

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83125; File No. SR-NASDAQ-2017-088)

April 27, 2018

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to Amend Nasdaq Rule 4703(a) to Allow Members to Designate an Order with a RTFY or SCAN Routing Order Attribute to Activate at 7:00 a.m. ET

I. Introduction

On August 30, 2017, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Nasdaq Rule 4703(a) relating to the times for activating an order with a RTFY or SCAN routing order attribute. The proposed rule change was published for comment in the Federal Register on September 18, 2017.³ On October 31, 2017, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On December 13, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and superseded the proposed rule change as

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 81579 (September 12, 2017), 82 FR 43584.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 81986, 82 FR 51453 (November 6, 2017). The Commission designated December 17, 2017 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

originally filed.⁶ On December 15, 2017, the Commission published notice of Amendment No. 1 and instituted proceedings under Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.⁸ On March 14, 2018, pursuant to Section 19(b)(2) of the Act,⁹ the Commission designated a longer period within which to issue an order approving or disapproving the proposed rule change.¹⁰ On April 19, 2018, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and superseded the proposed rule change, as modified by Amendment No. 1.¹¹ The Commission has received no comments on the proposed rule change. The Commission is publishing this notice to

⁶ In Amendment No. 1, the Exchange: (1) modified the proposal to allow members entering an order with a RTFY or SCAN routing order attribute to designate the order to activate at a specific time during Pre-Market Hours (rather than System Hours) on the same day; (2) specified that the proposed functionality would be offered on a port level basis; (3) stated that all of the times-in-force in Nasdaq Rule 4703(a) currently apply to orders with RTFY or SCAN routing order attributes and made corresponding clarifications and corrections throughout the proposal; (4) provided additional information regarding why members might use the proposed functionality; and (5) provided additional discussion regarding members' best execution obligations and the application of the Exchange's regulatory checks associated with the proposed functionality, and reminded members of their regulatory obligations (e.g., Market Access Rule, Regulation SHO) when using the proposed functionality. Amendment No. 1 is available at <https://www.sec.gov/comments/sr-nasdaq-2017-088/nasdaq2017088-2798107-161689.pdf>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Securities Exchange Act Release No. 82335, 82 FR 60637 (December 21, 2017).

⁹ 15 U.S.C. 78s(b)(2).

¹⁰ See Securities Exchange Act Release No. 82871, 83 FR 12229 (March 20, 2018). The Commission designated May 16, 2018 as the date by which the Commission shall either approve or disapprove the proposed rule change.

¹¹ In Amendment No. 2, the Exchange: (1) further narrowed the proposal by allowing members to designate orders with RTFY or SCAN routing order attributes to activate at 7:00 a.m. ET; (2) provided additional information regarding why members might use the proposed functionality; and (3) compared the proposed functionality to existing functionalities on other exchanges. Amendment No. 2 is available at <https://www.sec.gov/comments/sr-nasdaq-2017-088/nasdaq2017088-3476253-162214.pdf>.

solicit comments on Amendment No. 2 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

II. Description of the Proposal

The Exchange proposes to amend Nasdaq Rule 4703(a) to allow members to designate a 7:00 a.m. ET activation time for an order with a RTFY or SCAN routing order attribute.

RTFY is a routing option available for an order that qualifies as a designated retail order under which orders check the system for available shares only if so instructed by the entering firm and are thereafter routed to destinations on the system routing table.¹² If shares remain unexecuted after routing, they are posted to the Nasdaq book.¹³ Once on the book, should the order subsequently be locked or crossed by another market center, the system will not route the order to the locking or crossing market center.¹⁴ RTFY is designed to allow orders to participate in the opening, reopening, and closing process of the primary listing market for a security.¹⁵

SCAN is a routing option under which orders check the system for available shares and simultaneously route the remaining shares to destinations on the system routing table.¹⁶ If shares remain unexecuted after routing, they are posted on the Nasdaq book.¹⁷ Once on the book, should the order subsequently be locked or crossed by another market center, the system will not route the order to the locking or crossing market center.¹⁸

¹² See Nasdaq Rule 4758(a)(1)(A)(v)b.

¹³ See id.

¹⁴ See id.

¹⁵ See id.

¹⁶ See Nasdaq Rule 4758(a)(1)(A)(iv).

¹⁷ See id.

¹⁸ See id.

Nasdaq Rule 4703(a) provides the times-in-force that may be assigned to orders entered into the system. According to Nasdaq Rule 4703(a), members specify an order's time-in-force by designating a time at which the order will become active and a time at which the order will cease to be active. All of the times-in-force currently described in Nasdaq Rule 4703(a) are applicable to orders with RTFY or SCAN routing order attributes.¹⁹ According to the Exchange, during Pre-Market Hours,²⁰ members usually designate orders with RTFY or SCAN routing order attributes to activate upon entry or at 8:00 a.m. ET.²¹ The Exchange now proposes to amend Nasdaq Rule 4703(a) to provide that a member entering an order with a RTFY or SCAN routing order attribute may designate the order to activate at 7:00 a.m. ET if entered prior to 7:00 a.m. ET on the same day.²² As with the existing 8:00 a.m. ET activation time, the Exchange proposes to offer the 7:00 a.m. ET activation time on a port level basis.²³

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the requirements of the Act and the rules and regulations

¹⁹ See Amendment No. 2 at n.12.

