

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68762; File No. SR-NASDAQ-2013-012)

January 29, 2013

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend NASDAQ Rule 4756 and Rule 4763 Regarding Modification of Previously Entered Orders

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 January 18, 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 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 proposes to amend NASDAQ Rule 4756 (Entry and Display of Quotes and Orders) and Rule 4763 (Short Sale Price Test Pursuant to Rule 201 of Regulation SHO) to stipulate how Participants in the NASDAQ Market Center System may modify previously entered orders and to describe how modified orders are processed. NASDAQ proposes to implement the proposed rule change 30 days after the date of the filing or shortly thereafter.

The text of the proposed rule change is below. Proposed new language is italicized; deletions are bracketed.

**4756. Entry and Display of Quotes and Orders**

(a) Entry of Orders—Participants can enter orders into the System, subject to the following requirements and conditions:

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

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

(1) - (2) No change.

(3) Orders can be entered into the System (or previously entered orders cancelled or modified) from 7:00 a.m. until 8:00 p.m. Eastern Time. Participants may modify a previously entered order without cancelling it or affecting the priority of the order on the book solely for the purpose of modifying the marking of a sell order as long, short, or short exempt; provided, however, that if an order is redesignated as short, a Short Sale Period is in effect under Rule 4763, and the order is not priced at a Permitted Price or higher under Rule 4763(e), the order will be cancelled. In addition, a partial cancellation of an order to reduce its share size will not affect the priority of the order on the book. Except as provided in Rule 4761, all other modifications of orders will result in the replacement of the original order with a new order with a new time stamp.

(b) – (c) No change.

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

(a) – (d) No change.

(e) Re-pricing of Orders during Short Sale Period. Except as provided below, [D]during the Short Sale Period, short sale orders that are limited to the national best bid or lower and short sale market orders will be re-priced by the System one minimum allowable price increment above the current national best bid (“Permitted Price”). To reflect declines in the national best bid, the Exchange will continue to re-price a short sale order at the lowest Permitted Price down to the order's original limit price, or if a market order, until the order is filled. Non-displayed orders between the NASDAQ bid and offer at the time of receipt will also be re-priced upward to a Permitted Price to correspond with a rise in the national best bid.

(1) –(2) No change.

(3) During the Short Sale Period, if an order was entered as a long sale order or a short sale exempt order but is subsequently marked pursuant to NASDAQ Rule 4756(a)(3) as a short sale order, the System will cancel the order unless it is priced at a Permitted Price or higher.

(f) – (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 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to stipulate how Participants in the NASDAQ Market Center System may modify previously entered orders and to describe how modified orders are processed. Currently, Rule 4756 permits previously entered orders to be cancelled, a fact that has been interpreted by NASDAQ to allow a Participant to cancel an order in full or in part. However, new language is being added to the rule to make it clear that a partial cancellation of an order (i.e., a reduction in the share size of the order) does not cause the order to lose priority on the NASDAQ Market Center book. NASDAQ believes that it is reasonable to allow the partial cancellation of an order without the order losing priority because the Participant that entered the order continues to express its willingness to trade at the price entered when the

order first came onto the book. Moreover, if the order is displayed, other Participants quoting at the same price are aware of the priority of their orders relative to the partially cancelled order. While a partial cancellation may provide these other Participants with greater opportunities to provide a fill, NASDAQ does not believe that it would be reasonable for the Participants to jump ahead of an order with time priority merely because the size of the order has been reduced. Similarly, if the partially cancelled order is non-displayed, other Participants would have no awareness of its price, its original size, or its reduced size. Again, while other Participants at that price may have an increased opportunity to provide a fill when the order's size is reduced, they would not have an expectation that the priority of their orders would change vis-à-vis that of an order that arrived on the book at an earlier time. Finally, with respect to Participants seeking to access liquidity, the reduced size of the order would be disseminated (if a displayed order) or not disseminated (if a non-displayed order) via market data feeds, but these Participants would be indifferent as to the order's priority vis-à-vis other orders with the same price.

