



**Jeffrey S. Davis**  
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June 6, 2016

Brent J. Fields  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Amendment No. 1 (SR-NASDAQ-2016-035)

Dear Mr. Fields:

The NASDAQ Stock Market LLC filed the above-referenced filing on June 6, 2016.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jeffrey S. Davis'.

Jeffrey S. Davis  
Deputy General Counsel

*Required fields are shown with yellow backgrounds and asterisks.*

Filing by NASDAQ Stock Market  
 Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

<input type="checkbox"/> Initial *	<input checked="" type="checkbox"/> Amendment *	<input type="checkbox"/> Withdrawal	<input checked="" type="checkbox"/> Section 19(b)(2) *	<input type="checkbox"/> Section 19(b)(3)(A) *	<input type="checkbox"/> Section 19(b)(3)(B) *
			Rule		
<input type="checkbox"/> Pilot	<input type="checkbox"/> Extension of Time Period for Commission Action *	<input type="text"/> Date Expires *	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010 <input type="checkbox"/> Section 806(e)(1) * <input type="checkbox"/> Section 806(e)(2) *	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934 <input type="checkbox"/> Section 3C(b)(2) *
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Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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**Description**

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

Proposal to establish a Secondary Contingency Procedure that would enable the Exchange to report an Official Closing Price on behalf of an impaired primary listing exchange.

**Contact Information**

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* Jeffrey      Last Name \* Davis

Title \* Deputy General Counsel

E-mail \* [REDACTED]

Telephone \* [REDACTED]      Fax [REDACTED]

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title \*)

Date 06/06/2016      Executive Vice President and General Counsel

By Edward S. Knight      [REDACTED]

(Name \*)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

**Form 19b-4 Information \***

Add Remove View

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

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**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

Add Remove View

Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) The Nasdaq Stock Market LLC (“Nasdaq” or “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> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) an amendment to a proposal to establish a Secondary Contingency Procedure that would enable the Exchange to report an Official Closing Price on behalf of an impaired primary listing exchange (“Amendment”).<sup>3</sup>

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by Senior Management of the Exchange pursuant to authority delegated by the Board of Directors of the Exchange on July 1, 2015. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Jeffrey S. Davis  
Deputy General Counsel  
Nasdaq, Inc.  
[REDACTED]

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

<sup>2</sup> 17 C.F.R. 240.19b-4.

<sup>3</sup> This Amendment replaces the original filing in its entirety.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

a. Purpose

Nasdaq has robust and resilient systems that are designed to ensure fair and orderly markets, including multiple redundancies and back-up systems. For the critical Nasdaq Official Closing Price (“NOCP”), Nasdaq currently has three systems that are designed to ensure the orderly execution and dissemination of the NOCP: (1) the Nasdaq Closing Cross set forth in Rule 4754(b)(1); (2) Auxiliary Procedures described in Rule 4754(b)(5); and (3) Primary Contingency Procedures contained in Rule 4754(b)(7).

Here, Nasdaq is proposing to establish Secondary Contingency Procedures in proposed new Rule 4754(b)(8). This proposal is made in conjunction with the New York Stock Exchange LLC (“NYSE”), NYSE Arca, Inc., and the exclusive securities information processors for the Nasdaq UTP Plan and the Consolidated Quote/Consolidated Tape Plan (“SIPs”).

**Overview of Secondary Contingency Procedures.**

Procedurally, Nasdaq, as a primary listing market, will designate a back-up exchange to provide an official closing price in the event that Nasdaq’s market is impaired and unable to execute a closing auction for all or a subset of listed securities under the standard closing procedures set forth in Rule 4754(b)(1) or the Primary Contingency Procedures set forth in Rule 4754(b)(7). Nasdaq would invoke the Secondary Contingency Procedures only after it determines that neither the standard closing procedures nor the Primary Contingency Procedures are available due to technical difficulties. Nasdaq will employ internal testing procedures to determine the

availability of each set of operating procedures, and thereby position itself to make and announce such a determination as rapidly as possible.

