

for trades settling on or after March 1, 2010.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act<sup>7</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>8</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members because Exchange members would equally be assessed the costs incurred by the Exchange to route customer orders to away markets on behalf of its members.

### 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 foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>9</sup> and paragraph (f)(2) of Rule 19b-4<sup>10</sup> thereunder. 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-2010-32 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-Phlx-2010-32. 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 such 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-Phlx-2010-32 and should be submitted on or before April 2, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Florence E. Harmon,**  
Deputy Secretary.

[FR Doc. 2010-5316 Filed 3-11-10; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61669; File No. SR-NASDAQ-2009-081]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change To Modify the Fees for Listing on the Nasdaq Stock Market and the Fee for Written Interpretations of Nasdaq Listing Rules

March 5, 2010.

## I. Introduction

On October 6, 2009, The NASDAQ Stock Market LLC ("Nasdaq") 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 modifying the application, entry and annual fees currently charged to issuers listed on the Nasdaq Global and Nasdaq Global Select Markets, as well as the fee for written interpretations of Nasdaq listing rules. The proposed rule change was published for comment in the **Federal Register** on November 4, 2009.<sup>3</sup> The Commission received three comment letters from one commenter on the proposal.<sup>4</sup> Nasdaq submitted four letters in response to the comments.<sup>5</sup> This order approves the proposed rule change.

## II. Description of the Proposal

### A. Nasdaq Global and Global Select Application, Entry and Annual Fees

Nasdaq currently imposes a \$5,000 application fee on a company applying to list on the Nasdaq Global or Nasdaq Global Select Markets.<sup>6</sup> Nasdaq

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

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

<sup>3</sup> See Securities Exchange Act Release No. 60899 (October 28, 2009), 74 FR 57212 ("Notice").

<sup>4</sup> See Letters to Elizabeth M. Murphy, Secretary, Commission, from Jesse W. Markham, Jr., Roger Myers, and Stephen Ryerson, Holme Roberts & Owen LLP (writing on behalf of Business Wire, Inc.), dated November 24, 2009 ("Business Wire Letter 1"); January 8, 2010 (stating its intent to respond to Nasdaq's response to its initial letter); and January 14, 2010 ("Business Wire Letter 2").

<sup>5</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from Arnold P. Golub, Vice President and Associate General Counsel, The NASDAQ Stock Market LLC, dated December 23, 2009 ("Nasdaq Letter 1"); from Michael N. Sohn and Donna E. Patterson, Arnold & Porter, LLP, dated December 23, 2009 (writing on behalf of Nasdaq) ("Nasdaq Letter 2"); from Arnold P. Golub, Vice President and Associate General Counsel, The NASDAQ Stock Market LLC, dated January 22, 2010 ("Nasdaq Letter 3"); and February 5, 2010 ("Nasdaq Letter 4").

<sup>6</sup> The application fee is non-refundable. The Global Select Market is a segment of The Nasdaq Global Market. See Nasdaq Rule 5005(a)(25) and (29).

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>10</sup> 17 CFR 240.19b-4(f)(2).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

proposes to increase this fee to \$25,000. The application fee would continue to be credited towards entry fees upon listing, and thus, this change would not affect the overall fees a company pays to list.

Nasdaq also proposes to modify the entry fee a company pays when listing on the Nasdaq Global or Nasdaq Global Select Markets. Currently, those fees are charged in three tiers, based on the number of shares the company has outstanding, and range from \$100,000 to \$150,000.<sup>7</sup> Nasdaq proposes to create, for Nasdaq Global and Nasdaq Global Select listings, an additional tier for companies issuing over 50 million to 100 million shares and to increase the entry fee by \$25,000 to \$75,000, depending on the number of shares to be listed.<sup>8</sup> These fees were last increased in January 2002.<sup>9</sup>

