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 changes 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 will also 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 No. SR–BYX–2011–022 and should be submitted on or before October 17, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–24584 Filed 9–23–11; 8:45 am]

BILLING CODE 8011–01–P

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65362; File No. SR–NASDAQ–2011–010]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Disapproving a Proposed Rule Change To Link Market Data Fees and Transaction Execution Fees

September 20, 2011.

I. Introduction

On January 10, 2011, 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 (''Exchange Act'' or ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to discount certain market data fees and increase certain liquidity provider credits for members that both (1) Execute specified levels of transaction volume on NASDAQ as a liquidity provider, and (2) purchase specified levels of market data from NASDAQ. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] Notice of filing of the proposed rule change was published in the **Federal Register** on January 27, 2011.[4] The Commission suspended the proposed rule change and instituted proceedings to determine whether to disapprove the proposed rule change in an order published in the **Federal Register** on February 3, 2011.[5] The Commission received three comment letters on the proposed rule change.[6] On April 4, 2011, NASDAQ submitted a response letter to the comments.[7] This order disapproves the proposed rule change.

II. Description of the Proposal

NASDAQ proposes to provide a discount on non-professional market data fees for NASDAQ Depth Data [8] (''NASDAQ Depth Data Product Fees'') charged to a member that provides liquidity through the NASDAQ Market Center and incurs NASDAQ Depth Data Product Fees at certain specified levels.[9] Specifically, a member would qualify as a:

- ''Tier 1 Firm'' for purposes of pricing during a particular month if it (i) Has an average daily volume of 12 million shares or more of liquidity provided through the NASDAQ Market Center in all securities during the month; and (ii) incurs NASDAQ Depth Data Product Fees during the month of $150,000 or more.
- ''Tier 2 Firm'' for purposes of pricing during a particular month if it (i) Has an average daily volume of 35 million or more shares of liquidity provided through the NASDAQ Market Center in all securities during the month; and (ii) incurs NASDAQ Depth Data Product Fees during the month of $300,000 or more.
- ''Tier 3 Firm'' for purposes of pricing during a particular month if it (i) Has an average daily volume of 65 million or more shares of liquidity provided through the NASDAQ Market Center in all securities during the month; and (ii) incurs NASDAQ Depth Data Product Fees during the month of $500,000 or more.

Tier 1 Firms would receive a 15% discount on NASDAQ Depth Data Product Fees charged to them, Tier 2 Firms would receive a 35% discount on NASDAQ Depth Data Product Fees charged to them, and Tier 3 Firms would receive a 50% discount on NASDAQ Depth Data Product Fees charged to them.[10] In addition, Tier 1 Firms would receive an increased liquidity provider credit for transactions executed on NASDAQ. Specifically, Tier 1 Firms would receive a credit of $0.0028 per share for displayed liquidity and $0.0015 per share for non-displayed liquidity, compared to the current liquidity provider credit of $0.0020 per share of displayed liquidity and $0.0010 per share of non-displayed liquidity applicable to these firms. There is no proposed enhancement to the existing liquidity provider credits at this time for Tier 2 and Tier 3 firms.

III. Summary of Comment Letters and NASDAQ's Response

The Commission received three comment letters objecting to the proposed rule change.[11] Shortly after NASDAQ filed the proposed rule change with the Commission, Direct Edge urged the Commission to suspend the proposed rule change and to institute proceedings to determine whether to approve or disapprove the proposal.[12] TD Ameritrade [13] and SIFMA/NetCoalition believe that the

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

[2] 17 CFR 240.19b–4.

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

[4] *See* Securities Exchange Act Release No. 63745 (January 20, 2011) 76 FR 4970 (''Notice'').

[5] *See* Securities Exchange Act Release No. 63796 (January 28, 2011) 76 FR 6165 (''Order Instituting Disapproval Proceedings'').

