

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80425; File No. SR-NASDAQ-2017-031)

April 11, 2017

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 4703 (Order Attributes), Rule 4752 (Opening Process), Rule 4753 (Nasdaq Halt Cross) and Rule 4754 (Nasdaq Closing Cross)

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 March 31, 2017, 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 and II 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 to amend Rule 4752 (Opening Process), Rule 4753 (Nasdaq Halt Cross) and Rule 4754 (Nasdaq Closing Cross) to specify the execution priority of an Order that has been locked or crossed at its non-displayed price by a Post-Only Order and re-priced for purposes of the Opening, Closing and Halt Cross. Nasdaq is also proposing to amend Rule 4703 (Order Attributes) and Rule 4753 (Halt Cross) to clarify the effect of the re-pricing of an Order that has been locked or crossed at its non-displayed price by a Post-Only Order for purposes of the Opening, Closing and Halt Cross.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

The purpose of this proposal is to amend Rule 4752 (Opening Process), Rule 4753 (Nasdaq Halt Cross) and Rule 4754 (Nasdaq Closing Cross) to specify the execution priority of an Order that has been locked or crossed at its non-displayed price by a Post-Only Order and re-priced for purposes of the Opening, Closing and Halt Cross.

Rule 4752, 4753 and 4754 set forth the operation of the Opening Cross, the Halt Cross, and the Closing Cross, respectively. Each Rule specifies the manner in which orders will be executed if less than all available interest is executed as part of the Cross. Specifically, Rule 4752 states that, if the Nasdaq Opening Cross price is selected and fewer than all shares of Market On Open ("MOO"), Limit On Open ("LOO"), Opening Imbalance Only Order ("OIO") and Early Market Hours Orders that are available in the Nasdaq Market Center would be executed, all Quotes and Orders shall be executed at the Nasdaq Opening Cross price in the following priority: (A) MOO and Early Market Hours market peg orders, with time as the secondary priority; (B) LOO orders, Early Market Hours limit orders, OIO orders, SDAY limit orders, SGTC limit orders, GTMC limit orders, SHEX limit orders, displayed quotes and reserve

interest priced more aggressively than the Nasdaq Opening Cross price based on limit price with time as the secondary priority; (C) LOO orders, OIO Orders, Early Market Hours and displayed interest of quotes, SDAY limit orders, SGTC limit orders, GTMC limit orders, and SHEX limit orders at the Nasdaq Opening Cross price with time as the secondary priority; and (D) reserve interest of quotes, SDAY limit orders, SGTC limit orders, and GTMC limit orders and SHEX limit orders at the Nasdaq Opening Cross price with time as the secondary priority.

Rule 4753 states that, if the Nasdaq Halt Cross price is selected and fewer than all shares of Eligible Interest that are available in the Nasdaq Market Center would be executed, all Eligible Interest shall be executed at the Nasdaq Halt Cross price in price/time priority.

Rule 4754 states that, if the Nasdaq Closing Cross price is selected and fewer than all Market On Close (“MOC”), Limit On Close (“LOC”), Imbalance Only (“IO”) and Close Eligible Interest would be executed, orders will be executed at the Nasdaq Closing Cross price in the following priority: (A) MOC orders, with time as the secondary priority; (B) LOC orders, limit orders, IO orders, displayed quotes and reserve interest priced more aggressively than the Nasdaq Closing Cross price based on price with time as the secondary priority; (C) LOC orders, IO Orders displayed interest of limit orders, and displayed interest of quotes at the Nasdaq Closing Cross price with time as the secondary priority; (D) reserve interest at the Nasdaq Closing Cross price with time as the secondary priority; and (E) unexecuted MOC, LOC, and IO orders will be canceled.

Nasdaq now proposes to amend the provisions of Rules 4752, 4753 and 4754 to specifically describe the execution priority an Order that was entered on the Nasdaq Book and has been locked or crossed at its non-displayed price by a Post-Only Order and re-priced for purposes of the Opening, Closing or Halt Cross.

