

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69142; File No. SR-NASDAQ-2013-048)

March 15, 2013

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Chapter V, Section 3 Subparagraph (d)(iv) Regarding Obvious Error or Catastrophic Error Review

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on March 14, 2013, The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. 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 a subparagraph (d)(iv) to provide for how NASDAQ proposes to treat options errors in response to the Regulation NMS Plan to Address Extraordinary Market Volatility.

The text of the proposed rule change is below; proposed new language is underlined.

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**Chapter V Regulation of Trading on NOM**

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

### Sec. 3 Trading Halts

(a) – (c) No change.

(d) This paragraph shall be in effect during a pilot period to coincide with the pilot period for the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS, as it may be amended from time to time (“LULD Plan”), except as specified in subparagraph (v) below. Capitalized terms used in this paragraph shall have the same meaning as provided for in the LULD Plan. During a Limit State and Straddle State in the Underlying NMS stock:

(i) - (iii) No change.

(iv) For a one year period following the adoption of this subparagraph (iv), trades are not subject to an obvious error or catastrophic error review pursuant to Chapter V, Sections 6(b) or 6(f). Nothing in this provision shall prevent trades from review on Exchange motion pursuant to Chapter V, Section 6(d)(i).

(e) No change.

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#### 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 the Statutory Basis for, the Proposed Rule Change

## 1. Purpose

The Exchange proposes to adopt Chapter V, Section 3(d)(iv)<sup>3</sup> to provide for how NOM will treat options orders in response to the Regulation NMS Plan to Address Extraordinary Market Volatility (the “Plan”), which is applicable to all NMS stocks, as defined in Regulation NMS Rule 600(b)(47). The Exchange proposes to adopt Section 3(d)(iv) for a one year pilot period.<sup>4</sup>

### Background

Since May 6, 2010, when the markets experienced excessive volatility in an abbreviated time period, i.e., the “flash crash,” the equities exchanges and the Financial Industry Regulatory Authority (“FINRA”) have implemented market-wide measures designed to restore investor confidence by reducing the potential for excessive market volatility. The measures adopted include pilot plans for stock-by-stock trading pauses,<sup>5</sup>

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<sup>3</sup> The provisions of Section (d)(i) and (ii) and (e) were filed and became effective on February 28, 2013, with a 30 day operative delay, on a pilot basis. See Securities Exchange Act Release No. 69120 (March 12, 2013) (SR-NASDAQ-2013-040). Section (d)(iii) was filed as SR-NASDAQ-2013-043. See Securities Exchange Act Release No. 69069 (March 7, 2013), 78 FR 15995 (March 13, 2013).

<sup>4</sup> The Exchange will conduct its own analysis concerning the elimination of obvious and catastrophic error provisions during Limit States and Straddle States and agrees to provide the Commission with relevant data to assess the impact of this proposed rule change. As part of its analysis, the Exchange will evaluate: (1) the options market quality during Limit States and Straddle States; (2) assess the character of incoming order flow and transactions during Limit States and Straddle States; and (3) review any complaints from members and their customers concerning executions during Limit States and Straddle States. Additionally, the Exchange agrees to provide to the Commission data requested to evaluate the impact of the elimination of the obvious and catastrophic error provisions, including data relevant to assessing the various analyses noted above.

<sup>5</sup> See e.g., NASDAQ Rule 4120.

related changes to the equities market clearly erroneous execution rules,<sup>6</sup> and more stringent equities market maker quoting requirements.<sup>7</sup> On May 31, 2012, the Commission approved the Plan, as amended, on a one-year pilot basis.<sup>8</sup> In addition, the Commission approved changes to the equities market-wide circuit breaker rules on a pilot basis to coincide with the pilot period for the Plan.<sup>9</sup>

The Plan is designed to prevent trades in individual NMS stocks from occurring outside of specified Price Bands.<sup>10</sup> As described more fully below, the requirements of the Plan are coupled with Trading Pauses to accommodate more fundamental price moves (as opposed to erroneous trades or momentary gaps in liquidity). All trading centers in NMS stocks, including both those operated by Participants and those operated by members of Participants, are required to establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the requirements specified in the Plan.

