

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59153; File No. SR-Nasdaq-2008-098)

December 23, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Regarding Routing to an Affiliated Exchange

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> notice is hereby given that on December 15, 2008, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared substantially by Nasdaq. The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

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

Nasdaq is proposing a rule change to amend: (i) Nasdaq Rule 4751 to modify the restriction on routing of Directed Orders to a facility of an exchange that is an affiliate of Nasdaq and (ii) Nasdaq Rule 4758 to provide for the establishment of procedures designed to manage the flow of confidential information between Nasdaq and its facilities (including its routing facility Nasdaq Execution Services, LLC) and other entities.

The text of the proposed rule change is available from Nasdaq’s website at <http://nasdaq.cchwallstreet.com>, at Nasdaq’s principal office, and at the Commission’s Public Reference Room.

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

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

Proposed new language is in italics.<sup>3</sup>

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## **Nasdaq Rules**

### **Equity Rules**

#### **4751. Definitions**

(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 inter-market 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 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 except for Directed Orders directed to the NASDAQ OMX BX Equities Market.

(g) – (i) No change.

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<sup>3</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaq.cchwallstreet.com>.

## 4758. Order Routing

(a) No change.

(b) Routing Broker

(1) – (7) No change.

(8) Nasdaq Execution Services LLC shall establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the NASDAQ Stock Market LLC and its facilities (including Nasdaq Execution Services LLC as its routing facility) and any other entity.

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## 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. The text of these statements may be examined at the places specified in Item III below, and is set forth in Sections A, B, and C below.

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

#### 1. Purpose

##### a. Affiliation and Order Routing

The NASDAQ OMX Group, Inc. (“NASDAQ OMX”), a Delaware corporation, owns three U.S. registered securities exchanges – Nasdaq, NASDAQ OMX PHLX, Inc. (“PHLX”) and The Boston Stock Exchange, Incorporated, to be renamed NASDAQ OMX BX, Inc. (“BX”).<sup>4</sup> In

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<sup>4</sup> See Securities Exchange Act Release No. 58927 (November 10, 2008), 73 FR 69685 (November 19, 2008) (SR-BSE-2008-48). This filing also proposes a new rule book for cash equities trading (“BX Rulebook Proposal”) on a facility of BX, to be named the NASDAQ OMX BX Equities Market.

addition, NASDAQ OMX currently indirectly owns Nasdaq Execution Services, LLC (“NES”), a registered broker-dealer and a member of BX. Thus, NES is an affiliate of each of Nasdaq, PHLX and BX.

Although BX does not currently have any equity trading operations, BX has proposed a new rulebook for BX to support the resumption of these operations.<sup>5</sup> Although BX will not route to other market centers, BX will receive orders routed to it by other market centers, including Nasdaq.<sup>6</sup>

NES is the approved outbound routing facility of Nasdaq for cash equities, providing outbound routing from Nasdaq to other market centers. NES does not provide inbound routing to Nasdaq. The acquisition of NES by NASDAQ OMX was approved by the Commission in 2004 and 2005<sup>7</sup> and the rules under which NES currently routes orders from Nasdaq to other market centers were approved initially by the Commission in 2006 and have been amended on

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<sup>5</sup> Id.

<sup>6</sup> PHLX does not currently trade cash equities, and therefore this filing does not apply to it. Nasdaq is not at this time proposing to modify limits on routing options to affiliated exchanges.

<sup>7</sup> 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).

several occasions.<sup>8</sup> Nasdaq Rules 4751 and 4758 establish the conditions under which Nasdaq is permitted to own and operate NES in its capacity as a facility of Nasdaq that routes orders from Nasdaq to other market centers. The conditions include requirements that: (1) NES is operated as a facility of Nasdaq; (2) NES will not engage in any business other than: (i) as an outbound router for Nasdaq and (ii) any other activities it may engage in as approved by the Commission; (3) for purposes of Commission Rule 17d-1 under the Act,<sup>9</sup> the designated examining authority of NES is a self-regulatory organization unaffiliated with Nasdaq; (4) use of NES to route orders to other market centers is optional;<sup>10</sup> and (5) Nasdaq will not route orders to an affiliated exchange, such as BX, unless they check the Nasdaq book prior to routing.

