F)

[6] 15 U.S.C. 78q–1.

[7] 15 U.S.C. 78s(b)(2).

[8] In approving this proposed rule change the Commission has considered the proposed rule's impact of efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68115; File No. SR–NASDAQ–2012–090]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Amend Rule 4626—Limitation of Liability

October 26, 2012.

I. Introduction

On July 23, 2012, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Exchange Rule 4626—Limitation of Liability (''accommodation proposal''). The proposed rule change was published for comment in the **Federal Register** on August 1, 2012.[3] The Commission received 11 comment letters on this proposal [4] and a response letter from Nasdaq.[5] On September 12, 2012, the Commission extended the time period in which to either approve the accommodation proposal, disapprove the accommodation

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67507 (July 26, 2012), 77 FR 45706 (''Notice'').

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission, from Sis DeMarco, Chief Compliance Officer, Triad Securities Corp., dated August 20, 2012 (''Triad Letter''); Eugene P. Torpey, Chief Compliance Officer, Vandham Securities Corp., dated August 21, 2012 (''Vandham Letter''); John C. Nagel, Managing Director and General Counsel, Citadel LLC, dated August 21, 2012 (''Citadel Letter''); Benjamin Bram, Watermill Institutional Trading LLC, dated August 22, 2012 (''Bram Letter''); Daniel Keegan, Managing Director, Citigroup Global Markets Inc., dated August 22, 2012 (''Citi Letter''); Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated August 22, 2012 (''SIFMA Letter''); Mark Shelton, Group Managing Director and General Counsel, UBS Securities LLC, dated August 22, 2012 (''UBS Letter''); Andrew J. Entwistle and Vincent R. Cappucci, Entwistle & Cappucci LLP, dated August 22, 2012 (''Entwistle Letter''); Douglas G. Thompson, Michael G. McLellan, and Robert O. Wilson, Finkelstein Thompson LLP, Christopher Lovell, Victor E. Stewart, and Fred T. Isquith, Lovell Stewart Halebian Jacobson LLP, Jacob H. Zamansky and Edward H. Glenn, Zamansky & Associates LLC, dated August 22, 2012 (''Thompson Letter''); James J. Angel, Associate Professor of Finance, Georgetown University, McDonough School of Business, dated August 23, 2012 (''Angel Letter''); and Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc., dated August 29, 2012 (''Knight Letter'').

[5] *See* letter to Elizabeth M. Murphy, Secretary, Commission, from Joan C. Conley, Senior Vice President and Corporate Secretary, The NASDAQ Stock Market LLC, dated September 17, 2012 (''Nasdaq Letter'').

proposal, or to institute proceedings to determine whether to approve or disapprove the accommodation proposal, to October 30, 2012.[6] This order institutes proceedings under Section 19(b)(2)(B) of the Act[7] to determine whether to approve or disapprove the accommodation proposal.

II. Description of Proposal[8]

Pursuant to existing Nasdaq Rule 4626(a), Nasdaq and its affiliates are not liable for any losses, damages, or other claims arising out of the Nasdaq Market Center or its use.[9] However, existing Nasdaq Rule 4626(b) allows Nasdaq to compensate users of the Nasdaq Market Center for losses directly resulting from the systems' actual failure to correctly process an order, Quote/Order, message, or other data, provided the Nasdaq Market Center has acknowledged receipt of the order, Quote/Order, message, or data. Nasdaq's payment for all claims made by all market participants related to the use of the Nasdaq Market Center during a single calendar month shall not exceed the larger of $500,000 or the amount of the recovery obtained by Nasdaq under any applicable insurance policy.[10]