In November 2016, the Commission approved changes to the functionality of Post-Only Orders.³ As a result of this new Post-Only functionality, Nasdaq recently amended Rule 4703 and Rule 4753 to address the treatment of an Order that has been locked or crossed at its non-displayed price by a Post-Only Order for purposes of the Opening, Closing and Halt Cross. Nasdaq amended Rule 4703 and Rule 4753 to specify that, if an Order to buy (sell) that is entered on the Nasdaq Book is locked or crossed at its non-displayed price by a Post-Only Order, that Order will be deemed to have a price at one minimum increment below (above) the price of the Post-Only for purposes of selecting the price of the Opening Cross, the Closing Cross, and the Halt Cross.⁴ This functionality applies to Non-Displayed Orders, Post-Only Orders, Price to

³ See Securities Exchange Act Release No. 79290 (November 10, 2016), 81 FR 81184 (November 17, 2016) (SR-NASDAQ-2016-111).

Under the new Post-Only functionality, the behavior of Post-Only orders would be altered when the adjusted price of such orders lock or cross a non-displayed price on the Exchange's Book. Specifically, if the adjusted price of the Post-Only Order would lock or cross a non-displayed price on the Exchange's Book, the Post-Only order would be posted in the same manner as a Price to Comply Order. However, the Post-Only Order would execute if (i) it is priced below \$1.00 and the value of price improvement associated with executing against an Order on the Nasdaq Book (as measured against the original limit price of the Order) equals or exceeds the sum of fees charged for such execution and the value of any rebate that would be provided if the Order posted to the Nasdaq Book and subsequently provided liquidity, or (ii) it is priced at \$1.00 or more and the value of price improvement associated with executing against an Order on the Nasdaq Book (as measured against the original limit price of the Order) equals or exceeds \$0.01 per share.

Additionally, if the Post-Only Order would not lock or cross a Protected Quotation but would lock or cross a Non-Displayed Order on the Exchange's Book, the Post-Only Order would be posted, ranked, and displayed at its limit price. The Post-Only Order would execute if (i) it is priced below \$1.00 and the value of price improvement associated with executing against an Order on the Nasdaq Book equals or exceeds the sum of fees charged for such execution and the value of any rebate that would be provided if the Order posted to the Nasdaq Book and subsequently provided liquidity, or (ii) it is priced at \$1.00 or more and the value of price improvement associated with executing against an Order on the Nasdaq Book equals or exceeds \$0.01 per share.

⁴ See Securities Exchange Act Release No. 80216 (March 10, 2017), 82 FR 14074 (March 16, 2017) (SR-NASDAQ-2017-028) ("Cross Proposal").

Comply Orders and Midpoint Peg Post-Only Orders when the non-displayed price of that Order is locked or crossed by a Post-Only Order.⁵

Nasdaq is now proposing to amend Rules 4752, 4753 and 4754 to specify the execution priority of an Order that has been locked or crossed at its non-displayed price by a Post-Only Order and re-priced for purposes of the Opening, Closing and Halt Cross. Accordingly, Nasdaq proposes to amend Rule 4752(d)(3)(B) to state that Orders to buy (sell) that are locked or crossed at their non-displayed price by a Post-Only Order on the Nasdaq Book in Early Market Hours, and which have been deemed to have a price at one minimum price increment below (above) the price of the Post-Only Order, shall be ranked in time priority ahead of all orders one minimum price increment below (above) the price of the Post-Only Order but behind all orders at the price at which the Order was posted to the Nasdaq Book. This re-pricing functionality will apply to Non-Displayed Orders, Post-Only Orders, and Price to Comply Orders when the non-displayed price of that Order is locked or crossed by a Post-Only Order.