As set forth in more detail in the Plan, Price Bands consisting of a Lower Price Band and an Upper Price Band for each NMS Stock are calculated by the Processors.<sup>11</sup>

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<sup>6</sup> See e.g., NASDAQ Rule 4762.

<sup>7</sup> See e.g., NASDAQ Rule 4613.

<sup>8</sup> See Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4-631) (Order Approving the Plan on a Pilot Basis).

<sup>9</sup> See Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR-BATS-2011-038; SR-BYX-2011-025; SR-BX-2011-068; SR-CBOE-2011-087; SR-C2-2011-024; SR-CHX-2011-30; SR-EDGA-2011-31; SR-EDGX-2011-30; SR-FINRA-2011-054; SR-ISE-2011-61; SR-NASDAQ-2011-131; SR-NSX-2011-11; SR-NYSE-2011-48; SR-NYSEAmex-2011-73; SR-NYSEArca-2011-68; SR-Phlx-2011-129).

<sup>10</sup> Unless otherwise specified, capitalized terms used in this proposed rule change are based on the defined terms of the Plan.

<sup>11</sup> See Section V(A) of the Plan.

When the National Best Bid (Offer) is below (above) the Lower (Upper) Price Band, the Processors shall disseminate such National Best Bid (Offer) with an appropriate flag identifying it as unexecutable. When the National Best Bid (Offer) is equal to the Upper (Lower) Price Band, the Processors shall distribute such National Best Bid (Offer) with an appropriate flag identifying it as a Limit State Quotation.<sup>12</sup> All trading centers in NMS stocks must maintain written policies and procedures that are reasonably designed to prevent the display of offers below the Lower Price Band and bids above the Upper Price Band for NMS stocks. Notwithstanding this requirement, the Processor shall display an offer below the Lower Price Band or a bid above the Upper Price Band, but with a flag that it is non-executable. Such bids or offers shall not be included in the National Best Bid or National Best Offer calculations.<sup>13</sup> Trading in an NMS stock immediately enters a Limit State if the National Best Offer (Bid) equals but does not cross the Lower (Upper) Price Band.<sup>14</sup> Trading for an NMS stock exits a Limit State if, within 15 seconds of entering the Limit State, all Limit State Quotations were executed or canceled in their entirety. If the market does not exit a Limit State within 15 seconds, then the Primary Listing Exchange would declare a five-minute trading pause pursuant to Section VII of the Plan, which would be applicable to all markets trading the security.<sup>15</sup> In addition, the Plan defines a Straddle State as when the National Best Bid (Offer) is below (above) the

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<sup>12</sup> See Section VI(A) of the Plan.

<sup>13</sup> See Section VI(A)(3) of the Plan.

<sup>14</sup> See Section VI(B)(1) of the Plan.

<sup>15</sup> The primary listing market would declare a Trading Pause in an NMS stock; upon notification by the primary listing market, the Processor would disseminate this information to the public. No trades in that NMS stock could occur during the trading pause, but all bids and offers may be displayed. See Section VII(A) of the Plan.

Lower (Upper) Price Band and the NMS stock is not in a Limit State. For example, assume the Lower Price Band for an NMS Stock is \$9.50 and the Upper Price Band is \$10.50, such NMS stock would be in a Straddle State if the National Best Bid were below \$9.50, and therefore unexecutable, and the National Best Offer were above \$9.50 (including a National Best Offer that could be above \$10.50). If an NMS stock is in a Straddle State and trading in that stock deviates from normal trading characteristics, the Primary Listing Exchange may declare a trading pause for that NMS stock if such Trading Pause would support the Plan's goal to address extraordinary market volatility.

#### Proposal

The Exchange proposes to adopt new Chapter V, Section 3(d)(iv) to provide that trades are not subject to an obvious error or catastrophic error review pursuant to Chapter V, Section 6(b) or 6(f) during a Limit State or Straddle State.

