SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92600; File No. SR–NASDAQ–2021–057]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NOM's Options Regulatory Fee

August 6, 2021.

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 August 5, 2021, 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 and II, 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 Substance of the Proposed Rule Change

The Exchange proposes to amend The Nasdaq Options Market LLC's (''NOM'') Pricing Schedule at Options 7, Section 5 related to the Options Regulatory Fee or ''ORF''.

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on October 1, 2021.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* 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

Currently, NOM assesses an ORF of $0.0020 per contract side as specified in NOM's Pricing Schedule at Options 7, Section 5. The Exchange proposes to waive its ORF from October 1, 2021 to January 31, 2022, and then recommence the ORF on February 1, 2022.

By way of background, the options industry has experienced extremely high options trading volumes and volatility. This historical anomaly of persistent increased options volumes has impacted NOM's ORF collection which, in turn, has caused the Exchange to continue to revisit its financial forecast to reflect the sustained elevated options volumes and volatility. As the Exchange continues to monitor the amount of revenue collected from the ORF to ensure that our ORF collection, in combination with other regulatory fees and fines, does not exceed regulatory costs, the Exchange has found it difficult to determine when volumes will return to more normal levels. In order to avoid iterative rule changes to amend its ORF, the Exchange believes it is prudent to instead waive its ORF from October 1, 2021 to January 31, 2022, to permit the Exchange to plan future forecasts without the need to account for any ORF collection during that timeframe. This proposal would ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would not exceed the Exchange's total regulatory costs. NOM would recommence assessing its current ORF rate of $0.0020 per contract side as of February 1, 2022. Furthermore, prior to February 1, 2022, NOM will examine its ORF rate to determine if the $0.0020 per contract side ORF is justified given the current volumes in 2022 as well as the current Exchange regulatory expenses at that time. NOM would file a proposed rule change to amend its per contract ORF if changes are necessary to ensure an equitable allocation of reasonable ORF, if *e.g.,* the Exchange believes that the volumes NOM experiences in the second half of 2021 are likely to persist throughout 2022. Of note, NOM proposes to continue to operate with the ORF fee waived in January 2022 to allow its Participants[3] and other broker dealers time to align their systems for February 1, 2022, allowing for time after the holiday period which traditionally have year-end code freezes in place.

Collection of ORF

Currently, NOM assesses its ORF for each customer option transaction that is either: (1) Executed by a Participant on NOM; or (2) cleared by a NOM Participant at The Options Clearing Corporation (''OCC'') in the customer range,[4] even if the transaction was executed by a non-Participant of NOM, regardless of the exchange on which the transaction occurs.[5]

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of Participant customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as Office of the General Counsel, technology, and internal audit. Indirect expenses are estimated to be approximately 42% of the total regulatory costs for 2021. Thus, direct

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

[2] 17 CFR 240.19b–4.

[3] The term ''Options Participant'' or ''Participant'' mean a firm, or organization that is registered with the Exchange pursuant to Options 2A of these Rules for purposes of participating in options trading on NOM as a ''Nasdaq Options Order Entry Firm'' or ''Nasdaq Options Market Maker''. *See* Options 1, Section 1(a)(39). All NOM Participants must be an existing member or become a member of the Exchange, pursuant to the 1000 rules series, and continue to abide by the requirements of the 1000 Series with respect to participation in NOM. *See* Options 2A, Section 1(b)(3).

[4] Participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that Participants mark orders with the correct account origin code.

[5] The Exchange uses reports from OCC when assessing and collecting the ORF.

expenses are estimated to be approximately 58% of total regulatory costs for 2021.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange proposes to waive ORF from October 1, 2021 to January 31, 2022, to help ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. NOM would recommence assessing its current ORF rate of $0.0020 per contract side as of February 1, 2022. The Exchange issued an Options Trader Alert on July 2, 2021 indicating the proposed rate change for October 1, 2021.[6]

The proposed waiver is based on recent options volume which has remained at abnormally and unexpectedly high levels. Options volume in 2021 remains significantly high when that volume is compared to 2019 and 2020 options volume. For example, total options contract volume in November 2020 was 71% higher than the total options contract volume in November 2019.[7] Below is industry data from OCC [8] which illustrates the significant increase in volume during the fourth quarter of 2020.

Volume	October 2020	November 2020	December 2020	Q4 2020
Total	633,365,184	673,660,858	753,568,354	2,060,594,396
Customer	587,707,301	630,297,252	708,037,956	1,926,042,509
Total ADV	28,789,326.55	33,683,042.90	34,253,107.00	32,196,787.44
Customer ADV	26,713,968.23	31,514,862.60	32,183,543.45	30,094,414.20

Below is industry data from OCC [9] which illustrates the significant increase in volume from January 2021 through March 2021. The options volume in the first quarter of 2021 was higher than the fourth quarter of 2020. Also, April and May 2021 volumes remain significantly high as compared to 2020 options volume in general.