[6] *See* Letter dated January 13, 2011 from William O'Brien, Chief Executive Officer, Direct Edge to Florence E. Harmon, Deputy Secretary, Commission (the ''Direct Edge Letter''); Letter dated January 31, 2011 from Christopher Nagy, Managing Director Order Strategy, and Richard P. Urian, Global Head of Market Data, TD Ameritrade Inc. to Elizabeth M. Murphy, Secretary, Commission (the ''TD Ameritrade Letter''); and Letter dated March 21, 2011 from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, and Markham Erickson, Executive Director and General Counsel, NetCoalition to Elizabeth M. Murphy, Secretary, Commission (the ''SIFMA/NetCoalition Letter'').

[7] *See* Letter dated April 4, 2011 from Joan Conley, Senior Vice President, NASDAQ OMX Group, Inc. to Elizabeth M. Murphy, Secretary, Commission (the ''NASDAQ Response Letter''). In addition, on August 2, 2011, counsel for NASDAQ submitted a brief letter. *See* Letter dated August 1, 2011 from Eugene Scalia, Gibson, Dunn & Crutcher LLP to Elizabeth M. Murphy, Secretary, Commission (the ''NASDAQ Counsel Letter'').

[8] NASDAQ Depth Data includes National Quotation Data Service (individual market maker quotation data), TotalView (depth-of-book data for NASDAQ-listed securities), and OpenView (depth-of-book data for non-NASDAQ-listed securities) data products.

[9] For a more detailed description of the proposed rule change, *see* Notice, *supra* note 4.

[10] A NASDAQ member incurs non-professional fees when it offers NASDAQ Depth Data to natural persons that are not acting in a capacity that subjects them to financial industry regulation (*e.g.*, retail customers).

[11] *See supra*, note 6.

[12] *See* Direct Edge Letter, *supra* note 6 at 1.

[13] *See* TD Ameritrade Letter, *supra* note 6 at 1.

filing should be disapproved by the Commission.

Evidence of Costs

SIFMA/NetCoalition argue that NASDAQ's proposal is deficient because NASDAQ does not provide any evidence of the costs of collecting and distributing market data to support the fairness and reasonableness of its fees.[14] SIFMA/NetCoalition believe that NASDAQ's general contention that it incurs high fixed costs to operate its securities platform is inadequate to justify its proposed market data fees because SIFMA/NetCoalition believe those costs are driven principally, if not totally, by its trading services.[15] DirectEdge and TD Ameritrade also argue that NASDAQ failed to provide necessary evidence of the costs of producing its market data as support for the fairness and reasonableness of its fees.[16]

NASDAQ responds that there is no legitimate basis for the demand that an exchange submit evidence on the marginal costs of collecting and distributing market data to prove a market data fee is ''fair and reasonable.''[17] NASDAQ asserts that the Commission has already considered and rejected a cost-of-service ratemaking approach to setting market data fees, instead adopting an approach that relies on market forces to determine the prices of depth-of-book products.[18] NASDAQ acknowledges that cost data could be relevant in determining reasonableness, but takes the position that the fixed costs of market data production are inseparable from the fixed costs of providing NASDAQ's trading platform.[19]

Joint Products

In its proposed rule change, NASDAQ argues that trade executions and market data are ''joint products'' which require NASDAQ to incur joint costs.[20] NASDAQ further states that these costs are inseparable because they are not uniquely incurred on behalf of either service provided by NASDAQ.[21] Accordingly, NASDAQ is of the view that, given the joint nature of trade executions and market data, a bundled discount that is linked to total spending across the joint products is economically sensible.[22]