Nasdaq would invoke the Secondary Contingency Procedures by announcing publicly that its market is impaired and unable to execute a closing auction. If Nasdaq makes that announcement prior to 3:00 p.m., Eastern Standard Time (“EST”), the official closing price from Nasdaq’s designated back-up exchange would serve as the NOCP. If Nasdaq makes that announcement after 3:00 p.m., EST, the SIP would calculate a Volume Weighted Average Price (“VWAP”), described in more detail below. Whether the announcement is made before or after 3:00 p.m., EST, the SIP would publish the NOCP on Nasdaq’s behalf either: (1) based on a message from Nasdaq’s back-up exchange or (2) based on the VWAP calculation.

#### **Designation of Back-Up Exchange.**

Nasdaq proposes to designate NYSE Arca as its official back-up exchange. Nasdaq believes that NYSE Arca is best positioned to serve as Nasdaq’s back-up for two primary reasons: (1) NYSE Arca and Nasdaq membership substantially overlaps; (2) NYSE Arca already operates an effective closing cross that it can use to execute a closing cross in Nasdaq-listed securities. In the event Nasdaq is unable to execute a closing cross, Nasdaq members that are also NYSE Arca members should be technically prepared to transfer liquidity to NYSE Arca to ensure a deeply liquid closing cross.

Nasdaq expects NYSE Arca will designate Nasdaq as its back-up exchange for the same reasons. Again, the two exchanges’ memberships substantially overlap, meaning that liquidity can and already does flow smoothly from one exchange to the other. Also, Nasdaq already operates a closing cross for securities listed on NYSE Arca,

as well as all other securities for which consolidated information is disseminated via Tapes A and B.

**The Role of the SIPs.**

The Operating Committees for the Nasdaq and CQ/CT Plans have already voted to modify the SIPs to support this proposal. Specifically, each exchange that is designated as a back-up exchange (Nasdaq and NYSE Arca), will disseminate via the SIPs an official closing price in every listed security marked with the .M sale condition code.

The SIPs will apply the following procedures:

1. Each primary listing exchange would print a standardized Official Closing Price (“OCP”), with a sale condition ‘M,’ in each security it trades, whether as primary or on a UTP basis.
2. Each primary listing exchange would include in its rules that, in the event that it is impaired and cannot conduct a closing auction, the exchange’s contingency OCP would be the OCP of a specified “back-up exchange” or, if the impairment is announced after 3:00 p.m., EST, a VWAP calculation.
3. In the event that a primary listing exchange publicly announces that it is impaired and unable to conduct a closing auction for all or a subset of its primary symbols, the SIP would print the primary listing exchange’s contingency OCP as the OCP of the primary listing exchange, including calculation of the VWAP. The advantages of the SIP reprinting the contingency OCP as the OCP of the primary listing exchange, rather than the

back-up exchange separately sending to the SIP its OCP as the OCP of the primary exchange are that:

- a. The SIP provides a centralized service of which each primary listing exchange can take advantage
  - b. Participant – line validations are retained
  - c. There is assurance of full symbol coverage
  - d. The SIP provides a single location for future updates or configuration changes or new primary listing exchanges
  - e. A single source and method for VWAP calculations
4. The primary listing exchange's contingency OCP would differ depending on what time the impaired primary market announces that it will be using the closing contingency plan.
- a. If announced prior to 3:00 p.m., EST, the primary listing exchange's contingency OCP would be based on the following hierarchy:
    - i. Official Closing Price (sale condition 'M') of a pre-designated back-up exchange(s). An exchange that has more than 1 back-up exchange as part of its hierarchy of contingency OCPs, will announce publicly the exchange(s) that will be relied on for the contingency OCP.
    - ii. If no such contingency OCP exists, then a VWAP calculated by the SIP of the final 5 minute regular trading session. The VWAP calculations would include all last sale eligible trades in the last 5 minutes of the normal trading day up to the time that the VWAP is

processed. The VWAP would include the closing auctions prints of all markets and would take into account any trade breaks or corrections up to the time the VWAP is processed. Because the VWAP would include any last-sale eligible trades, busts, or corrections that were reported up to the time that the SIP calculates the VWAP, the Exchange believes that the VWAP price would reflect any pricing adjustments that may be reported after 4:00 pm. ET.

