

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59807; File No. SR-NASDAQ-2009-036)

April 21, 2009

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

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 April 17, 2009, 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 prepared by NASDAQ. NASDAQ has designated the proposed rule change as constituting a non-controversial 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 Substance of the Proposed Rule Change

NASDAQ proposes to modify Rule 4758, Order Routing, to provide market participants with the option of entering orders that do not check the Nasdaq Market Center book prior to routing. NASDAQ proposes to implement the change with respect to Rule 4758(a)(1)(A)(i) on or about May 1, 2009, and will announce the exact date of implementation in a NASDAQ Equity Trader Alert. NASDAQ proposes to implement the change with respect to Rules 4758(a)(1)(A)(ii) and (iii) on a date in May or June 2009, to be announced in a NASDAQ Equity Trader Alert.

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 and proposed deletions are in brackets.

4758. Order Routing

(a) Order Routing Process

(1) The Order Routing Process shall be available to Participants from 7:00 a.m. until 8:00 p.m. Eastern Time, and shall route orders as described below: All routing of orders shall comply with Rule 611 of Regulation NMS under the Exchange Act.

(A) The System provides three routing options. Of these three, DOT is only available for orders ultimately sought to be directed to either the New York Stock Exchange ("NYSE") or [the American Stock Exchange ("AMEX")] NYSE Amex. The System will consider the quotations only of accessible markets. The three System routing options are:

(i) DOT ("DOT")—under this option, after checking the System for available shares if so instructed by the entering firm, orders are sent to other available market centers for potential execution, per entering firm's instructions, before being sent to the destination exchange, so long as the price at such market centers would not violate the Order Protection Rule. Any un-executed portion will thereafter be sent to the NYSE or [AMEX] NYSE Amex, as appropriate, at the order's original limit order price. This option may only be used for orders with time-in-force parameters of either SDAY, SIOC, MDAY, MIOC, GTMC or market-on-open/close.

Notwithstanding the foregoing, orders designated for participation in the

NYSE or [AMEX] NYSE Amex opening or closing processes will not check the System for available shares prior to routing.

(ii) Reactive Electronic Only ("STGY")—under this option, after checking the System for available shares if so instructed by the entering firm, 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 it would send the order to a destination market center. If shares 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 accessible market center, the System shall 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.

(iii) Electronic Only Scan ("SCAN")—under this option, after checking the System for available shares if so instructed by the entering firm, orders are sent to other available market centers for potential execution, per entering firm's instructions, in compliance with Rule 611 under Regulation NMS. When checking the book, the System will seek to execute at the price it would send the order to a destination market center. If shares 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.

Orders that do not check the System for available shares prior to routing may not be sent to a facility of an exchange that is an affiliate of Nasdaq, except for orders that are sent to the NASDAQ OMX BX Equities Market.

(B) No change.

(b) No change.

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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 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

In SR-NASDAQ-2008-079,⁴ NASDAQ amended Rule 4758 to provide that if an order is routed to the New York Stock Exchange ("NYSE") or NYSE Amex and is designated as eligible for posting to the NYSE or NYSE Amex book, the order must check the NASDAQ book prior to routing. Routing of orders eligible to post at NYSE or NYSE Amex is conducted pursuant to

⁴ Securities Exchange Act Release No. 58721 (October 2, 2008), 73 FR 59696 (October 9, 2008) (SR-NASDAQ-2008-079).

NASDAQ's DOT routing strategy, as described in Rule 4758(a)(1)(A)(i). NASDAQ is now proposing to eliminate the requirement, as established by SR-NASDAQ-2008-079, that such orders check the NASDAQ book. The change is a response to requests from market participants for greater flexibility in the instructions that they may provide with respect to routing. Under amended Rule 4758(a)(1)(A)(i), a market participant may opt either to access the NASDAQ book prior to routing or bypass it. Similarly, the market participant may specify that the order should access liquidity available on one or more of the trading venues to which NASDAQ routes, or it may opt to have the order go directly to its destination exchange. In all cases, the order will access liquidity available on NASDAQ or other trading venues only if the price is consistent with the Order Protection Rule of Regulation NMS. NASDAQ plans to implement the change to Rule 4758(a)(1)(A)(i) on or about May 1, 2009, and will announce the exact date of implementation in a NASDAQ Equity Trader Alert.