The Commission has approved NES's affiliation with BX subject to the conditions that: (1) NES remains a facility of Nasdaq; (2) use of NES's routing function by Nasdaq members continues to be optional and (3) NES does not provide routing of Directed Orders to BX or any trading facilities thereof, unless such orders first attempt to access any liquidity on the Nasdaq

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<sup>8</sup> See Securities Exchange Act Release Nos. 58752 (October 8, 2008), 73 FR 61181 (October 15, 2008) (SR-NASDAQ-2008-079); 58135 (July 10, 2008), 73 FR 40898 (July 16, 2008) (SR-NASDAQ-2008-061); 58069 (June 30, 2008), 73 FR 39360 (July 9, 2008) (SR-NASDAQ-2008-054); 56708 (October 26, 2007), 72 FR 61925 (November 1, 2007) (SR-NASDAQ-2007-078); 56867 (November 29, 2007), 72 FR 69263 (December 7, 2007) (SR-NASDAQ-2007-065); 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).

<sup>9</sup> 17 CFR 240.17d-1.

<sup>10</sup> Because only Nasdaq members may enter orders into Nasdaq, it also follows that routing by NES is available only to Nasdaq members.

book.<sup>11</sup>

Nasdaq proposes that, upon the resumption of cash equity trading by BX, NES, in its operation as a facility of Nasdaq, be permitted to route all orders, including Directed Orders, to BX's equity market without checking the Nasdaq book prior to routing. Directed Orders are orders that route directly to other exchanges on an immediate-or-cancel basis without first checking the Nasdaq book for liquidity.<sup>12</sup> In order to modify the conditions regarding the operation of NES and allow NES to route Directed Orders to BX, Nasdaq proposes to modify the restriction in Nasdaq Rule 4751(f)(9) that prohibits the routing of Directed Orders to a facility of an exchange that is an affiliate of Nasdaq. Under the proposed rule change, inbound routing of Directed Orders to the NASDAQ OMX BX Equities Market would be permitted.

On September 29, 2008, the Commission approved rule changes to permit the NYSE, NYSE Arca and NYSE Alternext US to accept inbound orders that their affiliate Arca Securities routes in its capacity as a facility of NYSE or NYSE Arca, subject to certain limitations and conditions intended to address the Commission's concerns regarding affiliation.<sup>13</sup> In the orders approving these rule changes, the Commission noted its concerns about potential informational advantages and conflicts of interest between an exchange's self-regulatory obligations and its

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<sup>11</sup> See Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR-BSE-2008-23).

<sup>12</sup> Rules 4751 and 4755 provide for routing of "directed orders" to automated market centers other than Nasdaq on an "immediate-or-cancel" basis. Such directed orders may be designated as intermarket sweep orders ("ISOs"), 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.

<sup>13</sup> See Securities Exchange Act Release Nos. 58681 (September 29, 2008), 73 FR 58285 (October 6, 2008)(SR-NYSEArca-2008-90) ("NYSE Arca Order"); 58680 (September 29, 2008), 73 FR 58283 (October 6, 2008)(SR-NYSE-2008-76) ("NYSE Order"); 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008)(SR-Amex-2008-62) ("NYSE Alternext US Order").

commercial interest when the exchange is affiliated with one of its members, but determined that the proposed limitations and conditions were sufficient to mitigate its concerns.<sup>14</sup>

Nasdaq proposes to amend Nasdaq Rule 4758 to provide that NES will 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 NES) and any other entity.<sup>15</sup>

In addition, in the BX Rulebook Proposal, BX is proposing a rule change and certain undertakings intended to manage the flow of confidential and proprietary information between NES and BX and to minimize potential conflicts of interest.<sup>16</sup>

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>17</sup> in general, and with Section 6(b)(5) of the Act,<sup>18</sup> 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

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<sup>14</sup> The Commission also set forth these concerns in its order abrogating NYSE Arca Rule 7.31(x). See Securities Exchange Act Release No. 57648 (April 11, 2008), 73 FR 20981 (April 17, 2008).