As set forth in more detail in the Notice, Nasdaq proposes to add subsection (3) to Nasdaq Rule 4626(b) to establish a voluntary accommodation program for certain claims arising from the initial public offering (''IPO'') of Facebook, Inc. (''Facebook'') on May 18, 2012 (collectively ''Facebook IPO'').[11] Specifically, Nasdaq proposes to compensate market participants for certain claims related to system difficulties in the Nasdaq Halt and Imbalance Cross process (''Cross'')[12] in connection with the Facebook IPO in an amount not to exceed $62 million.[13] Further, as proposed, claims for compensation must arise solely from realized or unrealized direct trading losses from four specific categories of Cross orders: (i) Sell Cross orders that were submitted between 11:11 a.m. ET and 11:30 a.m. ET on May 18, 2012, that were priced at $42.00 or less, and that did not execute; (ii) sell Cross orders that were submitted between 11:11 a.m. ET and 11:30 a.m. ET on May 18, 2012, that were priced at $42.00 or less, and that executed at a price below $42.00; (iii) buy Cross orders priced at exactly $42.00 and that were executed in the Cross, but not immediately confirmed; and (iv) buy Cross orders priced above $42.00 and that were executed in the Cross, but not immediately confirmed, but only to the extent entered with respect to a customer[14] that was permitted by the member to cancel its order prior to 1:50 p.m. and for which a request to cancel the order was submitted to Nasdaq by the member, also prior to 1:50 p.m.[15]

According to proposed Nasdaq Rule 4626(b)(3)(B), the measure of loss for the Cross orders described in (i), (iii), and (iv) above would be the lesser of: (a) The differential between the expected execution price of the orders in the Cross process that established an opening print of $42.00 and the actual execution price received; or (b) the differential between the expected execution price of the orders in the Cross process that established an opening print of $42.00 and a benchmark price of $40.527.[16] With respect to Cross orders described in (iv) above, the amount of loss would be reduced by 30 percent.[17] Further, according to proposed Rule 4626(b)(3)(B), the measure of loss for the Cross orders described in (ii) above would be the differential between the expected execution price of the orders in the Cross process that established an opening print of $42.00 and the actual execution price received.[18]

With respect to the process for submitting claims pursuant to proposed Nasdaq Rule 4626(b)(3), all claims must be submitted in writing no later than seven days after this accommodation proposal is approved by the Commission.[19] As proposed, the Financial Industry Regulatory Authority, Inc. (''FINRA'') would process and evaluate all the claims submitted, using the standards set forth in Nasdaq Rule 4626.[20] FINRA would then provide to the Nasdaq Board of Directors and the Board of Directors of The NASDAQ OMX Group, Inc. an analysis of the total value of eligible claims submitted under proposed Nasdaq Rule 4626(b)(3), and Nasdaq would thereafter file with the Commission a proposed rule change setting forth the amount of eligible claims and the amount it proposes to

[6] *See* Securities Exchange Act Release No. 67842 (September 12, 2012), 77 FR 57171 (September 17, 2012).

[7] 15 U.S.C. 78s(b)(2)(B).

[8] In issuing this order, the Commission neither makes any findings nor expresses any opinion with regard to Nasdaq's representations and interpretations contained in its accommodation proposal.

[9] According to Nasdaq Rule 4626(a), any losses, damages, or other claims, related to a failure of the Nasdaq Market Center to deliver, display, transmit, execute, compare, submit for clearance and settlement, adjust, retain priority for, or otherwise correctly process an order, Quote/Order, message, or other data entered into, or created by, the Nasdaq Market Center is absorbed by the member, or the member sponsoring the customer, that entered the order, Quote/Order, message, or other data into the Nasdaq Market Center.

[10] *See* Nasdaq Rule 4626(b)(1). With respect to the aggregate of all claims made by all market participants during a single calendar month related to a systems malfunction or error of the Nasdaq Market Center concerning locked/crossed market, trade through protection, market maker quoting, order protection, or firm quote compliance functions of the market participant, to the extent such functions are electronically enforced by the Nasdaq trading system and where Nasdaq determines in its sole discretion that such systems malfunction or error was caused exclusively by Nasdaq and no outside factors contributed to the systems malfunction or error, Nasdaq's payment during a single calendar month will not exceed the larger of $3,000,000 or the amount of the recovery obtained by Nasdaq under any applicable insurance policy. *See* Nasdaq Rule 4626(b)(2). The Facebook initial public offering does not implicate the types of systems errors or malfunctions described in Nasdaq Rule 4626(b)(2).

[11] In addition to adding proposed subsection (b)(3) to Nasdaq Rule 4626, Nasdaq proposes to make certain technical amendments to existing subsections of that rule. *See, e.g.,* proposed Nasdaq Rule 4626(b)(4) and (b)(6).

