

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

#### 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2013-120 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-Phlx-2013-120*. 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 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 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 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-Phlx-2013-120 and should be submitted on or before January 13, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71098; File No. SR-NASDAQ-2013-152]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Describe the Implementation of Rule 4626(b)(3)

December 17, 2013.

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 December 9, 2013, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. 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

The Exchange is filing a proposal to describe the implementation of Rule 4626(b)(3). There is no text of the proposed rule change. The complete text of the filing is available on the Exchange's Web site at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, 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

##### I. Introduction

On March 22, 2013, the Commission approved a proposal by Nasdaq to establish a one-time voluntary accommodation policy for claims arising from system difficulties that Nasdaq experienced during the initial public offering ("IPO") of Facebook, Inc. ("Facebook" or "FB") on May 18, 2012.<sup>3</sup> Rule 4626 limits the liability of Nasdaq and its affiliates with respect to any losses, damages, or other claims arising out of the Nasdaq Market Center or its use and provides for limited accommodations under the conditions specified in the rule.<sup>4</sup> Rule 4626(b)(1) provides that for the aggregate of all claims made by market participants related to the use of the Nasdaq Market Center during a single calendar month, Nasdaq's payments under Rule 4626 shall not exceed the larger of \$500,000 or the amount of the recovery obtained by Nasdaq under any applicable insurance policy. Rule 4626(b)(2) states that for the aggregate of all claims made by market participants related to systems malfunctions or errors of the Nasdaq Market Center concerning locked/crossed compliance, trade through protection, market maker quoting, order protection, or firm quote compliance, during a single calendar month Nasdaq's payments under Rule 4626 shall not exceed the larger of

<sup>3</sup> Securities Exchange Act Release No. 69216 (March 22, 2013), 78 FR 19040 (March 28, 2013) (SR-NASDAQ-2012-090) ("Approval Order"). See also Securities Exchange Act Release No. 67507 (July 26, 2012), 77 FR 45706 (August 1, 2012) (SR-NASDAQ-2012-090) ("Proposing Release").

<sup>4</sup> Rule 4626(a) provides that except as set forth in the accommodation portion of the rule, "Nasdaq and its affiliates shall not be liable for any losses, damages, or other claims arising out of the Nasdaq Market Center or its use. 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 shall be 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."

<sup>17</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.

\$3,000,000 or the amount of the recovery obtained by Nasdaq under any applicable insurance policy. Rule 4626(b)(3) establishes a methodology for submission, evaluation, and payment of claims associated with the Facebook IPO.

On May 18, 2012, Nasdaq experienced system difficulties during the Nasdaq Halt and Imbalance Cross Process (the "Cross") for the FB IPO. These difficulties delayed the completion of the Cross from 11:05 a.m. until 11:30 a.m.<sup>5</sup> Based on its assessment of the information available at the time, Nasdaq concluded that the system issues would not have any effects beyond the delay itself. In an exercise of its regulatory authority, Nasdaq determined to proceed with the IPO at 11:30 a.m. rather than postpone it.

As a result of the system difficulties, however, certain orders for FB stock that were entered between 11:11:00 a.m. and 11:30:09 a.m. in the expectation of participating in the Cross—and that were not cancelled prior to 11:30:09 a.m.—either did not execute or executed after 1:50 p.m. at prices other than the \$42.00 price established by the Cross. (Other orders entered between 11:11:00 a.m. and 11:30:09 a.m., including cancellations, buy orders below \$42.00, and sell orders above \$42.00, were handled without incident.) System issues also delayed the dissemination of Cross transaction reports from 11:30 a.m. until 1:50 p.m. At 1:50 p.m., Nasdaq system difficulties were completely resolved.

Rule 4626(b)(3) provides that, as a result of these unique circumstances, Nasdaq will accommodate members for losses attributable to the system difficulties on May 18, 2012 in an amount not to exceed \$62 million. Rule 4626(b)(3)(A) provides that all claims for such accommodation must arise solely from realized or unrealized direct trading losses arising from the following specific Cross orders:

(i) SELL Cross orders that were submitted between 11:11 a.m. and 11:30 a.m. 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. and 11:30 a.m. 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 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.