The DOT routing strategy is the only strategy under which orders are eligible for posting to the books of away markets. NASDAQ's STGY and SCAN routing strategies, as described in Rule 4758(a)(1)(A)(ii) and (iii), currently contemplate that orders will check the NASDAQ book, route to away markets on an immediate-or-cancel basis, and return to the NASDAQ book in accordance with the time-in-force instructions of the order. Under STGY, the order will again route if the order's price is subsequently locked or crossed by another market center; under SCAN, the order remains on the NASDAQ book regardless of the price subsequently available at away markets. Orders are routed to away markets only if an execution at the price available at such markets would not violate the Order Protection Rule of Regulation NMS. At a later date in May or June 2009, to be announced in a NASDAQ Equity Trader Alert, NASDAQ will modify these routing strategies to provide market participants with the option of having their orders not

check the NASDAQ book before initial routing to away markets. In all other respects, the routing strategies will remain unchanged.

NASDAQ is also amending Rule 4758 to provide that if an order does not check the NASDAQ book for available shares prior to routing, it may not be sent to a facility of an exchange that is an affiliate of NASDAQ, with the exception of orders that are sent to the NASDAQ OMX BX Equities Market. In SR-NASDAQ-2008-061,⁵ which was filed in anticipation of the acquisition of the Boston Stock Exchange (now NASDAQ OMX BX) and the Philadelphia Stock Exchange (now NASDAQ OMX PHLX), NASDAQ stipulated that it would not route orders to affiliated exchanges unless the orders checked the NASDAQ book prior to routing. Subsequently, in SR-NASDAQ-2008-098,⁶ NASDAQ amended this restriction to provide that orders that do not check the NASDAQ book may be routed to the NASDAQ OMX BX Equities Market on a twelve-month pilot basis. As detailed in that filing and in a related filing by NASDAQ OMX BX,⁷ the lifting of the restriction was premised upon (i) NASDAQ establishing and maintaining procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between NASDAQ and its facilities (including its routing broker) and any other entity, and (ii) NASDAQ OMX BX adopting rules and undertakings to manage the flow of confidential and proprietary information between NASDAQ's routing broker and NASDAQ OMX BX and to minimize potential conflicts of interest.

⁵ Securities Exchange Act Release No. 58135 (July 10, 2008), 73 FR 40898 (July 16, 2008) (SR-NASDAQ-2008-061).

⁶ Securities Exchange Act Release No. 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008) (SR-NASDAQ-2008-098).

⁷ Securities Exchange Act Release No. 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR-BSE-2008-48).

NASDAQ's other affiliated exchange, NASDAQ OMX PHLX, ceased operation of its system for trading cash equities during the fourth quarter of 2008. As a result, NASDAQ does not currently route any cash equities orders to NASDAQ OMX PHLX. If, however, NASDAQ OMX PHLX were to resume trading of cash equities, the proposed rule language would restrict routing of orders to NASDAQ OMX PHLX that did not check the NASDAQ book prior to routing until such time as NASDAQ and NASDAQ OMX PHLX adopted rules and procedures comparable to those adopted by NASDAQ and NASDAQ OMX BX.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁸ in general, and with Section 6(b)(5) of the Act,⁹ 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 change will provide functionality that allows members to route to away markets without first checking the NASDAQ book, in response to members' request for this added flexibility. This functionality was previously in effect for NASDAQ's DOT routing strategy. The change places appropriate restrictions on routing of orders to NASDAQ's affiliated exchanges.

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.

⁸ 15 U.S.C. 78f.

⁹ 15 U.S.C. 78f(b)(5).

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

Written comments on the proposed rule change were neither solicited nor received.

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

Because the proposed rule change: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, 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 Act¹⁰ and Rule 19b-4(f)(6) thereunder.¹¹

A proposed rule change filed under 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.¹² However, Rule 19b-4(f)(6)(iii)¹³ 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. The Commission notes that NASDAQ's proposal is substantially similar to the rule of another national securities exchange and does not raise any new substantive issues.¹⁴ NASDAQ states that waiving the operative delay will allow NASDAQ to compete more effectively by putting its

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f)(6).

¹² 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NASDAQ has satisfied this requirement.

¹³ Id.

¹⁴ See BATS Exchange Rule 11.9(c)(12).

new functionality in effect without undue delay.¹⁵ For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, and designates the proposed rule change to be operative upon filing with the Commission.¹⁶

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-2009-036 on the subject line.

Paper Comments:

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

¹⁵ See SR-NASDAQ-2009-036, Item 7.

¹⁶ For the 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).

All submissions should refer to File Number SR-NASDAQ-2009-036. 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, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of 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-2009-036 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 and Markets, pursuant to delegated authority.¹⁷

Florence E. Harmon
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).