[12] *See* Nasdaq Rule 4753.

[13] *See* proposed Nasdaq Rule 4626(b)(3); Notice, *supra* note 3, at 47507.

[14] As proposed, unless Nasdaq Rule 4626 states otherwise, the term ''customer'' includes any unaffiliated entity upon whose behalf an order is entered, including any unaffiliated broker or dealer. *See* proposed Nasdaq Rule 4626(b)(3)(A).

[15] *See* proposed Nasdaq Rule 4626(b)(3)(A); Notice, *supra* note 3, at 45710–11. In addition, proposed Nasdaq Rule 4626(b)(3)(C) states that alleged losses arising in any form or that in any way resulted from any other causes would not be considered losses eligible for the proposed accommodations. Proposed Nasdaq Rule 4626(b)(3)(C) sets forth a non-exhaustive list of examples of such losses.

[16] $40.527 constitutes the volume-weighted average price (''VWAP'') of Facebook stock on May 18, 2012, between 1:50 p.m. ET and 2:35 p.m. ET. *See* proposed Nasdaq Rule 4626(b)(3)(B). *See also* Notice, *supra* note 3, at 45710–11 (describing Nasdaq's rationale for establishing the $40.527 benchmark).

[17] *See* proposed Nasdaq Rule 4626(b)(3)(B); *see also* Notice, *supra* note 3, at 45710 (describing Nasdaq's rationale for lowering the amount of eligible losses for the fourth category of Cross orders).

[18] Each member's direct trading losses calculated in accordance with proposed Nasdaq Rule 4626(b)(3)(A) and (B) are referred to as the ''member's share.'' *See* proposed Nasdaq Rule 4626(b)(3)(B).

[19] *See* proposed Nasdaq Rule 4626(b)(3)(D). According to Nasdaq, notice of approval would be publicly posted on the Nasdaq Trader Web site at *www.nasdaqtrader.com* and provided directly to all member firms via an Equity Trader Alert. *See* Notice, *supra* note 3, at 45712.

[20] *See* proposed Nasdaq Rule 4626(b)(3)(D). FINRA may request such supplemental information as it deems necessary to assist its evaluation of claims. *See id.* According to Nasdaq, FINRA's role would be limited to measuring data against the benchmarks established under Nasdaq Rule 4626(b)(3) to ascertain the eligibility and value of each member's claims. *See* Notice, *supra* note 3, at 45712. Further, Nasdaq represents that FINRA staff assessing the claims would not be involved in providing regulatory services to any Nasdaq market, and they would not have purchased Facebook stock during Nasdaq's IPO opening process or currently own Facebook stock. *See id.*

pay to its members.[21] All payments would be made in cash and would not be made until the proposed rule change setting forth the amount of eligible claims becomes final and effective.[22]

Furthermore, as proposed, in order to receive payment under proposed Nasdaq Rule 4626(b)(3), not later than seven days after the effective date of the proposed rule change setting forth the amount of eligible claims, the member must submit to Nasdaq an attestation detailing the amount of customer compensation [23] and covered proprietary losses.[24] Failure to provide the required attestation within the specified time period would void the member's eligibility to receive compensation under proposed Nasdaq Rule 4626(b)(3).[25] In addition, under proposed Nasdaq Rule 4626(b)(3)(H), all payments to members under the accommodation proposal would be contingent upon the execution and delivery to Nasdaq of a release by the member of all claims by it or its affiliates against Nasdaq or its affiliates for losses that arise out of, are associated with, or relate in any way to the Facebook IPO Cross or any actions or omissions related in any way to that Cross.[26] The failure to provide this release within 14 days after the effective date of the proposed rule change setting forth the amount of eligible claims would void the member's eligibility to receive compensation pursuant to proposed Nasdaq Rule 4626(b)(3).[27]