As originally approved, Rule 4626(b)(3)(D) provided that all claims related to the FB IPO must be submitted in writing not later than 7 days after formal approval of the FB accommodation proposal by the Commission, which occurred on March 22, 2013. In recognition of the fact that the Passover and Good Friday holidays occurred during the week when claim submissions would otherwise be due, Nasdaq submitted an immediately effective proposed rule change to extend the deadline for claim submission until 11:59 p.m. on April 8, 2013.<sup>6</sup> Nasdaq received claims with respect to 75 market participant identifiers ("MPIDs") within the deadline. Nasdaq did not receive any claims after the deadline.

Rule 4626(d)(3)(D) further provides that all claims shall be processed and evaluated by the Financial Industry Regulation Authority ("FINRA"), applying the standards set forth in Rule 4626. FINRA is authorized to request such supplemental information as it deems necessary to assist its evaluation of claims.

Rule 4626(b)(3)(E) provides that FINRA shall provide to the Nasdaq Board of Directors and the Board of Directors of NASDAQ OMX an analysis of the total value of eligible claims. FINRA has provided the required analysis. The provision further requires that Nasdaq will file with the Commission a rule proposal setting forth the amount of eligible claims under the standards set forth in Rule 4626 and the amount proposed to be paid to members by Nasdaq. This proposed rule change, filed pursuant to authority delegated by the Nasdaq Board of Directors, satisfies this requirement. In addition, the proposed rule change discusses the application of Rule 4626 to certain types of claims. Finally, the proposed rule change discusses the process contemplated for payment of valid claims.

## II. FINRA Review Process

For the claim review process, FINRA established a working group consisting of FINRA Market Regulation Department analysts and managers ("FB Claims Team" or "FINRA staff"). During

the review process, the designated analysts and managers did not perform any regulatory services for any Nasdaq market, did not purchase FB stock (either in the secondary market or as part of Nasdaq's IPO opening process) and did not own FB stock.<sup>7</sup>

Following the issuance of the Approval Order, Nasdaq made each claim received by Nasdaq (including associated worksheets) available to FINRA by means of an encrypted shared access folder. The FB Claims Team copied the claims and stored them on a FINRA network folder. Access to the FINRA network folder was limited to FINRA staff directly working on the FB claim review process. Throughout the process, the FB Claims Team reconciled with Nasdaq staff the number of claims. After the window for submitting claims closed on April 8, 2013, the FB Claims Team held a meeting with a representative of Nasdaq to verify that each claim received by Nasdaq had been copied to the FINRA network folder.

Upon receipt of a claim, a manager in the FB Claims Team performed a preliminary review of the claim to determine if the information submitted appeared to be accurate and complete per the criteria set forth in the rule filing. For each claim a matter was opened in a FINRA database and the matter was linked back to the claimant's submission for internal tracking purposes.<sup>8</sup>

In several instances, FB Claims Team staff contacted the firm filing the claim to obtain additional information or confirm certain information provided within its claim worksheet. A dedicated email address was established to facilitate all electronic communications with firms. Access to the mailbox was limited to those staff directly working on the FB claim review process.

To assist the FB Claims Team, staff within FINRA's Market Regulation Department developed scripts to retrieve order and execution information related to each order listed on the individual claim worksheets. The

<sup>7</sup> A Steering Committee, composed of members of senior management of the Market Regulation Department, provided guidance to the FB Claims Team on the resolution of process and substantive issues arising during the course of the FB claim evaluation process, reviewed the form and content of the review summary forms for each claim, and monitored the overall progress of the claim review effort. However, members of the Steering Committee did not participate in the FB Claim Team's assessment of and decisions to recommend the approval or disapproval of individual claims.

<sup>8</sup> If a member firm submitted a claim with multiple MPIDs, the FB Claims staff opened one matter in the tracking system. In the case of claims involving sponsored access arrangements, the FB Claims staff opened one matter in the tracking system under the sponsoring firm.

<sup>6</sup> Securities Exchange Act Release No. 69250 (March 28, 2013), 78 FR 20160 (April 3, 2013) (SR-NASDAQ-2013-055).

<sup>5</sup> All times in this filing are Eastern Time.

