SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89334; File No. SR-NASDAQ-2020-037)

July 16, 2020

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt a New "Early Market On Close" Order Type

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 July 6, 2020, 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 adopt the "Early Market On Close" as a new order type. The Exchange also proposes to amend Rule 4754 and make conforming changes to Rules 4703 and 4756.

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.

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

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

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 Exchange proposes to amend Rule 4702 to adopt a new Order Type, entitled the "Early Market on Close" or "EMOC" Order Type. Generally speaking, the Exchange intends for the EMOC to be an additional offering to its Market On Close ("MOC") Orders, as well as a competitive alternative to the newly-approved Cboe BZX Market-On-Close order type (the "Cboe Market Close" or "CMC").[3] That is, EMOC would enable market participants that wish to buy or sell Nasdaq-listed securities as part of the Nasdaq closing auction (the "Nasdaq Closing Cross"), and to obtain matched executions at the Nasdaq Closing Cross price, the ability to do so at a time that is earlier than what is possible with ordinary MOC Orders.[4]

Specifically, an EMOC Order would be an unpriced Order to buy or sell a Nasdaq-listed security that the Exchange would seek to match with other like orders at 3:35 p.m. Eastern Time

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3 See Securities Exchange Act Release No. 34-88008 (January 21, 2020), 85 FR 4726 (January 27, 2020) (SR-BatsBZX-2017-34) (the "BZX Approval Order").

4 Pursuant to Rule 4702(b)(11), a MOC is an Order Type entered without a price that may be executed only during the Nasdaq Closing Cross. MOC Orders may be entered between 4 a.m. ET and immediately prior to 3:55 p.m. ET. MOC Orders may be cancelled and/or modified between 4 a.m. ET and immediately prior to 3:50 p.m. ET. Between 3:50 p.m. ET and immediately prior to 3:58 p.m. ET, an MOC Order can be cancelled and/or modified only if the Participant requests that Nasdaq correct a legitimate error in the Order (e.g., Side, Size, Symbol, or Price, or duplication of an Order). MOC Orders cannot be cancelled or modified at or after 3:58 p.m. ET for any reason. An MOC Order shall execute only at the price determined by the Nasdaq Closing Cross.

("ET"). If so matched, the Exchange would execute the Order as part of the Nasdaq Closing Cross.

If no such match occurs, the Exchange would automatically convert any unmatched shares of EMOC Orders into a regular MOC Order for participation in the Nasdaq Closing Cross, while retaining their original time priority. Once converted, unmatched shares of EMOC Orders would thereafter be handled in the same manner as an ordinary MOC Order. Notably, a participant would be able to cancel or modify a converted EMOC Order for any reason after 3:35 and before 3:50 p.m. ET, just as it would for a MOC Order, and the participant could cancel or modify the converted EMOC Order between 3:50 and prior to 3:58 p.m. ET to correct a legitimate error in the Order, again, just as it could with a MOC Order. Converted shares of EMOC Orders would execute in the Nasdaq Closing Cross in the same manner and with the same priority as does a MOC Order and it would be subject to the same auxiliary, LULD Closing Cross, and contingency procedures as are MOC Orders. Like MOC Orders, converted shares of EMOC Orders that remain unexecuted after the Closing Cross will be canceled.

The Exchange proposes to allow its members to enter, cancel, or modify EMOC Orders beginning at 9:30 a.m. ET[5] and until immediately prior to 3:35 p.m. ET (or 25 minutes prior to the early closing time on a day when Nasdaq closes early). Exchange members would not be able to enter, cancel, or modify EMOC Orders at or after 3:35 p.m. (or at or after 25 minutes prior to the early closing time on a day when Nasdaq closes early).[6]

5 Nasdaq believes that accepting EMOC orders beginning at 9:30 a.m, is appropriate because it observes that this is approximately the time that its members typically begin to enter regular Market on Close Orders.

6 The QIX order entry protocol would not be available for the entry of an EMOC because it is used primarily for quoting purposes.

Pursuant to proposed Rule 4702(b)(16)(B), a Participant would be able to designate the Time-in-Force for an EMOC Order either by designating a Time-in-Force of "On Close" or by entering a Time-in-Force of IOC and flagging the Order to participate in the Nasdaq Closing Cross.

