

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-82335; File No. SR-NASDAQ-2017-088)

December 15, 2017

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Allow Participants to Designate when an Order with a RTFY or SCAN Routing Order Attribute will be Activated During Pre-Market Hours

I. Introduction

On August 30, 2017, The Nasdaq Stock Market LLC (“Exchange” or “Nasdaq”) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change to amend Nasdaq Rule 4703(a) to allow participants to designate when an order with a RTFY or SCAN routing order attribute will be activated during Pre-Market Hours. The proposed rule change was published for comment in the Federal Register on September 18, 2017.<sup>3</sup> On October 31, 2017, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.<sup>5</sup> The Commission has received no comment letters on the proposed rule change. On December 13, 2017, the Exchange filed Amendment No. 1 to the proposed rule

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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> See Securities Exchange Act Release No. 81579 (September 12, 2017), 82 FR 43584.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 81986, 82 FR 51453 (November 6, 2017). The Commission designated December 17, 2017 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

change.<sup>6</sup> The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>7</sup> to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

## II. Description of the Proposal

The Exchange proposes to amend Nasdaq Rule 4703(a) to allow participants to designate a specific time during Pre-Market Hours<sup>8</sup> when an order with a RTFY or SCAN routing order attribute will be activated.

RTFY is a routing option available for an order that qualifies as a designated retail order under which orders check the system for available shares only if so instructed by the entering

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<sup>6</sup> In Amendment No. 1, the Exchange: (1) modified the proposal to allow participants entering an order with the RTFY or SCAN routing order attribute to designate the order to activate at a specific time during Pre-Market Hours (rather than System Hours) on the same day; (2) specified that the proposed functionality would be offered on a port level basis; (3) stated that all of the times-in-force in Nasdaq Rule 4703(a) currently apply to orders with the RTFY or SCAN routing order attribute and made corresponding clarifications and corrections throughout the proposal; (4) provided additional information regarding why participants might use the proposed functionality; and (5) provided additional discussion regarding members' best execution obligations and the application of the Exchange's regulatory checks associated with the proposed functionality, and reminded members of their regulatory obligations (e.g., Market Access Rule, Regulation SHO) when using the proposed functionality. Amendment No. 1 is available at <https://www.sec.gov/comments/sr-nasdaq-2017-088/nasdaq2017088-2798107-161689.pdf>.

<sup>7</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>8</sup> "Pre-Market Hours" means the period of time beginning at 4:00 a.m. ET and ending immediately prior to the commencement of Market Hours. See Nasdaq Rule 4701(g). "Market Hours" means the period of time beginning at 9:30 a.m. ET and ending at 4:00 p.m. ET (or such earlier time as may be designated by Nasdaq on a day when Nasdaq closes early). See id. "System Hours" means the period of time beginning at 4:00 a.m. ET and ending at 8:00 p.m. ET (or such earlier time as may be designated by Nasdaq on a day when Nasdaq closes early). See id.

firm and are thereafter routed to destinations on the system routing table.<sup>9</sup> If shares remain unexecuted after routing, they are posted to the Nasdaq book.<sup>10</sup> Once on the book, should the order subsequently be locked or crossed by another market center, the system will not route the order to the locking or crossing market center.<sup>11</sup> RTFY is designed to allow orders to participate in the opening, reopening, and closing process of the primary listing market for a security.<sup>12</sup> SCAN is a routing option under which orders check the system for available shares and simultaneously route the remaining shares to destinations on the system routing table.<sup>13</sup> If shares remain unexecuted after routing, they are posted on the Nasdaq book.<sup>14</sup> Once on the book, should the order subsequently be locked or crossed by another market center, the system will not route the order to the locking or crossing market center.<sup>15</sup>

Nasdaq Rule 4703(a) provides the times-in-force that may be assigned to orders entered into the system. According to Nasdaq Rule 4703(a), participants specify an order's time-in-force by designating a time at which the order will become active and a time at which the order will cease to be active. All of the times-in-force currently described in Nasdaq Rule 4703(a) are applicable to orders with RTFY or SCAN routing order attributes.<sup>16</sup> According to the Exchange, during Pre-Market Hours, participants usually designate orders with RTFY or SCAN routing

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<sup>9</sup> See Nasdaq Rule 4758(a)(1)(A)(v)b.