SIFMA/NetCoalition believe that NASDAQ's ''joint products'' theory is fundamentally flawed, and cannot support the conclusion that the proposed fees are fair and reasonable.[23] In their view, just because products are bundled together does not mean that the individual components are competitively priced or constrained by competitive forces.[24] SIFMA/NetCoalition also allege that NASDAQ offers no support for the conclusion that exchange competition constrains market data prices.[25] Further, SIFMA/NetCoalition argue that NASDAQ's joint products ''platform competition theory'' is flawed as a matter of economics, because order-execution services and market data are bought and sold separately, at different times, in different proportions and by different consumers.[26] Accordingly, in SIFMA/NetCoalition's view, the price of order execution services and market data is a result of distinct competitive conditions confronting each product, and competition for one does not constrain the pricing of the other.[27] In addition, SIFMA/NetCoalition argue that NASDAQ's theory incorrectly assumes that traders could readily switch orders to another platform in response to a price increase in market data, and thereby lower their trading costs, because the decision to purchase the data is made before and independent of the decision to trade.[28] And for those investors who purchase only market data from a platform and no other services, their only choice is to pay the non-discounted data prices imposed by the exchange—prices that in SIMFA/NetCoalition's view subsidize other exchange costs—or stop buying the data entirely.[29] Finally, SIFMA/NetCoalition argue that NASDAQ provided no actual evidence to support its platform competition theory.[30]

NASDAQ responds that SIFMA/NetCoalition simply ignore the nature of competition among trading platforms, and states that customers can and do switch their trading volume from platform to platform, including in response to the total costs of trading on a particular platform.[31] NASDAQ further believes that the evidence shows that NASDAQ does in fact compete for order flow by enhancing the quality of its data products and/or lowering the price of its data products.[32]

In addition, NASDAQ argues that the proposed discount is not a ''tying arrangement,'' and even if it could be fairly characterized as such, presents no meaningful risk of harm to competition, consumers, or the efficient function of the markets.[33] Instead, NASDAQ takes the position that the proposed discount is an attempt by NASDAQ to provide incentives to its best customers to purchase two NASDAQ products in high volumes, and to use market data discounts as a ''carrot'' to attract additional retail order flow to the exchange.[34] NASDAQ believes that the potential competitive harm characterized by a tying arrangement, which arises from a 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 or might have preferred to purchase elsewhere on different terms, does not arise from the NASDAQ proposal.[35] Even if the proposal was fairly characterized as a tying arrangement, NASDAQ believes the intensely competitive nature of the marketplace would remove any concerns, and argues that competitive forces ensure that its proposal is equitable, fair, and not unreasonably discriminatory.[36] Finally, NASDAQ stresses that it continues to offer all of its products separately at prices

[14] *See* SIFMA/NetCoalition Letter, *supra* note 6 at 2–3.

[15] *See* SIFMA/NetCoalition Letter, *supra* note 6 at 3.

[16] *See* Direct Edge Letter and TD Ameritrade Letter, *supra* note 6.

[17] *See* NASDAQ Response Letter, *supra* note 7 at 15.

[18] *See* NASDAQ Response Letter, *supra* note 7 at 15.

[19] *See* NASDAQ Response Letter, *supra* note 7 at 15–6.

[20] *See* Notice, *supra* note 4 at 4972.

[21] *See id.*

[22] *Id.*

[23] *See* SIFMA/NetCoalition Letter, *supra* note 6 at 4.

[24] *See id.*

[25] *See* SIFMA/NetCoalition Letter, *supra* note 6 at 5.

[26] *See id.*

[27] *See* SIFMA/NetCoalition Letter, *supra* note 6 at 5.

[28] *See* SIFMA/NetCoalition Letter, *supra* note 6 at 5.

[29] *See* SIFMA/NetCoalition Letter, *supra* note 6 at 5.

[30] *See* SIFMA/NetCoalition Letter, *supra* note 6 at 6. Similarly, DirectEdge is of the view that NASDAQ's arguments about the intermingled nature of the data- and transaction-services costs of operating an exchange platform are insufficient to satisfy its cost-justification obligations. *See* Direct Edge Letter, *supra* note 6 at 1.

[31] *See* NASDAQ Response Letter, *supra* note 7 at 7.

[32] *See* NASDAQ Response Letter, *supra* note 7 at 7.

[33] *See* NASDAQ Response Letter, *supra* note 7 at 9.