- iii. If no last sale eligible trades are printed in the last 5 minutes, then the consolidated last sale during regular trading hours.
  - iv. If no such same day consolidated last sale eligible trades exist, then the primary listing exchange's prior trading day's Official Closing Price.
  - v. If no Official Closing Price for a security can be determined under subsections (i), (ii), (iii), or (iv) above, the Exchange would not publish and Official Closing Price for such security.
- b. If announced after 3:00 p.m., EST, the primary listing exchange's contingency OCP would be determined by the following hierarchy:
- i. Final 5 minute VWAP of regular trading session (same calculation as described above).
  - ii. If no last sale eligible trades printed in the last 5 minutes, then the consolidated last sale during regular trading hours.

- iii. If no such same day consolidated last sale eligible trades exist, then the primary listing exchange's prior trading day's Official Closing Price.
- iv. If no Official Closing Price for a security can be determined under subsections (i), (ii), or (iii) above, the Exchange would not publish and Official Closing Price for such security.

Whenever Nasdaq utilizes the Secondary Contingency Procedures, Nasdaq will cancel all open interest designated for the Nasdaq close residing in Nasdaq systems. This is designed to give members the opportunity to route their orders to alternative execution venues. Also, in all cases involving the Secondary Contingency Procedures, after hours trading will begin at 4:00 p.m. or upon resolution of the disruption that triggered the use of these proposed procedures.

The proposed rule changes are associated with technology changes for the Exchange and also for the SIP for Nasdaq-listed securities. The SIP has announced plans to implement a new platform in the fourth quarter of 2016. The Exchange intends to implement the proposed rule change within 120 days of the date of implementation of that new SIP platform. The Exchange believes that it is inadvisable to launch both the new SIP platform and the new back-up closing functionality at the same time. A delay of 120 days will permit market participants to test and launch on the new SIP platform, and then to separately test and launch the new back-up closing functionality.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>4</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>5</sup> in particular, in that it is designed to promote just and equitable principles of trade, 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 Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide transparency in how the Exchange would determine the Nasdaq Official Closing Price in Exchange-listed securities when the Exchange is unable to conduct a closing transaction due to a systems or technical issue. The Exchange believes that the proposed amendments would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed determination of a Nasdaq Official Closing Price was crafted in response to input from industry participants and would:

- provide a pre-determined, consistent solution that would result in a closing print to the SIP within a reasonable time frame from the normal closing time;
- minimize the need for industry participants to modify their processing of data from the SIP; and
- provide advance notification of the applicable closing contingency plan to

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<sup>4</sup> 15 U.S.C. 78f(b).

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

provide sufficient time for industry participants to route any closing interest to an alternate venue to participate in that venue's closing auction.

More specifically, the Exchange believes the proposed hierarchy for determining the Nasdaq Official Closing Price if the Exchange determines that it is impaired before 3:00 p.m., EST, would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposal, which is based on input from market participants, would provide sufficient time for market participants to direct closing-only interest to a designated alternate exchange in time for such interest to participate in a closing auction on such alternate venue in a meaningful manner.

The Exchange further believes that relying on the official closing price of a designated alternate exchange would provide for an established hierarchy for determining an Official Closing Price for an Exchange-listed security if there is insufficient interest to conduct a closing auction on the alternate exchange. In such case, the rules of NYSE Arca and Nasdaq already provide a mechanism for determining an official closing price for securities that trade on those markets.

The Exchange further believes that if the Exchange determines after 3:00 p.m., EST, that it is impaired and unable to conduct a closing transaction, the proposed VWAP calculation would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide for a mechanism to determine the value of an affected security for purposes of determining a Nasdaq Official Closing Price. By using a volume-weighted calculation that would include the closing transactions on an affected security on alternate exchanges as well as any busts or corrections that were reported up to the time that the SIP calculates the value, the

Exchange believes that the proposed calculation would reflect the correct price of a security.

In addition, by using a VWAP calculation rather than the last consolidated last-sale eligible price as of the end of regular trading hours, the Exchange would reduce the potential for an anomalous trade that may not reflect the true price of a security from being set as the Nasdaq Official Closing Price for a security.

