

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58135; File No. SR-NASDAQ-2008-061)

July 10, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Routing to Affiliated Exchanges

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 9, 2008, The NASDAQ Stock Market LLC (“NASDAQ”), filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been substantially prepared by NASDAQ. NASDAQ has designated the proposed rule change as constituting a rule change under Rule 19b-4(f)(6) under the Act,³ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

NASDAQ proposes to modify NASDAQ Rule 4751 and Chapter VI, Section 11 of the Rules of the NASDAQ Options Market (“NOM”) to limit the routing of certain orders to exchanges affiliated with NASDAQ. NASDAQ proposes to implement the rule change at the time of the closings of proposed acquisitions of the Philadelphia Stock Exchange, Inc. (“PHLX”) and Boston Stock Exchange, Incorporated (“BSE”).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6).

The text of the proposed rule change is below. Proposed new language is underlined.⁴

NASDAQ Rules

Equity Rules

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4751. Definitions

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(a) – (e) No change.

(f) The term "Order Type" shall mean the unique processing prescribed for designated orders that are eligible for entry into the System, and shall include:

(1) – (8) No change.

(9) "Directed Orders" are orders that are directed to an exchange other than Nasdaq as directed by the entering party without checking the Nasdaq book. If unexecuted, the order (or unexecuted portion thereof) shall be returned to the entering party. This option may only be used for orders with time-in-force parameters of IOC.

Directed Orders may be designated as intermarket sweep orders by the entering party to execute against the full displayed size of any protected bid or offer (as defined in Rule 600(b) of Regulation NMS under the Act). A broker-dealer that designates an order as an

⁴ Changes are marked to the rule text that appears in the electronic Nasdaq Manual found at <http://nasdaq.complinet.com>.

intermarket sweep order has the responsibility of complying with Rules 610 and 611 of Regulation NMS.

Directed Orders may not be directed to a facility of an exchange that is an affiliate of Nasdaq.

(g) – (i) No change.

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Options Rules

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Chapter VI Trading System

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Sec. 11 Order Routing

(a) For System securities, the order routing process shall be available to Participants from 9:30 a.m. Eastern Time until market close, and shall route orders as follows. Participants can designate orders as either available for routing or not available for routing. Orders designated as not available for routing shall follow the book processing rules set forth in Section 10 above. Orders designated as available for routing, will first check the System for available contracts for execution. After checking the System for available contracts, orders are sent to other available market centers for potential execution, per entering firm's instructions. When checking the book, the System will seek to execute at the price at which it would send the order to a destination market center. If contracts remain un-executed after routing, they are posted on the book. Once

on the book, should the order subsequently be locked or crossed by another market center, the System will not route the order to the locking or crossing market center. With the exception of the Minimum Quantity order type, all time-in-force parameters and order types may be used in conjunction with this routing option.

(b) For Non-System securities, the order routing process shall be available to Participants from 9:30 a.m. Eastern Time until market close and shall route orders based on the participant's instructions. Notwithstanding the foregoing, the order routing process will not be available to route Non-System Securities to a facility of an exchange that is an affiliate of Nasdaq.

(c) – (d) No change.

(e) NOM shall route orders in options via Nasdaq Options Services LLC, a broker-dealer that is a member of an unaffiliated SRO which is the designated examining authority for the broker-dealer. Nasdaq Options Services LLC serves as the Routing Facility of NOM. The sole function of the Routing Facility will be to route orders in options listed and open for trading on NOM to away markets pursuant to NOM rules solely on behalf of NOM. The Routing Facility is subject to regulation as a facility of Nasdaq, including the requirement to file proposed rule changes under Section 19 of the Act.

Nasdaq Options Services LLC also routes orders in options that are not listed and actually trading on NOM. When routing orders in options that are not listed and open for trading on

NOM, Nasdaq Options Services is not a facility of NOM and is not regulated as a facility of Nasdaq but as a broker-dealer regulated by its designated examining authority.

Use of Nasdaq Options Services LLC to route orders to other market centers is optional.

Parties that do not desire to use Nasdaq Options Services LLC must designate orders as not available for routing.

NOM shall establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and its facilities (including the Routing Facility), and any other entity.

