

the Exchange is on an even playing field with competing options exchanges concerning openings.

The Exchange believes that the proposed definition of "market for the underlying security" should enable Exchange options participants to price options promptly and accurately at the opening of trading, resulting in narrower spreads and deeper markets on the Exchange.

The Exchange further believes that the proposed rule change will provide it with more flexibility to determine when to permit the Phlx XL automated opening system to begin, which should contribute to the Exchange's ability to conduct openings in a fairly and orderly manner.

#### *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.

#### *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 proposed rule change is being designated by the Exchange as a "non-controversial" rule pursuant to Section 19(b)(3)(A)<sup>11</sup> of the Act and subparagraph (f)(6) of Rule 19b-4 thereunder,<sup>12</sup> because the proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the Exchange has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the filing of the proposed rule change.<sup>13</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>14</sup> normally does not

become operative for 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii)<sup>15</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The proposed rule change is based on the rules of another self-regulatory organization,<sup>16</sup> and this proposal does not raise any novel issues. In addition, the Exchange states that it is being placed at a competitive disadvantage because other exchanges are able to open trading in an options series at times when the Exchange cannot. Allowing the proposed rule change to become operative on filing will ensure that the Exchange is on an even playing field with competing options exchanges concerning openings. For these reasons, the Commission designates the proposed rule change as operative upon filing.<sup>17</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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.

### **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-Phlx-2008-75 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-Phlx-2008-75. 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 inspection and copying 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 will also be available for inspection and copying at the principal office of the self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2008-75 and should be submitted on or before December 9, 2008.

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

**Florence E. Harmon,**  
*Acting Secretary.*

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### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-58911; File No. SR-NASDAQ-2008-085]

#### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the Procedures Applicable to Listed Companies That Are Late in Filing a Required Periodic Report With the Commission**

November 6, 2008.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934

<sup>18</sup> 17 CFR 200.30-3(a)(12).

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

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> As required under Rule 19b-4(f)(6)(iii), the Exchange has provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing of the proposed rule change.

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>16</sup> See Securities Exchange Act Release No. 56600 (October 2, 2007), 72 FR 57619 (October 10, 2007) (SR-CBOE-2007-88).

<sup>17</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's effect on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

("Act"),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on October 30, 2008, The NASDAQ Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by Nasdaq. Nasdaq has designated the proposed rule change as effecting a change described under Rule 19b-4(f)(6) under the Act,<sup>4</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to modify the procedures applicable to listed companies that are late in filing a required periodic report with the Commission.

The text of the proposed rule change is below. Proposed new language is in *italics*; proposed deletions are in brackets.<sup>5</sup>

#### 4802. Purpose and General Provisions

(a) No change.

(b) (1) An issuer may file a written request for an exception to any of the standards set forth in the Rule 4000 Series at any time during the pendency of a proceeding under the Rule 4800 Series.

(2)(A) *Subject to the limitation in subparagraph (B), below, a [A] Listing Qualifications Panel may grant exceptions for a period not to exceed 180 days from the date of the Staff Determination with respect to the deficiency for which the exception is granted, and the Listing Council may grant exceptions for a period not to exceed 360 days from the date of the Staff Determination with respect to the deficiency for which the exception is granted, in each case where it deems appropriate.*

(B) *In the case of a company that fails to file a periodic report (e.g., Form 10-K, 10-Q, 20-F, 40-F, or N-CSR), neither a Listing Qualifications Panel nor the Listing Council may grant an exception for a period to exceed 360 days from the due date of the first such late periodic report. The company can regain compliance with the requirement*

*by filing that periodic report and any other delinquent reports with due dates falling before the end of the exception period. In determining whether to grant an exception, and the length of any such exception, the Panel and Listing Council will consider the company's specific circumstances, including the likelihood that the filing can be made within the exception period, the company's past compliance history, the reasons for the late filing, corporate events that may occur within the exception period, the company's general financial status, and the company's disclosures to the market. This review will be based on information provided by a variety of sources, which may include the company, its audit committee, its outside auditors, the staff of the SEC and any other regulatory body.*

(c)-(f) No change.

#### 4803. Staff Review of Deficiency

(a) Whenever staff of the Listing Department determines that an issuer does not meet a listing standard set forth in the Rule 4000 Series, staff shall immediately notify the issuer. The issuer shall make a public announcement through the news media disclosing the receipt of this notice, including the Rule(s) upon which it was based. Prior to the release of the public announcement, the issuer shall provide such disclosure to Nasdaq's Market Watch Department, the Listing Department, and the Hearings Department. The public announcement shall be made as promptly as possible, but not more than four business days following receipt of the notice from the Listing Department.