The Exchange further believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposal would have minimal impact on market participants. As proposed, from the perspective of market participants, even if the Exchange were impaired, the SIP would publish a Nasdaq Official Closing Price for Exchange-listed securities on behalf of the Exchange in a manner that would be no different than if the Exchange were not impaired. If the Exchange determines that it is impaired after 3:00 p.m., EST, market participants would not have to make any system changes. If the Exchange determines that it is impaired before 3:00 p.m., EST, and designates an alternate exchange, market participants may have to do systems work to re-direct closing-only orders to the alternate exchange. However, the Exchange understands, based on input from market participants, that such changes would be feasible based on the amount of advance notice. In addition, the Exchange believes that designating an alternate exchange when there is sufficient time to do so would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would allow for the price-discovery mechanism of a closing auction to be available for impacted Exchange-listed securities.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues, but rather to provide for how the Exchange would determine an Official Closing Price for Exchange-listed securities if it is impaired and cannot conduct a closing transaction due to a systems or technical issue. The proposal has been crafted with input from market participants, Nasdaq, and the SIPs, and is designed to reduce the burden on competition by having similar back-up procedures across all primary listing exchanges if such exchange is impaired and cannot conduct a closing transaction.

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

On April 5, 2016, the Securities Industry and Financial Markets Association (“SIFMA”) filed a comment regarding this proposed rule change.<sup>6</sup> In its comment, SIFMA suggested three changes. First, SIFMA requested that the Exchange rules specify that any designation of an alternative exchange should be publicly announced at or before 3:00 p.m. Nasdaq has already announced that NYSE Arca will be designated as Nasdaq’s alternative exchange. Therefore, Nasdaq is interpreting SIFMA’s request to be that Nasdaq publicly announce any determination to invoke the Secondary Contingency Procedures described in this proposal. Nasdaq agrees with this suggestion and will amend the proposed rule language accordingly.<sup>7</sup>

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<sup>6</sup> See letter, dated April 5, 2016, from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent Fields, Secretary, Commission.

<sup>7</sup> See Proposed Rule 4754(b)(7)(A).

Second, SIFMA suggests that if Nasdaq determines not to conduct its own closing auction, that Nasdaq expressly assume responsibility under its rules for the cancellation of open interest the exchange has already received. The suggestion modification would, according to SIFMA, provide members certainty that their open interest will not be executed by Nasdaq despite the determination to invoke the Secondary Contingency Procedures. Nasdaq agrees with this suggestion and will amend the proposed rule language accordingly.<sup>8</sup>

Third, SIFMA suggests that any VWAP calculation should not include any other exchanges' closing transactions. Nasdaq disagrees with this suggestion and therefore it respectfully declines to amend the proposal. Nasdaq believes that the VWAP should include the maximum liquidity available. The closing transactions from away markets are likely to include material amounts of liquidity executed close in temporal proximity. In these important ways, closing transactions on other markets are actually more rather than less valuable to the determination of the VWAP.

6. Extension of Time Period for Commission Action

The Exchange does not consent to an extension of the time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

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<sup>8</sup> See Proposed Rule 4754(b)(8)(C).

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of proposed rule for publication in the Federal Register.

5. Text of the proposed rule change.

**EXHIBIT 1**

## SECURITIES AND EXCHANGE COMMISSION

(Release No. \_\_\_\_\_ ; File No. SR-NASDAQ-2016-035)

June \_\_, 2016

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Establish a Secondary Contingency Procedure to Enable the Exchange to Report an Official Closing Price on Behalf of an Impaired Primary Listing 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 June 6, 2016, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. 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

The Exchange proposes an amendment to a proposal to establish a Secondary Contingency Procedure that would enable the Exchange to report an Official Closing Price on behalf of an impaired primary listing exchange (“Amendment”).<sup>3</sup>

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, 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.

<sup>3</sup> This Amendment replaces the original filing in its entirety.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange 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. The Exchange 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

Nasdaq has robust and resilient systems that are designed to ensure fair and orderly markets, including multiple redundancies and back-up systems. For the critical Nasdaq Official Closing Price ("NOCP"), Nasdaq currently has three systems that are designed to ensure the orderly execution and dissemination of the NOCP: (1) the Nasdaq Closing Cross set forth in Rule 4754(b)(1); (2) Auxiliary Procedures described in Rule 4754(b)(5); and (3) Primary Contingency Procedures contained in Rule 4754(b)(7).