In addition, Nasdaq proposes to modify the annual fee imposed on domestic and foreign issues and American Depositary Receipts (“ADRs”) listed on the Nasdaq Global and Nasdaq Global Select Markets. The proposed change would result in revised annual fees for domestic and foreign issues for Nasdaq Global and Nasdaq Global Select listings, ranging from \$35,000 to \$99,500, based on the number of shares outstanding, and a maximum increase of \$5,000, depending on the company’s total shares outstanding.<sup>10</sup> In addition, Nasdaq proposes to combine two of the existing seven fee tiers to create a new tier for companies with over 10 million to 50 million shares outstanding. As a result, according to Nasdaq, there would be no fee increase for approximately 25 percent of Nasdaq companies.<sup>11</sup> Annual

<sup>7</sup> The current entry fees for Nasdaq Global and Nasdaq Global Select listings are as follows: \$100,000 for up to 30 million shares; \$125,000 for 30+ to 50 million shares; and \$150,000 for over 50 million shares. See Nasdaq Rule 5910(a).

<sup>8</sup> The proposed entry fees for Nasdaq Global and Nasdaq Global Select listings are as follows: \$125,000 for up to 30 million shares; \$150,000 for 30+ to 50 million shares; \$200,000 for 50+ to 100 million shares; and \$225,000 for shares over 100 million.

<sup>9</sup> See Securities Exchange Act Release No. 45206 (December 28, 2001), 67 FR 621 (January 4, 2002) (approving SR-NASD-2001-76).

<sup>10</sup> The current annual fees for domestic and foreign issues listed on Nasdaq Global and Nasdaq Global Select are as follows: \$30,000 for up to 10 million shares; \$35,000 for 10+ to 25 million shares; \$37,500 for 25+ to 50 million shares; \$45,000 for 50+ to 75 million shares; \$65,500 for 75+ to 100 million shares; \$85,000 for 100+ to 150 million shares; and \$95,000 for over 150 million shares. See Nasdaq Rule 5910(c).

<sup>11</sup> The proposed annual fees for domestic and foreign issues listed on Nasdaq Global or Nasdaq Global Select are as follows: \$35,000 for up to 10 million shares; \$37,500 for 10+ to 50 million shares; \$46,500 for 50+ to 75 million shares; \$68,500 for 75+ to 100 million shares; \$89,000 for 100+ to 150 million shares; and \$99,500 for shares over 150

fees for domestic and foreign<sup>12</sup> companies were last increased in January 2007.<sup>13</sup> The revised annual fee applicable to ADRs listed on Nasdaq Global and Nasdaq Global Select would result in an annual increase ranging from \$8,775 to \$20,000, and the revised fee would range from \$30,000 to \$50,000, depending on the number of ADRs outstanding.<sup>14</sup> In addition, Nasdaq proposes to expand the size of the tiers of shares outstanding on which these proposed fees are based. Annual fees for ADRs were last increased in February 2004.<sup>15</sup>

#### B. Fee for Written Interpretations of Nasdaq Listing Rules

Nasdaq also proposes to change the fee for written interpretations of Nasdaq listing rules 5000 through 5900<sup>16</sup> for all companies listed on Nasdaq’s Capital, Global and Global Select Markets. Currently, for a written interpretation, a company is required to submit a non-refundable fee of \$5,000 for a regular request, which is generally completed within four weeks from the date Nasdaq receives all information necessary to respond to the request, or \$15,000 for an expedited request, in which the company requests a response by a specific date that is less than four weeks after the date Nasdaq receives all necessary information.

Nasdaq proposes to eliminate the alternative for a non-expedited request and require all companies seeking a written interpretation to pay \$15,000. Further, Nasdaq proposes to modify the timeframes in which Nasdaq would respond to interpretive requests. As revised, the rule would state that Nasdaq would generally respond to all requests for a written interpretation

million. Companies with 25 million to 50 million shares outstanding would not face a fee increase under the proposed change.