[34] *See* NASDAQ Response Letter, *supra* note 7 at 2.

[35] *See* NASDAQ Response Letter, *supra* note 7 at 9. NASDAQ also does not believe that the proposal involves a tying arrangement because customers are not required to purchase a tied product from NASDAQ, nor are they required to forgo purchases of any product from any competitor. *See* NASDAQ Response Letter, *supra* note 7 at 10. *See also* NASDAQ Counsel Letter, *supra* note 7.

[36] *See* NASDAQ Response Letter, *supra* note 7 at 2–3.

approved by the Commission as fair and reasonable.[37]

Constraints on Market Data Pricing

SIFMA/NetCoalition do not believe that NASDAQ provides sufficient support for its argument that alternative sources of information act to constrain the prices it can charge for depth-of-book market data.[38] SIFMA/NetCoalition argue that investors need depth-of-book data from all exchanges with substantial trading in a particular security in order to have a reasonably comprehensive picture of liquidity below the top of the book in that security. Accordingly, in SIFMA/NetCoalition's view, any institutional investor or informed or active retail investor who trades or holds multiple equity securities must buy NASDAQ's available market data as a matter of necessity.[39] Thus, SIFMA/NetCoalition argue that the availability of depth-of-book data from other venues does not effectively constrain the prices that NASDAQ can charge for depth-of-book data.[40]

NASDAQ responds that the market for depth-of-book data products is fluid and robust, and that consumers of NASDAQ's depth-of-book product have different data needs, subscribe at different levels, and are sensitive to changes in price.[41] NASDAQ further argues that the high degree of turnover that they have had in market data customers and the variation in subscription levels among users of NASDAQ data indicate that access to NASDAQ market data is not essential.[42]

SIFMA/NetCoalition also argue that there is no evidence that competition for order flow constrains the price of market data, and suggests the data cited by NASDAQ in this regard is inadequate.[43] NASDAQ responds that competition for order flow can act as a significant constraint on depth-of-book data fees if those who purchase depth-of-book data direct a substantial volume of orders to the exchange, and presents evidence that it believes demonstrates this currently is the case at NASDAQ.[44]

Unfair Discrimination

Finally, SIFMA/NetCoalition argue that the NASDAQ proposal is unfairly discriminatory because the proposed fee discounts are unavailable to firms that serve professional investors, or those that serve retail investors and purchase depth-of-book data but do not provide order execution services.[45]

NASDAQ responds that differential pricing in response to competitive market conditions does not unreasonably discriminate between market participants.[46] NASDAQ notes that the Commission has accepted certain differential pricing structures, such as those based on volume or whether the recipient is a professional or non-professional.[47] NASDAQ takes the position that there is no evidence that the proposed discount would impair the functioning of the national market system or result in predatory prices, or threaten to injure competition among exchanges or customers.[48]

IV. Discussion

Under Section 19(b)(2)(C) of the Act, the Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to such organization.[49] The Commission shall disapprove a proposed rule change if it does not make such a finding.[50] The Commission's Rules of Practice, under Rule 700(b)(3), state that the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder * * * is on the self-regulatory organization that proposed the rule change'' and that a ''mere assertion that the proposed rule change is consistent with those requirements * * * is not sufficient.''[51]

After careful consideration, the Commission does not find 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.[52] In particular, the Commission does not find that the proposed rule change is consistent with: (1) Section 6(b)(4) of the Act which, among other things, requires that the rules of a national securities exchange ''provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;''[53] (2) Section 6(b)(5) of the Act which, among other things, requires that the rules of a national securities exchange be ''not designed to permit unfair discrimination between customers, issuers, brokers, or dealers;''[54] (3) Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act];''[55] and (4) Section 11A of the Act and Rules 603(a)(1) and 603(a)(2) of Regulation NMS which, among other things, require NASDAQ to distribute market data on terms that are ''not unreasonably discriminatory.''[56]