FB Claims Team was provided with the complete Nasdaq SingleBook order lifecycle, including execution messages, for each IPO Cross order and any corresponding Order Audit Trail System (“OATS”) order lifecycles. This information was posted on the same FINRA network where the claim worksheets were stored. Market Regulation staff providing technology support also provided additional data to validate the covering trade information provided by the firms and assisted with ad hoc queries, upon the request of the FB Claims Team. The Market Regulation Department staff providing technology support to the FB Claims Team did not perform any assessment of the eligibility of any individual orders in the claims or make any determination as to whether any such orders were entitled to any accommodation.

The FB Claims Team staff reviewed the information provided by Market Regulation Department technology support staff and compared the information to the order information provided by the firms. In certain instances, staff contacted firms to request additional information or obtain clarification regarding any issues.

After completing the analysis of each order listed in the claim, one of the assigned analysts prepared a review summary memo for supervisory review. The summary memo contained a report of findings, which included sections regarding: (a) The order information; (b) the direct trading losses calculation by the firm; (c) the staff’s analysis of the order information broken out by category; and (d) the staff’s direct trading losses calculation. Each review summary memo was submitted for two levels of supervisory review.

After receiving FINRA’s review summary memos for each claim, Nasdaq reviewed and determined that it concurred with FINRA’s analysis. Thereafter, on October 25, 2013, Nasdaq transmitted to members that had submitted claims the results of the analysis for their claims. Based on questions it then received from several members, Nasdaq concluded that there may have been some confusion regarding the scope of permissible claims based on Cross orders to BUY priced at \$42. Accordingly, in an effort to ensure that all potential valid claims were fully considered, on November 4, 2013, Nasdaq contacted all claimants to provide them the opportunity to provide FINRA with additional information to support claims with regard to these orders. As a result of this process, the FB Claims Team prepared supplemental review summary memos with respect to several claims. Nasdaq reviewed and

determined that it concurred with FINRA’s analysis, and the supplemental review summary memos were transmitted to affected members on December 6, 2013.

### III. Results

The first category of covered claims, as provided in Rule 4626(b)(3)(A)(i), is SELL Cross orders that were submitted between 11:11 a.m. and 11:30 a.m. on May 18, 2012, that were priced at \$42 or less, and that did not execute (“Category I”). Sellers who entered orders priced at \$42.00 or less between 11:11 a.m. and 11:30 a.m. would have expected their orders to execute in the Cross, because the Net Order Imbalance Indicator (“NOI”) disseminated by Nasdaq indicated that the relative proportion of buy and sell interest would allow the execution, at a price of \$42, of all sell orders priced at \$42 or less. Accordingly, if such orders did not execute due to Nasdaq’s system difficulties, the member entering the order would incur a loss. Under Rule 4626(b)(3)(B), the measure of loss for such orders is the lesser of (i) the differential between the expected execution price of \$42 and the actual execution price received, or (ii) the differential between the expected execution price of \$42 and a benchmark price of \$40.527, which constitutes the volume-weighted average price of FB stock on May 18, 2012, between 1:50 p.m. and 2:35 p.m. (the “Benchmark Price”).

Nasdaq received claims with respect to 791 orders in Category I. FINRA’s analysis has determined that claims with respect to 784 of these orders were valid under the terms of the rule, and Nasdaq concurs in this determination. The aggregate value of the valid claims is \$20,364,741.96.

The second category of covered claims, as provided in Rule 4626(b)(3)(A)(ii), is SELL Cross orders that were submitted between 11:11 a.m. and 11:30 a.m. on May 18, 2012, that were priced at \$42 or less, and that executed at a price below \$42 (“Category II”). Sellers who entered orders priced at \$42.00 or less between 11:11 a.m. and 11:30 a.m. would have expected their orders to execute in the Cross. Accordingly, if such orders executed at a price less than \$42 due to Nasdaq’s system difficulties, the member entering the order would incur a loss. Under Rule 4626(b)(3)(B), the measure of loss for such orders is the differential between the expected execution price of \$42 and the actual execution price received.

Nasdaq received claims with respect to 242 orders in Category II. FINRA’s

analysis has determined that claims with respect to 238 of these orders were valid under the terms of the rule, and Nasdaq concurs in this determination. The aggregate value of the valid claims is \$9,990,901.52.