Nasdaq proposes to amend Rule 4753(b)(3) to state that Orders to buy (sell) that are locked or crossed at their non-displayed price by a Post-Only Order on the Nasdaq Book, and which have been deemed to have a price at one minimum price increment below (above) the price of the Post-Only Order, shall be ranked in time priority ahead of all orders one minimum price increment below (above) the price of the Post-Only Order but behind all orders at the price at which the Order was posted to the Nasdaq Book. This re-pricing functionality will apply to Non-Displayed Orders, Post-Only Orders, Price to Comply Orders and Midpoint Peg Post-Only Orders when the non-displayed price of that Order is locked or crossed by a Post-Only Order.

⁵ As noted in the Cross Proposal, in this scenario, the Post-Only Order would have locked or crossed the Non-Displayed Order, Post-Only, Price to Comply Order, or Midpoint Peg Post-Only Order at its non-displayed price upon entry if the value of price improvement associated with executing against the Order is not met. Id.

Finally, Nasdaq proposes to amend Rule 4754(b)(3)(B) to state that Orders to buy (sell) that are locked or crossed at their non-displayed price by a Post-Only Order on the Nasdaq Book, and which have been deemed to have a price at one minimum price increment below (above) the price of the Post-Only Order, shall be ranked in time priority ahead of all orders one minimum price increment below (above) the price of the Post-Only Order but behind all orders at the price at which the Order was posted to the Nasdaq Book. This re-pricing functionality will apply to Non-Displayed Orders, Post-Only Orders, Price to Comply Orders and Midpoint Peg Post-Only Orders when the non-displayed price of that Order is locked or crossed by a Post-Only Order.

Nasdaq also proposes to amend the language in Rule 4703 (Order Attributes) and Rule 4753 relating to the re-pricing of Orders that are locked or crossed at its non-displayed price by a Post-Only Order for purposes of determining the Opening, Closing or Halt Cross, as described above. Rule 4703(l) describes this re-pricing functionality as occurring “for purposes of selecting the Nasdaq Opening Cross or Closing Cross price.” Rule 4753(d) similarly describes this re-pricing functionality as occurring “for purposes of selecting the Nasdaq Halt Cross Price.” Nasdaq proposes to amend both 4703(l) and Rule 4753(d) to describe this functionality as occurring for purposes of the Nasdaq Opening, Closing, or Halt Cross. Nasdaq is making this change to clarify the effect of the re-pricing functionality, since the re-pricing of an Order pursuant to this provision establishes both the price of the Order for purposes of the Cross and the execution priority of the Order as part of the Cross (although that execution priority may be modified based on the changes being proposed herein).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁷ 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. This filing supplements the Cross Proposal to re-price an Order that is locked or crossed at its non-displayed price by a Post-Only Order for purposes of the Opening, Closing and Halt Cross. As stated in that proposal, Nasdaq believed that such re-pricing was consistent with the Act because it, among other things, reflected the intent of the Nasdaq Opening and Closing Cross functionality.

Nasdaq believes that this proposal is consistent with the Act for several reasons. First, the proposal adopts a new execution priority, for an Order that has a non-displayed price that is locked or crossed by a Post-Only Order, that reflects the configuration of Nasdaq systems that is necessary to fulfill a central premise of the Opening, Halt, and Closing Cross. Specifically, given the operation of the Opening, Halt and Closing Cross, Orders cannot be locked or crossed for purposes of the Cross. The proposed changes here reflect this premise, and the configuration of the Nasdaq systems that is necessary to achieve this result.

Second, Nasdaq is proposing to rank Orders that are subject to this proposal in time priority ahead of all other Orders at that same price. While Nasdaq notes that, in certain scenarios, an Order might not participate in a Cross at its re-priced price when it might have participated in the Cross at its posted price on the Nasdaq Book, the proposal increases the likelihood that such interest will be executed as part of the Cross than if such interest had been

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

assigned a different priority at its new price.⁸ Nasdaq also notes that there are instances in which a locked or crossed Order may participate in a Cross at its posted price on the Nasdaq Book.⁹

Third, Nasdaq notes that re-priced Orders that do not participate in the Opening or Halt Cross remain on the Nasdaq Book, and that the proposed functionality would not impair the ability of such Orders to participate in the Regular Market Session after the conclusion of the Cross.

