

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69521; File No. SR-NASDAQ-2013-071)

May 6, 2013

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend NASDAQ Rule 4763

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on April 24, 2013, 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, which Items have been prepared by NASDAQ. 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 proposes to amend NASDAQ Rule 4763 (Short Sale Price Test Pursuant to Rule 201 of Regulation SHO) to establish that the short sale price test for NASDAQ-listed securities will not be calculated until after NASDAQ completes the Nasdaq Opening Cross or, where no Nasdaq Opening Cross occurs, begins trading pursuant to NASDAQ Rule 4752.

The text of the proposed rule change is below.<sup>3</sup> Proposed new language is underlined; deletions are bracketed.

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

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

<sup>3</sup> Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://nasdaq.cchwallstreet.com>.

**4763. Short Sale Price Test Pursuant to Rule 201 of Regulation SHO**

(a) – (b) No change.

(c) **Determination of Trigger Price.** For covered securities for which the Exchange is the listing market, the System shall determine whether a transaction in a covered security has occurred at a Trigger Price and shall immediately notify the single plan processor.

(1) The System will not calculate the Trigger Price of a covered security until: [it opens trading for that security.]

(A) after the completion of the Nasdaq Opening Cross pursuant to Rule 4752(d), for securities in which a Nasdaq Opening Cross occurs, or

(B) after the System begins trading pursuant to Rule 4752(c) for securities in which no Nasdaq Opening Cross occurs.

(2) No change.

(d) – (g) 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. 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

Rule 201 of Regulation SHO<sup>4</sup> contains a short sale-related circuit breaker that, if triggered, imposes a restriction on the prices at which securities may be sold short (“short sale price test”). Rule 201(b) requires that trading centers,<sup>5</sup> such as NASDAQ, establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security<sup>6</sup> at a price that is less than or equal to the current national best bid<sup>7</sup> if the price of that covered security decreases by 10% or more from the covered security’s closing price as determined by the listing

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<sup>4</sup> 17 CFR 242.201. *See also* Securities Exchange Act Release No. 61595 (Feb. 26, 2010), 75 Fed. Reg. 11232 (Mar. 10, 2010) and Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO (“T&M FAQs”).

<sup>5</sup> Rule 201(a)(9) states that the term “trading center” shall have the same meaning as in Rule 600(b)(78) of Regulation NMS. Rule 600(b)(78) defines a “trading center” as “a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.” 17 CFR 242.600(b)(78).

<sup>6</sup> The term “covered security” shall have the same meaning as in Rule 201 of Regulation SHO. Rule 201(a)(1) defines the term “covered security” to mean any “NMS stock” as defined under Rule 600(b)(47) of Regulation NMS. Rule 600(b)(47) of Regulation NMS defines an “NMS stock” as “any NMS security other than an option.” Rule 600(b)(46) of Regulation NMS defines an “NMS security” as “any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.” 17 CFR 242.201(a)(1); 17 CFR 242.600(b)(47); and 17 CFR 242.600(b)(46).

<sup>7</sup> The term “national best bid” shall have the same meaning as in Rule 201 of Regulation SHO. Rule 201(a)(4) states that such term shall have the same meaning as in Rule 600(b)(42) of Regulation NMS. 17 CFR 242.201(a)(4). *See also* 17 CFR 242.600(b)(42).

market<sup>8</sup> for the covered security as of the end of regular trading hours<sup>9</sup> on the prior day (“Trigger Price”). Rule 4763(b) provides, in compliance with Rule 201, that in the event the short sale price test is triggered, the Exchange will not execute or display a short sale order with respect to a covered security at a price that is less than or equal to the current national best bid.

Under Rule 4763(c), where NASDAQ is the listing market for a covered security, the System (as defined in NASDAQ Rule 4751(a)) will determine whether the short sale price test of Rule 201 has been triggered (i.e., whether a transaction in a covered security has occurred at a Trigger Price) and will immediately notify the single plan processor for the covered security. Currently under Rule 4763(c)(1), the System will not calculate the Trigger Price of a covered security until the Exchange opens trading for that security. Because the phrase “opens trading” is not defined in NASDAQ’s rules, some ambiguity exists regarding its precise application. The purpose of the proposed rule change is to clearly establish when NASDAQ will begin calculating whether the short sale price test of Rule 201 of Regulation SHO under the Act has been triggered for NASDAQ-listed securities.