(1) No change.

(2) *In the case of deficiencies from the standards of Rules 4310(c)(14) and 4320(e)(12), staff's notice shall provide the issuer with 60 calendar days to submit a plan to regain compliance with the listing standard; provided, however, that the issuer shall not be provided with an opportunity to submit such a plan if review under the Rule 4800 Series of a prior Staff Determination (other than a Staff Determination that serves as a public reprimand letter as described in Section 4801(k)(2)) with respect to the issuer is already pending. Staff in the Listing Department may extend this deadline for up to an additional 15 calendar days upon good cause shown and may request such additional information from the issuer as is necessary to make a determination regarding whether to grant such an extension.*

(2)-(3) Renumbered as (3) and (4).

(b)(1) Unless review under the Rule 4800 Series of a prior Staff

Determination (other than a Staff Determination that serves as a public reprimand letter as described in Rule 4801(k)(2)) with respect to the issuer is already pending, the Listing Department may grant the issuer additional time to regain compliance with a listing standard described in paragraph (a)(1) and (a)(2). *The maximum amount of time that the Listing Department may provide is described in paragraph (b)(2), below. Staff in the Listing Department may request such additional information from the issuer as is necessary to make a determination regarding whether to grant an exception.*

[; provided, however, that the additional time provided by all such exceptions shall not exceed 105 calendar days from the date of staff's notification pursuant to paragraph (a).] The Listing Department shall prepare a written record describing the basis for granting any exception, and shall provide the issuer with written notice as to the terms of the exception. If the issuer does not regain compliance within the time period provided by all applicable exceptions, the Listing Department shall immediately issue a Staff Determination pursuant to Rule 4804(a). If the Listing Department determines not to grant the issuer additional time to regain compliance, the Listing Department shall immediately issue a Staff Determination pursuant to Rule 4804(a) that includes a description of the basis for denying the exception.

(2)(A) *The maximum additional time provided by all exceptions granted by the Listing Department for a deficiency described in Rule 4803(a)(1) is 105 calendar days from the date of staff's notification pursuant to paragraph (a).*

(B) *The maximum additional time provided by all exceptions granted by the Listing Department for a deficiency described in Rule 4803(a)(2) is 180 calendar days from the due date of the first late periodic report (as extended by Rule 12b-25, if applicable). In determining whether to grant an exception, and the length of any such exception, the Listing Department will consider, and the company should address in its plan of compliance, the company's specific circumstances, including the likelihood that the filing can be made within the exception period, the company's past compliance history, the reasons for the late filing, corporate events that may occur within the exception period, the company's general financial status, and the company's disclosures to the market. This review will be based on information provided by a variety of sources, which may include the company, its audit committee, its*

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

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

<sup>5</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaqomx.cchwallstreet.com>.

outside auditors, the staff of the SEC and any other regulatory body.

\* \* \* \* \*

#### 4805. Request for Hearing

(a) An issuer may, within seven calendar days of the date of the Staff Determination, request either a written or oral hearing to review the Staff Determination. Requests for hearings should be filed with the Hearings Department. *Subject to the limitation in paragraph (b), a [A] request for a hearing shall stay the delisting action pending the issuance of a Panel Decision. If no hearing is requested within the seven calendar day period, the right to request review is waived, and the Staff Determination shall take immediate effect. All hearings shall be held before a Listing Qualifications Panel as described in Rule 4806. All hearings shall be scheduled, to the extent practicable, within 45 days of the date that the request for hearing is filed, at a location determined by the Hearings Department. The Hearings Department shall make an acknowledgment of the issuer's hearing request stating the date, time, and location of the hearing, and the deadline for written submissions to the Listing Qualifications Panel. The issuer shall be provided at least 10 calendar days notice of the hearing unless the issuer waives such notice.*

(b) *A request for a hearing shall ordinarily stay the delisting action pending the issuance of a Panel Decision. However, if the Staff Determination relates to deficiencies from the standards of Rules 4310(c)(14) or 4320(e)(12), which require an issuer to timely file its periodic reports with the Commission, the delisting action will only be stayed for 15 calendar days from the deadline to request a hearing unless the issuer specifically requests and the Panel grants a further stay. A request for a further stay must include an explanation of why such a stay would be appropriate and should be included in the issuer's request for a hearing. Based on that submission and any recommendation provided by staff of the Listing Department, the Panel will determine whether to grant the issuer a further stay. In determining whether to grant the stay, the Panel will consider the company's specific circumstances, including the likelihood that the filing can be made within any exception period that could subsequently be granted, the company's past compliance history, the reasons for the late filing, corporate events that may occur within the exception period, the company's general financial status, and the company's disclosures to the market.*