With respect to the priority of payment under proposed Nasdaq Rule 4626(b)(3), payments would be made in two tranches.[28] First, if the member has provided customer compensation, the member would receive an amount equal to the lesser of the member's share or the amount of customer compensation.[29] Second, the member would receive an amount with respect to covered proprietary losses, however, the sum of payments to a member would not exceed the member's share.[30] According to proposed Nasdaq Rule 4626(b)(3)(G), if the amount calculated under the first tranche (*i.e.,* customer compensation) exceeds $62 million, accommodation would be prorated among members eligible to receive accommodation under the first tranche. If the first tranche is paid in full and the amount calculated under the second tranche exceeds the funds remaining from the $62 million accommodation pool, such funds would be prorated among members eligible to receive accommodation under the second tranche.[31] Further, if a member's eligibility to receive funds is voided under proposed Nasdaq Rule 4626(b)(3), and the funds payable to other members must be prorated, the funds available to pay other members would be increased accordingly.[32]

III. Summary of Comments and Nasdaq's Response

As previously noted, the Commission received 11 comment letters on the accommodation proposal and one response letter from Nasdaq.[33] Eight commenters raised concerns with respect to the accommodation proposal,[34] two commenters expressed their support for the accommodation proposal,[35] and one commenter addressed the issue of exchange liability more broadly.[36]

Commenters raised concerns in the following areas, each of which is discussed in greater detail below: (1) The requirement that market participants release all other potentially valid claims as a condition to participation in the accommodation program; (2) Nasdaq's calculation and use of a benchmark price of $40.527; (3) the categories of claim-eligible trading losses; (4) the amount of the accommodation pool; (5) regulatory immunity from private suits and limitations on liability; (6) the applicability of Nasdaq Rule 4626; (7) the impact of approval of the accommodation proposal on pending litigation; and (8) two procedural issues.

A. Release of All Claims Relating to the Facebook IPO Cross

Several commenters expressed concerns that payment to eligible claimants are conditioned upon the member firm executing a release of claims by the firm or its affiliates against Nasdaq for losses associated with the Facebook IPO on May 18, 2012.[37] Specifically, one commenter indicated that requiring execution of the release as a precondition to participation in the accommodation proposal creates a ''fundamentally unfair dilemma'' for members.[38] According to the commenter, Nasdaq members must choose to execute a release of claims and participate in the accommodation program, which may not make the member whole, or pursue ''cost-and resource-intensive alternative avenues of recovery.'' [39] Another commenter noted that releases of claims are typically the product of commercial, arms-length negotiation and not part of a rule imposed by a regulatory authority.[40] Finally, one commenter suggested that Nasdaq members be given the option to ''opt in'' to the accommodation program on an order by order basis or a firm by firm basis.[41]

In response, Nasdaq asserted that the release requirement is fair, reasonable, and furthers the objectives of Section 6(b)(5) of the Act [42] because it is ''aimed at avoiding unnecessary litigation and ensuring equal treatment of all members receiving funds under the [accommodation] [p]roposal.'' [43] Moreover, Nasdaq noted that participation in the accommodation program and execution of the release are entirely voluntary.[44] Accordingly, members that wish to forego participation in the accommodation program and pursue claims against

[21] *See* proposed Nasdaq Rule 4626(b)(3)(E). According to Nasdaq, the report that FINRA prepares for Nasdaq on its analysis of the eligibility of claims also would be provided to the public members of FINRA's Audit Committee. *See* Notice, *supra* note 3, at 45712.

[22] *See* proposed Nasdaq Rule 4626(b)(3)(E).

[23] According to proposed Nasdaq Rule 4626(b)(3)(F)(i), ''customer compensation'' means the amount of compensation, accommodation, or other economic benefit provided or to be provided by the member to its customers (other than customers that were brokers or dealers trading for their own account) in respect of trading in Facebook on May 18, 2012.

[24] According to proposed Nasdaq Rule 4626(b)(3)(F)(ii), ''covered proprietary losses'' means the extent to which the losses reflected in the member's share were incurred by the member trading for its own account or for the account of a customer that was a broker or dealer trading for its own account.

[25] *See* proposed Nasdaq Rule 4626(b)(3)(F). In addition, each member must maintain books and records that detail the nature and amount of customer compensation and covered proprietary losses. *See id.* According to Nasdaq, it, through FINRA, would expect to examine the accuracy of a member's attestation at a later date. *See* Notice, *supra* note 3, at 45712.

[26] *See* proposed Nasdaq Rule 4626(b)(3)(H); Notice, *supra* note 3, at 45713 (explaining the purpose of the release requirement).