When entering short sale EMOC Orders, Exchange members would be required to mark them as "short" or ''short exempt" pursuant to Rule 4702(a). The Exchange's System would reject EMOC Orders marked "short," while it would accept and process EMOC Orders marked "short exempt" in accordance with Rule 4763. This will ensure that the Exchange is able to comply with its obligations under Rule 201 of Regulation SHO in the event that a short sale circuit breaker is triggered and the Nasdaq Closing Cross price is not above the national best bid.[7]

At 3:35 p.m. ET (or 25 minutes prior to the early closing time on a day when Nasdaq closes early), the System would match for execution all buy and sell EMOC Orders entered into the System with execution priority determined based on time-received.

The Exchange would communicate information about the size of matched EMOC Orders as part of its Early Order Imbalance Indicator ("EOII") and Order Imbalance Indicator ("NOII").[8] However, the Exchange would not discretely disclose the number of matched EMOC

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7 See BZX Approval Order, supra, 85 FR at 4752.

8 The NOII is a message that the Exchange disseminates by electronic means, beginning at 3:55 p.m. ET (or 5 minutes prior to the early closing time on a day when Nasdaq closes early), and which contains information about MOC, LOC, IO, and Close Eligible Interest and the price at which those orders would execute at the time of dissemination. See Rule 4754(a)(7). The information that the NOII disseminates includes: (i) the "Current Reference Price" (discussed below); (ii) the number of shares represented by MOC, LOC, and IO orders that are paired at the Current Reference Price; (iii) the size of any "Imbalance" (i.e., the number of shares of buy or sell MOC or LOC orders that cannot be matched with other MOC, LOC, or IO order shares at a particular price at any given time); (iv) the buy/sell direction of any Imbalance; and (v) indicative prices at which the

shares in the EOII and NOII. Instead, the Exchange would fold this information into its disclosure of the aggregate number of shares that have been paired at the then Current Reference Price.[9] In other words, the EOII and NOII would provide an aggregate disclosure of the numbers of paired shares that represent EMOC, regular MOCs, Limit on Close, and Imbalance Only Orders. The disclosure would not specify the particular Order Types that the paired shares represent.[10]

Nasdaq Closing Cross would occur if the Nasdaq Closing Cross were to occur at that time and the percent by which the indicative prices are outside the then current Nasdaq Market Center best bid or best offer, whichever is closer. See id.

The EOII is an earlier message that the Exchange disseminates by electronic means, beginning at 3:50 p.m. ET (or 10 minutes prior to the early closing time on a day when Nasdaq closes early), and which contains all of the same categories of information as does the NOII, except that it excludes indicative pricing information. See Rule 4754(a)(10).

The Exchange proposes to amend the definitions of the terms NOII and EOII so that the Rules state that they will include information about EMOC Orders and the price at which those Orders would execute at the time of dissemination.

Nasdaq also proposes to amend the definition of "Imbalance" to include the number of shares of buy or sell EMOC Orders that cannot be matched with other EMOC Order shares at a particular price at any given time. Nasdaq notes that this definitional change will have no practical effect because shares of EMOC Orders that are not matched at 3:35 p.m. would be converted into regular MOC Orders.

9 As set forth in Rule 4754(a)(7), the term "Current Reference Price" means: (i) the single price that is at or within the current Nasdaq Market Center best bid and offer at which the maximum number of shares of MOC, LOC, and IO orders can be paired; or (ii) if more than one such price exists, the price that minimizes any imbalance; or (iii) if more than one such price exists, the entered price at which shares will remain unexecuted in the cross; or (iv) if more than one such price exists, the price that minimizes the distance from the bid-ask midpoint of the inside quotation prevailing at the time of the order imbalance indicator dissemination. The Exchange proposes to amend the definition of the term "Current Reference Price" so that it also includes shares representing EMOC Orders (even though EMOC Orders would not affect the calculation of the Current Reference Price due to the fact that they would be matched prior to the calculation of the Price). Nasdaq proposes similar conforming changes to include EMOCs in the definitions of the terms "Far Clearing Price" and "Near Clearing Price."

10 Nasdaq notes that in proposing to disseminate paired EMOC share information as part of its EOII and NOII, Nasdaq would afford market participants time to absorb that

All matched buy and sell EMOC Orders would remain in the System until the Nasdaq Closing Cross occurs. The System would execute all previously matched buy and sell EMOC orders, at the Nasdaq Closing Cross Price, when the Nasdaq Closing Cross occurs.