<sup>12</sup> Telephone conversation between Arnold Golub, Vice President and Associate General Counsel, Nasdaq, and Terri Evans, Special Counsel, and Arisa Tinaves, Special Counsel, Division of Trading and Markets, Commission, on November 5, 2009 (clarifying that fees for foreign companies also were last increased in January 2007).

<sup>13</sup> See Securities Exchange Act Release No. 55202 (January 30, 2007), 72 FR 6017 (February 8, 2007) (approving SR-NASDAQ-2006-40).

<sup>14</sup> The current annual fees for ADRs listed on Nasdaq Global and Nasdaq Global Select are as follows: \$21,225 for up to 10 million ADRs; \$26,500 for 10+ to 25 million ADRs; \$29,820 for 25+ to 50 million ADRs; and \$30,000 for over 50 million ADRs. See Nasdaq Rule 5910(d). The proposed annual fee for ADRs is as follows: \$30,000 for up to 10 million ADRs; \$37,500 for 10+ to 50 million ADRs; \$42,500 for 50+ to 75 million ADRs; and \$50,000 for ADRs over 75 million.

<sup>15</sup> See Securities Exchange Act Release No. 49169 (February 2, 2004), 69 FR 6009 (February 9, 2004) (approving SR-NASD-2003-178).

<sup>16</sup> The Commission notes that the 5000 series Rules are entitled NASDAQ Listing Rules.

within four weeks from the date Nasdaq receives all information necessary to respond to the request, although Nasdaq would attempt to respond by a sooner date if the company so requires. Nasdaq will continue, as it currently does, to not charge companies for oral interpretations of its rules.<sup>17</sup>

#### C. Implementation

The revised annual fee schedule would be effective January 1, 2010. The application and entry fee schedule would be effective for companies that apply for listing after Commission approval of the proposed rule change; thus a company that applied and paid the application fee prior to Commission approval would be charged an entry fee according to the fee schedule in effect at the time of its application. Finally, we note that the change to the interpretive fees is effective upon approval of the fee in this order.

### III. Summary of Comments

The Commission received three comment letters on the proposed rule change from Business Wire.<sup>18</sup> Generally, Business Wire requests that the Commission: “(1) deny Nasdaq’s proposal to increase its fees absent assurances that Nasdaq is not engaged in cross-subsidization of its information dissemination services subsidiary through application, entry, and annual fees for listings; (2) require transparency in all future pricing proposals from Nasdaq; and (3) restrict Nasdaq’s ownership of and/or involvement in business outside its core function that create actual or apparent conflicts of interest.”<sup>19</sup>

According to Business Wire, Nasdaq is increasing its “fee structure to cover unspecified cost increases at the same time it is attempting to attract new listings by offering millions of dollars in ‘free’ Information Dissemination Services [(“IDSs”)] bundled into the listing fee.”<sup>20</sup> Business Wire believes that Nasdaq is, in fact, raising its fees to subsidize the delivery of free or discounted IDSs to current or prospective listed companies through GlobeNewswire and other affiliates that provide IDSs such as press release services, webcasting, Web hosting and

<sup>17</sup> The Commission notes that Nasdaq has stated that it does not charge companies for oral interpretation requests of their rules. Telephone conversation on October 28, 2009 between Arnold Golub, Vice President and Associate General Counsel, Nasdaq and Sharon Lawson, Senior Special Counsel, Commission.

<sup>18</sup> See *supra* note 4.

<sup>19</sup> See Business Wire Letters 1 and 2.

<sup>20</sup> See Business Wire Letter 1; see also Business Wire Letter 2 (stating that the proposed rule change fails to explain why additional revenue is needed).