[27] *See* proposed Nasdaq Rule 4626(b)(3)(H).

[28] *See* proposed Nasdaq Rule 4626(b)(3)(G).

[29] *See id.*

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See supra* notes 4 and 5.

[34] *See* Triad Letter; Vandham Letter; Bram Letter; Citi Letter; SIFMA Letter; UBS Letter; Entwistle Letter; and Thompson Letter, *supra* note 4.

[35] *See* Citadel Letter and Knight Letter, *supra* note 4.

[36] *See* Angel Letter, *supra* note 4. The Angel Letter does not opine on the proposal, but rather comments more generally on what the appropriate parameters of liability should be for national securities exchanges.

[37] *See* UBS Letter, *supra* note 4, at 3–4; Vandham Letter, *supra* note 4, at 3; and Knight Letter, *supra* note 4, at 2.

[38] *See* UBS Letter, *supra* note 4, at 3.

[39] *See id.*

[40] *See* Knight Letter, *supra* note 4, at 2.

[41] *See* Vandham Letter, *supra* note 4, at 3.

[42] 15 U.S.C. 78f(b)(5).

[43] *See* Nasdaq Letter, *supra* note 5, at 5.

[44] *See id.*

Nasdaq instead remain free to do so.[45] Nasdaq also noted that the use of a release is routine in the context of a payment in settlement of a disputed claim, including those brought against regulated entities.[46] Finally, Nasdaq argued that allowing members to participate in the accommodation program without releasing Nasdaq from other claims related to the Facebook IPO Cross would, in effect, ''subsidize the costs of future litigation against itself.'' [47]

B. Nasdaq's Uniform Benchmark Price

Several commenters expressed concern with Nasdaq's calculation and use of the uniform benchmark price of $40.527 to determine the amount of compensation owed to a member under the accommodation proposal.[48] Generally, these commenters stated that, contrary to Nasdaq's assertion, a ''reasonably diligent member'' would not have mitigated losses during the first forty-five minutes after execution reports were delivered to firms.[49] More specifically, two commenters stated that the uniform benchmark price should be based on a VWAP of Facebook stock on Monday, May 21, 2012.[50]

In its response letter, Nasdaq reasserted that the use of the VWAP of Facebook stock during the 45 minute window after 1:50 p.m. is appropriate as the benchmark price because 45 minutes provided members enough time to identify and mitigate any unexpected losses or unanticipated positions.[51]

C. Nasdaq's Categories of Claim-Eligible Trading Losses

Several commenters stated that the types of orders eligible to receive compensation under the accommodation proposal are too narrowly defined.[52] Two commenters believe that Nasdaq should provide compensation for losses resulting from ''downstream operational, technological and customer issues.'' [53] One commenter stated that Nasdaq's system failures, specifically the failure to deliver execution reports for more than two hours after trading began, ''caused direct and severe damage'' to the commenter and other market participants and led to direct trading losses.[54] Another commenter argued that customer orders entered before 11:11 a.m. on May 18, 2012, that were ''cancel/replaced'' between 11:11 a.m. and 11:30:09 a.m. should be treated differently from other orders entered during such time and should be entitled to full compensation.[55]

Another commenter observed that the accommodation proposal provides no direct compensation to ''ordinary retail investors'' and does not guarantee that retail investors would receive any compensation for losses.[56] Because Nasdaq's proposal contemplates paying retail customers through Nasdaq member broker-dealers, the commenter expressed concern that there is no guarantee that compensation will ultimately be passed back to the retail investor, especially in instances where the member's ''customer'' is another broker-dealer.[57]

Nasdaq responded that the question before the Commission is only whether the proposal is consistent with the requirements of the Act.[58] Nasdaq asserted that commenters have not argued that the proposal ''discriminates unfairly'' among members or that it is otherwise inconsistent with the requirements of the Act.[59] Nasdaq stated its belief that none of the comments provide a basis for the Commission to determine that a modification to the methodology and criteria it proposed ''is necessary to remedy any inconsistency with the Exchange Act.'' [60] With respect to retail investors, Nasdaq stated that its accommodation proposal would benefit retail investors with eligible claims even though Nasdaq has no direct relationship with them.[61] Nasdaq noted that the accommodation proposal requires each member to submit an attestation detailing the amount of compensation provided or to be provided by the member to its customers.[62] Moreover, Nasdaq pointed out that accommodation payments are to be made in two tranches with the first tranche going toward retail customer claims.[63]

