

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR-CBOE-2011-015 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-CBOE-2011-015. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2011-015 and should be submitted on or before March 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63891; File No. SR-NASDAQ-2011-022]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Enhance the Investor Support Program

February 11, 2011.

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 February 2, 2011, The NASDAQ Stock Market LLC ("NASDAQ") 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 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 proposes changes to the fee provisions of Rule 7014 (Investor Support Program) to increase the rebate for adding targeted liquidity within the Investor Support Program. NASDAQ has designated this fee change proposal effective and operative upon filing.

The text of the proposed rule change is available at <http://nasdaq.cchwallstreet.com>, at NASDAQ's principal office, 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, NASDAQ 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. NASDAQ 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 the Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The Exchange is proposing changes to the fee provisions of Rule 7014 to increase the rebate for adding targeted liquidity within the Investor Support Program.

The Exchange established an Investor Support Program ("ISP") that 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").<sup>3</sup> The goal of the ISP is to incentivize members to provide such targeted liquidity to the NASDAQ Market Center.<sup>4</sup> The Exchange noted in the ISP Filing that maintaining and increasing the proportion of orders in exchange-listed securities executed on a registered exchange (rather than relying on any of the available off-exchange execution methods) would help raise investors' confidence in the fairness of their transactions and would benefit all investors by deepening NASDAQ's liquidity pool, supporting the quality of price discovery, promoting market

<sup>3</sup> For a detailed description of the Investor Support Program, see Securities Exchange Act Release No. 63270 (November 8, 2010), 75 FR 69489 (November 12, 2010)(NASDAQ-2010-141) (notice of filing and immediate effectiveness)(the "ISP Filing"). See also Securities Exchange Act Release Nos. 63414 (December 2, 2010), 75 FR 76505 (December 8, 2010)(NASDAQ-2010-153) (notice of filing and immediate effectiveness); and 63628 (January 3, 2011), 76 FR 1201 (January 7, 2011)(NASDAQ-2010-154) (notice of filing and immediate effectiveness).

<sup>4</sup> The Commission has recently expressed its concern that a significant percentage of the orders of individual investors are executed at over the counter ("OTC") markets, that is, at off-exchange markets; and that a significant percentage of the orders of institutional investors are executed in dark pools. Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (Concept Release on Equity Market Structure, "Concept Release"). In the Concept Release, the Commission has recognized the strong policy preference under the Act in favor of price transparency and displayed markets. The Commission published the Concept Release to invite public comment on a wide range of market structure issues, including high frequency trading and un-displayed, or "dark," liquidity. See also Mary L. Schapiro, *Strengthening Our Equity Market Structure* (Speech at the Economic Club of New York, Sept. 7, 2010) ("Schapiro Speech," available on the Commission Web site) (comments of Commission Chairman on what she viewed as a troubling trend of reduced participation in the equity markets by individual investors, and that nearly 30 percent of volume in U.S.-listed equities is executed in venues that do not display their liquidity or make it generally available to the public).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>10</sup> 17 CFR 200.30-3(a)(12).

transparency and improving investor protection.

The Exchange now proposes an adjustment to the Investor Support Program, in the form of an increase in the rebate for the ISP. The primary objective in making this adjustment is to further incentivize members to provide targeted liquidity to the Exchange by increasing the rebate for those that bring the largest amounts to NASDAQ.

The ISP generally compares a member's Participation Ratio for the current month to the same member's Participation Ratio in August 2010 (known as the "Baseline Participation Ratio").<sup>5</sup> This ratio is determined by measuring the number of shares in liquidity-providing orders entered by the member (through any NASDAQ port) and executed on NASDAQ and dividing this number by the consolidated (across all trading venues) share volume of System Securities<sup>6</sup> traded in the given month.<sup>7</sup> To determine the amount of the ISP credit pursuant to the program, pursuant to sub-section (b), NASDAQ would multiply \$0.0003 by the lower of: the number of shares of displayed liquidity provided in orders entered by the member through its ISP-designated ports and executed in the NASDAQ Market Center during the given month; or the amount of Added Liquidity<sup>8</sup> for the given month, which is compared to the member's Baseline Participation Ratio. The Exchange proposes to increase the rebate to a rate of \$0.0004 for members that bring a greater amount of targeted liquidity.

<sup>5</sup> The term "Participation Ratio" is defined as: for a given member in a given month, the ratio of (i) the number of shares of liquidity provided in orders entered by the member through any of its Nasdaq ports and executed in the Nasdaq Market Center during such month to (ii) the Consolidated Volume. Rule 7014 (d)(4).

