to [the Application] dedicated to processing Benchmark Orders.'' [64]

The Commission believes that one significant difference between Benchmark Orders and existing NASDAQ or other exchange orders is that the Benchmark Order is not initially directed to the NASDAQ matching engine for potential execution, but instead is directed to the Application for further processing and the generation of Child Orders, to be routed to the NASDAQ matching engine or another trading center. Thus, NASDAQ's proposed Benchmark Order is not an exchange order in the traditional sense, in that it would not immediately enter the Exchange's order book (*i.e.,* NASDAQ Market Center) [65] for potential execution. Instead, it essentially is an instruction that would reside outside of the matching engine and be processed by an Application, which would then route orders to NASDAQ, or another trading venue, using a selected algorithm, over a particular period of time, to achieve a particular objective.

Because NASDAQ is proposing to offer a novel order type designed to compete with services offered by broker-dealers, the Commission must consider, among other things, whether the proposed rule change would impose an unnecessary or inappropriate burden on competition under Section 6(b)(8) of the Act.[66] As noted above, SIFMA is concerned that NASDAQ's proposal could create regulatory disparities that would give NASDAQ an inappropriate advantage over broker-dealers providing the same services, and that NASDAQ ''would use the doctrine of regulatory immunity to protect itself from any liability that arises out of the Benchmark Order functionality, through systems issues or otherwise.'' [67] In addition, the Commission notes that NASDAQ Rule 4626 generally provides that ''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.'' [68]

NASDAQ does not respond to concerns raised by SIFMA with any substantive analysis of whether regulatory immunity, or exchange rules limiting liability, in the context of NASDAQ's proposal to offer a service traditionally provided by broker-dealers, would impose an undue burden on competition under the Act. NASDAQ simply responds that this ''judicially recognized doctrine is not at issue in connection with the Commission's review of NASDAQ's Benchmark Order Proposal'' and that ''[t]here is no need for the Commission to discuss immunity in analyzing the consistency of NASDAQ's Proposal with the Exchange Act.'' [69] Accordingly, the Commission does not believe that it can make the finding that NASDAQ's proposal is consistent with the requirements of Section 6(b)(8) of the Act.[70]

As noted above, Rule 700(b)(3) of the Commission's Rules of Practice states that ''[t]he burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder * * * is on the self-regulatory organization that proposed the rule change'' and that a ''mere assertion that the proposed rule change is consistent with those requirements * * * is not sufficient.'' [71] For the reasons set forth above, the Commission does not believe that NASDAQ has met its burden to demonstrate that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder.

IV. Conclusion

For the foregoing reasons, the Commission does not find that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Sections 6(b)(5) and 6(b)(8) of the Act.[72]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[73] that the proposed rule change (SR–NASDAQ–2012–059) be, and hereby is, disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[74]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00871 Filed 1–16–13; 8:45 am]

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[64] *Id.* at 29436.

[65] The term ''NASDAQ Market Center'' is defined in pertinent part as the ''automated system for order execution and trade reporting owned and operated by The NASDAQ Stock Market LLC * * * [comprising] an order execution service that enables Participants to automatically execute transactions in System Securities; and provides Participants with sufficient monitoring and updating capability to participate in an automated execution environment.'' *See* NASDAQ Rule 4751(a)(1).

[66] 15 U.S.C. 78f(b)(8).

[67] *See* SIFMA Letter, *supra* note 6, at 3.

[68] *See* NASDAQ Rule 4626.

[69] *See* NASDAQ Letter, *supra* note 8, at 7.

[70] 15 U.S.C. 78f(b)(8).

[71] 17 CFR 201.700(b)(3).

[72] 15 U.S.C. 78f(b)(5) and (b)(8).

[73] 15 U.S.C. 78s(b)(2).

[74] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68626; File No. SR–NASDAQ–2012–149]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify NASDAQ's Order Execution Rebates and Investor Support Program

January 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1], and Rule 19b–4 [2] thereunder, notice is hereby given that on December 31, 2012, 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 NASDAQ. 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

NASDAQ is proposing (i) to amend its schedule of execution rebates under Rule 7018(a), and (ii) to modify the Investor Support Program (the ''ISP'') under Rule 7014. While changes pursuant to this proposal are effective upon filing, the Exchange will implement the proposed rule on January 2, 2013.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.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. 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.

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

[2] 17 CFR 240.19b–4.

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

1. Purpose

NASDAQ is proposing (i) to amend its schedule of execution rebates under Rule 7018(a), and (ii) to modify the ISP under Rule 7014. As a general matter, the changes are designed to increase and broaden incentives for participation in NASDAQ by liquidity providers.

