This document is scheduled to be published in the
Federal Register on 05/26/2016 and available online at
http://federalregister.gov/a/2016-12386, and on **FDsys.gov**

8011-01p
SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77878; File No. SR-NASDAQ-2016-070)

May 20, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Options Pricing at Chapter XV, Section 2

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 May 10, 2016, 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 Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter XV, entitled "Options Pricing," at Section 2, which governs pricing for Exchange members using the NASDAQ Options Market ("NOM"), the Exchange's facility for executing and routing standardized equity and index options.[3] The Exchange proposes to amend certain Penny Pilot Options[4] pricing.

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

2 17 CFR 240.19b-4.

3 References in this proposal to Chapter and Series refer to NOM rules, unless otherwise indicated.

4 The Penny Pilot was established in March 2008 and was last extended in 2015. See Securities Exchange Act Release Nos. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008) (SR-NASDAQ-2008-026) (notice of filing and immediate effectiveness establishing Penny Pilot); and 75283 (June 24, 2015), 80 FR 37347 (June 30, 2015) (SR-NASDAQ-2015-063) (notice of filing and immediate effectiveness extending the Penny Pilot through June 30, 2016). All Penny Pilot Options listed on the Exchange can be found at http://www.nasdaqtrader.com/Micro.aspx?id=phlx.

The text of the proposed rule change is available on the Exchange's website 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

The Exchange proposes certain amendments to the NOM transaction fees set forth at Chapter XV, Section 2, for executing and routing standardized equity and index Penny Pilot Options. Specifically, the Exchange proposes to reduce the fee for Customer[5] or Professional[6] that removes liquidity in SPY Options.[7] The proposed change is discussed below.

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5 The term "Customer" or ("C") applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation ("OCC") which is not for the account of broker or dealer or for the account of a "Professional" (as that term is defined in Chapter I, Section 1(a)(48)).

6 The term "Professional" or ("P") means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) pursuant to Chapter I, Section 1(a)(48). All Professional orders shall be appropriately marked by Participants.

7 Options overlying Standard and Poor's Depositary Receipts/SPDRs ("SPY") are based on the SPDR exchange-traded fund ("ETF"), which is designed to track the performance of the S&P 500 Index.

The Exchange currently assesses Customer, Professional, Firm,[8] Non-NOM Market Maker,[9] NOM Market Maker,[10] and Broker-Dealer[11] a $0.50 per contract Fee for Removing Liquidity in Penny Pilot Options.[12] The Exchange proposes a slightly reduced Fee for Removing Customer and Professional Liquidity in SPY Options, which are the largest volume Penny Pilot Options traded on the Exchange. Excluding the proposed change in SPY Options, the Penny Pilot Options Fee for Removing Liquidity, as also the Penny Pilot Options Rebate to Add Liquidity does not change.

Change 1 –Penny Pilot Options: Change Fee for Removing Customer and Professional Liquidity in SPY Options

The Exchange proposes to modify the Penny Pilot Options fees and rebates schedule (per executed contract) to slightly reduce the fee when a Customer or Professional removes liquidity in SPY Options. Specifically, the Exchange proposes to make note 3 applicable to Customer and Professional Penny Pilot Options in Chapter XV, Section 2(1), and to state that "A Customer or Professional that removes liquidity in SPY Options will be assessed a fee of $0.47 per contract."

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8 The term "Firm" or ("F") applies to any transaction that is identified by a Participant for clearing in the Firm range at OCC.

9 The term "Non-NOM Market Maker" or ("O") is a registered market maker on another options exchange that is not a NOM Market Maker. A Non-NOM Market Maker must append the proper Non-NOM Market Maker designation to orders routed to NOM.

10 The term "NOM Market Maker" or ("M") is a Participant that has registered as a Market Maker on NOM pursuant to Chapter VII, Section 2, and must also remain in good standing pursuant to Chapter VII, Section 4. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security.

11 The term "Broker-Dealer" or ("B") applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category.

12 Customer, Professional, Firm, Non-NOM Market Maker, NOM Market Maker, and Broker-Dealer are NOM Participants. The term "Participant" or "Options Participant" means a firm, or organization that is registered with the Exchange pursuant to Chapter II of these Rules for purposes of participating in options trading on NOM as a "Nasdaq Options Order Entry Firm" or "Nasdaq Options Market Maker".

Currently, the fee for removing Penny Pilot Options liquidity, which includes SPY Options, is $0.50 per contract.

The Exchange is proposing to decrease the noted SPY Option Fee for Removing Liquidity at this time because it believes that the proposed decrease will incentivize Participants to send Customer and Professional Order flow to the Exchange. This enables the Exchange to remain competitive with other options exchanges.

The Exchange is also making two housekeeping changes in NOM Chapter XV, Section 2(1). First, the Exchange is correcting a typo in Penny Pilot Options Rebate to Add Liquidity and indicating that note "d" is applicable to Professional just as it is to Customer.[13] Second, the Exchange is adding "unless otherwise stated" in note "***" for better readability and clarity. The sentence as modified will read: "To determine the applicable percentage of total industry customer equity and ETF option average daily volume, unless otherwise stated, the Participant's Penny Pilot and Non-Penny Pilot Customer and/or Professional volume that adds liquidity will be included."

2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Section 6(b)(4) and (b)(5) of the Act,[15] 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

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[13] See Securities Exchange Act Release No. 77661 (April 20, 2016), 81 FR 24668 (April 26, 2016) (SR-NASDAQ-2016-055) (notice of filing and immediate effectiveness), wherein the Exchange proposed to make note "d" applicable to Professional just as it is to Customer.