The third category of covered claims, as provided in Rule 4626(b)(3)(A)(iii), is BUY Cross orders priced at exactly \$42 and that were executed in the Cross but not immediately confirmed (“Category III”). Buyers who entered orders priced at exactly \$42 would not have an expectation as to whether their orders would execute in the Cross, since the NOI disseminated by Nasdaq indicated that the relative proportion of buy and sell interest would not allow the execution of all buy orders priced at \$42. Accordingly, due to the delay of the dissemination of confirmations until 1:50 p.m., such buyers may have placed and received fills of orders to buy additional FB stock. Alternatively, given the uncertainty as to whether these orders would be executed in the Cross, a member may have allowed its customer to cancel before 1:50 p.m., such that the member would have excess shares when confirmation that the order was filled was provided at 1:50 p.m.

The text of Rule 4626(b)(3)(A)(iii) does not directly state that having excess shares through a duplicative buy order or a cancel is a necessary condition for compensation to be received under this category. The examples provided in explaining the purpose of SR-NASDAQ-2012-090 make this condition clear, however.<sup>9</sup> Specifically, in the absence of one of these conditions resulting in an unexpected long position, the member would either have been able to buy FB at a lower price, if it was not filled in the Cross, or would have received the price it sought in the Cross, and therefore any loss would be purely speculative in nature. See Rule 4626(b)(3)(C) (excluding coverage for “alleged or speculative lost trading opportunities”). Accordingly, Nasdaq has instructed FINRA to apply the rule

<sup>9</sup> “Market participants who entered Cross-only eligible buy orders priced exactly at \$42.00 that executed in the Cross but that were not confirmed until 1:50 p.m. could not have been sure whether their orders had been executed because the number of buy and sell limit shares priced at the clearing price and wishing to be matched in the Cross is never exactly equal. Consequently, in the interval between 11:30 a.m. and 1:50 p.m., these buyers may have purchased shares in the continuous market, and upon receiving Cross execution messages at 1:50 p.m., they may have experienced an unexpected long position. The sale of such an unexpected long position at a lower price would have occasioned a loss.” Proposing Release, 77 FR at 45710. See also Proposing Release, 77 FR at 47511 (Example 6 and Example 7).

in a manner that requires cancellations or additional purchase(s) during the period prior to 1:50 p.m. for the claim to be compensable. Under Rule 4626(b)(3)(B), the applicable measure of loss is the lesser of (i) the differential between the expected execution price of \$42 and the actual execution price received, or (ii) the differential between the expected execution price of \$42 and the Benchmark Price.<sup>10</sup>

Following the completion of initial assessments of members' claims, Nasdaq concluded that there may have been some confusion regarding the conditions associated with Category III. Accordingly, in an effort to ensure that all potential valid claims were fully considered, on November 4, 2013, Nasdaq contacted all claimants to provide them the opportunity to provide FINRA with additional information to support claims with regard to these orders. Nasdaq received claims with respect to 13,123 orders. FINRA's analysis has determined that claims with respect to 6,644 of these orders were valid under the terms of the rule,<sup>11</sup> and Nasdaq concurs in this determination. The aggregate value of the valid claims is \$2,971,394.13.

The fourth category of covered claims, as provided in Rule 4626(b)(3)(A)(iv), is BUY Cross orders priced above \$42 and that were executed in the Cross but not immediately confirmed, but only to the extent entered with respect to a customer 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 by the member, also prior to 1:50 p.m. ("Category IV"). Nasdaq believes that members that took such actions were reasonably attempting to assist their own customers in responding to the delayed dissemination of Cross transaction reports, and that such members further attempted to communicate their actions to Nasdaq through the submission of cancellations. When the member received confirmation of the execution of the customer's order at 1:50 p.m., the member held shares for which it no longer had a recipient. Under Rule 4626(b)(3)(B), the applicable measure of loss is the lesser of (i) the differential

between the expected execution price of \$42 and the actual execution price received, or (ii) the differential between the expected execution price of \$42 and the Benchmark Price. In this category, however, the outcome was affected not only by Nasdaq system issues, but also by the member's affirmative decision not to await the dissemination of confirmations, despite the fact that the member should reasonably have expected the order to be filled. Accordingly, Rule 4626(b)(3)(B) provides that a portion of the associated losses will be borne by the members, with the amount of compensable loss reduced by 30%.