Volume	January 2021	February 2021	March 2021	April 2021	May 2021
Total	838,339,790	823,412,827	898,653,388	711,388,828	718,368,993
Customer	784,399,878	782,113,450	837,247,059	667,208,963	659,913,862
Total ADV	44,123,146.84	43,337,517.20	39,071,886.40	33,875,658.50	35,918,449.70
Customer ADV	41,284,204.11	41,163,865.79	36,402,046.04	31,771,855.38	32,995,693.10

As a result of the historical anomaly created by these high options volumes, NOM has no assurance that the Exchange's final costs for 2021 will not differ materially from these expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue being generated utilizing the current ORF rate may result in revenue in excess of the Exchange's estimated regulatory costs for the year. Particularly, as noted above, the options market has seen a substantial increase in volume in 2021 as compared to 2020, due in large part to the continued extreme volatility in the marketplace as a result of the COVID–19 pandemic. This unprecedented spike in volatility resulted in significantly higher volume than was originally projected by the Exchange (thereby resulting in substantially higher ORF revenue than projected). The Exchange therefore proposes to waive ORF from October 1, 2021 to January 31, 2022 to ensure it does not exceed its regulatory costs for 2021. Particularly, the Exchange believes that waiving ORF from October 1, 2021 to January 31, 2022 and considering all of the Exchange's other regulatory fees and fines would allow the Exchange to continue covering a material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the current rate.[10]

NOM would recommence assessing its current ORF rate of $0.0020 per contract side as of February 1, 2022. Until October 1, 2021, the Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange would also continue monitoring the amount of revenue collected from the ORF when it recommences assessing ORF on February 1, 2022. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission and notifying [11] its Participants via an Options Trader Alert.[12]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act. [13] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act, [14] which provides that Exchange rules may provide for the equitable allocation of reasonable dues,

[6] *See* Options Trader Alert 2021–41.

[7] *See* data from OCC at: *https://www.businesswire.com/news/home/20201202005584/en/OCC-November-2020-Total-Volume-Up-71-Percent-From-a-Year-Ago.*

[8] *See* data from OCC at: *https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Volume-by-Account-Type.*

[9] *Id.*

[10] The Exchange notes that its regulatory responsibilities with respect to Participant compliance with options sales practice rules have largely been allocated to FINRA under a 17d–2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

[11] The Exchange will provide Participants with such notice at least 30 calendar days prior to the effective date of the change.

[12] The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange's projected regulatory revenue, including projected revenue from ORF, along with a projected regulatory expenses.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4).

fees, and other charges among its members, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [15] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee waiver is reasonable because customer transactions will be subject to no ORF from October 1, 2021 to January 31, 2022. Moreover, the proposed waiver is necessary, so the Exchange does not collect revenue in excess of its anticipated regulatory costs, in combination with other regulatory fees and fines, which is consistent with the Exchange's practices.

The Exchange designed the ORF to generate revenues that would be less than the amount of the Exchange's regulatory costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may be collecting revenue in excess of its regulatory costs. Indeed, the Exchange notes that when considering the recent options volume, which included an increase in customer options transactions, it estimates the ORF may generate revenues that may cover more than the approximated Exchange's projected regulatory costs. As such, the Exchange believes it's reasonable and appropriate to waive ORF from October 1, 2021 to January 31, 2022 and recommence assessing ORF on February 1, 2022.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory as no Participant would be assessed an ORF from October 1, 2021 to January 31, 2022. While the Exchange has assessed and collected ORF from January through September, 2021, but will not collect ORF, with this proposal, from October 2021 through January 2022, the Exchange does not believe that it is unfairly discriminatory to not assess the ORF from October 2021 through January 2022 because the ORF is designed and intended to recover a portion of the Exchange's regulatory costs without collecting in excess of those costs.

Unexpectedly high and sustained customer volume has resulted in higher revenues from the ORF that, if not suspended, will likely result in over-collection of ORF, which would be inconsistent with the Exchange's prior representations and undertaking to not collect ORF in excess of regulatory expenses. The Exchange did not decrease the amount of the ORF earlier in 2021 because it did not expect, based on its prior experience, that customer volume would remain abnormally high. Also, it is equitable and not unfairly discriminatory to recommence the assessment of the ORF on February 1, 2022 because assessing the ORF to each Participant for options transactions cleared by OCC in the customer range where the execution occurs on another exchange and is cleared by aa NOM Participant is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.[16]