Execution Rebates

NASDAQ is making a number of changes to its general schedule of rebates for execution of securities priced at $1 or more per share, as set forth in Rule 7018(a). Overall, the changes are aimed at providing greater incentives for the entry of liquidity-providing orders in NASDAQ. Specifically, NASDAQ is proposing to make the following changes:

• Currently, NASDAQ pays a credit of $0.0029 per share executed with respect to displayed quotes/orders for a member with shares of liquidity provided in all securities through one or more of its NASDAQ Market Center market participant identifiers (''MPIDs'') that represent more than 0.50% of Consolidated Volume [3] during the month. NASDAQ is modifying this rebate tier to decrease the threshold to more than 0.45% of Consolidated Volume. This change reverses a price increase made by NASDAQ in September 2012.[4]

• Similarly, NASDAQ is restoring a rebate tier that was eliminated in September 2012.[5] Under the restored tier, NASDAQ will pay a credit of $0.0029 per share executed with respect to displayed quotes/orders for a member with shares of liquidity accessed in all securities through one or more of its MPIDs that represent more than 0.65% of Consolidated Volume during the month, and that provides a daily average of at least 2 million shares of liquidity in all securities through one or more of its NASDAQ Market Center MPIDs during the month.[6]

• NASDAQ currently pays a credit of $0.0029 per share executed with respect to displayed quotes/orders for a member with shares of liquidity provided in all securities through one or more of its NASDAQ Market Center MPIDs representing more than 0.25% of Consolidated Volume during the month, and with an average daily volume during the month of more than 100,000 contracts of liquidity accessed or provided through one or more of its NASDAQ Options Market MPIDs. NASDAQ is proposing to decrease the Consolidated Volume requirement for this tier to shares representing more than 0.15% of Consolidated Volume, thereby reversing another change made in September 2012.[7]

• NASDAQ is also introducing a new rebate tier of $0.00305 per share executed with respect to displayed quotes/orders for a member that either (i) provides shares of liquidity in all securities through one of its MPIDs that represent 1.60% or more of Consolidated Volume during the month, or (ii) provides shares of liquidity in all securities through one or more of its MPIDs that represent 1.60% or more of Consolidated Volume during the month, and provides liquidity through one of its MPIDs that represent 0.75% or more of Consolidated Volume during the month.[8]

• Similarly, NASDAQ is introducing a new rebate tier of $0.0030 per share executed with respect to displayed quotes/orders for a member that either (i) provides shares of liquidity in all securities through one of its MPIDs that represent 1.20% or more of Consolidated Volume during the month, or (ii) provides shares of liquidity in all securities through one or more of its MPIDs that represent 1.20% or more of Consolidated Volume during the month, and provides liquidity through one of its MPIDs that represent 0.75% or more of Consolidated Volume during the month.[9]

Investor Support Program

The ISP enables NASDAQ members to earn a monthly fee credit for providing additional liquidity to NASDAQ and increasing the NASDAQ-traded volume of what are generally considered to be retail and institutional investor orders in exchange-traded securities (''targeted liquidity''). However, in order to partially offset the cost of the broad rebate incentives discussed above, NASDAQ is partially reducing the rebates payable under the ISP.

Participants in the ISP are required to designate specific NASDAQ order entry ports for use under the ISP and to meet specified criteria focused on market participation, liquidity provision, and high rates of order execution. Currently, a member that participates in the ISP receives a credit of $0.00005, $0.0001, or $0.000375 per share with respect to the number of shares of displayed liquidity provided by the member that execute at $1 or more per share.[10] The precise credit rate is determined by factors designed to measure the degree of the member's participation in the Nasdaq Market Center and the percentage of orders that it enters that execute—its ''ISP Execution Ratio''—which is seen as indicative of retail or institutional participation. Without making any other modifications to the program, NASDAQ will reduce the credit paid to market participants that currently qualify for a $0.000375 per share credit to $0.0002 per share. The specific requirements for qualifying for the $0.0002 credit are described below.

As provided in Rule 7014(c)(4), NASDAQ will pay a credit of $0.0002 per share [11] with respect to shares of displayed liquidity executed at a price of $1 or more and entered through ISP-designated ports, and $0.00005 per share with respect to all other shares of displayed liquidity executed at a price of $1 or more, if the following conditions are met:

(1) The member's Participation Ratio [12] for the month exceeds its

[3] ''Consolidated Volume'' is defined as ''the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities.''