<sup>15</sup> This sentence was modified at the request of the Exchange from the text contained in the proposed rule change. Telephone conversation between John Yetter, Vice President and Deputy General Counsel, NASDAQ OMX, and Nancy Burke-Sanow, Assistant Director, Division of Trading and Markets, Commission on December 22, 2008.

<sup>16</sup> See BX Rulebook Proposal, supra note 4.

<sup>17</sup> 15 U.S.C. 78f.

<sup>18</sup> 15 U.S.C. 78f(b)(5).

proposed rule change would permit inbound routing of Directed Orders and other orders to BX from its affiliate NES while minimizing the potential for conflicts of interest and informational advantages involved where a member firm is affiliated with an exchange to which it is routing orders.

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

Written comments were neither solicited nor received.

III. 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 No. SR-Nasdaq-2008-098 on the subject line.

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-2008-098. 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 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-Nasdaq-2008-098 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

#### IV. Commission's Findings and Order Granting Accelerated Approval of a Proposed Rule Change

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>19</sup> In particular, the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>20</sup> which requires, among other things, that the rules of a national securities exchange be 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

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<sup>19</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>20</sup> 15 U.S.C. 78f(b)(5).

market system; and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

On August 7, 2008, the Commission approved the acquisition of BX (formerly The Boston Stock Exchange, Incorporated) by NASDAQ OMX.<sup>21</sup> In conjunction with that transaction, the Exchange amended its rules to prohibit the routing of Directed Orders<sup>22</sup> to any facility of an exchange that is an affiliate of Nasdaq.<sup>23</sup> This limitation corresponds to one of the conditions proposed by BX at the time it was acquired by NASDAQ OMX to permit its affiliation with NES.<sup>24</sup> NES, a broker-dealer that will become a member of BX, currently provides to Nasdaq members optional routing services to other market centers. NES is owned by NASDAQ OMX, which also owns three registered securities exchanges – Nasdaq, BX, and the PHLX.<sup>25</sup> Thus, NES is an affiliate of each of these exchanges.

BX previously proposed as a condition to its affiliation with NES, that NES would only route orders to BSE that first attempt to access liquidity on Nasdaq. In connection with the resumption of equities trading on BX, BX is now proposing to accept orders routed to it by NES in its capacity as a facility of Nasdaq, including orders that do not first attempt to access liquidity on

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<sup>21</sup> See supra note 11.

<sup>22</sup> Nasdaq Rule 4751(f)(9) defines Directed Orders as immediate-or-cancel orders that are directed to an exchange other than Nasdaq without checking the Nasdaq book.

<sup>23</sup> See Nasdaq Rule 4751(f)(9). See also Securities Exchange Act Release No. 58135, supra note 8.

<sup>24</sup> See Securities Exchange Act Release No. 58324, supra note 11, at notes 117-123 and accompanying text. See also Securities Exchange Act Release No. 58135, supra note 8.

<sup>25</sup> See Securities Exchange Act Release Nos. Release No. 58324, supra note 11; and 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (order approving NASDAQ OMX's acquisition of the PHLX.)

Nasdaq.<sup>26</sup> In the instant filing, the Exchange proposes to amend Nasdaq Rule 4751 to allow the routing of Directed Orders<sup>27</sup> from Nasdaq to the NASDAQ OMX BX Equities Market. The Exchange is also proposing to amend Nasdaq Rule 4758 to add a requirement that NES 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 NES, and any other entity.

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.<sup>28</sup> Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests when the exchange is affiliated with one of its members, the Commission believes that it is consistent with the Act to permit NES to expand the outbound routing services it provides to Nasdaq, subject to certain conditions.

