

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-67027; File No. SR-NASDAQ-2012-061)

May 18, 2012

Self-Regulatory Organizations; The NASDAQ Stock Market LLC.; Notice of Filing of Proposed Rule Change for the NASDAQ Options Market to Accept Inbound Orders from NASDAQ OMX BX's New Options Market

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 May 15, 2012, The NASDAQ Stock Market LLC (“Exchange” or “NASDAQ”) filed with the Securities and Exchange Commission (“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

NASDAQ is filing with the Commission a proposal for the NASDAQ Options Market (“NOM”) to accept inbound orders routed by NASDAQ Options Services LLC (“NOS”) from NASDAQ OMX BX's new options market (with the attendant obligations and conditions), as described further below, on a one year pilot basis.

The text of the proposed rule change is available at <http://nasdaq.cchwallstreet.com>, at NASDAQ’s principal office, 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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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 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

In conjunction with a proposal by NASDAQ OMX BX ("BX") to establish a new options market and provide outbound routing services to all markets using its affiliated routing broker, NOS,<sup>3</sup> NASDAQ proposes that NOS be permitted to route orders from BX to NASDAQ on a one year pilot basis.

NOS is a broker-dealer and member of NASDAQ, BX and NASDAQ OMX PHLX ("PHLX"). NOS provides all routing functions for NASDAQ<sup>4</sup> and PHLX,<sup>5</sup> and BX has proposed that NOS do so for BX as well.<sup>6</sup> NASDAQ, PHLX, BX and NOS are affiliates. Accordingly, the affiliate relationship between NASDAQ and NOS, its member, raises the issue of an exchange's affiliation with a member of such exchange.<sup>7</sup> Specifically, in connection with prior filings, the Commission has expressed concern that the affiliation of an exchange with one of its members raises the potential for unfair competitive advantage and potential conflicts of

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<sup>3</sup> See SR-BX-2012-030.

<sup>4</sup> See NOM Rules Chapter VI, Section 11(e). See also Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008)(SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080).

<sup>5</sup> See Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR-Phlx-2009-32).

<sup>6</sup> See SR-BX-2012-030.

<sup>7</sup> Absent an effective filing, Exchange Rule 2160(b) would prohibit NOS from being a member of the Exchange.

interest between an exchange's self-regulatory obligations and its commercial interests.<sup>8</sup>

Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange of which it is a member, NASDAQ previously proposed, and the Commission approved, limitations and conditions on NOS's affiliation with NASDAQ.<sup>9</sup> In addition, NASDAQ is permitted to accept inbound orders that NOS routes in its capacity as a facility of PHLX, subject to certain limitations and conditions.<sup>10</sup>

Also recognizing that the Commission has expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, many exchanges have filed with the Commission the conditions and limitations under which they can accept inbound orders from an affiliated exchange using an affiliated router.<sup>11</sup> At this time, NASDAQ proposes to accept inbound options orders that NOS will route in its capacity as a facility of BX, subject to the following limitations and conditions:

- First, NASDAQ and the Financial Industry Regulatory Authority ("FINRA") will maintain a Regulatory Contract, as well as an agreement pursuant to Rule 17d-2 under the Act ("17d-2 Agreement").<sup>12</sup> Pursuant to the Regulatory Contract and the 17d-2 Agreement, FINRA will be allocated regulatory responsibilities to review

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<sup>8</sup> See e.g., Securities Exchange Act Release Nos. 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008)(SR-NASDAQ-2008-098); and 62736 (August 17, 2010), 75 FR 51861 (August 23, 2010) (SR-NASDAQ-2010-100).

<sup>9</sup> See Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008)(SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080).

<sup>10</sup> See Securities Exchange Act Release No. 59948 (May 20, 2009), 74 FR 25784 (May 29, 2009)(SR-NASDAQ-2009-047).

<sup>11</sup> See e.g., Securities Exchange Act Release No. 65399 (September 26, 2011), 76 FR 60955 (September 20, 2011) (SR-Phlx-2011-111).

<sup>12</sup> 17 CFR 240.17d-2.

NOS's compliance with certain NASDAQ rules.<sup>13</sup> Pursuant to the Regulatory Contract, however, NASDAQ retains ultimate responsibility for enforcing its rules with respect to NOS.

- Second, FINRA will monitor NOS for compliance with NASDAQ's trading rules, and will collect and maintain certain related information.<sup>14</sup>
- Third, FINRA will provide a report to NASDAQ's chief regulatory officer ("CRO"), on a quarterly basis, that: (i) quantifies all alerts (of which the Exchange or FINRA is aware) that identify NOS as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NOS as a participant that has potentially violated Commission or Exchange rules.
- Fourth, NASDAQ is amending NASDAQ Rule 2160<sup>15</sup> to require NASDAQ OMX, as the holding company owning both NASDAQ and NOS, to establish and maintain procedures and internal controls reasonably designed to ensure that NOS does not develop or implement changes to its system, based on non-public information

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<sup>13</sup> NOS is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

<sup>14</sup> Pursuant to the Regulatory Contract, both FINRA and NASDAQ will collect and maintain all alerts, complaints, investigations and enforcement actions in which NOS (in its capacity as a facility of BX routing orders to NASDAQ) is identified as a participant that has potentially violated applicable Commission or Exchange rules. NASDAQ and FINRA will retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations.

<sup>15</sup> Currently, NASDAQ Rule 2160 requires NASDAQ OMX, as the holding company owning both NASDAQ and NASDAQ Execution Services, LLC ("NES"), to establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to NASDAQ's systems as a result of its affiliation with NASDAQ, until such information is available generally to similarly situated Exchange members, in connection with the provision of inbound order routing to NASDAQ.

obtained regarding planned changes to NASDAQ's systems as a result of its affiliation with NASDAQ, until such information is available generally to similarly situated Exchange members, in connection with the provision of inbound order routing to NASDAQ. Currently, Rule 2160 applies to NES; NASDAQ proposes to add NOS to this rule.

- Fifth, NASDAQ proposes that the routing of orders from NOS to NASDAQ, in NOS's capacity as a facility of BX be authorized for a pilot period of one year.

NASDAQ believes that the above-listed conditions protect the independence of NASDAQ's regulatory responsibility with respect to NOS, and that these mitigate the aforementioned concerns about potential conflicts of interest and unfair competitive advantage.

## 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>16</sup> in general, and with Section 6(b)(5) of the Act,<sup>17</sup> in particular, in that the proposal is 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 regulating, clearing, settling, processing information with respect to, and 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, because the proposed rule change will allow NASDAQ to receive inbound routes of orders from NOS, acting in its capacity as a facility of BX, in a manner consistent with prior approvals and established protections. NASDAQ believes that the proposed conditions establish mechanisms that protect the independence of NASDAQ's regulatory responsibility with respect to NOS, as well as ensure

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<sup>16</sup> 15 U.S.C. 78f.

<sup>17</sup> 15 U.S.C. 78f(b)(5).

that NOS cannot use any information it may have because of its affiliation with NASDAQ to its advantage.

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.

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 (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 self-regulatory organization consents, the Commission will:

A. by order approve or 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-2012-061 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2012-061. 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; 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-2012-061 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>18</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).