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**Overview of Secondary Contingency Procedures.**

Procedurally, Nasdaq, as a primary listing market, will designate a back-up exchange to provide an official closing price in the event that Nasdaq's market is impaired and unable to execute a closing auction for all or a subset of listed securities

under the standard closing procedures set forth in Rule 4754(b)(1) or the Primary Contingency Procedures set forth in Rule 4754(b)(7). Nasdaq would invoke the Secondary Contingency Procedures only after it determines that neither the standard closing procedures nor the Primary Contingency Procedures are available due to technical difficulties. Nasdaq will employ internal testing procedures to determine the availability of each set of operating procedures, and thereby position itself to make and announce such a determination as rapidly as possible.

Nasdaq would invoke the Secondary Contingency Procedures by announcing publicly that its market is impaired and unable to execute a closing auction. If Nasdaq makes that announcement prior to 3:00 p.m., Eastern Standard Time (“EST”), the official closing price from Nasdaq’s designated back-up exchange would serve as the NOCP. If Nasdaq makes that announcement after 3:00 p.m., EST, the SIP would calculate a Volume Weighted Average Price (“VWAP”), described in more detail below. Whether the announcement is made before or after 3:00 p.m., EST, the SIP would publish the NOCP on Nasdaq’s behalf either: (1) based on a message from Nasdaq’s back-up exchange or (2) based on the VWAP calculation.

#### **Designation of Back-Up Exchange.**

Nasdaq proposes to designate NYSE Arca as its official back-up exchange. Nasdaq believes that NYSE Arca is best positioned to serve as Nasdaq’s back-up for two primary reasons: (1) NYSE Arca and Nasdaq membership substantially overlaps; (2) NYSE Arca already operates an effective closing cross that it can use to execute a closing cross in Nasdaq-listed securities. In the event Nasdaq is unable to execute a closing cross, Nasdaq members that are also NYSE Arca members should be technically prepared to transfer liquidity to NYSE Arca to ensure a deeply liquid closing cross.

Nasdaq expects NYSE Arca will designate Nasdaq as its back-up exchange for the same reasons. Again, the two exchanges' memberships substantially overlap, meaning that liquidity can and already does flow smoothly from one exchange to the other. Also, Nasdaq already operates a closing cross for securities listed on NYSE Arca, as well as all other securities for which consolidated information is disseminated via Tapes A and B.

### **The Role of the SIPs.**

The Operating Committees for the Nasdaq and CQ/CT Plans have already voted to modify the SIPs to support this proposal. Specifically, each exchange that is designated as a back-up exchange (Nasdaq and NYSE Arca), will disseminate via the SIPs an official closing price in every listed security marked with the .M sale condition code.

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contingency OCP as the OCP of the primary listing exchange, including calculation of the VWAP. The advantages of the SIP reprinting the contingency OCP as the OCP of the primary listing exchange, rather than the back-up exchange separately sending to the SIP its OCP as the OCP of the primary exchange are that:

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- a. If announced prior to 3:00 p.m., EST, the primary listing exchange's contingency OCP would be based on the following hierarchy:
    - i. Official Closing Price (sale condition 'M') of a pre-designated back-up exchange(s). An exchange that has more than 1 back-up exchange as part of its hierarchy of contingency OCPs, will announce publicly the exchange(s) that will be relied on for the contingency OCP.

- ii. If no such contingency OCP exists, then a VWAP calculated by the SIP of the final 5 minute regular trading session. The VWAP calculations would include all last sale eligible trades in the last 5 minutes of the normal trading day up to the time that the VWAP is processed. The VWAP would include the closing auctions prints of all markets and would take into account any trade breaks or corrections up to the time the VWAP is processed. Because the VWAP would include any last-sale eligible trades, busts, or corrections that were reported up to the time that the SIP calculates the VWAP, the Exchange believes that the VWAP price would reflect any pricing adjustments that may be reported after 4:00 pm. ET.
  - iii. If no last sale eligible trades are printed in the last 5 minutes, then the consolidated last sale during regular trading hours.
  - iv. If no such same day consolidated last sale eligible trades exist, then the primary listing exchange's prior trading day's Official Closing Price.
  - v. If no Official Closing Price for a security can be determined under subsections (i), (ii), (iii), or (iv) above, the Exchange would not publish and Official Closing Price for such security.
- b. If announced after 3:00 p.m., EST, the primary listing exchange's contingency OCP would be determined by the following hierarchy:

- i. Final 5 minute VWAP of regular trading session (same calculation as described above).
- ii. If no last sale eligible trades printed in the last 5 minutes, then the consolidated last sale during regular trading hours.
- iii. If no such same day consolidated last sale eligible trades exist, then the primary listing exchange's prior trading day's Official Closing Price.
- iv. If no Official Closing Price for a security can be determined under subsections (i), (ii), or (iii) above, the Exchange would not publish and Official Closing Price for such security.