D. $62 Million Accommodation Pool Is Insufficient

Several commenters argued that the proposed $62 million accommodation pool is an insufficient amount to compensate market participants harmed by Nasdaq's systems issues.[64]

Nasdaq responded that commenters' objections to the amount of compensation are ''unpersuasive'' because the Commission has already determined that rules, such as existing Nasdaq Rule 4626, limiting exchange liability are consistent with the Act.[65] Accordingly, if the accommodation proposal is disapproved, Nasdaq asserted that the current limitation on liability of $500,000 would apply.[66] Nasdaq emphasized that members who believe the amount of compensation offered is insufficient or otherwise dislike the accommodation proposal may elect not to participate.[67] Nasdaq also stated that the purpose of the accommodation proposal is ''not to pay all claims of losses alleged with respect to the trading of Facebook stock,'' but rather the purpose is ''to modify an existing rule that limits Nasdaq's liability to $500,000 in order to make additional funds available to compensate members and their customers for the categories of loss

[45] *See id.*

[46] *See id.*

[47] *See id.*

[48] *See* Triad Letter, *supra* note 4, at 1–3; Vandham Letter, *supra* note 4, at 2; Bram Letter, *supra* note 4, at 1; Citi Letter, *supra* note 4, at 2 and 10. According to Nasdaq, the forty-five minutes after execution reports were delivered ''would have been ample time for a reasonably diligent member to have identified any unexpected customer losses or unanticipated customer positions, and taken steps to mitigate or liquidate them.'' *See* Notice, *supra* note 3, at footnote 24.

[49] *See* Triad Letter, *supra* note 4, at 1–3; Vandham Letter, *supra* note 4, at 2; Bram Letter, *supra* note 4, at 1; Citi Letter, *supra* note 4, at 2 and 10.

[50] *See* Triad Letter, *supra* note 4, at 1; Citi Letter, *supra* note 4, at 2 (stating that the benchmark price should be the VWAP of Facebook stock between the opening price on Monday, May 21, 2012 and the price at noon on that same day).

[51] *See* Nasdaq Letter, *supra* note 5, at 3. Specifically, Nasdaq noted that: (i) All orders and cancellations, including those entered between 11:11 a.m. and 11:30 a.m., were ''executed, cancelled, or released into the market'' by 1:50 p.m.; (ii) confirmations of all trades and cancellations had been disseminated to members by 1:50 p.m.; and (iii) Nasdaq began reporting a firm bid and ask to the tape and all data feeds were operating normally by 1:50 p.m. *See id.,* at 3–4. Nasdaq also stated that it issued a ''System Status message'' informing members that all systems were operating normally at 1:57 p.m. *See id.,* at 4.

[52] *See* UBS Letter, *supra* note 4, at 2–3; Citi Letter, *supra* note 4, at 7–10; and Vandham Letter, *supra* note 4, at 3.

[53] *See* UBS Letter, *supra* note 4, at 3; Citi Letter, *supra* note 4, at 7–10 (noting that ''[i]n some cases, investors submitted multiple redundant orders based on the belief that the orders were not going through'' and ''[i]n other cases, investors submitted cancelations before receiving order confirmations, but were stuck with the stock.'').

[54] *See* UBS Letter, *supra* note 4, at 3.

[55] *See* Vandham Letter, *supra* note 4, at 3. The commenter believes that Nasdaq's failure to properly account for cancel/replaced orders resulted in Nasdaq ''taking the profits generated from certain clients to distribute amongst a larger group.'' *See id.*

[56] *See* Thompson Letter, *supra* note 4, at 3–4.

[57] *See id.,* at 11.

[58] *See* Nasdaq Letter, *supra* note 5, at 2.

[59] *See id.*

[60] *See id.,* at 4.

[61] *See id.,* at 8.

[62] *See id.*

[63] *See id.*

[64] *See* UBS Letter, *supra* note 4, at 2 (estimating that its losses are ''in excess of $350 million'' and describing Nasdaq's proposal to pay $62 million in the aggregate as ''woefully inadequate''); *see also* Thompson Letter, *supra* note 4, at 4, 20.