Currently, under Sections 6(b)(i) and (f)(i), obvious and catastrophic errors are calculated by determining a theoretical price and applying such price, based on objective standards, to ascertain whether the trade should be nullified or adjusted. Trades are adjusted pursuant to an adjustment table that, in effect, assesses an adjustment penalty. By adjusting trades above or below the theoretical price, the rule assesses a "penalty" in that the adjustment price is not as favorable as the amount the party making the error would have received had it not made the error.

Pursuant to Section 6(c), the theoretical price of an option is determined in one of two ways: (i) If the series is traded on at least one other options exchange, the mid-point of the National Best Bid and Offer ("NBBO"), just prior to the transaction; or (ii) If there are no quotes for comparison purposes, as determined by MarketWatch as defined in

Chapter I. Recently, the Exchange amended Section 6(c)(i) to change the first method to provide that if the series is traded on at least one other options exchange, the theoretical price is the last National Best Bid price with respect to an erroneous sell transaction and the last National Best Offer price with respect to an erroneous buy transaction, just prior to the transaction.<sup>16</sup>

The Exchange believes that neither of these methods is appropriate during a Limit State or Straddle State. As discussed above, during a Limit State or Straddle State, options prices may deviate substantially from those available prior to or following the State. The Exchange believes the new provision (once operative) would give rise to much uncertainty for market participants as there is no bright line definition of what the theoretical price should be for an option when the underlying NMS stock has an unexecutable bid or offer or both. Determining theoretical price in such a situation would be often times very subjective as opposed to an objective determination giving rise to additional uncertainty and confusion for investors. Accordingly, the Exchange does not believe that the approach which depends on a reliable NBBO in the option is appropriate during a Limit State or Straddle State. While in a Limit State or Straddle State, only limit orders will be accepted by the Exchange, affirming that the participant is willing to accept an execution up to the limit price. Further, because the Exchange system will only trade through the theoretical bid or offer if the Exchange or the participant (via an ISO order) has accessed all better priced interest away in accordance the Options Order Protection and Locked/Crossed Markets Plan, the Exchange believes potential trade

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<sup>16</sup> Securities Exchange Act Release No. 69058 (March 7, 2013), 78 FR 15997 (March 13, 2013) (SR-NASDAQ-2013-039). It became effective on February 26, 2013 and will become operative 30 days thereafter.

reviews of executions that occurred at the participant's limit price and also in compliance with aforementioned Plan could result in uncertainty that could harm liquidity and also could create an advantage to either side of an execution depending on the future movement of the underlying stock.

The Exchange recognizes that the second method (in Section (c)(ii)) affords discretion to Exchange staff in determining the theoretical price and thereby, ultimately, whether a trade is busted or adjusted and to what price. The Exchange has determined that it would be difficult to exercise such discretion in periods of extraordinary market volatility and in particular when the price of the underlying security is unreliable. Moreover, the theoretical price would be subjective. Thus, the Exchange has determined not to permit an obvious or catastrophic error review if there are no quotes for comparison purposes. The Exchange believes that adding certainty to the execution of orders in these situations should encourage market participants to continue to provide liquidity to the Exchange and thus promote a fair and orderly market.

In addition, the Exchange proposes to provide that trades are not subject to an obvious error and catastrophic error review if pursuant to Section 6(b)(ii) the trade resulted from an execution price in a series quoted no bid. A zero bid option refers to an option where the bid price is \$ 0.00. Series of options quoted zero bid are usually deep out-of-the-money series that are perceived as having little if any chance of expiring in-the-money. For this reason, relatively few transactions occur in these series and those that do are usually the result of a momentary pricing error.

Specifically, under this provision, where the trade resulted in an execution price in a series that was, and for five seconds prior to the execution remained, quoted no bid and



at least one strike price below (for calls) or above (for puts) in the same class were quoted no bid at the time of the erroneous execution, the trade shall be nullified. For purposes of this provision, bids and offers of the parties to the subject trade that are in any of the series in the same options class shall not be considered. The Exchange believes that these situations are not appropriate for an error review because they are more likely to result in a windfall to one party at the expense of another, in a Limit State or Straddle State, because the criteria for meeting the no-bid provision are more likely to be met in a Limit State or Straddle State, and unlike normal circumstances, may not be a true reflection of the value of the series being quoted. For example, in a series quoted \$1.95-\$2.00 on multiple exchanges prior to the Limit State or Straddle State, an order to B10@ \$2.00 is likely a reasonably priced trade because the buyer attempted to pay \$2.00 with a limit price. However, if that series and the series one strike below are both quoted \$0.00-\$5.00, then both the seller and the buyer at \$2.00 would have an opportunity to dispute the trade. This would create uncertainty to both parties and an advantage to one participant if the underlying stock moved significantly in their direction.