Whenever Nasdaq utilizes the Secondary Contingency Procedures, Nasdaq will cancel all open interest designated for the Nasdaq close residing in Nasdaq systems. This is designed to give members the opportunity to route their orders to alternative execution venues. Also, in all cases involving the Secondary Contingency Procedures, after hours trading will begin at 4:00 p.m. or upon resolution of the disruption that triggered the use of these proposed procedures.

The proposed rule changes are associated with technology changes for the Exchange and also for the SIP for Nasdaq-listed securities. The SIP has announced plans to implement a new platform in the fourth quarter of 2016. The Exchange intends to implement the proposed rule change within 120 days of the date of implementation of that new SIP platform. The Exchange believes that it is inadvisable to launch both the new SIP platform and the new back-up closing functionality at the same time. A delay of

120 days will permit market participants to test and launch on the new SIP platform, and then to separately test and launch the new back-up closing functionality.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>4</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>5</sup> in particular, in that it is designed to promote just and equitable principles of trade, 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 Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide transparency in how the Exchange would determine the Nasdaq Official Closing Price in Exchange-listed securities when the Exchange is unable to conduct a closing transaction due to a systems or technical issue. The Exchange believes that the proposed amendments would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed determination of a Nasdaq Official Closing Price was crafted in response to input from industry participants and would:

- provide a pre-determined, consistent solution that would result in a closing print to the SIP within a reasonable time frame from the normal closing time;
- minimize the need for industry participants to modify their processing of

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<sup>4</sup> 15 U.S.C. 78f(b).

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

data from the SIP; and

- provide advance notification of the applicable closing contingency plan to provide sufficient time for industry participants to route any closing interest to an alternate venue to participate in that venue's closing auction.

More specifically, the Exchange believes the proposed hierarchy for determining the Nasdaq Official Closing Price if the Exchange determines that it is impaired before 3:00 p.m., EST, would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposal, which is based on input from market participants, would provide sufficient time for market participants to direct closing-only interest to a designated alternate exchange in time for such interest to participate in a closing auction on such alternate venue in a meaningful manner.

The Exchange further believes that relying on the official closing price of a designated alternate exchange would provide for an established hierarchy for determining an Official Closing Price for an Exchange-listed security if there is insufficient interest to conduct a closing auction on the alternate exchange. In such case, the rules of NYSE Arca and Nasdaq already provide a mechanism for determining an official closing price for securities that trade on those markets.

The Exchange further believes that if the Exchange determines after 3:00 p.m., EST, that it is impaired and unable to conduct a closing transaction, the proposed VWAP calculation would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide for a mechanism to determine the value of an affected security for purposes of determining a Nasdaq Official Closing Price. By using a volume-weighted calculation that would include the

closing transactions on an affected security on alternate exchanges as well as any busts or corrections that were reported up to the time that the SIP calculates the value, the Exchange believes that the proposed calculation would reflect the correct price of a security.

In addition, by using a VWAP calculation rather than the last consolidated last-sale eligible price as of the end of regular trading hours, the Exchange would reduce the potential for an anomalous trade that may not reflect the true price of a security from being set as the Nasdaq Official Closing Price for a security.

The Exchange further believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposal would have minimal impact on market participants. As proposed, from the perspective of market participants, even if the Exchange were impaired, the SIP would publish a Nasdaq Official Closing Price for Exchange-listed securities on behalf of the Exchange in a manner that would be no different than if the Exchange were not impaired. If the Exchange determines that it is impaired after 3:00 p.m., EST, market participants would not have to make any system changes. If the Exchange determines that it is impaired before 3:00 p.m., EST, and designates an alternate exchange, market participants may have to do systems work to re-direct closing-only orders to the alternate exchange. However, the Exchange understands, based on input from market participants, that such changes would be feasible based on the amount of advance notice. In addition, the Exchange believes that designating an alternate exchange when there is sufficient time to do so would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would

allow for the price-discovery mechanism of a closing auction to be available for impacted Exchange-listed securities.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues, but rather to provide for how the Exchange would determine an Official Closing Price for Exchange-listed securities if it is impaired and cannot conduct a closing transaction due to a systems or technical issue. The proposal has been crafted with input from market participants, Nasdaq, and the SIPs, and is designed to reduce the burden on competition by having similar back-up procedures across all primary listing exchanges if such exchange is impaired and cannot conduct a closing transaction.