[65] *See* Nasdaq Letter, *supra* note 5, at 2.

[66] *See id.*

[67] *See id.,* at 2–3.

defined in the [accommodation] [p]roposal * * * .'' [68]

E. Regulatory Immunity From Private Suits and Limitations on Liability

Several commenters stated that Nasdaq is not entitled to immunity from liability because it was acting in its ''for profit'' capacity in its handling of the Facebook IPO, rather than acting in its ''regulatory capacity'' as a self-regulatory organization.[69] However, the two commenters that supported the accommodation proposal noted that the broader issues of regulatory immunity and limitations on exchange liability should be considered separately from Nasdaq's accommodation proposal.[70]

Nasdaq responded that the Commission's task with regard to the accommodation proposal is only to determine whether the proposed rule change is consistent with the Act, and the Commission does not need to address the issue of regulatory immunity to do so.[71]

F. Applicability of Nasdaq Rule 4626

According to one commenter, market participants' losses ''resulted not from the type of ordinary system failures contemplated by Rule 4626 * * *, but rather from a known design flaw that resulted in a similar technology issue dating back to Fall 2011, as well as Nasdaq's high-risk, profit-oriented behavior prior to and during the IPO * * *'' [72] This commenter argued that it is improper to use Rule 4626 to create an accommodation fund in connection with the Facebook IPO because the losses suffered in connection with the IPO do not fall within the parameters of Rule 4626.[73]

Nasdaq emphasized in response that Rule 4626 is a pre-existing Commission approved rule and that the rule squarely applies to Nasdaq's systems issues related to the Facebook IPO.[74]

G. Impact on Pending Litigation

Two commenters expressed concern that Commission approval of the accommodation proposal might negatively impact other adjudications of disputes with Nasdaq regarding the Facebook IPO.[75] The commenters expressed concern that courts or other adjudicative bodies might interpret Commission approval of the accommodation proposal as defining or approving the classes of eligible claimants as restricted only to market participants who submitted one of the four enumerated Cross order types.[76] The Nasdaq Letter did not specifically respond to commenters' concerns on this issue.

H. Procedural Concerns

Several commenters raised procedural concerns regarding the implementation of the accommodation proposal.[77] Two commenters noted that Nasdaq should waive the one-year time limit to bring actions against Nasdaq in Sections 18(H) and 19 of its Service Agreement given the amount of time it could take to implement the compensation process set forth in the proposed rule change.[78] Three commenters stated that Nasdaq member firms should not be required to release Nasdaq from liability before member firms receive notice of a final payment amount pursuant to the accommodation proposal.[79]

Nasdaq responded that commenters' requests to extend the one-year time limit for members to bring claims against Nasdaq improperly ask the Commission to interfere with existing contractual relationships that have no bearing on whether Nasdaq Rule 4626 should be amended.[80] As for concerns that claimants might have to release their claims against Nasdaq prior to receiving compensation under the accommodation proposal, Nasdaq stated that it does not object to the release becoming effective upon payment.[81]

IV. Proceedings To Determine Whether To Approve or Disapprove SR–NASDAQ–2012–090 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [82] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[83] the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 6(b)(5) of the Act [84] requires that the rules of a national securities exchange be designed, among other things, 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; and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As discussed above, Nasdaq's accommodation proposal would amend its existing Rule 4626 to provide $62 million to compensate certain types of claims arising in connection with the Facebook IPO Cross on May 18, 2012. Further, as proposed, a Nasdaq member must execute a release of all claims by the member or its affiliates against Nasdaq or its affiliates for losses that arise out of, are associated with, or relate in any way to the Facebook IPO Cross or to any actions or omissions related in any way to that Cross in order to receive any payment under proposed Nasdaq Rule 4626(b)(3). The concerns articulated by commenters, including the limited categories of claims eligible for compensation, the method of determining losses for certain categories of eligible claims, and the requirement that a member waive all claims against

[68] *See id.,* at 4.

[69] *See* Citi Letter, *supra* note 4, at 2–4 and 12–15; SIFMA Letter, *supra* note 4, at 2–4; Thompson Letter, *supra* note 4, at 8–10.