The books, records, premises, officers, directors, agents, and employees of the Routing Facility, as a facility of the Exchange, shall be deemed to be the books, records, premises, officers, directors, agents, and employees of the Exchange for purposes of and subject to oversight pursuant to the Exchange Act. The books and records of the Routing Facility, as a facility of the Exchange, shall be subject at all times to inspection and copying by the Exchange and 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, 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

On October 2, 2007, The Nasdaq Stock Market, Inc. (which was recently renamed The NASDAQ OMX Group, Inc. ("NASDAQ OMX")) announced that it had entered into an agreement with BSE pursuant to which NASDAQ OMX will acquire all of the outstanding membership interests in BSE, and BSE will be merged with and into Yellow Merger Corporation, a Delaware corporation and wholly owned subsidiary of NASDAQ OMX, with BSE surviving the merger (the "BSE Merger"). As a result of the BSE Merger, BSE will become a Delaware stock corporation, with 100% of its outstanding stock owned by NASDAQ OMX.

On November 7, 2007, The Nasdaq Stock Market, Inc. announced that it had entered into an agreement with PHLX pursuant to which NASDAQ OMX will acquire all of the outstanding capital stock of PHLX, and PHLX will be merged with and into Pinnacle Merger Corp., a Delaware corporation and wholly owned subsidiary of NASDAQ OMX, with PHLX surviving the merger (the "PHLX Merger," and together with the BSE Merger, the "Mergers"). NASDAQ OMX will operate BSE and PHLX as wholly owned subsidiaries, with rules, membership rosters, and listings that are separate and distinct from the rules, membership rosters, and listings of NASDAQ.

Nasdaq Execution Services, LLC ("NES") and NASDAQ Options Services, LLC ("NOS"), which are both subsidiaries of NASDAQ, are registered broker-dealers and members of BSE and PHLX. In their filings related to the Mergers, both BSE and PHLX proposed to adopt rules requiring Commission approval of any affiliations between themselves and their

members.⁵ As a result of the Mergers, NES and NOS will become affiliates of BSE and PHLX. Accordingly, in their filings, both BSE and PHLX requested Commission approval of such affiliations, subject to the following conditions:

- With respect to NES: NES remains a facility of NASDAQ; use of NES's routing function by NASDAQ members continues to be optional; and NES does not provide routing of directed orders to BSE, PHLX or any trading facilities thereof, unless such orders first attempt to access any liquidity on the NASDAQ book.
- With respect to NOS: NOS remains a facility of NASDAQ; use of NOS's Routing Facility function by NASDAQ members continues to be optional; and NOS does not provide routing of orders in options that are not listed and open for trading on the NASDAQ Option Market ("NOM") to BSE, PHLX, or any trading facilities thereof.

In this filing, NASDAQ is proposing modifications to its rules to fully implement these conditions.

The acquisition of the entities that are now NES and NOS by The Nasdaq Stock Market, Inc. (now NASDAQ OMX) was approved by the Commission in 2004 and 2005.⁶ The rules

⁵ Securities Exchange Act Release No. 57757 (May 1, 2008), 73 FR 26159 (May 8, 2008) (SR-BSE-2008-23) ("BSE Governance Proposal Notice"); Securities Exchange Act Release No. 57703 (April 23, 2008), 73 FR 23293 (April 29, 2008) (SR-PHLX-2008-31) ("PHLX Acquisition Proposal Notice").

⁶ See Securities Exchange Act Release Nos. 50311 (September 3, 2004), 69 FR 54818 (September 10, 2004) (Order Granting Application for a Temporary Conditional Exemption Pursuant To Section 36(a) of the Exchange Act by the National Association of Securities Dealers, Inc. Relating to the Acquisition of an ECN by The Nasdaq Stock Market, Inc.) and 52902 (December 7, 2005), 70 FR 73810 (December 13, 2005) (SR-NASD-2005-128) (Order Approving a Proposed Rule Change To Establish Rules Governing the Operation of the INET System).

under which NES currently routes orders to other market centers were approved by the Commission in 2006 and were subsequently amended on several occasions.⁷

Notably, NASDAQ Rule 4758(a) describes various order routing strategies that a NASDAQ market participant may employ. All of the routing strategies that allow routing to BSE or PHLX stipulate that routing occurs “after checking the System [i.e., the NASDAQ book] for available shares.”⁸ NASDAQ Rule 4758(b) further describes the parameters for operation of NES as follows: (1) all routing of equities by NASDAQ is performed by NES, which, in turn, routes orders to other market centers as directed by the NASDAQ; (2) NES will not engage in any business other than: (a) as a outbound router for NASDAQ and (b) any other activities it may engage in as approved by the Commission; (3) NES will operate as a facility, as defined in Section 3(a)(2) of the Act, of NASDAQ; (4) for purposes of Rule 17d-1 under the Act, the designated examining authority of NES will be a self-regulatory organization unaffiliated with NASDAQ or any of its affiliates; (5) NASDAQ shall be responsible for filing with the Commission rule changes related to the operation of, and fees for services provided by, NES, and NES shall be subject to exchange non-discrimination requirements; (6) the books, records, premises, officers, agents, directors and employees of NES, as a facility of NASDAQ, shall be deemed to be the books, records, premises, officers, agents, directors and employees of