*The Panel will notify the company of its conclusion as soon as is practicable, but in no event more than 15 calendar days following the deadline to request the hearing. In the event the Panel determines not to grant the issuer a stay, the issuer's securities will be immediately suspended and will remain suspended unless the Panel Decision issued after the hearing determines to reinstate the securities.*

(b)–(c) Renumbered as (c) and (d).

\* \* \* \* \*

#### 4809. Discretionary Review by Nasdaq Board

(a) *A Listing Council Decision or a Panel Decision, in a matter where the Listing Qualifications Panel has granted the maximum exception period and the Listing Council is precluded from granting additional time under Rule 4802(b)(2)(B), may be called for review by the Nasdaq Board solely upon the request of one or more Directors not later than the next Nasdaq Board meeting that is 15 calendar days or more following the date of the Listing Council or Panel Decision. Such review shall be undertaken solely at the discretion of the Nasdaq Board and will not operate as a stay of the Listing Council or Panel Decision, unless the call for review specifies to the contrary. At the sole discretion of the Nasdaq Board, the call for review of a Listing Council or Panel Decision may be withdrawn at any time prior to the issuance of a decision.*

(b) *If the Nasdaq Board conducts a discretionary review, the review generally shall be based on the written record considered by the Listing Council or Listing Qualifications Panel. However, the Nasdaq Board may, at its discretion, request and consider additional information from the issuer and/or from staff of the Listing Department. If the Board considers additional information, the record of proceedings before the Nasdaq Board shall be kept by the Nasdaq Office of Appeals and Review.*

(c) *If the Nasdaq Board conducts a discretionary review, the issuer shall be provided with a written decision that meets the requirements of Rule 4811. The Nasdaq Board may affirm, modify or reverse the Listing Council or Panel Decision and may remand the matter to the Listing Council, Listing Qualifications Panel, or staff of the Listing Department with appropriate instructions. The decision of the Nasdaq Board will take immediate effect, unless it specifies to the contrary, and represents the final action of Nasdaq. If the Nasdaq Board determines to delist the issuer, the securities of the issuer will be immediately suspended, unless*

the Nasdaq Board specifies to the contrary, and Nasdaq will follow the procedures described in IM-4800 and submit an application on Form 25 to the Commission to strike the security from listing.

\* \* \* \* \*

## 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 Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

Nasdaq proposes to modify its process relating to companies that are late in filing a required periodic report with the Commission.

Currently, when a Nasdaq-listed company is late in filing a required periodic report with the Securities and Exchange Commission or other appropriate regulatory authority, Nasdaq staff immediately sends the company a delisting letter pursuant to Nasdaq Rule 4310(c)(14) or 4320(e)(12).<sup>6</sup> Nasdaq rules do not allow a company any compliance period to make a late filing and Nasdaq staff does not have the authority to consider a company's plan to regain compliance or otherwise grant the company any additional time. While a Nasdaq-listed company may receive a short "exception" to the filing requirement, such exceptions are only granted by a Listing Qualification Panel after a hearing and cannot exceed 180 days from the staff's delisting letter.<sup>7</sup> If a company cannot file within that period, it typically would be delisted from Nasdaq<sup>8</sup> and its securities would

<sup>6</sup> Rule 4310(c)(14) is applicable to domestic and Canadian issuers. Rule 4320(e)(12) is applicable to non-U.S. companies, other than Canadian companies.

<sup>7</sup> Pursuant to Rule 4805(a), a request for a hearing stays the security's delisting pending the issuance of a decision by the Panel.

<sup>8</sup> Pursuant to Rule 4807(b), the Nasdaq Listing and Hearing Review Council (the "Listing Council") can call for review a Panel decision to delist a company for this reason and stay the delisting. The Listing Council has recently exercised this

be ineligible to trade on any other exchange or on the OTC Bulletin Board.