EDGAR filings, all of which Nasdaq refers to as its “Core Services,” and which are offered under the umbrella of Nasdaq affiliate Nasdaq OMX Group Corporate Services, Inc. (“NOCS”).<sup>21</sup> According to Business Wire, Nasdaq jointly markets itself and the IDSs offered by NOCS, to induce companies listed on other exchanges to switch listings or to retain Nasdaq listings, by effectively reducing a company’s listing costs through the provision of IDSs.<sup>22</sup> Specifically, Business Wire asserts that Nasdaq offers extensive free or discounted IDSs to certain listed companies and that, in fact, Nasdaq has offered “up to five years of free or heavily discounted wire distribution \* \* \* to certain companies either as an inducement to switch listings or as part of a package deal to reduce the cost of the company’s existing listing on Nasdaq.”<sup>23</sup> According to Business Wire, the alleged cross-subsidization unduly burdens competition and inequitably allocates fees among its issuers in violation of Sections 6(b)(4), (5) and (8) of the Act, as well as Sections 1 and 2 of the Sherman Act.<sup>24</sup>

Specifically, Business Wire argues that Nasdaq’s proposal fails to satisfy Section 6(b)(4) of the Act, which requires the equitable allocation of reasonable dues, fees and other charges among its issuers, because listed companies that use Nasdaq’s free or discounted IDSs pay the same listing fees as listed companies that elect not to do so and purchase such services from third parties. Business Wire believes that Nasdaq’s fees are not equitably allocated because one set of listed companies is subsidizing another by effectively paying, through their listing fees, a portion of the costs that are incurred by Nasdaq to provide free or discounted IDSs.<sup>25</sup> Business Wire further asserts that the proposed fee increases would facilitate Nasdaq’s alleged tying and cross-subsidization in violation of the antitrust laws and would, therefore, be inconsistent with just and equitable principles of trade

under Section 6(b)(5) of the Act.<sup>26</sup> Moreover, Business Wire believes that Nasdaq’s proposed fee increases would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act. According to Business Wire, Nasdaq’s “cross-subsidization provides no significant benefit to investors, listed companies, or the exchange system that might make such a significant impact on competition necessary or appropriate.”<sup>27</sup>

Business Wire also alleges that Nasdaq is tying its IDSs to its listing services in violation of Section 1 of the Sherman Act. According to Business Wire, a tying arrangement violates Section 1 of the Sherman Act “if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.”<sup>28</sup> Business Wire believes that Nasdaq’s free or discounted offerings meet the legal standard of a tying arrangement in violation of the antitrust laws.<sup>29</sup>

Additionally, Business Wire alleges that Nasdaq, by offering free or discounted IDSs, evinces an attempt to monopolize in violation of Section 2 of the Sherman Act.<sup>30</sup> Specifically, Business Wire alleges that Nasdaq is engaging in predatory anti-competitive conduct. Business Wire urges the Commission to ensure that no part of the proposed fee increase is used to subsidize Nasdaq’s provision of IDSs.

Finally, Business Wire states that Nasdaq’s offering of IDSs creates a conflict of interest with its role as a self-regulatory organization. For example, Business Wire believes that Nasdaq’s role in enforcing compliance with rules relating to the dissemination of material information by listed companies could result in Nasdaq effectively becoming

<sup>26</sup> See Business Wire Letter 1.

<sup>27</sup> See Business Wire Letter 1.

<sup>28</sup> See Business Wire Letter 1.

<sup>29</sup> Business Wire believes that Nasdaq is tying together its listing services and its IDSs because customers that list on Nasdaq and are provided such free or discounted services will effectively be precluded from switching to another source of IDSs since they would be paying for Nasdaq’s IDSs, whether they use them or not, through the elevated listing fees. Business Wire further alleges that Nasdaq has sufficient market power to coerce purchase of the tied product since the only way to avoid the indirect cost of Nasdaq’s IDSs would be for a company to either not list on Nasdaq or incur significant costs to move their listing to a different exchange. Lastly, Business Wire asserts that the amount of commerce affected in the IDSs’ market is far above the “not insubstantial” requirement of the Sherman Act (asserting that Nasdaq is offering millions of dollars of free wire distribution and other IDSs). See Business Wire Letters 1 and 2.