NASDAQ proposes to link the level of fees that a market participant would be charged for obtaining NASDAQ market data to the extent of that market participant's trading in the NASDAQ market. In addition, the level of transaction credits that a market participant receives for trading on NASDAQ would in some cases be linked to the level of NASDAQ market data that it purchases. In the Order Instituting Disapproval Proceedings, the Commission highlighted the statutory provisions and rules referenced above, and expressed concern, among other things, that NASDAQ's proposal may fail to satisfy the standards under the Act and the rules thereunder that require market data fees to be equitable, fair, and not unreasonably discriminatory.[57] In addition, the Commission noted that it previously had stated that the Act precludes

[37] *See* NASDAQ Response Letter, *supra* note 7 at 10.

[38] *See* SIFMA/NetCoalition Letter, *supra* note 6 at 6–7.

[39] *See* SIFMA/NetCoalition Letter, *supra* note 6 at 7.

[40] *See* SIFMA/NetCoalition Letter, *supra* note 6 at 7.

[41] *See* NASDAQ Response Letter, *supra* note 7 at 19.

[42] *See* NASDAQ Response Letter, *supra* note 7 at 19.

[43] *See* SIFMA Letter/NetCoalition, *supra* note 6 at 7–8.

[44] *See* NASDAQ Response Letter, *supra* note 7 at 20–21.

[45] *See* SIFMA/NetCoalition Letter, *supra* note 6 at 8–9.

[46] *See* NASDAQ Response Letter, *supra* note 7 at 11.

[47] *See* NASDAQ Response Letter, *supra* note 7 at 11, 13–14.

[48] *See* NASDAQ Response Letter, *supra* note 7 at 14.

[49] *See* 15 U.S.C. 78s(b)(2)(C)(i).

[50] *See* 15 U.S.C. 78s(b)(2)(C)(ii); *see also* 17 CFR 201.700(b)(3) and note 62 *infra,* and accompanying text.

[51] *See* 17 CFR 201.700. The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. *See id.* Any failure of a self-regulatory organization to provide the information elicited by Form 19b–4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization. *Id.*

[52] In disapproving the 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).

[53] 15 U.S.C. 78f(b)(4).

[54] 15 U.S.C. 78f(b)(5).

[55] 15 U.S.C. 78f(b)(8).

[56] 15 U.S.C. 78k–1(a)(1)(C)(i)–(iv), 17 CFR 242.603(a)(1), and 17 CFR 242.603(a)(2).

[57] *See* Order Instituting Disapproval Proceedings at 4.

exchanges from adopting terms for market data distribution that unfairly discriminate by favoring participants in an exchange's market or penalizing participants in other markets, and expressed particular concern that NASDAQ's proposal may be inconsistent with that standard.[58] The Commission raised similar concerns with respect to NASDAQ's proposal to tie the level of transaction credits paid to market participants to the amount of market data they purchase.[59]

The Commission does not believe NASDAQ has demonstrated that the incremental step of linking the pricing of trade executions and market data will not unnecessarily or inappropriately burden competition. As noted above, NASDAQ takes the position that trade executions and market data are ''joint products,'' with joint costs, and that a bundled discount that is linked to total spending across both products is economically sensible. NASDAQ argues it currently faces intense competition for both trade executions and market data, and that its proposal is simply an attempt to incent its best customers to purchase both products in high volumes, and use market data discounts as a ''carrot'' to attract additional retail order flow to the exchange.

The Commission, however, does not believe that NASDAQ has adequately articulated why the linking of market data fees to execution volume, and the linking of transaction credits to market data purchases, will not negatively impact the competition that exists today in these two markets. In fact, the Commission believes that preventing the linking of market data fees to trade executions will help bolster competitive forces in the area of market data, because exchange market data fees must appeal simultaneously to market participants that trade directly on an exchange and those that do not trade directly on an exchange. The Commission notes that competition in the market for depth-of-book market data is significant, but is not as intense as competition for transaction services. This is at least in part due to the difficulty of attracting a sufficiently large volume of orders to generate valuable market data streams that a wide range of market participants will want to obtain, as opposed to the relative ease of establishing trading platforms. The Commission believes it is important to preserve competitive forces for market data as much as possible.