⁷ See Securities Exchange Act Release Nos. 56867 (November 29, 2007), 72 FR 69263 (December 7, 2007) (SR-NASDAQ-2007-065); 56708 (October 26, 2007), 72 FR 61925 (November 1, 2007) (SR-NASDAQ-2007-078); 55335 (February 23, 2007), 72 FR 9369 (March 1, 2007) (SR-NASDAQ-2007-005); 54613 (October 17, 2006), 71 FR 62325 (October 24, 2006) (SR-NASDAQ 2006-043); 54271 (August 3, 2006), 71 FR 45876 (August 10, 2006) (SR-NASDAQ-2006-027); and 54155 (July 14, 2006), 71 FR 41291 (July 20, 2006) (SR-NASDAQ-2006-001).

⁸ The “DOT” routing strategy allows market participants to instruct whether or not a particular order should check the book prior to routing, but is available for routing solely to the New York Stock Exchange and the American Stock Exchange.

NASDAQ for purposes of, and subject to oversight pursuant to, the Act, and the books and records of NES, as a facility of the NASDAQ, shall be subject at all times to inspection and copying by the Commission; and (7) use of NES is optional.

In addition to the order routing strategies described in Rule 4758, Rules 4751 and 4755 provide for routing of “directed orders” to automated market centers other than NASDAQ on an “immediate-or-cancel” basis.⁹ Such directed orders may be designated as intermarket sweep orders (“ISOs”),¹⁰ which may be executed by the receiving venue based on the representation of the market participant that it has routed to all superior protected quotations, or not so designated, in which case the orders will execute only if their execution would not result in a trade-through. Under existing rules, directed orders are the only types of orders that could be routed by NES to BSE or PHLX without checking the NASDAQ book prior to routing. As described above, Rule 4758 already establishes all the restrictions stipulated in the BSE Filing and the PHLX Filing with respect to NASDAQ’s order routing strategies. In order to implement the restrictions with respect to “Directed Orders,” as defined in NASDAQ Rule 4751, NASDAQ is amending that rule to provide that Directed Orders may not be directed to a facility of an exchange that is an affiliate of NASDAQ.

⁹ Separately, Rule 4758 provides for routing of orders with a time-in-force other than immediate-or-cancel, but only to the New York Stock Exchange or the American Stock Exchange.

¹⁰ Rule 600(b)(30) under Regulation NMS recognizes the regulatory purpose of an ISO and defines it as follows: “Intermarket sweep order” means a limit order for an NMS stock that meets the following requirements: (i) When routed to a trading center, the limit order is identified as an intermarket sweep order; and (ii) Simultaneously with the routing of the limit order identified as an intermarket sweep order, one or more additional limit orders, as necessary, are routed to execute against the full displayed size of any protected bid, in the case of a limit order to sell, or the full displayed size of any protected offer, in the case of a limit order to buy, for the NMS stock with a price that is superior to the limit price of the limit order identified as an intermarket sweep order. These additional routed orders also must be marked as intermarket sweep orders.”

NOS serves as the outbound router for the NOM, which commenced operations on March 31, 2008. Under NOM Rule Chapter VI, Section 11: (1) NOM routes orders in options via NOS, which serves as the sole “Routing Facility” of NOM; (2) the sole function of the Routing Facility is to route orders in options listed and open for trading on NOM to away markets pursuant to NOM rules, solely on behalf of NOM; (3) NOS is a member of an unaffiliated SRO which is the designated examining authority for the broker-dealer; (4) the Routing Facility is subject to regulation as a facility of NASDAQ, including the requirement to file proposed rule changes under Section 19 of the Act; (5) NOM must establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between NASDAQ and its facilities (including the Routing Facility), and any other entity; and (6) the books, records, premises, officers, directors, agents, and employees of the Routing Facility, as a facility of NASDAQ, shall be deemed to be the books, records, premises, officers, directors, agents, and employees of NASDAQ for purposes of and subject to oversight pursuant to the Act, and the books and records of the Routing Facility, as a facility of NASDAQ, shall be subject at all times to inspection and copying by NASDAQ and the Commission.