<sup>30</sup> See Business Wire Letter 1.

the “preferred provider” of IDSs.<sup>31</sup> Accordingly, Business Wire believes that not only should Nasdaq’s proposal be rejected, but that Nasdaq should be required to sell GlobeNewswire or operate it on a strict arms-length basis.<sup>32</sup>

#### IV. Response to Comments

In response to Business Wire’s comments, Nasdaq asserts that its proposed fee change satisfies the requirements of the Act.<sup>33</sup> Specifically, Nasdaq states that its “proposed fees are in all cases equal to, or less than, the fees charged by other exchanges” and are supported by improvements to its market and regulatory process, as well as by changes in the marketplace.<sup>34</sup>

According to Nasdaq, it must now “spread its fixed costs, including the costs for regulation, across fewer listed companies and applicants than in the past.”<sup>35</sup> Specifically, Nasdaq states that the number of companies listed on Nasdaq has declined approximately ten percent, but that its regulatory costs have either remained constant or increased.<sup>36</sup> Nasdaq also asserts that the proposal does not permit unfair discrimination between customers, issuers, brokers, or dealers. According to Nasdaq the proposed fees are “allocated based on shares outstanding, as are Nasdaq’s current fees and fees for other exchanges, and that similarly situated companies would be charged the same fees.”<sup>37</sup>

Further, in response to Business Wire’s concern that Nasdaq’s proposed fees unduly burden competition in violation of Section 6(b)(8) of the Act, Nasdaq believes that in assessing competition, the Commission should be concerned with competition among the entities it regulates, such as exchanges, brokers, dealers, and issuers, and not competitive issues in other areas of the economy.<sup>38</sup> Accordingly, Nasdaq asserts that the only competitive impact of the proposed rule change would be to allow Nasdaq “to recover the costs of, and continue to make, improvements to its market and regulatory process, and

<sup>31</sup> See Business Wire Letter 1; see also Business Wire Letter 2 (stating by “intertwining its listing services with Globe’s Information Dissemination Services, Nasdaq is circumventing any controls between its regulatory function and the non-regulated services provided by its affiliated entities.”)

<sup>32</sup> See Business Wire Letters 1 and 2.

<sup>33</sup> See Nasdaq Letters 1, 3 and 4.

<sup>34</sup> See Nasdaq Letter 4.

<sup>35</sup> See Nasdaq Letter 1.

<sup>36</sup> See Nasdaq Letter 3. Nasdaq represents that from December 31, 2006 until December 31, 2009, the number of companies listed on Nasdaq has declined from 3,193 companies to 2,852 companies.

<sup>37</sup> See Nasdaq Letter 1.

<sup>38</sup> See Nasdaq Letter 1.

<sup>21</sup> See Business Wire Letter 1. The Commission notes that Nasdaq clarified that NOCS and Nasdaq are separate subsidiaries of NASDAQ OMX Group, Inc. See Nasdaq Letter 1. Nasdaq also clarified that references in its letters to Nasdaq Corporate Services, Inc., NASDAQ OMX Corporate Services, Inc., and Nasdaq Corporate Services, LLC should all be references to NASDAQ OMX Group Corporate Services, Inc. Telephone conversation on March 3, 2010 between Arnold Golub, Vice President and Associate General Counsel, Nasdaq, and Terri Evans, Special Counsel, Commission.

<sup>22</sup> See Business Wire Letter 2.

<sup>23</sup> See Business Wire Letter 2.

<sup>24</sup> See Business Wire Letter 1.