The Commission is similarly concerned about placing an undue burden on competition in the execution services market. NASDAQ's proposal would allow it to use significant discounts on fees for its market data products as an inducement to attract order flow rather than relying on the quality of its transaction services and the level of its transaction fees to compete for orders. NASDAQ argues that any competitor exchange could choose to respond to the proposed pricing by NASDAQ by offering its own discounts on its data products.[60] However, exchanges that do not provide market data, or that already do not charge any participant for market data, would not be able to respond to NASDAQ's proposal with a similar pricing scheme. New exchanges generally do not have established market data streams and their market data is often free. Thus, new exchanges would not be able to offer a pricing scheme similar to NASDAQ's proposal because they will not have established market data streams they can offer at reduced rates to entice participants to execute trades on their new platforms.

The Commission also does not believe NASDAQ has demonstrated that the incremental step of linking the pricing of trade executions and market data is an equitable allocation of fees, or is not unfairly or unreasonably discriminatory. As noted above, NASDAQ believes the marketplace is intensely competitive, and argues that competitive forces ensure that its proposal is equitable, fair and not unreasonably discriminatory. NASDAQ's proposal, however, could result in market participants purchasing the same market data from NASDAQ paying different fees depending on the volume of transactions they execute on NASDAQ. NASDAQ's proposal also could result in market participants executing the same volume of transactions on NASDAQ receiving different transaction credits depending on the amount of market data they purchase from NASDAQ.

The Commission is concerned that the proposal would result in an inequitable allocation of fees, and unfairly or unreasonably discriminate against market participants who are large users of market data but not execution services, or who are large users of execution services but not market data. This could include, for example, market participants who need to divide their order flow among multiple exchanges that trade NMS stocks, or that utilize market data but do not trade on NASDAQ, and thus do not provide sufficient transaction volume to NASDAQ to qualify for a larger market data discount or any discount at all. In this regard, the Commission is concerned that linking market data fees to transaction volume would essentially allow NASDAQ to charge significantly higher fees for market data to market participants that choose to trade at other exchanges, by providing discounts to those market participants that provide order flow to NASDAQ.[61] As noted above, Rule 700(b)(3) of the Commission's Rules of Practice states that ''[t]he burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder * * * is on the self-regulatory organization that proposed the rule change'' and that a ''mere assertion that the proposed rule change is consistent with those requirements * * * is not sufficient.''[62] For the reasons set forth above, the Commission does not believe that NASDAQ has met its burden to demonstrate that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder.

V. Conclusion

For the foregoing reasons, the Commission does not find that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities association, and, in particular, with Sections 6(b)(4), 6(b)(5), 6(b)(8) and 11A of the Act and with Rule 603(a)(1) and (2) of Regulation NMS thereunder.

It Is Therefore Ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (SR–NASDAQ–2011–010) be, and hereby is, disapproved.

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[58] *See* Order Instituting Disapproval Proceedings at 5–6.

[59] *See* Order Instituting Disapproval Proceedings at 6.

[60] *See* NASDAQ Response Letter, *supra* note 7 at 14.

[61] ''[A]n exchange proposal that seeks to penalize market participants for trading in markets other than the proposing exchange would present a substantial countervailing basis for finding unreasonable and unfair discrimination and likely would prevent the Commission from approving an exchange proposal.'' *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74791 (December 9, 2008) (SR–NYSEArca–2006–21) (Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data), vacated and remanded by *NetCoalition* v. *SEC,* No. 09–1042 (DC Cir. 2010) but on other grounds.