#### Rationale

When NASDAQ OMX PHLX (“PHLX”) Rule 1092 was first adopted, the Commission stated that it “...considers that in most circumstances trades that are executed between parties should be honored. On rare occasions, the price of the executed trade indicates an ‘obvious error’ may exist, suggesting that it is unrealistic to expect that the parties to the trade had come to a meeting of the minds regarding the terms of the transaction. In the Commission’s view, the determination of whether an ‘obvious error’ has occurred, and the adjustment or nullification of a transaction because an obvious error

is considered to exist, should be based on specific and objective criteria and subject to specific and objective procedures... The Commission believes that Phlx's proposed obvious error rule establishes specific and objective criteria for determining when a trade is an 'obvious error.' Moreover, the Commission believes that the Exchange's proposal establishes specific and objective procedures governing the adjustment or nullification of a trade that resulted from an 'obvious error.'"<sup>17</sup>

In 2008, PHLX amended Rule 1092 to adopt the catastrophic error provision. In doing so, the Exchange stated that it had "...weighed carefully the need to assure that one market participant is not permitted to receive a windfall at the expense of another market participant that made an Obvious Error, against the need to assure that market participants are not simply being given an opportunity to reconsider poor trading decisions. The Exchange states that, while it believes that the Obvious Error Rule strikes the correct balance in most situations, in some extreme situations, trade participants may not be aware of errors that result in very large losses within the time periods currently required under the rule. In this type of extreme situation, the Exchange believes its members should be given more time to seek relief so that there is a greater opportunity to mitigate very large losses and reduce the corresponding large wind-falls. However, to maintain the appropriate balance, the Exchange believes members should only be given more time when the execution price is much further away from the theoretical price than is required for Obvious Errors so that relief is only provided in extreme circumstances."<sup>18</sup>

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<sup>17</sup> See Securities Exchange Act Release No. 49785 (May 28, 2004), 69 FR 32090 (June 8, 2004) (SR-Phlx-2003-68).

<sup>18</sup> See Securities Exchange Act Release No. 58002 (June 23, 2008), 73 FR 36581 (June 27, 2008) (SR-Phlx-2008-42) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Catastrophic Errors).

The Exchange believes that this proposal is consistent with those principles because it strikes the aforementioned balance. The Exchange is proposing to decline to review trades, which is specific and objective. Furthermore, the proposal more fairly balances the potential windfall to one market participant against the potential reconsideration of a trading decision under the guise of an error, and thereby results in more certainty during periods of extreme market volatility.

The Exchange notes that there are additional protections in place outside of the Obvious and Catastrophic Errors Rule, specifically pre-trade protections. First, SEC Rule 15c3-5 requires that, “financial risk management controls and supervisory procedures must be reasonably designed to prevent the entry of orders that exceed appropriate pre-set credit or capital thresholds, or that appear to be erroneous.”<sup>19</sup> Secondly, the Exchange has price checks applicable to limit orders that reject limit orders that are priced sufficiently far through the NBBO that it seems likely an error occurred. The requirements placed upon broker-dealers to adopt controls to prevent the entry of orders that appear to be erroneous, coupled with Exchange functionality that filters out orders that appear to be erroneous serve to sharply reduce the incidence of errors arising from situations, for example, where participants mistakenly enter an order to pay \$20 for an option that is offered at \$2. Accordingly, the Exchange believes it is appropriate to eliminate any potential protection applying the obvious or catastrophic error rule might provide during Limit States and Straddle States, as its application may produce inequitable results.