While Nasdaq believes that the availability of timely financial statements is vitally important for investors, recent changes in the regulatory environment have made it increasingly difficult for companies to prepare, obtain auditor review, and file their periodic financial statements on time. Heightened scrutiny by independent auditors and increasingly complex technical accounting standards result in better financial disclosure, but they also may delay the filing process. Further, when a company does delay its filing, the formal process required to investigate the underlying issues causing the delay and, if necessary, to restate its financial statements, can be a laborious time-consuming process. In these situations, companies often publish whatever financial information they can and inform investors of the reasons for the delay. Generally speaking, Nasdaq believes that delisting a company that is taking all appropriate steps to regain compliance and file financial statements, while keeping the public informed, is not in the best interest of the company or its investors. In addition, Nasdaq has found that receipt of a delisting letter immediately upon being late in a required filing is disruptive to the Company and can be misleading to shareholders and prospective investors.

As a result, Nasdaq has determined to modify its rules to allow companies to submit a plan to regain compliance to the staff of the Listing Qualifications Department and to allow staff to grant the company up to 180 days from the due date for a periodic report (as extended by Exchange Act Rule 12b-25, if applicable) to regain compliance. Nasdaq will notify companies promptly upon determining that they are delinquent and companies will have to publicly disclose receipt of that notification both under Nasdaq Rules<sup>9</sup> and the Commission's Form 8-K rules.<sup>10</sup> Nasdaq will also disseminate the fact that the company is late in filing a periodic report<sup>11</sup> and the company will be included on a list of deficient and

discretion in certain late filing cases. Pursuant to Rule 4802(b), the Listing Council cannot grant an exception for such a company to stay listed longer than 360 days from the date of the staff's delisting letter.

<sup>9</sup> See Rule 4803(a).

<sup>10</sup> See Item 3.01(a) of Form 8-K and Instruction 2 thereto.

<sup>11</sup> Nasdaq includes an indicator in the daily issue symbol directory, which notes that the company is delinquent in filing a periodic report, for data vendors to display on their single security quotation screens.

delinquent companies on Nasdaq's Web site.<sup>12</sup>

In determining whether to grant a company additional time, staff will consider the company's specific circumstances, including the company's past compliance history, the reasons for the late filing, corporate events that may occur within the exception period, the company's general financial status, the company's disclosures to the market, and the likelihood that the filing can be made within the exception period. This review will be based on information provided by a variety of sources, which may include the company, its audit committee, its outside auditors, the staff of the SEC and any other regulatory body.

If the company has not regained compliance during any additional periods granted by the Listing Qualifications Department,<sup>13</sup> or if staff determines that it is not appropriate to grant additional time, the company will receive a delisting notification from Nasdaq staff and, to avoid being delisted, can request review by a Nasdaq Listing Qualifications Panel.<sup>14</sup> Under the proposed rules, such a request will stay the delisting for 15 calendar days to permit the Panel to make a determination as to whether a further stay is appropriate.<sup>15</sup> In the event the Panel determines not to grant the issuer a further stay, the issuer's securities will be suspended and will remain suspended unless the Panel Decision issued after the hearing determines to reinstate the securities. If the Panel grants the issuer a further stay, that stay would remain in effect until the Panel issues a Panel Decision, which could permit the company to remain listed for up to 180 days from the date of the staff's delisting determination but in no event more than 360 days from the due date of the company's first late filing, or

<sup>12</sup> See <http://www.nasdaq.com/services/DelDefOpenReport.pdf>.

<sup>13</sup> If staff initially grants a company less than 180 days from the due date of the delinquent periodic report, staff may subsequently grant additional time, up to the full extent of its discretion.

<sup>14</sup> Nasdaq staff could also terminate an exception based on superseding events or if the company fails to comply with another listing requirement during the exception period.

<sup>15</sup> The decision to continue the stay may be made by different panel members than those who ultimately hear the company's appeal at the hearing. In determining whether to grant the stay, the Panel will consider the company's specific circumstances, including the likelihood that the filing can be made within any exception period that could subsequently be granted, the company's past compliance history, the reasons for the late filing, corporate events that may occur within the exception period, the company's general financial status, and the company's disclosures to the market.

could deny any further exception and delist the company.

If the staff and the Panel each grant the maximum time available for the company to regain compliance, the Nasdaq Listing and Hearing Review Council would be unable to grant any additional time regardless of whether the company appeals or the Listing Council calls the matter for review.<sup>16</sup> In these cases, however, Nasdaq is modifying Rule 4809 to permit the Nasdaq Board of Directors to call the Panel decision for review, at the Board's sole discretion.<sup>17</sup> Nasdaq believes that this modification will help assure that there is an opportunity for meaningful review of a Panel decision, if the Board believes that it is appropriate. If, on the other hand, either the staff or the Panel grant less than the maximum time available for the company to regain compliance, the company could appeal to the Listing Council or the Listing Council could call the matter for review, and the Listing Council could grant an exception for the company to stay listed for up to 360 days from the date of the staff's delisting letter, but in no event more than 360 days from the due date of the company's first late filing.