[62] 17 CFR 201.700(b)(3).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[63]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–24607 Filed 9–23–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65360; File No. SR–C2–2011–022]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to the Exchange's Complex Order Execution Mechanisms

September 20, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 16, 2011, the C2 Options Exchange, Incorporated (''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend C2 Rules [sic] 6.13, *Complex Order Execution.* The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/RuleFilings.aspx*), at the Exchange's Office of the Secretary and at the Commission.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

C2 Rule 6.13 governs the operation of the Exchange's electronic complex order book and electronic complex order auction (referred to as ''COB'' and ''COA,'' respectively). The purpose of this proposed rule change is to incorporate a provision that would provide the Exchange with the ability to determine which electronic allocation algorithm shall apply for COB and/or COA executions on a class-by-class basis, subject to certain conditions. Currently, as described in more detail below, the allocation algorithms for COB and COA default to the allocation algorithms in effect for a given options class. As proposed, the rule change would provide the Exchange with the flexibility to permit the allocation algorithm in effect for COB/COA to be different from the default allocation algorithm in effect for the options class. The applicable algorithm for COB/COA would be selected from among the allocation algorithms set forth in Rule 6.12, *Order Execution and Priority.*[5]

Specifically, the Exchange is proposing as follows:

- *COB:* Currently, Rule 6.13(b)(1)(A) through (B) provides that, at the same net price, individual series component legs have priority over complex orders resting in the COB when executing against a complex order. If there are multiple complex orders resting in COB at the same price, the allocation of a complex order within COB is pursuant to the rules of trading priority otherwise applicable to incoming electronic orders in the individual component legs. The Exchange is proposing to amend Rule 6.13(b)(1)(B) to have the flexibility to determine to apply a different allocation algorithm for complex orders resting in COB. Such algorithm would be selected from among the algorithms set forth in Rule 6.12. (At the same price, the individual series legs will continue to have priority over complex orders resting in COB regardless of the allocation algorithm that is chosen for complex orders resting in COB.)
- *COA:* Currently, Rule 6.13(c)(5)(A) through (D) provides that, at the same place [sic], individual series component legs have priority over complex orders resting in COB and COA responses when executing against an incoming COA-eligible order. To the extent there are multiple complex orders and responses at the same price, Rule 6.13(c)(5)(B) through (D) specifies that, at the same price, the allocation is based on public customer complex orders and responses having priority (with multiple public customer complex orders and responses being allocated based on time priority), then non-public customer complex orders resting in COB before the COA auction response time interval (with multiple non-public customer complex orders being allocated based on the allocation algorithm in effect for the individual component legs), then non-public customer complex orders resting in COB and responses received during the COA auction response time interval (with such multiple non-public customer complex orders and responses being allocated based on the allocation algorithm in effect for the individual component legs). The Exchange is proposing to amend the rule to have the flexibility to determine to apply a different allocation algorithm from the one set out in Rule 6.13(c)(5)(B) through (D) for complex orders and responses that trade against a COA-eligible order. Such algorithm would be selected from among the algorithms set forth in Rule 6.12, which may or may not include public customer priority. (At the same price, the individual series legs will continue to have priority over complex orders in COB and COA responses regardless of the allocation algorithm that is chosen for complex orders in COB and COA responses.) All pronouncements regarding allocation algorithm determinations by the Exchange will be announced to C2 Trading Permit Holders via Regulatory Circular.

As noted above, the allocation algorithm applied to COB/COA for each options class will be selected from among those set forth in Rule 6.12. Thus, the Exchange is not creating any new algorithms for the mechanisms, but is amending Rules [sic] 6.13 to provide the flexibility to choose an algorithm from among the existing algorithms to be applied to the COB/COA mechanisms rather than simply defaulting to the algorithm in effect for intra-day trading in an options class (*e.g.,* the algorithm for intra-day trading

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[63] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

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

[4] 17 CFR 240.19b–4(f)(6).

[5] The allocation algorithms include price-time priority, pro-rata priority, and price-time with primary public customer and secondary trade participation right priority. Each of these base allocation methodologies can be supplemented with an optional market turner priority overlay. *See* Rule 6.12(a) through (b).