Unlike NES, NOS does not have a “directed order” for options that are trading on NOM; rather, all routable orders for options that are trading on NOM check the NOM book prior to routing. However, NOS also routes orders in options that are not trading on NOM (referred to in the NOM Rules as “Non-System Securities”). When routing orders in options that are not listed and open for trading on NOM, NOS is not regulated as a facility of NASDAQ but rather as a broker-dealer regulated by its designated examining authority. However, as provided by Chapter

IV, Section 5 of the NOM Rules, all orders routed by NOS under these circumstances are routed to away markets that are at the best price, and solely on an immediate-or-cancel basis.

NASDAQ is amending Chapter VI, Section 11 of the NOM Rules to provide that NOM's order routing process will not be available to route Non-System Securities to a facility of an exchange that is an affiliate of NASDAQ. In addition, although Chapter VI, Section 11 currently states that NOM participants can designate orders as either available for routing or not available for routing, NASDAQ is further amending this rule to explicitly state that use of NOS to route orders to other market centers is optional, and that parties that do not desire to use NOS must designate orders as not available for routing.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹¹ in general, and with Section 6(b)(5) of the Act,¹² in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change will provide that routing from NASDAQ to BSE or PHLX through NES and NOS will occur solely in circumstances where routed orders access liquidity available on the NASDAQ book prior to routing.

¹¹ 15 U.S.C. 78f.

¹² 15 U.S.C. 78f(b)(5).

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

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹³ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁴ As required under Rule 19b-4(f)(6)(iii),¹⁵ NASDAQ provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, prior to the date of filing of the proposed rule change.

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative for 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. NASDAQ has requested that the Commission waive the 30-day operative delay because the proposed rule change will implement changes designed to provide that routing from

¹³ 15 U.S.C. 78s(b)(3)(A).

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 17 CFR 240.19b-4(f)(6)(iii).

NASDAQ to BSE or PHLX through NES and NOS will occur solely in circumstances where routed orders access liquidity available on the NASDAQ book prior to routing, which limits are designed to lessen potential conflicts of interest that may be associated with routing to affiliated exchanges. The acquisitions of PHLX and BSE are expected to close imminently, and therefore waiving the 30-day pre-operative period would allow NASDAQ to implement these changes at the time of such closings.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission notes that the proposed rule change will limit the routing of orders from NASDAQ to PHLX and BSE,¹⁶ which will be affiliates of NASDAQ following the Mergers, by NES and NOS, which are members of NES and NOS and affiliates of NASDAQ and will be affiliates of PHLX and BSE following the Mergers, to the routing of orders that first attempt to access liquidity on the NASDAQ book. The Commission has in the past expressed its concern about the potential for unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests that could exist if an exchange were to otherwise become affiliated with one of its members, as well as the potential for unfair competitive advantage that the affiliated member could have by virtue of informational or operational advantages, or the ability to receive preferential treatment.¹⁷ As noted above, NASDAQ represents that the proposed restrictions are

¹⁶ The Commission notes that BSE's equities market is not currently operational. See BSE Governance Proposal Notice, supra note 5, 73 FR at 26166.

¹⁷ See Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving the New York Stock Exchange, Inc.'s merger with Archipelago Holdings, Inc.). See also Securities Exchange Act Release No. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members).

designed to lessen potential conflicts of interest that may be associated with routing to affiliated exchanges. The Commission also notes that public comment was previously solicited with respect to the proposed restrictions in the context of rule proposals filed by PHLX and BSE relating to the Mergers.¹⁸ No comments were received on those filings. Further, the Commission notes that NASDAQ represents that it will only implement the proposed rule change at the time of the closings of the proposed acquisitions of PHLX and BSE, respectively. For these reasons, the Commission designates that the proposed rule change become operative immediately.¹⁹

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. Please include File Number SR-NASDAQ-2008-061 on the subject line.

¹⁸ See BSE Governance Proposal Notice and PHLX Acquisition Proposal Notice, supra note 5.

¹⁹ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2008-061. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room 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 office of the NASDAQ. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make

available publicly. All submissions should refer to File Number SR-NASDAQ-2008-061 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading & Markets, pursuant to delegated authority.²⁰

Florence E. Harmon
Acting Secretary

²⁰ 17 CFR 200.30-3(a)(12).