[70] *See* Citadel Letter, *supra* note 4, at 2; Knight Letter, *supra* note 4, at 2.

[71] *See* Nasdaq Letter, *supra* note 5, at 6–7.

[72] *See* Citi Letter, *supra* note 4, at 4, 15–16.

[73] *See id.*

[74] *See* Nasdaq Letter, *supra* note 5, at 5–6.

[75] *See* Thompson Letter, *supra* note 4, at 4–8; *see also* Entwistle Letter, *supra* note 4, at 2.

[76] *See id.*

[77] *See* Citi Letter, *supra* note 4, at 16; SIFMA Letter, *supra* note 4, at 5; and Knight Letter, *supra* note 4, at 2.

[78] Section 18(H) provides ''that any claim, dispute, controversy, or other matter in question arising out of the agreement must be made no later than one year after it has arisen. Section 19 of the agreement provides that any claim, dispute, controversy, or other matter in question arising out of the agreement is expressly waived if it is not brought within that period.'' *See* SIFMA Letter, *supra* note 4, at 5; *see also* Citi Letter, *supra* note 4, at 16.

[79] *See* SIFMA Letter, *supra* note 4, at 5–6; Citi Letter, *supra* note 4, at 16; and Knight Letter, *supra* note 4, at 2.

[80] *See* Nasdaq Letter, *supra* note 5, footnote 11. Nasdaq believes that members who voluntarily choose to proceed with their claims outside of the accommodation proposal ''should do so under the terms and conditions they have agreed to, and not seek to use the Commission's notice and comment process to renegotiate their prior contractual commitments.'' *See id.*

[81] *See id.,* at footnote 9. Nasdaq also stated that it intends to implement the accommodation proposal such that a member would be aware of the results of its claim prior to being required to execute a release. *See id.*

[82] 15 U.S.C. 78s(b)(2)(B).

[83] 15 U.S.C. 78s(b)(2)(B).

[84] 15 U.S.C. 78f(b)(5).

Nasdaq or its affiliates for losses that relate to the Facebook IPO Cross, raise questions about whether the accommodation proposal would promote just and equitable principles of trade, protect investors and the public interest, and not be designed to permit unfair discrimination between market participants.[85]

Accordingly, in light of the concerns raised by commenters, the Commission believes that questions are raised as to whether Nasdaq's accommodation proposal is consistent with the requirements of Section 6(b)(5) of the Act, including whether the accommodation proposal would promote just and equitable principles of trade, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any other concerns they may have with the accommodation proposal. In particular, the Commission invites the written views of interested persons concerning whether the accommodation proposal is consistent with Section 6(b)(5)[86] or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[87]

Interested persons are invited to submit written data, views, and arguments regarding whether the accommodation proposal should be approved or disapproved by November 23, 2012. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by December 7, 2012. 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 email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2012–090 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–2012–090. This file number should be included on the subject line if email 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 accommodation proposal that are filed with the Commission, and all written communications relating to the accommodation proposal 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, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings 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–2012–090 and should be submitted on or before November 23, 2012. Rebuttal comments should be submitted by December 7, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[88]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–26857 Filed 11–1–12; 8:45 am]

BILLING CODE 8011–01–P

[85] *See supra* Sections III.A.–C.

[86] 15 U.S.C. 78f(b)(5).

[87] Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Reps. No. 75, 94th Cong., 1st Sess. 30 (1975).

[88] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68109; File No. SR–CME–2012–40]

Self-Regulatory Organizations; Chicago Mercantile Exchange Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Add One Series of Credit Default Index Swaps Available for Clearing

DATE: October 26, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 15, 2012, Chicago Mercantile Exchange Inc. (''CME'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I, II and III below, which Items have been prepared primarily by CME. CME filed the proposed rule change pursuant to Section 19(b)(3)(A)[3] of the Act and Rule 19b–4(f)(4)(i)[4] thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The text of the proposed rule change is below. *Italicized* text indicates additions; [bracketed] text indicates deletions.

* * * * *

CHICAGO MERCANTILE EXCHANGE INC. RULEBOOK

Rule 100–80203—No Change.

* * * * *

CME Chapter 802 Rules: Appendix 1

APPENDIX 1

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4)(i).