Nasdaq received claims with respect to 44,966 orders in Category IV. FINRA's analysis has determined that claims with respect to 40,397 of these orders were valid under the terms of the rule, and Nasdaq concurs in this determination. The aggregate value of the valid claims, as reduced by 30% for the reasons described above, is \$10,702,864.00.

For a particular member, the total of valid claims under Category I, Category II, Category III, and Category IV is referred to as the "Member's Share". The sum of the Member's Share for all members, which constitutes the maximum amount payable under Rule 4626 with respect to the FB IPO, is \$44,029,901.61.

For several reasons, this amount is less than the maximum accommodation pool of \$62 million provided for in the rule. First, as has been widely reported in the press, one member that was eligible to file a claim under Rule 4626 opted to forego participation in the program and instituted an arbitration proceeding against Nasdaq.<sup>12</sup> Second, as detailed above, claims with respect to certain orders did not satisfy the requirements of the rule. Notably, in some instances, claims for compensation under Category III did not satisfy the rule because there were not excess shares at 1:50 p.m., and claims for compensation under Category IV did not satisfy the rule because the member did not permit its customer to cancel its order prior to 1:50 p.m. or did not submit a request to cancel to Nasdaq prior to 1:50 p.m. Although Nasdaq's systems provided it with information about the size, price, and entry time of orders submitted to the Cross, as well as the ultimate disposition of those orders, Nasdaq did not have information about the customer-facing activities of its

members. Accordingly, in establishing the maximum value of an accommodation pool, Nasdaq needed to assume that all orders in the Cross with the price and entry times specified by the rule might provide the basis for a valid claim. However, for the reasons described above, other actions (*i.e.*, duplicative BUYS or customer cancellations) are required for harm to exist. In conducting its analysis, FINRA fully evaluated claims to determine whether such actions were taken. Accordingly, certain orders in the Cross did not actually provide a basis for a claim. Finally, Nasdaq believes that some members with BUY orders in the Cross did not file claims with respect to such orders because they understood that they had not taken actions that would provide the basis for a valid claim, while other members with *de minimis* potential claims also chose not to file.

#### IV. Payment Process

As discussed in the Proposing Release, Nasdaq's business and legal relationships are with its members, not its members' customers. Nasdaq has no contractual or other relationships with its members' customers, and generally does not possess information about interactions between a member and its customer that may underlie members' trading activity. Nevertheless, in adopting the FB accommodation rule, Nasdaq was mindful that member's customers were impacted by the processing of member orders in the FB Cross. Accordingly, Rule 4626 requires that to the extent that a member receiving accommodation thereunder had customers that incurred losses, accommodation payments received by members from Nasdaq must be used for the benefit of such customers.

Accordingly, as provided in Rule 4626(b)(3)(F), all accommodation payments are contingent upon a member's submission to Nasdaq, not later than seven days after the effective date of this proposed rule change, an attestation detailing:

(i) 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 Inc. on May 18, 2012 ("Customer Compensation"), and

(ii) the extent to which the losses reflected in the Member's Share<sup>13</sup> were incurred by the member trading for its

<sup>10</sup> The measure is premised on the expectation that the customer or proprietary account on whose behalf the trade was made received a fill or submitted a cancellation prior to 1:50 p.m., making the fill of the Cross order at 1:50 p.m. the unexpected long position that needed to be covered. Thus, the difference between the \$42 price of the Cross order and the lesser of the actual execution price associated with selling this position or the Benchmark Price is an appropriate measure of the member's covered loss.

<sup>11</sup> Claims reviewed in the supplemental process were considered under Category III.

<sup>12</sup> See "UBS Challenges Nasdaq's Facebook IPO Plan" (March 25, 2013) (available at <http://blogs.wsj.com/deals/2013/03/25/ubs-challenges-nasdaqs-facebook-ipo-plan>).

