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Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File Number SR-NASDAQ-2009-043; SEC Release No. 59875 (May 6, 2009), 74 FR 22794 (May 14, 2009) and File Number SR-BATS-2009-014

Dear Ms. Murphy:

NYSE Euronext, on behalf of New York Stock Exchange LLC ("NYSE"), NYSE Amex LLC ("NYSE Amex"), and NYSE Arca, Inc. ("NYSE Arca"),[1] submits this letter in response to the above-referenced NASDAQ Stock Market LLC ("Nasdaq") and BATS Exchange ("BATS") filings, which each propose to modify their respective routing strategies to provide preferential treatment for their own market participants before routing orders to away markets.

As described more fully below, NYSE Euronext believes that the time is ripe for the Securities and Exchange Commission ("Commission") to review not just the proposed Nasdaq and BATS functionality, but similar trading functionality used by registered alternative trading systems ("ATS") that provide non-public order information to a select class of market participants at the expense of a free and open market system. Pending such market-wide review, NYSE Euronext respectfully urges the Commission to abrogate the above-referenced Nasdaq filing and reject the BATS filings as not non-controversial.

Proposed Nasdaq and BATS Filings

As set forth in the above-referenced filing, Nasdaq filed for immediate effectiveness to amend Nasdaq Rule 4758 (Order Routing) to provide for what it describes as an "optional" pre-routing display period for orders using either the DOT, SCAN, or STGY routing strategies, as set forth in that rule. As proposed, orders entered at Nasdaq using one of those routing

[1] NYSE, NYSE Amex, and NYSE Arca are each U.S. Regulated Subsidiaries of NYSE Euronext.

strategies will first execute to the maximum extent possible in Nasdaq's book. Rather than routing the remaining unexecuted portion of the order pursuant to the chosen routing strategy, Nasdaq will instead hold the order at Nasdaq and display it only to Nasdaq market participants and market data vendors to provide them with an opportunity to match the National Best Bid or Offer ("NBBO").[2]

Nasdaq would determine the period of time that such orders will be displayed to Nasdaq market participants, but such period would not exceed three seconds.[3] Only after that pre-routing display period ends would Nasdaq then route the order pursuant to the chosen trading strategy. Although the proposed rule text provides that the three-second delay in routing an order would be at the customer's instruction, Nasdaq's default position will be to hold orders to "flash" them to its own participants, i.e., disseminate a private quote. Customers must opt out of that default position so that their orders can get an immediate execution. In its brief rule filing, Nasdaq cites only to the CBOE Stock Exchange's ("CBSX") rules for support that this functionality has already been approved by the Commission and therefore is non-controversial.

BATS proposes a similar rule filing to amend BATS Rule 11.13 to add the "BATS Optional Liquidity Technology" or "BOLT" functionality, whereby, similar to the Nasdaq proposed functionality, orders that are not executed in their entirety at BATS would be displayed at the NBBO first to BATS members and sponsored participants for a period of up to three seconds before such orders are routed to away markets, as required by Reg. NMS. The BATS proposal differs slightly from the Nasdaq proposal in that the customer would need to affirmatively instruct that the order would be subject to the pre-routing display and the customer could dictate how long such order would be held at BATS. But the end result is the same: both BATS and Nasdaq propose to provide their market participants with additional, but not immediate, opportunities to match the NBBO. Moreover, the perfunctory BATS proposal similarly cites only to the CBSX rule and Nasdaq filing as support for its contention that its rule filing is non-controversial.

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2 Nasdaq has announced that it will display these private quotes via its proprietary TotalView- ITCH data feed.

3 The proposed rule text states that the period can be up to three seconds. Nasdaq has since stated that the period will be no more than 500 milliseconds, however, that time change is not reflected in a rule amendment. Nasdaq has also publicly stated that its private quotes will be disseminated for a period of 20 to 30 milliseconds.

