

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63028; File No. SR-NASDAQ-2010-099)

October 1, 2010

Self-Regulatory Organizations; NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change to Adopt a Definition of Professional and Require that All Professional Orders be Appropriately Marked

I. Introduction

On August 6, 2010, The NASDAQ Stock Market (“NASDAQ”), 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 Chapter I, Section 1 (Definitions) of the rules of the Nasdaq Options Market (“NOM”) to adopt a definition of “Professional” and require that all Professional orders be appropriately marked by NOM Participants (“NOM Rules”). The proposed rule change was published for comment in the Federal Register on August 20, 2010.³ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description

Under the proposal, new Chapter I, Section 1(a)(48) will state that the term “Professional” means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 62724 (August 16, 2010), 75 FR 51509 (“Notice”).

own beneficial account(s). A Participant⁴ or a Public Customer⁵ may, without limitation, be a Professional. Moreover, in order to properly represent orders entered on the Exchange according to the new definition, a Participant will be required to appropriately mark all Professional orders.⁶ To comply with this requirement, Participants will be required to review their Public Customers' activity on at least a quarterly basis to determine whether orders that are not for the account of a broker-dealer should be represented as Professional orders.⁷ The Exchange will issue a notice to Participants via OTA or ORA outlining the procedures for the implementation of the proposal.

The professional order designation rule will apply to NOM members, including NASDAQ Options Services LLC ("NOS"). NOS is NOM's exclusive order router for all orders

⁴ A member of NOM is known as a Participant. Some participants are also members of other options exchanges such as, for example, International Securities Exchange, LLC ("ISE"), Chicago Board Options Exchange, Incorporated ("CBOE"), and NASDAQ OMX PHLX LLC ("Phlx"). See Notice, *supra* note 3. See also Chapter I, Section 1(a)(40) of the NOM Rules.

⁵ Public Customer is defined in Chapter I, Section 1(a)(48) as a person that is not a broker or dealer in securities.

⁶ The Exchange intends to require Participants to identify Professional orders submitted electronically by identifying them in the customer type field, and will notify Participants via an Options Trader Alert ("OTA") or Options Regulatory Alert ("ORA") regarding this requirement.

⁷ According to NASDAQ, Participants will be required to conduct a quarterly review and make any appropriate changes to the way in which they are representing orders within five business days after the end of each calendar quarter. While Participants will only be required to review their accounts on a quarterly basis, if during a quarter NOM identifies a customer for which orders are being represented as other than Professional orders but that has averaged more than 390 orders per day during a month, NOM will notify the Participant and the Participant will be required to change the manner in which it is representing the customer's orders within five business days. This is similar to the process of other options exchanges that have adopted a Professional designation. See, e.g., Securities Exchange Act Release No. 61802 (March 30, 2010), 75 FR 17193 (April 5, 2010) (SR-Phlx-2010-05).

that come through the Exchange.⁸ Under the proposal, NOS, a member of several exchanges that have rules requiring a Professional designation, will be able to route Professional orders to those options exchanges that require Professional orders to be designated as such.⁹

The Professional definition will not revise the Exchange's price/time order entry (priority) rules. For example, unlike other options exchanges with the Professional designation, the proposed rule change does not affect on NOM the priority of orders designated as Professional. Instead, the proposal is intended to make certain that Participants mark Professional orders properly regardless of whether the order is entered on NOM or routed to another options exchange that has the Professional designation. Moreover, when the proposed Professional designation is in place, NOM will be able to accept orders that are marked as Professional.¹⁰

The designation of an order as Professional will not result in any different treatment of such orders for purposes of NOM rules concerning away market protection. That is, all non-broker-dealer orders, including those orders that meet the definition of Professional, will continue to be treated equally for purposes of NOM's away market protection rules.¹¹

III. Discussion and Commission's Findings

⁸ See Notice, supra note 3.

⁹ The Professional definition proposed by NOM comports with the Professional designation that has been implemented by Phlx, CBOE, ISE, and NYSE Amex LLC ("NYSE Amex"). See Securities Exchange Act Release Nos. 61802 (March 30, 2010), 75 FR 17193 (April 5, 2010) (SR-Phlx-2010-05); 61198 (December 17, 2009), 74 FR 68880 (December 29, 2009) (SR-CBOE-2009-078); 59287 (January 23, 2009), 74 FR 5694 (January 30, 2009) (SR-ISE-2006-26); and 61818 (March 31, 2010), 75 FR 17457 (April 6, 2010) (SR-NYSEAmex-2010-18).

¹⁰ According to NASDAQ, NOM only accepts orders that are marked as customer, firm, market maker, or away market maker orders.

¹¹ See, e.g., Chapter VI, Section 11 and Chapter XII.

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹² In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission notes that NOM's proposed definition of Professional and requirement that Professional orders be properly marked are consistent with the rules of other exchanges relating to Professional orders, which previously were approved by the Commission.¹³ The Commission notes that the proposal will not amend NOM's price/time order entry (priority) rules with respect to the treatment of orders submitted to NOM. The proposal in effect allows NOM to accept orders marked as Professional and, if necessary to comply with its order protection rules, to route them via NOS to an away market that maintains the Professional order designation, in accordance with that exchange's order marking requirements. The Commission believes that conforming NOM's rules to those of the other exchanges that have the Professional order designation will reduce disparate rules in this area and may help reduce regulatory arbitrage.

¹² In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹³ See supra note 9.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁴ that the proposed rule change (SR-NASDAQ-2010-099) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Florence E. Harmon
Deputy Secretary

¹⁴ 15 U.S.C. 78s(b)(2).

¹⁵ 17 CFR 200.30-3(a)(12).