[4] Securities Exchange Act Release No. 67849 (September 13, 2012), 77 FR 58190 (September 19, 2012) (SR–NASDAQ–2012–103).

[5] *Id.*

[6] Along with the rule language providing for this new rebate tier, NASDAQ is also including language applicable to rebates for midpoint pegged orders and midpoint post-only orders (''midpoint orders''), and non-displayed orders. This language is being added simply to make it clear that existing rebates for these orders apply to members qualifying for the new tier with respect to their displayed orders.

[7] *Supra* n.4.

[8] As discussed in Securities Exchange Act Release No. 64003 (March 2, 2011), 76 FR 12784 (March 8, 2011) (SR–NASDAQ–2011–028), some pricing incentives in NASDAQ's fee and rebate schedule require members to achieve certain volume thresholds through a single MPID to avoid providing excessive encouragement to members to aggregate the activity of several firms to which they provide sponsored access (some of whom may not themselves be members of NASDAQ) for the sole purpose of earning a higher rebate.

Along with the rule language providing for this new rebate tier, NASDAQ is also including language applicable to rebates for midpoint orders and non-displayed orders. This language is being added simply to make it clear that existing rebates for these orders apply to members qualifying for the new tier with respect to their displayed orders. NASDAQ is also making a conforming change to move the location of the definition of ''midpoint orders''.

[9] Along with the rule language providing for this new rebate tier, NASDAQ is also including language applicable to rebates for midpoint orders and non-displayed orders. This language is being added simply to make it clear that existing rebates for these orders apply to members qualifying for the new tier with respect to their displayed orders.

[10] A participant in the ISP must designate specific order-entry ports for use in tabulating certain requirements under the program.

[11] A reduction from $0.000375 per share.

[12] ''Participation Ratio'' is defined as follows: ''[F]or a given member in a given month, the ratio of (A) the number of shares of liquidity provided

Baseline Participation Ratio [13] by at least 0.86%. The requirement reflects the expectation that in order to earn a higher rebate under the program, a member participating in the program must increase its participation in NASDAQ as compared with an historical baseline.

(2) The member's ''ISP Execution Ratio'' for the month must be less than 10. The ISP Execution Ratio is defined as ''the ratio of (A) the total number of liquidity-providing orders entered by a member through its ISP-designated ports during the specified time period to (B) the number of liquidity-providing orders entered by such member through its ISP-designated ports and executed (in full or partially) in the Nasdaq Market Center during such time period; provided that: (i) No order shall be counted as executed more than once; and (ii) no Pegged Orders, odd-lot orders, or MIOC or SIOC orders shall be included in the tabulation.'' [14] Thus, the definition requires a ratio between the total number of orders that post to the NASDAQ book and the number of such orders that actually execute that is low, a characteristic that NASDAQ believes to be reflective of retail and institutional order flow.

(3) The shares of liquidity provided through ISP-designated ports during the month are equal to or greater than 0.2% of Consolidated Volume during the month, reflecting the ISP's goals of encouraging higher levels of liquidity provision.

(4) At least 40% of the liquidity provided by the member during the month is provided through ISP-designated ports. This requirement is designed to mitigate ''gaming'' of the program by firms that do not generally represent retail or institutional order flow but that nevertheless are able to channel a portion of their orders that they intend to execute through ISP-designated ports and thereby receive a credit with respect to those orders.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[15] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[16] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Changes to Rebates

NASDAQ believes that the proposed changes to rebate tiers are reasonable, because they will increase the rebates payable to eligible market participants. NASDAQ further believes that the changes are consistent with an equitable allocation of fees because the modified rebate schedule will provide increased incentives for provision of displayed liquidity that NASDAQ believes benefit all market participants by dampening price volatility and promoting price discovery. Finally, NASDAQ believes that the changes are not unreasonably discriminatory because opportunities for enhanced rebates to liquidity providers will be broadened under the modified schedule. Specifically:

- The changes to the rebate tiers through which members may earn a $0.0029 per share executed rebate are reasonable because they will make it easier for members to receive a rebate at that level, by lowering the volume requirements for existing tiers and by adding a new tier through which members may qualify. In addition, the changes are consistent with an equitable allocation of fees because they reflect an allocation of rebates to liquidity providers designed to encourage beneficial market activity, with greater incentives for market participants to provide liquidity. Finally, the changes are not unreasonably discriminatory because they increase the availability of higher rebates without eliminating any of the other means by which a member may earn a higher rebate under Rule 7018(a).
- The addition of two new rebate tiers focused on members that provide high levels of liquidity is reasonable because it will reduce the costs of market participants that make significant contributions to market quality. The change is consistent with an equitable allocation of fees because NASDAQ believes that it is equitable to provide incentives to members that are capable of providing high levels of liquidity (1.2% to 1.6% of Consolidated Volume) to participate in NASDAQ to a greater extent, because doing so has the potential to increase NASDAQ's market quality to the benefit of all its market participants. Finally, NASDAQ believes that these new rebate tiers are not unreasonably discriminatory because the rebates they would provide are not significantly higher than rebates otherwise available through Rule 7018(a) and Rule 7014, and are being offered to increase the quality of the NASDAQ market.

