

to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2013-101 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-2013-101. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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-2013-101, and should be submitted on or before November 12, 2013.

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

**Kevin M. O'Neill,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-70569; File No. SR-NASDAQ-2013-102]

#### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change To Assume Operational Responsibility for Certain Surveillance Activity Currently Performed by FINRA Under the Exchange's Authority and Supervision**

September 30, 2013.

On July 31, 2013, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to assume operational responsibility for certain surveillance activity currently performed by the Financial Industry Regulatory Authority ("FINRA") under the Exchange's authority and supervision. The proposed rule change was published for comment in the **Federal Register** on August 16, 2013.<sup>3</sup> The Commission received no comments on the proposal.

After careful review, 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>4</sup> and, in particular, the requirements of Section 6(b)(5) of the Act.<sup>5</sup> Since it became a national securities exchange, NASDAQ has contracted with FINRA through various regulatory services agreements to perform certain surveillance and other regulatory functions on its behalf.<sup>6</sup> NASDAQ Rule 0150 requires that, unless NASDAQ obtains prior Commission approval, the regulatory functions subject to the regulatory

services agreement in effect at the time when NASDAQ became a national securities exchange must continue to be performed by FINRA or an affiliate thereof or by another independent self-regulatory organization. NASDAQ now proposes to reallocate operational responsibility from FINRA to NASDAQ Regulation for a limited number of equities surveillance patterns and related review functions focused on: (1) Manipulation patterns that monitor solely NASDAQ activity, including patterns that monitor the Exchange's opening and closing crosses and compliance with minimum bid listing requirements, and (2) monitoring of compliance by member firms with elements of the Commission's Regulation M<sup>7</sup> and NASDAQ Rule 4619 compliance.

In the Notice, the Exchange represents that it has the ability to conduct the surveillances and regulatory functions that it will assume. The Commission also notes that the Exchange represents that its expertise in its own market structure, along with its existing real-time monitoring of these activities, may enable the Exchange to better detect improper activities on its market. Moreover, these patterns, underlying rules, and analytical requirements are similar to patterns that NASDAQ regulatory personnel already operate for affiliated options markets. The Exchange represents that NASDAQ's MarketWatch group, which already handles other real-time surveillance of the NASDAQ market, should be able to adequately and effectively handle the surveillances related to the instant proposed rule change.

In the Notice, the Exchange further represents that it will continue to refer potentially violative conduct to FINRA for further review and that FINRA will continue to perform most of the surveillance activity for NASDAQ's equity markets. The Exchange also represents that FINRA will continue to perform examination and enforcement work, subject to NASDAQ's supervision and ultimate responsibility.

For the foregoing reasons, the Commission believes that the proposed rule change is consistent with the Act.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>8</sup> that the proposed rule change (SR-NASDAQ-2013-102) be, and it hereby is, approved.

<sup>7</sup> 17 CFR 242.100 et seq.

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> 17 CFR 200.30-3(a)(12).

<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. 70159 (August 12, 2013), 78 FR 50123 (August 16, 2013) ("Notice").

<sup>4</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

<sup>6</sup> See Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006).

<sup>26</sup> 17 CFR 200.30-3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-70670; File No. SR-Topaz-2013-08]

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

October 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 1, 2013, the Topaz Exchange, LLC (d/b/a ISE Gemini) (the "Exchange" or "Topaz") 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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Topaz is proposing to amend its Schedule of Fees to increase Maker Rebates for Market Makers that achieve the Tier 4 ADV threshold, to permit Topaz to exclude from its ADV calculations any trading day on which the Exchange is closed for trading due to a market-wide trading halt, to adopt a definition of "affiliate" for the purpose of calculating affiliated Member ADV, and to make other related clarifying changes. The text of the proposed rule change is available on the Exchange's Internet Web site at <http://www.ise.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 the 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 self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

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

##### 1. Purpose

The Exchange proposes to increase Maker Rebates for Market Makers<sup>3</sup> that achieve the Tier 4 average daily volume ("ADV") threshold, to permit Topaz to exclude from its ADV calculations any trading day on which the Exchange is closed for trading due to a market-wide trading halt, to adopt a definition of "affiliate" for the purpose of calculating affiliated Member ADV, and to make other related clarifying changes to its Schedule of Fees.