The Exchange believes recommencing the ORF on February 1, 2022 at the same rate, unless options volumes at that time warrant a proposed rule change, continues to ensure fairness by assessing higher fees to those Participants that require more Exchange regulatory services based on the amount of customer options business they conduct. As noted in prior ORF rule changes which set the current ORF rate of $0.0020 per contract side, regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (*e.g.,* staff expenses), as well as investigations into customer complaints and the terminations of registered persons.[17]

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that this proposal creates an unnecessary or inappropriate intra-market or inter-market burden on competition for several reasons. First, ORF has been amended several times since its inception in 2011.[18] For example, NOM amended its ORF rate from $0.0021 to $0.0027 per contract side as of August 1, 2017. Participants who either executed a transaction on NOM or cleared a transaction at OCC in the customer range would have been assessed a higher ORF for a transaction executed on NOM on August 1, 2017 ($0.0027 per contract side) as compared to July 31, 2017 ($0.0021 per contract side). There have been ORF amendments which have caused NOM to assess different ORF rates to Participants for different time periods causing Participants to have paid different ORFs since 2011. For example, if NOM received payment of a fine from a disciplinary action, that fine would offset regulatory costs and would cause NOM to require less regulatory revenue for a particular period. The changing regulatory costs would impact the ORF assessed by NOM to Participants. In the past, the Exchange has amended ORF to be higher or lower,[19] thereby impacting the amount paid by Participants in a calendar year. Third, options markets assess ORF at different rates. For

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

[16] If the OCC clearing member is a NOM Participant, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not a NOM Participant, ORF is collected only on the cleared customer contracts executed at NOM, taking into account any CMTA instructions which may result in collecting the ORF from a non-member.

[17] *See* Securities Exchange Act Release No. 81344 (August 8, 2017), 82 FR 37955 (August 14, 2017) (SR–NASDAQ–2017–068) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Revise the NASDAQ Options Market LLC Rules Regarding the Options Regulatory Fee). The Exchange also noted in this rule change that, ''As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the Customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-Customer component (*e.g.* Participant proprietary transactions) of its regulatory program.'' *See* 82 FR 37956. Further, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its Participants, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group (''ISG'') the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its Participants.

[18] *See* Securities Exchange Act Release Nos. 81344 (August 8, 2017), 82 FR 37955 (August 14, 2017) (SR–NASDAQ–2017–068); 78360 (July 19, 2016), 81 FR 48475 (July 25, 2016) (SR–NASDAQ–2016–096); and 76950 (January 21, 2016), 81 FR 4687 (January 27, 2016) (SR–NASDAQ–2016–003).

[19] *Id.*

instance, today, Nasdaq MRX, LLC (''MRX'') assesses a lower ORF of $0.0004 per contract side.[20] MRX has assessed this rate since February 1, 2019.[21] Depending on where a customer order is executed, a Participant could be assessed a much different ORF. For example, in the case where a customer order is sent to NOM and routed to MRX, and a non-Participant cleared that transaction, the NOM ORF of $0.0020 would not be assessed to the Participant who executed the transaction or cleared the transaction, rather the MRX rate of $0.0004 per contract side would be assessed. In that same scenario presuming a non-Participant cleared the transaction, if the customer order could have executed on NOM instead of routing away the Participant would have been assessed the NOM ORF of $0.0020 per contract side. The customer, in that instance, would have no knowledge of where the order could be executed, as the liquidity profile of each exchange may differ at that exact moment. Therefore, Participants could be assessed a different ORF on the same day on the same transaction based on routing decisions, and in those cases the Participant would continue to benefit from the regulatory program available on each market and discover where the liquidity is available, irrespective of any ORF rate differentials across markets.

The Exchange believes recommencing the ORF on February 1, 2022 at the same rate, unless options volumes or the Exchange's regulatory expenses at that time warrant a proposed rule change, does not create an undue burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. Recommencing the assessment of the current ORF does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

[20] *See* Securities Exchange Act Release Nos. 85127 (February 13, 2019), 84 FR 5173 (February 20, 2019) (SR–MRX–2019–03).

[21] Of note, prior to February 1, 2019, MRX assessed no ORF thereby creating a calendar year where Participants were assessed no ORF for a period similar to what is proposed.

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[22] of the Act and subparagraph (f)(2) of Rule 19b–4[23] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[24] of the Act to determine whether the proposed rule change 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.* Please include File No. SR–NASDAQ–2021–057 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. SR–NASDAQ–2021–057. 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 website (*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 website 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NASDAQ–2021–057, and should be submitted on or before September 2, 2021.

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f)(2).

[24] 15 U.S.C. 78s(b)(2)(B).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–17177 Filed 8–11–21; 8:45 am]

BILLING CODE 8011–01–P

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–433, OMB Control No. 3235–0489]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rule 17a–6

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information provided for in Rule 17a–6 (17 CFR 240.17a–6) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). The Commission plans to submit this existing collection of information to