Nasdaq understands that the Commission is considering additional changes that may be appropriate to the listing rules of all the Self-Regulatory Organizations ("SROs") that would result in substantially uniform treatment of delinquent filers by all the SROs. Nonetheless, Nasdaq believes that this interim change is appropriate now and will significantly reduce an existing burden of Nasdaq's rules on its listed companies. Nasdaq is committed to working with the Commission in conjunction with the other SROs to adopt other changes that the Commission feels appropriate.

#### Implementation

Nasdaq proposes to implement the proposed rule immediately for companies that have not yet received a

<sup>16</sup> Nasdaq does not propose to change the existing rules that allow a company to appeal such a matter to the Listing Council or for the Listing Council to call such a matter for review. Nonetheless, in a situation where the staff and the Panel each exercise the full extent of their discretion and grant the maximum time available under the rules, Rule 4802(b)(2)(B) would preclude the Listing Council from granting any additional time to the company to regain compliance.

<sup>17</sup> If the Nasdaq Board exercises its authority to call a Panel decision for review, that call for review will not automatically stay the Panel's decision. If there is a concurrent review of the Panel decision pending by the Listing Council, whether initiated by a company appeal or a Listing Council call for review, the Board will decide whether to permit that review to continue or to assert sole jurisdiction over the matter.

delisting notification. Nasdaq proposes no changes to the process for companies that have already received a delisting notification and therefore are already in the review process. As such, these companies can receive a Panel exception for a maximum of 180 days from the date of the staff's delisting determination. Thereafter, if the Listing Council calls the matter for review, the Listing Council can stay the delisting and grant the company an exception for a maximum of 360 days from the date of the staff's delisting letter.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>18</sup> in general and with Sections 6(b)(5) of the Act,<sup>19</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change is designed to remove uncertainty regarding the ability of companies to remain listed on Nasdaq, thereby protecting investors and removing an impediment to a free and open market, and provide additional transparency to Nasdaq's process surrounding delinquent periodic reports.

### 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

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become

operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>20</sup> and Rule 19b-4(f)(6) thereunder.<sup>21</sup>

A proposed rule change filed under 19b-4(f)(6) normally may not become operative for 30 days after the date of filing.<sup>22</sup> However, Rule 19b-4(f)(6)(iii)<sup>23</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. Nasdaq has requested that the Commission waive the 30-day operative delay and designate the proposed rule change to become operative upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change will not allow companies to remain listed on Nasdaq longer than 360 days from the due date of the first late annual or quarterly report, the maximum period currently allowed under Nasdaq rules. While the procedures for issuing delisting notices for Nasdaq late filers will be changed, as Nasdaq has stated in its filing, the changes are based on, and similar to, the NYSE's current procedures for NYSE issuers that are late in filing their annual report, and do not in any way extend the amount of time a late filer of both annual and quarterly reports can remain listed on Nasdaq.<sup>24</sup> Further, consistent with investor protection, under the new rules any extension of a stay granted by the Nasdaq staff (which cannot exceed 180 days from the due date of the filing), would have to be considered by an independent panel. Finally, waiving the 30 day operative delay will allow Nasdaq to apply the proposed change to upcoming company filings due for the quarter ended September 30, 2008.<sup>25</sup> Based on the above, the Commission

<sup>20</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>21</sup> 17 CFR 240.19b-4(f)(6).

<sup>22</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. Nasdaq has satisfied this requirement.

<sup>23</sup> *Id.*

<sup>24</sup> Unlike Nasdaq, NYSE delisting rules only apply to late filers of annual reports. *See* Securities Exchange Act Release No. 51777 (June 2, 2005), 70 FR 33573 (June 8, 2005).

<sup>25</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the impact of the proposed rule on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

designates the proposal to become operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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 the furtherance of the purposes of the Act.

## 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-2008-085 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-2008-085. 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 inspection and copying 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 such filing also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that

<sup>18</sup> 15 U.S.C. 78f.