<sup>10</sup> See id.

<sup>11</sup> See id.

<sup>12</sup> See id.

<sup>13</sup> See Nasdaq Rule 4758(a)(1)(A)(iv).

<sup>14</sup> See id.

<sup>15</sup> See id.

<sup>16</sup> See Amendment No. 1.

order attributes to activate upon entry or at 8:00 a.m. ET.<sup>17</sup> The Exchange now proposes to amend Nasdaq Rule 4703(a) to provide that a participant entering an order with the RTFY or SCAN routing order attribute may designate the order to activate at a specific time during Pre-Market Hours on the same day.<sup>18</sup> The Exchange proposes to offer this functionality on a port level basis.<sup>19</sup> As a result, if, for example, a participant cancels an order entered through a port set for 8:00 a.m. ET activation and wishes the order to instead activate at 8:20 a.m. ET, it must either have another port set for activation at 8:20 a.m. ET or, alternatively, enter the order at that time for immediate activation.<sup>20</sup>

According to the Exchange, as of the time that an order with a RTFY or SCAN routing order attribute is activated, the Exchange would subject orders that are eligible for display or execution to all of the Exchange's standard regulatory checks (including compliance with Regulation NMS, Regulation SHO, and relevant Exchange rules), as it currently does with all orders upon entry.<sup>21</sup>

III. Proceedings to Determine Whether to Approve or Disapprove SR-NASDAQ-2017-088, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>22</sup> to determine whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of proceedings

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<sup>17</sup> See id.

<sup>18</sup> Participants may cancel their inactive orders with RTFY or SCAN routing order attributes at any time before they are activated. See id.

<sup>19</sup> See id.

<sup>20</sup> See id.

<sup>21</sup> See id.

<sup>22</sup> 15 U.S.C. 78s(b)(2)(B).

does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change, as modified by Amendment No. 1.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>23</sup> the Commission is providing notice of the grounds for disapproval under consideration. As noted above, during Pre-Market Hours, Exchange participants usually designate orders with the RTFY or SCAN routing order attribute to activate upon entry or at 8:00 a.m. ET. The Exchange now proposes to permit participants to designate orders with the RTFY or SCAN routing order attribute to activate at any time during Pre-Market Hours on the same day (i.e., at any specified time during the period beginning at 4:00 a.m. ET and ending immediately prior to the commencement of Market Hours). As a result, participants could designate any time during Pre-Market Hours (rather than only 8:00 a.m. ET) to activate orders with the RTFY or SCAN routing order attribute, and the time between order entry and order activation could be much longer than is currently the case.

The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposal with Section 6(b)(5)<sup>24</sup> of the Act. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, 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.

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<sup>23</sup>

Id.

<sup>24</sup>

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

#### IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) or any other provision of the Act, or rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,<sup>25</sup> any request for an opportunity to make an oral presentation.<sup>26</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in Amendment No. 1,<sup>27</sup> in addition to any other comments they may wish to submit about the proposed rule change.

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<sup>25</sup> 17 CFR 240.19b-4.

<sup>26</sup> Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

<sup>27</sup> See supra note 6.

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 No. SR-NASDAQ-2017-088 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 No. SR-NASDAQ-2017-088. The 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 No. SR-NASDAQ-2017-088 and should be submitted by [insert date 21 days from the date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>28</sup>

Robert W. Errett  
Deputy Secretary

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<sup>28</sup> 17 CFR 200.30-3(a)(12); 17 CFR 200.30-3(a)(57).