If the Nasdaq Closing Cross price is selected and fewer than all MOC, LOC, IO and Close Eligible Interest would be executed, then Orders will be executed at the Nasdaq Closing Cross price, with previously matched EMOCs executing first in priority, and then the remaining Orders executing pursuant to the existing priority set forth in Rule 4754(b)(3) (as renumbered, (b)(4)). If, due to insufficient trading interest, no Nasdaq Closing Cross occurs in a security on a trading day, then the Exchange would cancel all matched EMOCs in the security.[11]

The Exchange also proposes to amend Rule 4754 to account for EMOC Orders in Nasdaq's auxiliary procedures and Limit-Up-Limit Down ("LULD") Closing Cross. First, in the event that Nasdaq employs auxiliary procedures due to extraordinary volumes in the Closing Cross, [12] Nasdaq proposes to subject EMOC Orders to the same procedures that would apply to regular MOC Orders.[13] Second, Nasdaq proposes to subject EMOC Orders to the same

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information and to act on it in advance of the Nasdaq Closing Cross. That said, Nasdaq does not believe that market participants would derive any particular benefit from knowing which of the aggregate paired shares reflected in the EOII or NOII are attributable to EMOC Orders; such a disclosure would not contribute to price discovery or otherwise materially impact participants' decisions as to whether or not to participate in the Nasdaq Closing Cross.

11 If, as of the Closing Cross cut-off time, there are matched EMOCs and a continuous market for a security, but there is no other crossing interest, then Nasdaq would conduct a Closing Cross with a Closing Cross price determined pursuant to 4754(b)(2)(A). This reflects the same procedure that the Exchange would follow in the event that the only closing interest in a security consisted of perfectly paired MOC Orders.

12 See Rule 4754(b)(5).

13 However, under proposed Rule 4754(b)(6)(A), the auxiliary procedures would provide that Nasdaq may end the order modification and cancellation periods for EMOCs as early as 3:25 p.m., whereas for MOCs, Nasdaq may end those periods as early as 3:40 p.m.

procedures that would apply to regular MOC Orders in the event that it conducts an LULD Closing Cross in a security.[14]

When Systems disruptions prevent the occurrence of the Nasdaq Closing Cross in a security,[15] such that Nasdaq invokes its contingency procedures, Nasdaq proposes to handle EMOC Orders in the same manner that it handles other open interest designated for the Nasdaq close. That is, Nasdaq proposes to cancel all EMOC orders in the event that an impairment causes it to invoke its contingency procedures because any such impairment would prevent Nasdaq from executing the Closing Cross in the security. Moreover, Nasdaq believes that it would be in the best interest of participants for the Exchange to cancel their matched EMOCs so as to allow participants determine how best to manage their orders given the circumstances that would exist under such a scenario.

Finally, Nasdaq notes that it proposes to make conforming changes to various provisions of the Rules, including Rule 4703(a)(1), (c), and (l), and Rule 4756 (a)(3).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[16] in general, and furthers the objectives of Section 6(b)(5) of the Act,[17] 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, because it is an additional offering to its existing MOC Order

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14 See Rule 4754(b)(6). Nasdaq notes that paired EMOC shares participating in an LULD Closing Cross would be executed against each other, and then other Order Types would execute in price/time priority order.

15 See Rule 4754(b)(7).

16 15 U.S.C. 78f(b).

17 15 U.S.C. 78f(b)(5).

type, and it will provide for a competitive alternative to the CMC order type. The proposed rule change would further remove impediments to and perfect the mechanisms of a free and open market and a national market system by promoting competition among national securities exchanges in the execution of market-on-close orders for Nasdaq-listed securities at the Nasdaq Closing Cross price.

Unlike CMCs, which siphon off orders from the primary listing exchanges and thereby threaten to undermine the integrity of the primary listing exchanges' closing auction processes, the EMOC Order Type would have no such effects. Instead, EMOC Orders are designed to help keep market-on-close orders in Nasdaq-listed securities on Nasdaq, which is sensible given that Nasdaq is the primary listing market for these securities and its Closing Cross establishes their official closing prices. The proposal would help to ensure that Nasdaq is able to continue to conduct its industry-leading Closing Cross auction smoothly and efficiently, and without undue complexity, to the benefit of all participants.