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

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

the Exchange operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."[16]

Likewise, in NetCoalition v. Securities and Exchange Commission[17] ("NetCoalition") the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[18] As the court emphasized, the Commission "intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost."[19]

Further, "[n]o one disputes that competition for order flow is 'fierce.' … As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution

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16 Securities Exchange Act Release No. 51808 (June 29, 2005), 70 FR 37496 at 37499 (File No. S7-10-04) ("Regulation NMS Adopting Release") [sic].

17 NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

18 See id. at 534-535.

19 See id. at 537.

of order flow from broker dealers'…."[20] Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that the proposed change is reasonable, equitable and not unfairly discriminatory for the following reasons.

Change 1 –Penny Pilot Options: Change Fee for Removing Customer and Professional Liquidity in SPY Options

The Exchange proposes to modify the Penny Pilot Options fees and rebates schedule (per executed contract) to slightly reduce the fee when a Customer or Professional removes liquidity in SPY Options. Specifically, the Exchange proposes to make note 3 applicable to Customer and Professional Penny Pilot Options in Chapter XV, Section 2(1), and to state that "A Customer or Professional that removes liquidity in SPY Options will be assessed a fee of $0.47 per contract." Currently, the fee is $0.50 per contract.

The Exchange is proposing to decrease the noted SPY Option-related fee at this time because it believes that the proposed decrease will incentivize Participants to send Customer and Professional Order flow to the Exchange. This enables the Exchange to remain competitive with other options exchanges.

The Exchange's proposal to reduce the noted SPY Option Fee for Removing Liquidity is reasonable because NOM Participants will continue to be incentivized, even more so with the proposed fee reduction, to send order flow to NOM.

The proposed rule change is reasonable because it continues to encourage market participant behavior through the fees and rebates system, which is an accepted methodology

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[20] See id. at 539 (quoting Securities Exchange Act Commission at [sic] Release No. 59039 (December 2, 2008), 73 FR 74770 at 74782-74783 (December 9, 2008) (SR-NYSEArca-2006-21)).

among options exchanges.[21] It is reasonable to incentivize bringing flow to the Exchange by offering reduced fees.

The Exchange believes it is equitable and not unfairly discriminatory to continue to charge the Fee for Removing Liquidity, as also the Rebate to Add Liquidity, in order to incentivize Professionals and Customers to bring liquidity to the Exchange. Such liquidity, and in particular Customer liquidity, attracts other market participants. Customer liquidity benefits all market participants by providing more trading opportunities, which attract Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The Exchange believes it is equitable and not unfairly discriminatory to make the proposed reduction in the Fee for Removing Liquidity because it will be applied uniformly across all similarly situated Participants, while promoting bringing liquidity to the Exchange. The Exchange also believes that it is equitable and not unfairly discriminatory to make sure that Customer and Professional are harmonized and treated the same, as proposed.

As noted, liquidity attracts other market participants. Customer and Professional liquidity benefits all market participants by providing more trading opportunities, which attract Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The proposed changes enhance the competitiveness of the Exchange by continuing to incentivize bringing flow to the Exchange.

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[21] See, e.g., fee and rebate schedules of other options exchanges, including, but not limited to, NASDAQ BX, Inc. ("BX Options"), NASDAQ PHLX LLC ("Phlx"), and Chicago Board Options Exchange ("CBOE").

The Exchange does not believe that the two housekeeping changes have any impact on the reasonable and equitable and not unfairly discriminatory nature of the proposal.

The Exchange desires to continue to incentivize members and member organizations, through the Exchange's rebate and proposed reduced fee structure, to select the Exchange as a venue for bringing liquidity and trading by offering competitive pricing. Such competitive, differentiated pricing exists today on other options exchanges. The Exchange's goal is creating and increasing incentives to attract orders to the Exchange that will, in turn, benefit all market participants through increased liquidity at the Exchange.

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. Specifically, the Exchange does not believe that its proposal to make changes to its Fee for Removing Liquidity where a Customer or Professional removes liquidity in SPY Options, as per proposed note 3, will impose any undue burden on competition, as discussed below.

The Exchange operates in a highly competitive market in which many sophisticated and knowledgeable market participants can readily and do send order flow to competing exchanges if they deem fee levels or rebate incentives at a particular exchange to be excessive or inadequate. Additionally, new competitors have entered the market and still others are reportedly entering the market shortly. These market forces ensure that the Exchange's fees and rebates remain competitive with the fee structures at other trading platforms. In that sense, the Exchange's proposal is actually pro-competitive because the Exchange is simply continuing its fees and rebates for Penny Pilot Options, and enhancing its fee structure in order to remain competitive in the current environment.

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. In terms of inter-market competition, the Exchange 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, the Exchange 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. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In terms of intra-market competition, the Exchange notes that price differentiation among different market participants operating on the Exchange (e.g., Customer and Professional as opposed to others) is reasonable. Customer and Professional activity, for example, enhances liquidity on the Exchange for the benefit of all market participants and benefits all market participants by providing more trading opportunities, which attracts market makers. An increase in the activity of these market participants (particularly in response to pricing) in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

Moreover, in this instance, the proposed changes to reduce the Fee for Removing Liquidity where Customer or Professional removes liquidity in SPY Options does not impose a burden on competition because the Exchange's execution and routing services are completely voluntary and subject to extensive competition both from other exchanges and from off-

exchange venues. If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result.

Accordingly, the Exchange 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. Additionally, the changes proposed herein are pro-competitive to the extent that they continue to allow the Exchange to promote and maintain order executions.

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.[22]

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:

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

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2016-070 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 Number SR-NASDAQ-2016-070. 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 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; 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-2016-070 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Robert W. Errett
Deputy Secretary

[23] 17 CFR 200.30-3(a)(12).

[FR Doc. 2016-12386 Filed: 5/25/2016 8:45 am; Publication Date: 5/26/2016]