<sup>25</sup> See Business Wire Letter 1.

therefore to continue to compete with other listing markets \* \* \*.”<sup>39</sup> Nasdaq also believes that any potential conflicts of interest are addressed by its separation of its regulatory functions, including the listing department, from its business functions, as well as through the rule filing process.<sup>40</sup> Moreover, the effectiveness of its regulatory program is subject to periodic Commission examination.<sup>41</sup>

Nasdaq also represents that its proposed fee changes are not designed to recoup GlobeNewswire’s costs,<sup>42</sup> and that “GlobeNewswire is profitable on a stand-alone basis, even after considering the marketing expenses it incurs when offering products for free on a trial basis, and there is therefore no need for Nasdaq to cross-subsidize GlobeNewswire \* \* \*.”<sup>43</sup> According to Nasdaq, GlobeNewswire makes promotional and partnership offers to current and prospective customers as part of its marketing efforts.<sup>44</sup> However, Nasdaq acknowledges that such marketing efforts on behalf of NOCS, including GlobeNewswire, “typically occur in meetings and discussions about the company’s choice of listing market.”<sup>45</sup> Nasdaq represents, however, that while NOCS will continue to offer a sample of services on a complimentary or discounted basis, such offers will be made regardless of where the company is listed or determines to list.<sup>46</sup> In addition, Nasdaq represents that while NOCS, including GlobeNewswire, may offer, without regard to the company’s choice of listing market, promotional packages of services to broad categories of companies with certain characteristics, it will not offer any individually customized packages of free or discounted services to any company.<sup>47</sup> Accordingly, Nasdaq believes that “any discounts provided for NOCS products cannot be misconstrued as being offered in

connection with a company’s listing on Nasdaq.”<sup>48</sup>

Also, in response to Business Wire’s antitrust claims, Nasdaq disputes Business Wire’s allegation that Nasdaq illegally ties GlobeNewswire and other IDs to a company’s listing on Nasdaq.<sup>49</sup> Nasdaq asserts that companies wishing to list on Nasdaq are not forced to use IDs provided by Nasdaq since neither the receipt of such services nor a Nasdaq listing are conditioned on the other.<sup>50</sup> Therefore, Nasdaq believes that the promotional offers for GlobeNewswire services do not constitute tying.<sup>51</sup> Nasdaq further asserts that “Business Wire’s claim that the costs of the \* \* \* promotions are the unstated basis for Nasdaq’s listing fee proposal is pure speculation.”<sup>52</sup>

Finally, Nasdaq asserts that the promotional nature of the offering alone precludes a predatory pricing claim constituting attempted monopolization under Section 2 of the Sherman Act. Nasdaq notes that courts routinely hold that promotional offers cannot constitute predatory pricing.<sup>53</sup>

#### V. Discussion and Commission’s Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>54</sup> Specifically, the Commission finds that the proposed rule change is consistent with Sections

6(b)(4), (b)(5), and (b)(8) of the Act,<sup>55</sup> which require, in part, that the rules of an exchange: (i) Provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities; (ii) are not designed to permit unfair discrimination between customers, issuers, brokers or dealers; and (iii) do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes that assurances it has received from Nasdaq in response to the comments of Business Wire adequately address the concerns expressed that Nasdaq is acting in an anti-competitive manner that is inconsistent with the Act. Specifically, Nasdaq has represented that promotional offers of IDs made by its affiliate, NOCS, are made regardless of whether or not a prospective customer is listed or may become listed on Nasdaq. Furthermore, NOCS will limit its promotional activities to: (1) Offering a free or discounted sampling of IDs—its “Core Services” package—to all prospective customers; and (2) perhaps offering other packages of complimentary or discounted IDs to broad categories of companies. In either case, the free or discounted services offered by NOCS “will explicitly and expressly provide that companies will be free to accept the offer and test NOCS services whether or not they choose to list on Nasdaq.”<sup>56</sup>

Based on Nasdaq’s representation that offers of IDs by NOCS will be made independent of the listing status of NOCS customers or potential customers, as well as additional information contained in Nasdaq’s responses,<sup>57</sup> the Commission does not believe that the proposed increases in listing fees cross-subsidize NOCS services in any way that constitutes an inappropriate burden on competition or an inequitable allocation of fees, or fails to promote just and equitable principles of trade, in a manner inconsistent with the Act. Accordingly, we find that the proposed changes to Nasdaq listing fees is consistent with the requirements of the

<sup>39</sup> See Nasdaq Letter 4.