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

On April 5, 2016, the Securities Industry and Financial Markets Association ("SIFMA") filed a comment regarding this proposed rule change.<sup>6</sup> In its comment, SIFMA suggested three changes. First, SIFMA requested that the Exchange rules specify that any designation of an alternative exchange should be publicly announced at or before 3:00 p.m. Nasdaq has already announced that NYSE Arca will be designated as Nasdaq's alternative exchange. Therefore, Nasdaq is interpreting SIFMA's request to be that Nasdaq publicly announce any determination to invoke the Secondary Contingency

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<sup>6</sup> See letter, dated April 5, 2016, from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent Fields, Secretary, Commission.

Procedures described in this proposal. Nasdaq agrees with this suggestion and will amend the proposed rule language accordingly.<sup>7</sup>

Second, SIFMA suggests that if Nasdaq determines not to conduct its own closing auction, that Nasdaq expressly assume responsibility under its rules for the cancellation of open interest the exchange has already received. The suggestion modification would, according to SIFMA, provide members certainty that their open interest will not be executed by Nasdaq despite the determination to invoke the Secondary Contingency Procedures. Nasdaq agrees with this suggestion and will amend the proposed rule language accordingly.<sup>8</sup>

Third, SIFMA suggests that any VWAP calculation should not include any other exchanges' closing transactions. Nasdaq disagrees with this suggestion and therefore it respectfully declines to amend the proposal. Nasdaq believes that the VWAP should include the maximum liquidity available. The closing transactions from away markets are likely to include material amounts of liquidity executed close in temporal proximity. In these important ways, closing transactions on other markets are actually more rather than less valuable to the determination of the VWAP.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or

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<sup>7</sup> See Proposed Rule 4754(b)(7)(A).

<sup>8</sup> See Proposed Rule 4754(b)(8)(C).

disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2016-035 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2016-035. 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 website viewing and printing 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 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-2016-035 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.<sup>9</sup>

Robert W. Errett  
Deputy Secretary

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<sup>9</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

Deleted text is [bracketed]. New text is underlined.

**The NASDAQ Stock Market Rules**

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**4754. Nasdaq Closing Cross**

(a) No Change.

(b) Processing of Nasdaq Closing Cross. The Nasdaq Closing Cross will begin at 4:00:00 p.m. EST, and post-market hours trading will commence when the Nasdaq Closing Cross concludes.

(1) – (6) No Change.

(7) Primary Contingency Procedures. When a disruption occurs [at or near the close of Market hours ]that prevents the execution of the Closing Cross as set forth above, Nasdaq shall apply either Primary Contingency Procedures pursuant to this paragraph (7) or Secondary Contingency Procedures pursuant to paragraph (8) below.[the following contingency procedures for the Closing Cross rather than procedures set forth above.]

Nasdaq will employ the Primary Contingency Procedures if at all possible, and it will employ the Secondary Contingency Procedures only if it determines that both the standard procedures and the Primary Contingency Procedures are unavailable. The determination to employ Primary or Secondary Contingency Procedures will be based upon all available information, including the type of disruption, the system or sub-system disrupted, the availability of testing and diagnostic data, and observed member and market impact.

The determination to implement Primary or Secondary [c]Contingency [p]Procedures [for the Contingency Closing Cross ]shall be made by the President of Nasdaq or any Senior Executive [Vice President ]designated by the President. If such disruption occurs, [

(A) NASDAQ ]Nasdaq shall publicly announce at the earliest possible time the initiation of Primary or Secondary [c]Contingency [closing p]Procedures via system status alerts, Equity Trader Alerts, and email notification directories. If Nasdaq determines to initiate Primary Contingency Procedures, the following provisions shall apply.