<sup>19</sup> 15 U.S.C. 78f(b)(5).

you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2008–085 and should be submitted on or before December 9, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58921; File No. SR–NYSE–2008–111]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC To Establish System of Rebates for Designated Market Makers

November 7, 2008.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”),<sup>2</sup> and Rule 19b–4 thereunder,<sup>3</sup> notice is hereby given that on October 30, 2008, New York Stock Exchange LLC (the “NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule changes 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 changes from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a schedule of fees and rebates applicable to Designated Market Makers (“DMMs”). While the change to the Exchange’s 2008 Price List pursuant to this proposal will be effective upon filing, the change will become operative as of November 3, 2008. The text of the proposed rule change is available on the Exchange’s Web site (<http://www.nyse.com>), at the Exchange’s Office of the Secretary, 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 self-regulatory organization 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 NYSE 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 to adopt a schedule of fees and rebates applicable to DMMs. While the change to the Exchange’s 2008 Price List pursuant to this proposal will be effective upon filing, the change will become operative as of November 3, 2008.

DMMs are a new category of market makers that the Exchange has created as a replacement for the specialists.<sup>1</sup> As was the case historically for the specialists, the DMMs will not be charged any fees on transactions executed on the Exchange for their own account in their capacity as DMMs that remove liquidity from the Exchange. However, as was the case with specialists in the period immediately prior to the adoption of the new market model, DMMs will be charged a \$0.0030 per share routing fee for orders routed to away markets, which is the same rate charged to all other market participants.<sup>2</sup>

Prior to the adoption of the new market model, the Exchange operated a revenue sharing program for the specialists (the “liquidity provision payments” or “LPPs”) that was structured to provide incentives to the specialists to add liquidity to the Exchange. The Exchange is discontinuing the LPP program in connection with the adoption of the new market model. The Exchange proposes to provide incentives to the DMMs that will be similar in effect to the LPPs, by awarding rebates to the DMMs when they add liquidity to the Exchange.<sup>3</sup> The following liquidity-

adding activities will qualify a DMM for a rebate:

- Posting displayed and non-displayed orders on the Display Book, including s-quote and s-quote reserve orders;
- Providing liquidity on non-displayed interest using the Capital Commitment Schedule; or, prior to the implementation of the Capital Commitment Schedule, using the following message activities: price improvement, size improvement (PRIN FILL), matching away market quotes;
- Executing trades in the crowd and at Liquidity Replenishment Points; and
- Providing liquidity on market-at-the-close and limit-at-the-close transactions.

Rebates will not apply to executions at the open, as trades at the open are free to all Exchange users and the DMM is therefore not generating any revenue for the Exchange from the DMM’s counterparty in the transaction.

DMMs will receive (i) a rebate of \$0.0030 per share when adding liquidity in round lots in active securities (*i.e.*, securities with a consolidated average daily trading volume (“ADV”) of greater than or equal to one million shares) (“Active Securities”);<sup>4</sup> and (ii) a rebate of \$0.0035 per share when they add liquidity in round lots in securities with a consolidated ADV of less than one million shares (“Less Active Securities”).<sup>3</sup> The Exchange will also pay DMMs a rebate of \$0.0004 per share for executions at the close. This rebate equals the \$0.0004 fee the Exchange charges other Exchange users for executions at the close.

In addition, each DMM will also receive all of the market data quote revenue (the “Quoting Share”) received by the Exchange from the Consolidated Tape Association under the Revenue Allocation Formula of Regulation NMS with respect to any Less Active Security in any month in which the DMM meets the quoting requirement of Rule 104(a)(1)(A) for that individual stock.<sup>5</sup>

DMMs will receive a rebate of \$0.0004 per share when providing liquidity with respect to odd lots and the odd lot

continuing for the duration of this transition, specialists will be subject to the same pricing and rebate regime as DMMs.

<sup>4</sup> The Exchange will determine whether a security is an Active Security or Less Active Security based on the previous month’s consolidated ADV.

<sup>5</sup> For Less Active Securities, a DMM must maintain a bid and an offer at the National Best Bid (“NBB”) and National Best Offer (“NBO”) (collectively herein “NBBO”) for an aggregate average monthly NBBO of 10% or more during a calendar month. For purposes of passing through the Quoting Share with respect to an individual stock, the Exchange will require the DMM to maintain the average monthly NBBO of 10% or more for that individual stock.

<sup>26</sup> 17 CFR 200.30–3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78a *et seq.*

<sup>3</sup> 17 CFR 240.19b–4.

<sup>1</sup> See 34–58845 (October 24, 2008).

<sup>2</sup> Except floor brokers, who pay \$0.0029 per share.

<sup>3</sup> Not all stocks will be traded under the DMM model immediately. For a brief transitional period, some stocks will continue to be traded under the specialist model. Commencing November 3, 2008,