<sup>40</sup> See Nasdaq Letter 2. Nasdaq maintains that NOCS, Nasdaq’s affiliate, has offered and plans to offer a limited amount of free or discounted “Core Services” to all companies whether the company is listed on Nasdaq or not.

<sup>41</sup> According to Nasdaq, “[i]llegal tying is the ‘seller’s exploitation of its control over the tying product \* \* \* to force the buyer into the purchase of a tied product \* \* \* that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.” See Nasdaq Letter 2.

<sup>42</sup> See Nasdaq Letter 2. Nasdaq asserts, among other things, that any offers of GlobeNewswire free or discounted services when competing for listings would fail the coercion element of the Sherman Act, since Nasdaq is willing to and does offer the listing service alone without the IDs. Additionally, according to Nasdaq, because Nasdaq must compete for listings, Nasdaq does not have the requisite market power required under the Sherman Act for a tying claim. See Nasdaq Letter 2.

<sup>43</sup> See Nasdaq Letter 2.

<sup>44</sup> Nasdaq further states that GlobeNewswire does not pose a real danger of driving competitors from the market, since GlobeNewswire only processes approximately 10 percent of corporate news releases in the U.S. Nasdaq also notes the substantial resources available to Business Wire. See Nasdaq Letter 2.

<sup>45</sup> In approving the proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>55</sup> 15 U.S.C. 78f(b)(4), (b)(5) and (b)(8).

<sup>56</sup> See Nasdaq Letter 4. In expressly and explicitly notifying companies that permitted offers are not contingent on a Nasdaq listing, Nasdaq further represents that any mention of a permitted offer on a Nasdaq or NOCS Web site will also state that the offer is not conditioned on the companies’ choice of listing market. The Commission notes it is important that any communications, irrespective of the method, on permitted free or discounted services make it expressly and explicitly clear that such services are available whether or not the company lists on Nasdaq.

<sup>57</sup> See Nasdaq Letters 1–4.

<sup>39</sup> See Nasdaq Letter 1.

<sup>40</sup> See Nasdaq Letter 1.

<sup>41</sup> See Nasdaq Letter 1.

<sup>42</sup> See Nasdaq Letter 1.

<sup>43</sup> See Nasdaq Letter 3.

<sup>44</sup> See Nasdaq Letter 1.

<sup>45</sup> See Nasdaq Letter 4.

<sup>46</sup> Nasdaq represents that any future offers of free and discounted services by NOCS will explicitly and expressly provide that companies are free to accept the offer whether or not they choose to list on Nasdaq. See Nasdaq Letter 4.

<sup>47</sup> See Nasdaq Letter 4. Nasdaq has represented that it will not offer any customized packages of free or discounted services, unless the Commission specifically states that it is permitted to do so. Telephone conversation on February 22, 2010 between Arnold Golub, Vice President and Associate General Counsel, Nasdaq and Sharon Lawson, Senior Special Counsel, Commission.

Act and, in particular, provides for an equitable allocation of reasonable fees among its issuers consistent with Section 6(b)(4) of the Act, does not unfairly discriminate between issuers consistent with Section 6(b)(5) of the Act, and is consistent with Section 6(b)(8) of the Act.

As to the concerns raised by Business Wire that the offering of IDs by NOCS creates a conflict of interest with Nasdaq's self-regulatory functions since, among other things, Nasdaq enforces rules relating to the dissemination of material information by listed companies, Nasdaq has represented that it has effectively separated its regulatory functions from its business functions, and that its business functions, including those of NOCS, in no way influence the regulatory oversight of listed companies and their disclosure requirements.<sup>58</sup> The Commission believes that Nasdaq's assurances concerning the separation of its business and regulatory functions adequately address the conflict of interest concerns raised by Business Wire. The Commission also notes that it oversees Nasdaq as a registered national securities exchange, including the performance of its regulatory functions in a manner consistent with the Act.