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<sup>19</sup> See Securities and Exchange Act Release No. 63241 (November 3, 2010), 75 FR 69791 (November 15, 2010) (S7-03-10).

The Exchange may still review transactions in the interest of maintaining a fair and orderly market and for the protection of investors, on its own motion, determine to review trades that are believed to be erroneous that occur during a Limit State or a Straddle State in accordance with Chapter V, Section 6(d)(i). The Exchange believes that this safeguard will provide the flexibility for the Exchange to act when necessary and appropriate to nullify or adjust a transaction, while also providing market participants with certainty that trades they effect with quotes and/or orders having limit prices will stand irrespective of subsequent moves in the underlying security. The right to review on Exchange motion transactions that occur during a Limit State or Straddle State under this provision would also allow the Exchange to account for unforeseen circumstances that result in obvious or catastrophic errors for which a nullification or adjustment may be necessary in order to preserve the interest of maintaining a fair and orderly market and for the protection of investors. The Exchange understands that this provision is specifically limited to maintaining a fair and orderly market for the protection of investors and will administer it in a manner that is consistent with the principles of the Act. The Exchange will create and maintain records relating to the use of the authority to act on its own motion during a Limit State or Straddle State, including when the Exchange received requests to act on its motion and determined not to as well as any complaints related to the Exchange's use of such authority.

Various Exchange staff have, over time, spoken to a number of member organizations about how to treat obvious and catastrophic errors during a Limit State or Straddle State, with no one viewpoint particularly emerging; rather, the Exchange staff has heard a variety of views, mostly focused on having many trades stand, on fairness

and fair and orderly markets and on being able to re-address the details during the course of the pilot, if needed.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>20</sup> in general, and with Section 6(b)(5) of the Act,<sup>21</sup> in particular, requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest, because it should provide certainty about how errors involving options orders and trades will be handled during periods of extraordinary volatility in the underlying security. The Exchange further believes that it is necessary and appropriate in the interest of promoting fair and orderly markets to exclude transactions executed during a Limit State or Straddle State from Section 6(b). The Exchange believes the application of the current rule will be impracticable given the lack of a reliable NBBO in the options market during Limit States and Straddle States, and that the resulting actions (i.e., nullified trades or adjusted prices) may not be appropriate given market conditions. This change would ensure that limit orders that are filled during a Limit State or Straddle State would have certainty of execution in a manner that promotes just and equitable principles of trade, removes impediments to, and perfects the mechanism of a free and open market and a national

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<sup>20</sup> 15 U.S.C. 78f.

<sup>21</sup> 15 U.S.C. 78f(b)(5).

market system. Moreover, given that options prices during brief Limit States or Straddle States may deviate substantially from those available shortly following the Limit State or Straddle State, the Exchange believes giving market participants time to re-evaluate a transaction would create an unreasonable adverse selection opportunity that would discourage participants from providing liquidity during Limit States or Straddle States. In this respect, the Exchange notes that by rejecting market orders and stop orders, and cancelling pending market orders and stop orders, only those orders with a limit price will be executed during a Limit State or Straddle State. Therefore, on balance, the Exchange believes that removing the potential inequity of nullifying or adjusting executions occurring during Limit States or Straddle States outweighs any potential benefits from applying certain provisions during such unusual market conditions. Additionally, as discussed above, there are additional pre-trade protections in place outside of Section 6 that will continue to safeguard customers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, the proposal does not impose an intra-market burden on competition, because it will apply to all members. Nor will the proposal impose a burden on competition among the options exchanges, because, in addition to the vigorous competition for order flow among the options exchanges, the proposal addresses a regulatory situation common to all options exchanges. To the extent that market participants disagree with the particular approach taken by the Exchange herein, market participants can easily and readily direct order flow to competing venues. The Exchange

believes this proposal will not impose a burden on competition and will help provide certainty during periods of extraordinary volatility in an NMS stock.

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 Exchange consents, the Commission shall: (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-2013-048 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-2013-048. 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-2013-048 and should be submitted on or before [insert date 15 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>22</sup> 17 CFR 200.30-3(a)(12).