The term "Consolidated Volume" is defined as: for 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. Rule 7014(d)(6).

<sup>6</sup> The term "System Securities" is defined as: all securities listed on NASDAQ and all securities subject to the Consolidated Tape Association Plan and the Consolidated Quotation Plan. Rule 4751(b).

<sup>7</sup> See Rule 7014(d)(2) and (d)(4).

<sup>8</sup> The term "Added Liquidity" is defined as: for a given member in a given month, the number of shares calculated by (i) subtracting from such member's Participation Ratio for that month the member's Baseline Participation Ratio, and then (ii) multiplying the resulting difference by the average daily 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; provided that if the result is a negative number, the Added Liquidity amount shall be deemed zero. Rule 7014(d)(1).

Specifically, the Exchange clarifies subsection (b) to state that, subject to the conditions set forth in section (c) the rebate rate may be \$0.0003 or \$0.0004.<sup>9</sup> The Exchange adds proposed subsection (c)(2) to indicate that the \$.00004 rebate rate is available to those members that bring in an even greater amount of liquidity by exceeding the Baseline Participation Ratio by at least 0.43%.<sup>10</sup> The Exchange believes that the increased rebate should encourage members to strive to bring even more retail and institutional orders in exchange-traded securities to the Exchange.

The ISP is designed to operate on a monthly cycle, both from the perspective of targeted flow brought to the Exchange and ISP rebates to members that brought such flow. Since its inception,<sup>11</sup> the ISP fee program has been, and continues to be, non-discriminatory, reasonable, and effective in attracting targeted liquidity to the NASDAQ Market Center. The primary objective in making the proposed adjustment is to encourage members to bring larger amounts of targeted liquidity to the Exchange by increasing the rebate for such liquidity. The Exchange believes that its proposal is decidedly non-discriminatory because it does not favor or distinguish any group of ISP participants while promoting the clear goal of the ISP.

## 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>12</sup> in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,<sup>13</sup> 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 it is designed to promote just and equitable principles of trade, to

<sup>9</sup> Subsection (c)(1) (which simply consolidates current subsections (c)(1) and (c)(2)) states that a member shall not be entitled to receive any ISP credit pursuant to (b) for a given month if any of the following applies: (A) the member's ISP Execution Ratio for the month in question is 10 or above; or (B) the average daily number of shares of liquidity provided in orders entered by the member through its ISP-designated ports and executed in the Nasdaq Market Center during the month is below 10 million, provided that in calculating such average, Nasdaq will exclude days when it is open for less than the entire regular trading day.

<sup>10</sup> 0.43% is the equivalent of approximately 35 million shares of added liquidity per day (based on January 2011 consolidated market activity).

<sup>11</sup> See Securities Exchange Act Release No. 63270 (November 8, 2010), 75 FR 69489 (November 12, 2010)(NASDAQ-2010-141)(notice of filing and immediate effectiveness).

<sup>12</sup> 15 U.S.C. 78f.

<sup>13</sup> 15 U.S.C. 78f(b)(4) and (5).

remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.

The Investor Support Program encourages members to add targeted liquidity that is executed in the NASDAQ Market Center. The primary objective in making this enhancement to the Investor Support Program is to add an even greater amount of targeted liquidity to the Exchange. The rule change proposal, like the ISP, is "not designed to permit unfair discrimination"<sup>14</sup> but, rather, is intended to promote submission of liquidity-providing orders to NASDAQ, which would benefit all NASDAQ members and all investors. Likewise, the proposal, like the ISP, is consistent with the Act's requirement "for the equitable allocation of reasonable dues, fees, and other charges."<sup>15</sup> As explained in the immediately preceding paragraphs, the proposal enhances the goal of the ISP. Members who choose to significantly increase the volume of ISP-eligible liquidity-providing orders that they submit to NASDAQ would be benefitting all investors, and therefore an additional credit, as contemplated in the proposed enhanced program, is equitable. Finally, NASDAQ notes that the intense competition among several national securities exchanges and numerous OTC venues effectively guarantees that fees and credits for the execution of trades in NMS securities remain equitable and are not unfairly discriminatory.<sup>16</sup>

### *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.

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

Written comments were neither solicited nor 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

<sup>14</sup> See Section 6(b)(5) of the Act, 15 U.S.C. 78f(b)(5).