The Nasdaq and BATS Proposed Functionality Impedes
a Free and Open Market System and Harms the Investing Public

NYSE Euronext believes that the Nasdaq and BATS proposed functionalities would impede a free and open market and a national market system and therefore the proposals are not non-controversial. Specifically, the proposed pre-routing display functionality circumvents the original purpose of Regulation NMS ("Reg. NMS"), which, as noted by the Commission in its adopting release, seeks to reinforce "the fundamental principle of obtaining the best price for investors when such price is represented by automated quotations that are immediately accessible."[4] (emphasis added)

While neither Nasdaq's nor BATS's proposed pre-routing order display functionality would result in orders trading through another market's protected bids or offers *per se*, the proposed functionality achieves essentially the same result by imposing a significant speed bump on the execution of orders. Rather than permitting orders to display to or execute immediately with available contra-side interest at the NBBO, as contemplated by Reg. NMS, the proposed functionality would hold those orders at a market center to provide a closed circuit of participants with an electronic advance "look" at the order. In today's trading environment, where trading and reaction time are discussed in micro seconds, an order that is held for even 500 milliseconds cannot be deemed an "immediate" execution.

NYSE Euronext notes that the private quotes that Nasdaq and BATS propose to distribute to selected groups of participants, including market data vendors, are in fact actionable order messages because the participant recipients of such a message can trade with the order. As such, these quotes should be publicly disseminated via the joint-industry plans and rules governing the dissemination of market data (Consolidated Quotation ("CQ") Plan and the OTC/UTP Plan ("Nasdaq UTP Plan")). NYSE Euronext further notes that neither Nasdaq nor BATS has provided a rationale for why selected market data vendors should be recipients of such private quotes, as opposed to disseminating such quotes publicly via a national market quotation plan. Given the number of Nasdaq and BATS participants who would be eligible to receive this advance look at orders, disseminating this interest via the CQ and Nasdaq UTP Plans would achieve the same goal in terms of ensuring that the customer entering such order

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4 See SEC Release No. 51808, 70 FR 37496 (June 29, 2005) (File No. S7-10-04) (Final Rule release adopting Reg. NMS).

obtains an execution at the best possible price. Disseminating such quotes via both national market quotation plans would also ensure compliance with Reg. NMS Order Display Rule and market data plans.

NYSE Euronext further believes that the proposed functionality harms the investing public because it may not result in the best execution for the customer. Displayed limit orders at the NBBO in other market centers may not receive an execution because the willing contra-side interest at Nasdaq or BATS is being held for the benefit of those market centers. Therefore, displayed limit orders on other markets may be disadvantaged, which defeats the purpose of Reg. NMS.

Similarly, by holding orders for the sole purpose of providing its own participants with up to three seconds to decide whether to match the NBBO (which may already be available in an away market center), customers who enter orders at Nasdaq or BATS may not get an immediate execution if that market center is not quoting at the NBBO. Moreover, because of the delay, the customer's execution price may no longer be what the NBBO was at the time the order was entered. Even 500 milliseconds can be a virtual eternity in today's electronic marketplace; the NBBO could easily have moved to a less favorable price for that customer in that time period.

For example, in the case of a limit order routed to a market center, if such order is marketable when entered, it should be executed, even if that means routing all or a portion of the order. It is highly possible that in today's fast markets, a marketable limit order may no longer be marketable after the period that it is held at a market center. Therefore, the proposals to hold an order to provide a select group with an advance look at that order could therefore result in a marketable limit order no longer being marketable, and thus missing an execution.

Nasdaq has stated that the pre-routing display to its market participants is at the customer's option. However, by imposing this trading functionality as a default position and requiring customers to affirmatively opt out of such functionality, Nasdaq has tipped the scale in favor of the advance look. The BATS proposal differs from the Nasdaq proposal on this point. Nonetheless, both proposals end up creating additional dark liquidity that is available only to their own market participants, despite the possibility that available buyers and sellers may already be available in other market centers. Moreover, it is unclear to what extent Nasdaq or BATS would disclose to customers the risks that they would be taking if an order is flashed internally without first being publicly disseminated via a consolidated quote system.