²⁰ “Pre-Market Hours” means the period of time beginning at 4:00 a.m. ET and ending immediately prior to the commencement of Market Hours. See Nasdaq Rule 4701(g). “Market Hours” means the period of time beginning at 9:30 a.m. ET and ending at 4:00 p.m. ET (or such earlier time as may be designated by Nasdaq on a day when Nasdaq closes early). See id.

²¹ See Amendment No. 2 at 5.

²² Orders can be entered into the system from 4:00 a.m. ET until 8:00 p.m. ET. See Nasdaq Rule 4756(a)(3).

²³ See Amendment No. 2 at n.14. As a result, if, for example, a member cancels an order entered through a port set for 7:00 a.m. ET activation and wishes the order to instead activate at 8:00 a.m. ET, it must either have another port set for activation at 8:00 a.m. ET or, alternatively, enter the order at that time for immediate activation. See id.

thereunder applicable to a national securities exchange.²⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁵ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Commission notes that the proposal would provide Exchange members with an additional time for activating orders with RTFY or SCAN routing order attributes, and could facilitate the entry of these orders.²⁶

The Commission notes that, as amended, the proposal would allow members to activate orders with RTFY or SCAN routing order attributes specifically at 7:00 a.m. ET. According to the Exchange, market participants have coded their systems for trading during Pre-Market Hours, such as 7:00 a.m. ET, as evidenced by trading sessions on other exchanges²⁷ that start at 7:00 a.m. ET.²⁸ The Commission believes that Exchange members may wish to activate orders with RTFY or SCAN routing order attributes at 7:00 a.m. ET to benefit from the liquidity at that time.

²⁴ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ The Exchange states that, should it become aware of other orders that would also benefit from this change, it would consider filing another rule change to extend the proposed activation functionality to such other orders. See Amendment No. 2 at 13-14.

²⁷ See infra note 29.

²⁸ See Amendment No. 2 at 7.

The Commission also notes that the 7:00 a.m. ET activation time is similar to existing functionalities on certain other exchanges where orders can activate at 7:00 a.m. ET.²⁹

The Exchange represents that as of the time that an order with a RTFY or SCAN routing order attribute is activated, the Exchange would subject orders that are eligible for display or execution to all of the Exchange's standard regulatory checks, as it currently does with all orders upon entry.³⁰ These checks include compliance with Regulation NMS, Regulation SHO, and relevant Exchange rules.³¹ Moreover, the Exchange reminds its members of their regulatory obligations when submitting an order with a RTFY or SCAN routing order attribute.³² In particular, the Exchange reminds that members must comply with the Market Access Rule, which requires, among other things, pre-trade controls and procedures that are reasonably designed to assure compliance with Exchange trading rules and Commission rules pursuant to Regulation SHO and Regulation NMS.³³ The Exchange also notes that a member's procedures must be reasonably designed to ensure compliance with the applicable regulatory requirements, not just at the time the order is routed to the Exchange, but also at the time the order is activated and becomes eligible for execution.³⁴

The Commission further notes the Exchange's discussion of the best execution obligations of members utilizing the proposed 7:00 a.m. ET activation time.³⁵ The Exchange

²⁹ See Cboe BZX Exchange, Inc. Rule 1.5(ee); Cboe BYX Exchange, Inc. Rule 1.5(ee); Cboe EDGA Exchange, Inc. Rule 1.5(ii); and Cboe EDGX Exchange, Inc. Rule 1.5(ii).

³⁰ See Amendment No. 2 at 10.

³¹ See id.

³² See id.

³³ See id. at 10-11.

³⁴ See id. at 11.

³⁵ See id. at 8-10.

notes that members may cancel their inactive orders with RTFY or SCAN routing order attributes at any time prior to the time the order activates, which would allow members to react to conditions that may cause them to violate their best execution obligations to their customers should the orders activate and execute.³⁶ The Exchange also notes that members may cancel their active orders with RTFY or SCAN routing order attributes and enter new orders at another time that the members believe will satisfy their best execution obligations.³⁷ The Commission notes that Exchange members' use of the proposed 7:00 a.m. ET activation time must be consistent with their best execution obligations.

IV. Solicitation of Comments on Amendment No. 2 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 2 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-2017-088 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-2017-088. 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

³⁶ See id. at 8.

³⁷ See id.

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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2017-088 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 2, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 2 in the Federal Register. As noted above, in Amendment No. 2, the Exchange narrowed the proposal from allowing members to activate orders with RTFY or SCAN routing order attributes at any time during Pre-Market Hours, to specifically allowing members to activate these orders at 7:00 a.m. ET, which is similar to existing functionalities on certain other exchanges. Moreover, Amendment No. 2 provided additional explanation regarding the potential benefits of a 7:00 a.m. ET activation time. Accordingly, the Commission finds good

cause, pursuant to Section 19(b)(2) of the Act,³⁸ to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³⁹ that the proposed rule change (SR-NASDAQ-2017-088), as modified by Amendment No. 2, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁰

Robert W. Errett
Deputy Secretary

³⁸ 15 U.S.C. 78s(b)(2).

³⁹ Id.

⁴⁰ 17 CFR 200.30-3(a)(12).