On September 3, 2013 the Exchange filed with the Commission an immediately effective rule filing (the "initial filing")<sup>4</sup> that established volume-based tiered rebates for adding liquidity on the Exchange ("Maker Rebate"). The Exchange is now proposing to increase the Tier 4 Maker Rebate applicable to Market Makers. Currently, Market Makers that achieve Tier 4 receive a Maker Rebate for Regular Orders in Standard Options of \$0.37 per contract for Penny Symbols, \$0.39 per contract for SPY, and \$0.46 per contract for Non-Penny Symbols. For Regular Orders in Mini Options, the Tier 4 Maker Rebate is \$0.037 per contract for Penny Symbols, \$0.039 per contract for SPY, and \$0.046 per contract for Non-Penny Symbols. The Exchange is proposing to increase the Tier 4 Maker Rebate by \$0.01 per contract in Standard Options and \$0.001 per contract in Mini Options. As such, the new Tier 4 Maker Rebate for Market Makers in Standard Options will be \$0.38 per contract for Penny Symbols, \$0.40 per contract for SPY, and \$0.47 per contract for Non-Penny Symbols. For Mini Options the new Tier 4 Maker Rebate for Market Makers will be \$0.038 per contract for Penny Symbols, \$0.040 per contract for SPY, and \$0.047 per

contract for Non-Penny Symbols. The Exchange believes that increasing the Maker Rebate applicable to Market Makers that achieve the ADV threshold for Tier 4 will incentivize Market Makers to increase order flow to the Exchange.

The Exchange is further proposing to modify its Schedule of Fees to permit the Exchange to exclude from its ADV calculation, when determining applicable rebate tiers, any day that the market is not open for the entire trading day. This would allow the Exchange to exclude days where the Exchange declares a trading halt in all securities or honors a market-wide trading halt declared by another market.<sup>5</sup> For example, this would have allowed the Exchange to exclude August 22, 2013 when trading was halted in Nasdaq-listed securities for three hours across all exchanges.<sup>6</sup> The Exchange will provide a notice, and post it on the Exchange's Web site, to inform Members of any day that is to be excluded from its ADV calculations in connection with this proposed rule change.

If the Exchange did not have the ability to exclude aberrant low volume days when calculating ADV for the month, as a result of the decreased trading volume, the numerator for the calculation (e.g., trading volume) would be correspondingly lower, but the denominator for the threshold calculations (e.g., the number of trading days) would not be decreased. This could result in an unintended cost increase. Absent the authority to exclude days that the market is not open for the entire trading day. Members will experience an effective decrease in rebates. The artificially low volumes of trading on such days could reduce the trading activity of Members both daily and monthly. Accordingly, excluding such days from the monthly calculation will diminish the likelihood of an effective increase in the cost of trading on the Exchange, a result that is unintended and undesirable to the Exchange and its Members.

As stated in the initial filing, the Exchange will aggregate the trading activity of affiliated members in determining ADV.<sup>7</sup> For example, a firm with market making and agency desks housed in different entities will be

<sup>5</sup> The Exchange will not be excluding days on which the Exchange closes early for holiday observance from its ADV calculation.

<sup>6</sup> Trading in Nasdaq-listed securities was halted across all markets on August 22, 2013 due to a systems issue experienced by the NASDAQ UTP SIP.

<sup>7</sup> Aggregation is necessary and appropriate because certain Members conduct customer and market maker trading activity through separate but related broker-dealers.

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

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

<sup>3</sup> The term Market Maker refers to "Competitive Market Makers" and "Primary Market Makers" collectively. Market Maker orders sent to the Exchange by an Electronic Access Member are assessed fees and rebates at the same level as Market Maker orders. See footnote 2, Schedule of Fees, Section I and II.

<sup>4</sup> See Securities Exchange Act Release No. 70426 (Sept. 17, 2013), 78 FR 58359 (Sept. 23, 2013) (SR-Topaz-2013-04).