With respect to its application, annual, and entry fees, Nasdaq has represented that the proposed increase in fees better reflects the costs associated with, among other things, listing application reviews, Nasdaq's new on-line application center, and enhancements to its listings compliance systems.<sup>59</sup> Moreover, Nasdaq notes that the number of listed companies on Nasdaq has declined approximately 10% since 2006, so that its regulatory costs must be allocated among fewer listed companies.<sup>60</sup> Nasdaq further notes that, despite the decline in listings, because of enhancements to its compliance programs and changes in regulatory requirements, the number of issuer filings that it reviews has substantially increased since 2002, and that the workload to monitor compliance in recent years has increased due to market conditions and other issues.

The Commission notes that Nasdaq's fees are comparable to and, in some instances, less than similar fees of the New York Stock Exchange.<sup>61</sup> Further,

the Commission did not receive any comment letters from currently-listed Nasdaq companies or prospective listed companies opposing the fee increase. Thus, the Commission finds that Nasdaq's proposed fees are reasonable, equitably allocated among issuers, and otherwise consistent with the requirements of the Act.

Finally, with respect to the increased fee for written interpretations, Nasdaq has represented that the fee increase is reasonable given the costs incurred by Nasdaq in connection with such requests. Nasdaq is proposing to charge \$15,000 for all written interpretation requests, and eliminate the distinction between a regular request, which currently costs \$5,000, and an expedited request which currently costs \$15,000. Nasdaq noted that since January 2008, the large majority of requests for a written interpretation (nearly 75%) are expedited reviews. While the Commission would be concerned if the written interpretive fee was set at a level so high that issuers were deterred from seeking such written interpretations when needed, this does not appear to be the case since the majority of issuers today elect to pay \$15,000 for an expedited review. Accordingly, the Commission believes that the proposed fee increase provides for the equitable allocation of reasonable fees among issuers consistent with Section 6(b)(4) of the Act, does not unfairly discriminate between issuers consistent with Section 6(b)(5) of the Act, and is otherwise consistent with the requirements of the Act. Moreover, the Commission notes that with respect to interpretations, issuers will still continue to receive oral interpretations at no charge.<sup>62</sup>

#### VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>63</sup> that the proposed rule change (SR-Nasdaq-2009-081) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>64</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010-5413 Filed 3-11-10; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61660; File No. SR-CBOE-2010-024]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating To Temporary Membership Status and Interim Trading Permit Access Fees

March 5, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on February 26, 2010, the Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

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

CBOE proposes to adjust (i) the monthly access fee for persons granted temporary CBOE membership status ("Temporary Members") pursuant to Interpretation and Policy .02 under CBOE Rule 3.19 ("Rule 3.19.02") and (ii) the monthly access fee for Interim Trading Permit ("ITP") holders under CBOE Rule 3.27. The text of the proposed rule change is available on the Exchange's Web site (<http://www.cboe.org/Legal/>), 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, CBOE 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 CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

<sup>58</sup> Telephone conversation on March 5, 2010 between Arnold Golub, Vice President and Associate General Counsel, Nasdaq and Sharon Lawson, Senior Special Counsel, Commission.

<sup>59</sup> See Nasdaq Letter 4.

<sup>60</sup> See Nasdaq Letter 3.

<sup>61</sup> See NYSE Sections 902.02 and 902.03 of the NYSE Listed Company Manual.

<sup>62</sup> See *supra* note 17.

<sup>63</sup> 15 U.S.C. 78s(b)(2).

<sup>64</sup> 17 CFR 200.30-3(a)(12).

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