Nasdaq Rule 4758 imposes certain conditions on NES as the Exchange's outbound order router. For example, NES must: (1) be a member of a self-regulatory organization unaffiliated with Nasdaq that is its designated examining authority; (2) be regulated as a facility of the

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<sup>26</sup> See Securities Exchange Act Release No. 59154 (December 23, 2008) (SR-BSE-2008-48) (order approving the BX Rulebook Filing) ("BX Rulebook Approval Order").

<sup>27</sup> Pursuant to Nasdaq Rule 4751(f)(9), Nasdaq currently may not route Directed Orders to a facility of an exchange that is an affiliate of Nasdaq.

<sup>28</sup> See, e.g., Securities Exchange Act Release Nos. 58324, *supra* note 11; 58673, (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-NYSE-2008-60 and SR-Amex-2008-62) (order approving the business combination between NYSE Euronext and NYSE Alternext US LLC); 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members); and 53382 (February 27, 2006, 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings).

Exchange;<sup>29</sup> and (3) not engage in any business other than its outbound router function unless otherwise approved by the Commission. Also, the books, records, premises, officers, agents, directors and employees of NES, as a facility of Nasdaq are deemed to be those of the Exchange for purposes of and subject to oversight pursuant to the Act.<sup>30</sup> In addition, use of NES to route orders from Nasdaq to away market centers is optional,<sup>31</sup> and a Nasdaq member is free to route orders to other market centers through alternative means. Pursuant to the proposal, NES will also establish and maintain procedures and internal controls reasonably designed to restrict the flow of confidential and proprietary information between Nasdaq and its facilities, including NES, and any other entity.<sup>32</sup>

In light of the protections discussed above and contained in Nasdaq Rule 4758, the Commission believes that it is consistent with the Act to permit Nasdaq to expand the availability of the outbound routing services provided by its affiliate, NES.

Nasdaq has asked the Commission to accelerate approval of the proposed rule change concurrent with approval of the BX Rulebook Proposal which establishes protections against

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<sup>29</sup> The Commission notes that, as a facility of the Exchange, NES is subject to Exchange oversight, as well as Commission oversight. Further, the Exchange is responsible for filing with the Commission proposed rule changes and fees relating to NES's outbound router function and NES's outbound router function is subject to exchange non-discrimination requirements.

<sup>30</sup> See Nasdaq Rule 4758(b)(6). In addition, the books and records of NES, as a facility of the Exchange, are subject at all times to inspection and copying by the Exchange and the Commission. Id.

<sup>31</sup> Nasdaq Rule 4758(b)(7).

<sup>32</sup> See proposed Nasdaq Rule 4758(b)(8). The Commission notes that this proposed requirement is consistent with the rules for Nasdaq Options Services LLC, which provides outbound routing services for the Nasdaq Options Market, that were previously approved by the Commission. See Nasdaq Options Rule Section 11(e). See also Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080) (order approving a proposed rule change relating to the establishment and operation of the NASDAQ Options Market).

possible conflicts of interest as a result of routing by NES to BX.<sup>33</sup> The Commission finds good cause for approving the proposed rule change before the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. The Commission notes that Nasdaq's proposal to expand the use of NES as its outbound order routing facility is consistent with prior Commission action.<sup>34</sup> Accordingly, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>35</sup> to approve the proposed rule change on an accelerated basis.

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<sup>33</sup> See SR-Nasdaq-2008-098, Item 7. The Commission is also approving today the BX Rulebook Proposal. See BX Rulebook Approval Order, supra note 26.

<sup>34</sup> See, e.g., Securities Exchange Act Release Nos. 59009 (November 24, 2008), 73 FR 73363 (December 2, 2008) (SR-NYSEALTR-2008-07); 58681, supra note 13; and 58680 supra note 13.

<sup>35</sup> 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NASDAQ-2008-098) is hereby approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>36</sup>

Florence E. Harmon  
Acting Secretary

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<sup>36</sup> 17 CFR 200.30-3(a)(12).