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<sup>8</sup> The term “listing market” shall have the same meaning as in Rule 201 of Regulation SHO. Rule 201(a)(3) defines the term “listing market” to have the same meaning as the term “listing market” as defined in the effective transaction reporting plan for the covered security. 17 CFR 242.201(a)(3). *See also* 17 CFR 242.201(a)(2).

<sup>9</sup> “Regular trading hours” is defined in Rule 201 to have the same meaning as in Rule 600(b)(64) of Regulation NMS. *See* Rule 201(a)(7). Rule 600(b)(64) provides that “Regular trading hours means the time between 9:30 a.m. and 4:00 p.m. Eastern Time, or such other time as is set forth in the procedures established pursuant to §242.605(a)(2).” 17 CFR 242.600(b)(64). *See also* T&M FAQs 1.1 and 1.2.

Specifically, NASDAQ members have questioned whether the short sale price test can be triggered in a NASDAQ-listed security by an execution on an away market that occurs after 9:30:00 a.m. but before NASDAQ completes the Nasdaq Opening Cross pursuant to Rule 4752. Typically, NASDAQ systems require less than 2 seconds to complete all Nasdaq Opening Crosses in NASDAQ-listed securities. Therefore, this question applies only to the limited circumstances in which an away market prints a regular way execution which would trigger the short sale price test of Rule 201 under Regulation SHO during the brief period after 9:30:00 but prior to the Nasdaq Opening Cross.

Accordingly, NASDAQ is modifying Rule 4763(c)(1) to state specifically when NASDAQ will begin calculating whether a transaction in a covered security has occurred at a Trigger Price. For securities in which a Nasdaq Opening Cross occurs as described in Rule 4752(d), NASDAQ will begin calculating the short sale price test after completing the Nasdaq Opening Cross. For securities in which no Nasdaq Opening Cross occurs, as described in Rule 4752(c), NASDAQ will begin calculating the short sale price test immediately when the System begins regular way trading pursuant to Rule 4752(c). NASDAQ believes that this proposed change eliminates any ambiguity that exists in the current rule.<sup>10</sup>

## 2. Statutory Basis

NASDAQ believes that its proposal is consistent with Section 6(b) of the Act<sup>11</sup> in

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<sup>10</sup> The proposed rule does not affect market participants' obligations contained in Regulation SHO under the Act. *See* 17 CFR 242.200 *et seq.*

<sup>11</sup> 15 U.S.C. 78f(b).

general, and furthers the objectives of Section 6(b)(5) of the Act<sup>12</sup> 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. Specifically, NASDAQ believes that it is important to resolve ambiguity in NASDAQ's rules, particularly a rule that NASDAQ administers as a listing market and that impacts all trading in a given security. The proposed change will enhance the fairness and efficiency of the NASDAQ market without affecting market participants' ability or cost to comply with applicable regulatory requirements.

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

NASDAQ 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. NASDAQ does not believe that competition exists regarding when an exchange begins calculating the short sale price test. However, to the extent such competition exists today, the proposed rule change conforms to the current practice of the New York Stock Exchange ("NYSE") and, therefore, equalizes the two markets' competitive positions.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited or received.

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<sup>12</sup> 15 U.S.C. 78f(b)(5).

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act<sup>13</sup> and paragraph (f)(6) of Rule 19b-4 thereunder.<sup>14</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay because the proposed rule change provides more clarity regarding the application of Regulation SHO under the Act and resolves an ambiguity in the Exchange's rules. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.<sup>15</sup> Waiver of the operative delay will allow the Exchange to resolve a potential ambiguity in NASDAQ's

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

<sup>15</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

rules. For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### 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-2013-071 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-2013-071. 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 Web site

(<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-2013-071 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>16</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(12).