<sup>15</sup> See Section 6(b)(4) of the Act, 15 U.S.C. 78f(b)(4).

<sup>16</sup> See, e.g., Concept Release (discusses the various venues where trades are executed).

19(b)(3)(A)(ii) of the Act.<sup>17</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 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR–NASDAQ–2011–022 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–2011–022. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and

copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–022 and should be submitted on or before March 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63895; File No. SR–FINRA–2009–090]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt FINRA Rule 5320 (Prohibition Against Trading Ahead of Customer Orders) in the Consolidated FINRA Rulebook

February 11, 2011.

#### I. Introduction

On December 12, 2009, the Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change to adopt FINRA Rule 5320 in FINRA's new consolidated rulebook (“Consolidated FINRA Rulebook”). The proposed rule change was published for comment in the **Federal Register** on December 22, 2009.<sup>3</sup> The Commission received four comment letters on the proposed rule change<sup>4</sup> and a letter from

FINRA responding to the comment letters.<sup>5</sup> On January 24, 2011, FINRA filed Amendment No. 1 to the proposed rule change.<sup>6</sup> This order approves the proposed rule change, as amended by Amendment No. 1.

#### II. Description of Proposed Rule Change and Summary of Comments

As part of the process of developing the Consolidated FINRA Rulebook,<sup>7</sup> FINRA proposes to adopt NASD IM–2110–2 (Trading Ahead of Customer Limit Order) and NASD Rule 2111 (Trading Ahead of Customer Market Orders) with significant changes as new FINRA Rule 5320 (Prohibition Against Trading Ahead of Customer Orders). NASD IM–2110–2 generally prohibits a member from trading for its own account in an NMS stock, as defined in Rule 600(b)(47) of Regulation NMS,<sup>8</sup> or

Elizabeth M. Murphy, Secretary, Commission, from Ann Vlcek, Managing Director and Associate General Counsel, SIFMA, dated January 28, 2010 (“SIFMA Letter”); and Letter to Elizabeth M. Murphy, Secretary, Commission, from Leonard J. Amoroso, General Counsel, Knight Capital Group, Inc. and Michael T. Corrao, Chief Compliance Officer, Knight Equity Markets, L.P., dated February 22, 2010 (“Knight Letter”).

<sup>5</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from Racquel Russell, Assistant General Counsel, Regulatory Policy and Oversight, FINRA, dated August 31, 2010 (“FINRA Letter”).

<sup>6</sup> Amendment No. 1 modifies the proposal to remove the requirement that a member assign and use a unique market participant identifier (MPID) for its market-making desks where the member structures its order handling practices in NMS stocks to permit its market-making desks to trade at prices that would satisfy customer orders held at a separate unit. The amendment also addresses the applicability of interpretive guidance previously issued in connection with NASD IM–2110–2 and NASD Rule 2111 to new FINRA Rule 5320. FINRA stated that, consistent with its existing policy, where a provision of FINRA Rule 5320 is not substantively different from NASD IM–2110–2 or NASD Rule 2111, previously issued interpretations generally will continue to apply (unless rescinded or updated by FINRA). The Commission expects FINRA to update, as soon as practicable, its interpretive guidance to reflect new FINRA Rule 5320 and to rescind any previous interpretive guidance that is no longer applicable. The amendment also clarifies that, in the case of extended hours trading in foreign securities where currency fluctuations are possible, the price at which the proprietary transaction is executed, not the price of the proprietary order, is relevant in determining whether the customer order protection requirement has been triggered. Finally, Amendment No. 1 makes several non-substantive, technical changes to the rule text.

<sup>7</sup> The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (“Incorporated NYSE Rules”). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE. The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

<sup>8</sup> Under Rule 600 of Regulation NMS, an NMS stock means any NMS security other than an

<sup>18</sup> 17 CFR 200.30–3(a)(12).

<sup>15</sup> U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> See Securities Exchange Act Release No. 61168 (December 15, 2009); 74 FR 68084 (“Notice”).

<sup>4</sup> See Letter to Elizabeth Murphy, Secretary, Commission, from Patrick Chi, Chief Compliance Officer, ITG, Inc., dated January 12, 2010 (“ITG Letter”); Letter to Elizabeth M. Murphy, Secretary, Commission, from R. Cromwell Coulson, Chief Executive Officer, Pink OTC Markets Inc., dated January 18, 2010 (“Pink OTC Letter”); Letter to

<sup>17</sup> 15 U.S.C. 78s(b)(3)(a)(ii).