Changes to the ISP

The ISP encourages members to add targeted liquidity that is executed in the Nasdaq Market Center. NASDAQ believes that the reduction in the rebates paid under the ISP from $0.000375 to $0.0002 with respect to certain tiers of the ISP is reasonable, because it provides a means for NASDAQ to reduce costs during a period of persistently low trading volumes, in addition to partially offsetting the costs of the general increased rebates instituted by this filing, but while still maintaining the overall structure of the ISP for the purpose of providing incentives for retail and institutional investors to provide targeted liquidity at NASDAQ. The change is consistent with an equitable allocation of fees: Although the change maintains the ISP's purpose of paying higher rebates to certain market participants in order to encourage them to benefit all NASDAQ members through the submission of targeted liquidity, the change reduces the disparity between rebates paid to ISP participants and other members for providing liquidity. In conjunction with the other changes made by this filing, this may serve to broaden the availability of enhanced rebates. Similarly, although NASDAQ believes that the price differentiation inherent in the ISP is fair, because it is designed to benefit all market participants by drawing targeted liquidity to the Exchange, the change reduces the level of differentiation between the rebates

in orders entered by the member through any of its Nasdaq ports and executed in the Nasdaq Market Center during such month to (B) the Consolidated Volume.'' ''Consolidated Volume'' is defined as follows: ''[F]or a given member in a given month, the consolidated volume of shares of System Securities in executed orders reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during such month.'' ''System Securities'' means all securities listed on NASDAQ and all securities subject to the Consolidated Tape Association Plan and the Consolidated Quotation Plan.

[13] ''Baseline Participation Ratio'' is defined as follows: ''[W]ith respect to a member, the lower of such member's Participation Ratio for the month of August 2010 or the month of August 2011, provided that in calculating such Participation Ratios, the numerator shall be increased by the amount (if any) of the member's Indirect Order Flow for such month, and provided further that if the result is zero for either month, the Baseline Participation Ratio shall be deemed to be 0.485% (when rounded to three decimal places).'' ''Indirect Order Flow'' is defined as follows: ''[F]or a given member in a given month, the number of shares of liquidity provided in orders entered into the Nasdaq Market Center at the member's direction by another member with minimal substantive intermediation by such other member and executed in the Nasdaq Market Center during such month.''

[14] These terms have the meanings assigned to them in Rule 4751. MIOC and SIOC orders are forms of ''immediate or cancel'' orders and therefore cannot be liquidity-providing orders.

[15] 15 U.S.C. 78f.

[16] 15 U.S.C. 78f(b)(4) and (5).

paid to ISP participants and those paid to other liquidity providers.

Finally, NASDAQ notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, NASDAQ must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. These competitive forces help to ensure that NASDAQ's fees are reasonable, equitably allocated, and not unfairly discriminatory since market participants can largely avoid fees to which they object by changing their trading behavior.

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

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, NASDAQ believes that the change, which will generally result in an increase in the rebates paid to encourage market participants to use NASDAQ, reflects the high degree of competition in the cash equities markets and will further enhance that competition by lowering fees and possibly encouraging NASDAQ's competitors to make competitive responses. Moreover, the decreased ISP rebate contained in the proposed rule change will not burden competition because the market for order execution is extremely competitive and members may readily opt to disfavor NASDAQ's execution services if they believe that alternatives offer them better value. Accordingly, NASDAQ believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, NASDAQ does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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 has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[17] 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 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 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.* Please include File Number SR–NASDAQ–2012–149 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–2012–149. 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–NASDAQ–2012–149 and should be submitted on or before February 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–00869 Filed 1–16–13; 8:45 am]

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[17] 15 U.S.C. 78s(b)(3)(A)(ii).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68627; File No. SR–ISE–2013–01]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees

January 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 2, 2013, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. 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 ISE proposes to amend its Schedule of Fees. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of

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

[2] 17 CFR 240.19b–4.