In support of their contention that the proposed rule filings are non-controversial, Nasdaq and BATS cite only to CBOE Rules 51.8 and 52.6 for support that the Commission has already considered the proposed functionality (BATS also references the Nasdaq filing). One of the cited rules, however, is inapposite: unlike the proposed Nasdaq or BATS rule, CBOE Rule 51.8(g)(10), concerns a "Trade, Flash or Cancel" order type that is intended to be executed only at CBSX and is not intended to be routed to away markets. While that order type is electronically exposed to CBSX market participants if the CBSX is not at the NBBO, at the end of the three-second display period under CBOE Rule 52.6, such order is cancelled if not executed at CBSX. This order type therefore keeps alive for an additional three seconds an order that otherwise would have been cancelled and not been routed. With respect to CBOE Rule 52.6, when the Commission approved that rule in September 2006, it did not review the implications of that rule under Reg. NMS, which had not yet been implemented for market centers.[5] Accordingly, the policy issues raised herein were not addressed when that rule was approved. Specifically, neither CBSX nor the Commission addressed whether an order that is flashed to market participants without either being disseminated via a consolidated quote system or routed directly to an away market, can be deemed an exception to either Rule 602 or 604 of Reg. NMS.

The Proliferation of Providing Preferential
Treatment by Holding Orders Warrants Commission Review

Given the proliferation of exchanges seeking to hold orders to provide advance looks to their own participants, NYSE Euronext believes that the time is ripe for the Commission to reconsider the implications of permitting exchanges and registered ATS's to provide pre-routing display to a limited, but in some cases large, class of participants. In addition to CBSX, DirectEdge ECN LLC ("Direct Edge") also offers an Enhanced Liquidity Provider ("ELP") program that similarly holds orders within a limited Direct Edge community before publicly posting bids and offers. When both CBSX Rule 52.6 and Direct Edge's ELP functionality started, the volume of transactions at those market centers represented just a fraction of equities trading in U.S. market centers. However, with the continued growth of

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[5] SEC Release No. 5442 (Sept. 11, 2006), 71 FR 54537 (Sept. 15, 2006) (SR-CBOE-2004-21).

Direct Edge's market share[6] and its proposal to register as an exchange, and now the proposals from both Nasdaq and BATS to add such preferential treatment functionality at those market centers, what was once a limited functionality may become the norm for equities trading.

As noted above, NYSE Euronext believes that the potential widespread use of holding orders by multiple market centers would impede the free and open market system contemplated by Reg. NMS by bypassing the purpose of the Order Protection Rule. Moreover, such pre-routing display to a subset of market participants may also contravene Rules 602 and 604 of Reg. NMS and Rule 301(b)(3)(ii) of Regulation ATS. NYSE Euronext further notes that reducing publicly available liquidity in this way may impact bid-offer spreads and the execution costs to customers.

Moreover, NYSE Euronext believes that exchanges and ATS's seeking to use this functionality need to identify how they will surveil for possible abuses of the information advantage that a market participant who receives a flash message may have either to trade ahead, front run or otherwise interposition vis-à-vis customer orders. At a minimum, because of the potential to trade in multiple market centers based on knowledge of a private quote, exchanges would need sophisticated audit trails that track not only when an order is flashed, but also trading activity in that security by a participant who has access to that electronic look. Moreover, given the volume of transactions flowing through ATS's, they too should be subject to the same regulatory scrutiny to ensure that market participants do not use those venues to end-run regulatory requirements that they would otherwise be subject to if using a registered exchange.

NYSE Euronext therefore respectfully urges that the Commission abrogate the Nasdaq rule filing and reject the BATS rule filing, as referenced above, as not non-controversial. As noted above, these filings are controversial not only because they raise issues of investor protection and impose a burden on competition, but also because the policy issues raised by these proposed rule filings have not previously been considered by the Commission.[7] NYSE Euronext further respectfully requests that the Commission undertake a market-wide review

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[6] Direct Edge claims that in April 2009, it experienced a 273 percent increase in volume from a year earlier.

[7] If the Commission does not abrogate the Nasdaq filing and reject the BATS filing, to remain competitive, NYSE Euronext may also need to add similar functionality for one or more of its market centers. In such case, NYSE Euronext understands that it too would be able to file such rule proposals for immediate effectiveness.

of the impact of such pre-routing display functionality, as already in use at Direct Edge and CBSX, and as contemplated by Nasdaq and BATS.

Respectfully submitted,

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