<sup>13</sup> Defined specifically as a member's direct trading losses calculated in accordance with paragraphs (b)(3)(A) and (B) of the proposed rule.

own account or for the account of a customer that was a broker or dealer trading for its own account ("Covered Proprietary Losses").

As of October 25, 2013, Nasdaq provided each member that submitted a claim with an initial analysis of the value of its claim, *i.e.*, the value of its Member's Share, along with the required form of attestation. Thereafter, in an effort to ensure that all potential valid claims were fully considered, on November 4, 2013, Nasdaq contacted all claimants to provide them the opportunity to provide FINRA with additional information to support claims, as discussed above. As a result of this process, FINRA prepared supplemental review summary memos with respect to several claims, and the supplemental review summary memos were transmitted to affected members on December 6, 2013. Accordingly, all claimants are in a position to provide the required attestation by December 16, 2013, the deadline mandated by the rule. As provided in Rule 4626(b)(3)(F), failure to provide the required attestation within the specified time limit will void the member's eligibility to receive an accommodation under the rule. Each member is also required to maintain books and records that detail the nature and amount of Customer Compensation and Covered Proprietary Losses. Nasdaq, through FINRA, its regulatory services provider, will examine the accuracy of member's attestation at a later date.

Rule 4626(b)(3)(G) provides that accommodation payments will be made in two tranches of priority:

(i) First, if a member has provided Customer Compensation, the member will receive an amount equal to the lesser of the Member's Share or the amount of Customer Compensation. For example, if a Member's Share was \$1 million, and the member had paid, or had committed to pay, compensation to its customers of at least \$1 million, the member's expected accommodation would be \$1 million. On the other hand, if the Member's Share was \$1 million, but the member had paid, or committed to pay, only \$500,000 in compensation to its customers, the member's accommodation in the first tranche would be only \$500,000.

(ii) Second, the member will receive an amount with respect to Covered Proprietary Losses; provided, however, that the sum of payments to a member under the rule shall not exceed the Member's Share. If a member had both Covered Proprietary Losses and losses associated with customer business, it may receive distributions under both tranches. For example, if a Member's

Share was \$1 million, the member had \$300,000 in Covered Proprietary Losses, and the member had provided \$300,000 in Customer Compensation, the member's expected accommodation would be \$600,000 in total.

Alternatively, if the member had \$300,000 in Covered Proprietary Losses and had provided \$700,000 or more in Customer Compensation, the member's expected accommodation would be \$1 million.

Rule 4626(b)(3)(G) further provides that in the event the amounts calculated under the tranches exceed the maximum accommodation pool of \$62 million, amounts paid would be prorated in accordance with the formula described in the rule. Because the total amount of valid claims as determined by FINRA does not exceed \$62 million, Nasdaq expects to pay both tranches simultaneously without proration of claims.

One notable issue that arose in the application of the Rule to certain claims was the appropriate treatment of claims for orders entered into Nasdaq under a sponsored access arrangement. Rule 4626(b)(3)(A) provides that "the term 'customer' shall be construed to include any unaffiliated entity upon whose behalf an order is entered, including any unaffiliated broker or dealer." Nasdaq rules permit the existence of sponsored access arrangements, but require oversight by the sponsor, which is required to be a member. *See* Nasdaq Rule 4611(d). An order entered under a sponsored access arrangement is entered through an MPID belonging to the sponsor, even though it originates from the sponsoree. Thus, the order may be construed as being entered by the sponsor on behalf of the sponsoree, causing the sponsoree to fit within the definition of "customer." A claim with respect to orders entered under a sponsored access arrangement would be paid to the sponsor, subject to its certification that it would provide the funds as Customer Compensation to the sponsoree.<sup>14</sup>

Rule 4626(b)(3)(H) provides that final payment of any accommodation payment is 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 FB IPO Cross or to any actions or omissions related in any way to that

<sup>14</sup> For Category IV claims, if the sponsoree itself had customer(s) permitted to cancel order(s) prior to 1:50 p.m., and the sponsoree in fact submitted a cancellation to NASDAQ prior to 1:50 p.m., the claim would be construed as valid. This fact pattern did not occur in any of the filed claims, however.

