

becomes eligible for acceptance and exposure at a subsequent point in time;

(C) Any customer order placed by a customer who authorizes the Participant to not expose the order, either at the time the order is placed or prior thereto pursuant to an individually negotiated agreement with respect to such customer's orders;

(D) Any customer order that is an odd lot order (e.g., less than 100 shares);

(E) Any customer order to be executed outside of the hours of operation of the Application; or

(F) Any other order that would not fall within the definition of the term "covered order" as defined in Exchange Act Rule 11Ac1-5(a)(8).]

(3[4]) not attach a condition for Minimum Relative Price Improvement to any order submitted to the Application solely for its own principal account and not involving a customer order.

* * * * *

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

Presently, NASD Rule 5020(b)(3) requires PAMMS to submit 80% of their Mandatory Eligible Orders to Primex in order to retain their status as PAMMS ("Percentage Test").⁴ Members registered as PAMMS can utilize certain matching features and are eligible for fee sharing, which are features not available to members that do not participate as PAMMS (i.e., Crowd Participants).⁵

⁴ The term "Mandatory Eligible Order" is defined in NASD Rule 5011(l).

⁵ PAMMS can enter Clean Cross orders and use the Two Cent Match, 50% Match, and Block Facilitation Match features. These features are described in NASD Rule 5014. In addition, pursuant to NASD Rule 7010(r)(1), a PAMM can share in the Primex fees charged to members when the PAMMS order interacts with crowd interest in Primex.

The purpose of the Percentage Test was to achieve a mix of trading interest that would result in retail orders being exposed to other market participants that would compete for the orders by providing price improvement. Ultimately, the Percentage Test was a balance between continuing to provide PAMMS flexibility in how they execute their customer orders and the desire to provide a cross section of orders that would generate crowd participation and competition for orders. However, members have indicated that the Percentage Test complicates their order handling decisions, creating a disincentive to participating in Primex. Therefore, Nasdaq is proposing to eliminate the Percentage Test and allow members to participate as PAMMS irrespective of the number of orders they submit to the System.

The proposal to eliminate the Percentage Test does not modify any other aspect of Primex. For example, PAMMS must continue to comply with the other requirements of NASD Rule 5020 that govern PAMM eligibility, and PAMMS will continue to have the right to use the matching features and to participate in the fee sharing arrangements that are not available to Crowd Participants.

2. Statutory Basis

Nasdaq believes the proposed rule change is consistent with section 15A(b)(6) of the Act,⁶ which requires that NASD's rules be designed, among other things, to remove impediments to and perfect the mechanism of a free and open market and national market system, and, in general, protect investors and the public interest. Nasdaq believes the proposal to eliminate the Percentage Test is consistent with NASD's obligations under section 15A(b)(6) of the Act because it will remove an impediment to using Primex, which should result in greater participation in the System and increased liquidity and opportunities for price improvement.

When originally implemented, Nasdaq believed the requirement would promote liquidity by ensuring a cross section of order flow from each PAMM, which in turn would encourage non-market makers to participate in Primex and offer opportunities for price improvement. Nasdaq represents that promoting liquidity and price improvement opportunities are consistent with the protection of investors. However, instead of fostering liquidity, members have indicated the requirement is a disincentive to using

Primex. Members desire flexibility in making order routing decisions and the rule complicates these decisions. Therefore, Nasdaq staff is proposing to eliminate the Percentage Test, which will eliminate an impediment to using Primex. As a result, Nasdaq expects that more members will participate in Primex, which should increase liquidity and opportunities for price improvement.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will impose any burden on competition that is 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 been designated by NASD as effecting a change in an existing order-entry or trading system of NASD that: (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 have the effect of limiting the access to or availability of the system. The proposed rule change has therefore become effective pursuant to section 19(b)(3)(A) of the Act⁷ and Rule 19b-4(f)(5)⁸ thereunder. The Nasdaq believes that the proposal to eliminate the Percentage Test complies with the requirements of Rule 19b-4(f)(5) under the Act because it effects a change in Primex, an existing trading system. In addition, the proposal does not modify how Primex operates. Therefore, it does not significantly affect the protection of investors or the public interest. Instead, the proposal eliminates a requirement that is viewed as an impediment to using Primex. In this regard, the proposal does not have the effect of limiting the access or availability of the System, but instead should promote access to it, which should increase participation in the System and promote competition for orders exposed in the System.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(f)(5).

⁶ 15 U.S.C. 78o-3(b)(6).