Finally, this proposed change is limited to an Order with a non-displayed price that is locked by a Post-Only Order for purposes of the Open, Halt and Closing Cross. While non-displayed liquidity may enhance market quality in other ways, such liquidity does not contribute to the price discovery process in the same manner as displayed liquidity. Had the Order been displayed, the priority of the Order would not have changed, as the Order would be setting the best displayed price on the Exchange. Use of the Nasdaq systems and Order types is completely voluntary, and members may always opt to use a different Order type to achieve a different result.

Nasdaq believes that amending the language in Rule 4703 and Rule 4753 relating to the re-pricing of an Order that is locked or crossed at its non-displayed price for purposes of the Opening, Closing or Halt Cross is consistent with the Act because it more accurately describes the effect of this re-pricing functionality as it relates to the Cross.

⁸ For example, if the non-displayed price of a sell Order was entered at \$10.15, and was locked by a Post-Only Order to buy at \$10.15, the price of the sell Order would be adjusted to \$10.16 for purposes of the Cross. That Order would now have priority over all other Orders at \$10.16.

⁹ Pursuant to this functionality, an Order is only re-priced at the time that the Cross price is being calculated. To the extent that a member cancels any locking Post-Only Orders prior to the calculation of the Cross price, the locked Order would not be re-priced. This might occur prior to the Opening, Closing, or Halt Cross, which reduces the likelihood that a locked Order will be re-priced and will be unable to participate in the Cross.

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 change adopts an execution priority for a more aggressively-priced Order that has been locked or crossed at its non-displayed price by a Post-Only Order and re-priced for purposes of the Opening, Closing or Halt Cross that reflects the configuration of Nasdaq systems that is necessary to ensure that Orders are not locked or crossed for purposes of the Opening, Halt or Closing Cross. To the extent that such Orders will be ranked in time priority ahead of all other Orders at that same price, the proposal increases the likelihood that such interest will be executed as part of the Cross than if such interest had been assigned a different priority at its new price. There are instances where a locked or crossed Order may participate in a Cross at its posted price on the Nasdaq Book, and re-priced Orders that do not participate in the Opening or Halt Cross would remain eligible to participate in the Regular Market Session after the conclusion of the Cross. Moreover, the use of Exchange Order types and attributes is voluntary, and no member is required to use any specific Order type or attribute or even to use any Exchange Order type or attribute or any Exchange functionality at all. If an Exchange member believes for any reason that the proposed rule change will be detrimental, that perceived detriment can be avoided by choosing not to enter or interact with the Order types modified by this proposed rule change. Finally, the proposal will apply equally to all Orders that meet its criteria.

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

No written comments were either solicited or received.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it 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 pursuant to Rule 19b-4(f)(6) under the Act¹² normally does not become operative for 30 days after the date of its filing. 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. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange believes the proposal reflects the configuration of Nasdaq systems necessary to ensure that Orders are not locked or crossed for purposes of the Opening, Halt or Closing Cross, while increasing the likelihood that re-priced Orders will be executed as part of the Cross than if such interest had been assigned a different priority at its new price. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and the 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. The Exchange has satisfied this requirement.

¹² 17 CFR 240.19b-4(f)(6).

¹³ 17 CFR 240.19b-4(f)(6)(iii).

delay and designates the proposal operative upon filing.¹⁴

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or 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. Please include File Number SR-NASDAQ-2017-031 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-2017-031. 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

¹⁴ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

comments on the Commission's Internet website (<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-2017-031 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.¹⁵

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Assistant Secretary

¹⁵ 17 CFR 200.30-3(a)(12).