([B]A) For each security, [NASDAQ ]Nasdaq shall identify the last regular-way trade reported by the network processor prior to 4:00 p.m. and

shall publish that price as the [NASDAQ ]Nasdaq Official Closing Price for that security. For securities in which there has been no consolidated trading in that security for that day, there shall be no [NASDAQ ]Nasdaq Official Closing Price and no Closing Cross.

([C]B) [NASDAQ ]Nasdaq shall identify and segregate all MOC and LOC Orders entered prior to 3:50 p.m., and all Imbalance Only orders entered prior to 4:00 p.m. Only these MOC, LOC, and Imbalance Only Orders shall be eligible to participate in the Contingency Closing Cross.

([D]C) [NASDAQ ]Nasdaq shall cross and execute eligible MOC and LOC Orders in price time priority in order to maximize the trading interest executed at the [NASDAQ ]Nasdaq Official Closing Price. If an order imbalance exists, [NASDAQ ]Nasdaq shall include in the cross Imbalance Only Orders on the side of the market with less trading interest in price/time priority, and then execute all MOC, LOC and Imbalance Only Orders at the [NASDAQ ]Nasdaq Official Closing Price.

([E]D) [NASDAQ ]Nasdaq shall report the results of the Contingency Closing Cross to the network processor for each security, and deliver execution reports to members.

([F]E) After hours trading shall begin either as scheduled at 4:00 p.m. or upon resolution of the disruption that triggered [NASDAQ ]Nasdaq to operate the Contingency Closing Cross.

(8) Secondary Contingency Procedures. When a determination to implement Secondary Contingency Procedures has been made by the President of Nasdaq or any Senior Executive designated by the President pursuant to paragraph (7) above, Nasdaq shall publicly announce this determination at the earliest possible time via system status alerts, Equity Trader Alerts, and email notification directories. The following procedures shall apply.

(A) If Nasdaq determines to follow Secondary Contingency Procedures for one or more securities at or before 3:00 p.m., Nasdaq will designate an alternate exchange and the Nasdaq Official Closing Price for those securities will be:

(i) the official closing price established for such security under the rules of the designated alternate exchange; or

(ii) if there is no official closing price in a security on the designated alternate exchange, the Nasdaq Official Closing Price will be the volume-weighted average price of the consolidated last-sale eligible prices of the last five minutes of trading during regular trading hours, including any closing transactions on an exchange and any trade

breaks or corrections up to the time the VWAP is processed; or

(iii) if there were no consolidated last-sale eligible trades in the last five minutes of trading during regular trading hours, the Nasdaq Official Closing Price of such security will be the last consolidated last-sale eligible trade for such security during regular trading hours on that trading day; or

(iv) if there were no consolidated last-sale eligible trades the Nasdaq Official Closing Price of such security will be the prior day's Nasdaq Official Closing Price; or

(v) If no Nasdaq Official Closing Price for a security can be determined under subsections (i), (ii), (iii) or (iv) above, the Exchange would not publish an Official Closing Price for such security.

(B) If Nasdaq determines to follow Secondary Closing Procedures for one or more securities after 3:00 p.m., the Nasdaq Official Closing Price for those securities will be:

(i) the volume-weighted average price of the consolidated last-sale eligible prices of the last five minutes of trading during regular trading hours, including any closing transactions on an exchange and any trade breaks or corrections up to the time the VWAP is processed; or

(ii) if there were no consolidated last-sale eligible trades in the last five minutes of trading during regular trading hours, the Nasdaq Official Closing Price of such security will be the last consolidated last-sale eligible trade for such security during regular trading hours on that trading day

(iii) if there were no consolidated last-sale eligible trades on the day in question, the Nasdaq Official Closing Price of such security will be the prior day's Nasdaq Official Closing Price.

(iv) If no Nasdaq Official Closing Price for a security can be determined under subsections (i), (ii) or (iii) above, the Exchange would not publish an Official Closing Price for such security.

(C) Nasdaq shall cancel all open interest designated for the Nasdaq close residing in Nasdaq systems to give members the opportunity to route their orders to alternative execution venues.

(D) After hours trading shall begin either as scheduled at 4:00 p.m. or upon resolution of the disruption that triggered Nasdaq to operate the Secondary Contingency Closing Procedures.