Meanwhile, participants that choose to utilize EMOC Orders could take comfort in knowing that Nasdaq, unlike BZX, is already experienced in executing market on close orders in Nasdaq-listed securities and that Nasdaq has a track record of doing so competently and reliably. Moreover, because Nasdaq's Closing Cross process is subject to the Commission's highest regulatory standards for security, integrity, reliability, and resiliency, participants can feel at ease knowing that Nasdaq will treat EMOC Orders with the utmost care, and that the Commission will hold Nasdaq accountable if it fails to do so. The BZX Market on Close process, on the other hand, is untested and subject to lower regulatory standards.[18]

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18 See BZX Approval Order, supra, at 4734 ("[T]he fact that closing auction systems are subject to the heightened requirements of Regulation SCI for critical SCI systems could

The Exchange also believes that its proposed design of EMOC is equitable, provides for a free and open market, and is in the interests of investors and the public and a national market system. For example, Nasdaq believes that it is equitable and in the interest of investors to provide for unmatched shares of EMOC Orders to convert to regular MOC Orders at 3:35 p.m. because doing so reduces the operational risk for market participants relative to other alternatives such as CMC as they would not have to take additional action to submit new MOC Orders should they remain interested in participating in the Nasdaq Closing Cross despite the lack of a match. Meanwhile, participants that do not wish to proceed with MOC Orders in this instance would remain free to cancel or modify their orders for at least 15 minutes after conversion.

Additionally, Nasdaq believes that it is equitable and in the interest of investors to cancel EMOC Orders in the event that Nasdaq does not conduct a Closing Cross because to do otherwise would force market participants to execute EMOC Orders at prices that may be stale[19] and which may not reflect the true market price for such securities. Moreover, Nasdaq notes that this proposal is the same as how Nasdaq handles other open cross-only interest when no Closing Cross occurs.

Nasdaq also believes that it is equitable and facilitates a free and open market to handle EMOC Orders similarly to other Order Types in the event of extraordinary volume at the close, insufficient trading interest to conduct an LULD Closing Cross in a security following an LULD

encourage market participants to send MOC orders to closing auctions on the primary listing exchanges due to the additional regulatory protections required of such systems.”).

19 If a disruption prevents the occurrence of Nasdaq Closing Cross, then under contingency procedures described in Rule 4754(b)(7), the Exchange will execute orders at the Nasdaq Official Closing Price, which may be, under certain circumstances, the last consolidated last-sale eligible trade price for a security during regular trading hours or, if there were no such trades on the day in question, the Nasdaq Official Closing Price of the security on the prior trading day.

trading pause, the occurrence of an LULD Closing Cross in a security, and when the Exchange applies contingency procedures.

Lastly, Nasdaq believes that its proposal facilitates a free and open market incorporating into its EOII and NOII publications the numbers of paired shares of EMOC Orders in advance of the Nasdaq Closing Cross. By including EMOC paired shares information in the EOII and NOII publications, Nasdaq will ensure that market participants are adequately informed about the depth of interest in its Closing Cross at a point in time when they are able to act on that information by choosing whether to participate in the Closing Cross. Nasdaq notes that its proposal is consistent with the interests of investors and the public to simply add EMOC-related paired shares to its aggregate EOII and NOII disclosures of paired shares, rather than to separately identify the number of paired shares that are due to EMOC Orders, because the Exchange does not believe participants would gain any valuable insights from a separate disclosure. Nasdaq notes that it does not separately identify paired shares that are attributable to MOC or Limit on Close Orders.

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 Exchange believes the proposal would increase competition among exchanges by offering a competitive alternative to BZX's Market-On-Close process. Indeed, the proposal will offer market participants an option to enter early market on close orders for Nasdaq-listed stocks, while providing the added benefit of executing those orders in a process that is recognized for its reliability and which is more highly-regulated than is the BZX Market Close process. Moreover, unlike other offerings that siphon orders from the price discovery process on the primary market, Nasdaq's proposal will not contribute to the fragmentation of the closing process for Nasdaq-listed securities. Finally, EMOC would offer participants reduced operational risk by automatically converting their unmatched EMOCs to MOCs at 3:35 p.m. and retaining its original time priority, while still affording them the opportunity to cancel converted orders prior to the Closing Cross Cutoff Time.

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

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

(A) by order approve or disapprove the 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. Please include File Number SR-NASDAQ-2020-037 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-2020-037. 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 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-2020-037, 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.[20]

J. Matthew DeLesDernier
Assistant Secretary

[20] 17 CFR 200.30-3(a)(12).