Cross, including but not limited to the execution or confirmation of orders in FB on May 18, 2012. Failure to provide the release within 14 days after the effective date of this proposed rule change (*i.e.*, by December 23, 2013) will void the member's eligibility to receive an accommodation under the Rule. The release also includes an attachment whereby the claimant may provide Nasdaq with payment instructions. Nasdaq will pay all valid claims in accordance with the payment instructions provided, immediately upon the expiration of the 60-day time period during which this filing is subject to suspension by the Commission. By its terms, the release will be effective on the date on which payment to the member is provided in accordance with the payment instructions provided.

This proposed rule change is not intended to and does not affect the limitations of liability set forth in Nasdaq's agreements or SEC-sanctioned rules,<sup>15</sup> or those limitations or immunities that bar claims for damages against Nasdaq as a matter of law. Rather, they reflect Nasdaq's determination to implement a fair and equitable accommodation policy that takes into account the impacts of Nasdaq's system issues on the investing public and members.

## 2. Statutory Basis

Nasdaq believes that the accommodation proposal is consistent with Section 6(b) of the Act<sup>16</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>17</sup> in particular, because the proposal is

<sup>15</sup> Notably, the Commission has repeatedly determined that rules limiting SRO liability, such as Rule 4626(a), are consistent with the Act. *See, e.g.*, BATS Exchange and BATS-Y Exchange Rules 11.16; C2 Options Exchange Rule 6.42; CBOE Options Exchange Rule 6.7; CME Rule 578; EDGA and EDGX Rules 11.12; ISE Rule 705; NASDAQ OMX PHLX Rule 3226; NASDAQ OMX BX Rule 4626; NYSE Rules 17 and 18; NYSE MKT Rule 905NY; NYSE Arca (Options) Rule 14.2; NYSE Arca (Equity) Rule 13.2; One Chicago Rule 421.

<sup>16</sup> 15 U.S.C. 78f(b) (setting forth the prerequisites for registration as a national securities exchange).

<sup>17</sup> 15 U.S.C. 78f(b)(5) (requiring that an exchange's rules be "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; and not [be] designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange").

designed to promote just and equitable principles of trade, 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. In the Approval Order, the Commission found that Rule 4626(b)(3) is consistent with the Act because it “sets forth objective and transparent processes to determine eligible claims and how such claims would be paid to Nasdaq members that elect to participate in the accommodation plan.” The Commission further determined that providing compensation pursuant to the rule would be in the public interest and that the rule would encourage members to compensate their customers. Similarly, Nasdaq believes that this proposed rule change is consistent with the Act because it will allow Nasdaq to accomplish the approved objectives of the Rule 4626(b)(3) through final payment of eligible claims. As described above, FINRA, in its role as a neutral third party, has conducted an exhaustive analysis of submitted claims, measuring relevant data against the rule’s objective benchmarks to ascertain the value of each member’s claims, and Nasdaq has reviewed and concurs in FINRA’s analysis. Based on this analysis, and subject to completion by claimants of the remaining conditions to payment, Nasdaq will be able to pay the full amount of valid claims immediately upon the expiration of the 60-day time period during which this filing is subject to suspension by the Commission.

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

Nasdaq believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the proposed rule change does not relate to the provision of goods or services, nor does it impose regulatory restrictions on the ability of members to compete. Accordingly, the change does not affect competition in any respect.

#### *C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

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

Because the foregoing proposed rule change does not: (i) Significantly affect

the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>18</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>19</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

#### **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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2013-152 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-2013-152. 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 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 Web site viewing and printing in the Commission’s Public Reference Room, 100 F Street NE., Washington, DC 20549-1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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-2013-152, and should be submitted on or before January 13, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Kevin M. O’Neill,**

*Deputy Secretary.*

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### **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-71087; File No. SR-Topaz-2013-17]**

#### **Self-Regulatory Organizations; Topaz Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Market Data Offerings**

December 17, 2013.

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 December 5, 2013, Topaz Exchange LLC (d/b/a ISE Gemini) (the “Exchange” or “Topaz”) 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. Topaz has designated the proposed rule change as constituting a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4 under the Act,<sup>3</sup> which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>20</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).

<sup>18</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

<sup>19</sup> 17 CFR 240.19b-4(f)(6).