In addition, NASDAQ is modifying Rule 4756 to provide that a sell order may be modified in order to change its marking as long, short, or short exempt without affecting its priority on the book.<sup>3</sup> Participants sometimes wish to modify the marking of a sell order on the book due to changes in the Participant's holdings of the security in question. At present, such a modification may only be achieved by the cancellation of the existing order and its replacement with a new order with a different time stamp. NASDAQ believes that it is reasonable to allow the modification of an order for this purpose without affecting its priority, since the order's marking has no bearing on the timing of its entry onto the book vis-à-vis other orders at the same

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<sup>3</sup> The proposed rule does not affect Participants' obligations contained in Regulation SHO under the Act, and Participants must continue to comply with such obligations, including the order marking and locate requirements. See 17 CFR 242.200 et seq.

price.<sup>4</sup> In the event, however, that a long or short exempt order is redesignated as a short sale order and the security that is the subject of the order is in a Short Sale Period, as provided for in Rule 4763 and Rule 201 under Regulation SHO,<sup>5</sup> the order will be evaluated to determine whether its price would be a Permitted Price within the meaning of Rule 4763(e). If not, the order will be cancelled rather than repriced.<sup>6</sup> NASDAQ believes that cancelling the order under these circumstances is preferable to repricing it, because it alerts the Participant entering the order to the existence of the Short Sale Period and forces the Participant to evaluate its intentions with regard to the order.

Finally, NASDAQ is amending Rule 4756 to make it clear that, except as provided in Rule 4761,<sup>7</sup> all other modifications of previously submitted orders, including increases in size<sup>8</sup> and changes in price, will result in the cancellation of the original order and its replacement with a new order with a new time stamp. Although the addition of this rule language does not reflect a change in the way the NASDAQ system currently operates, NASDAQ believes that the clarity of the rule will be enhanced by including the new language. NASDAQ further believes that the functionality described by the rule language is important to ensuring that Participants cannot use an existing order unfairly to retain priority with respect to a materially different order.

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<sup>4</sup> A change to the marking of the order would be effected through the submission of a “modify order” message.

<sup>5</sup> 17 CFR 242.201.

<sup>6</sup> If an order originally marked as long or short is marked as short exempt, the order will not be cancelled or repriced. Rule 4763(g).

<sup>7</sup> Rule 4761 provides for automatic adjustment of open orders in response to issuer corporate actions related to a dividend, payment, or distribution.

<sup>8</sup> NASDAQ reminds Participants that if a seller increases the size of a pending sell order, the resulting modified order is considered a new order and must be marked by the broker-dealer to reflect the seller’s net position at the time of order modification pursuant to Rule 200 of Regulation SHO.

## 2. Statutory Basis

NASDAQ believes that its proposal is consistent with Section 6(b) of the Act<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>10</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 permitting Participants to change the marking of sell orders without affecting their priority on the NASDAQ book will eliminate an aspect of the NASDAQ Market Center system that had unnecessarily made it more difficult for posted sell orders to execute. Thus, the change will enhance the fairness and efficiency of the NASDAQ market without affecting the ability of Participants to comply with applicable regulatory requirements. In addition, the changes to the rule that describe the effect of a partial order cancellation promote the clarity of the rule with respect to the ability of a Participant to reduce the size of an existing order without affecting its priority. NASDAQ further believes that allowing an order to retain priority under these conditions is consistent with the operation of a free and open market and the protection of investors and the public interest, since the Participant that entered an order that is partially cancelled has nevertheless expressed a continued willingness to trade at a specified price, and therefore should retain priority over Participants that joined that price at a later time. Finally, NASDAQ believes that the proposed addition of language to clearly stipulate that all other order modifications will result in the cancellation and replacement of the original order with a new order with new time priority is consistent with the protection of investors and the public interest because the new language will make clear an existing feature of the market that NASDAQ believes is important to ensuring that

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<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

Participants cannot use an existing order unfairly to retain priority with respect to a materially different order.

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. Specifically, NASDAQ believes that the change with respect to allowing Participants to modify the long, short, or short exempt marking of a sell order without affecting its priority will assist NASDAQ in competing with the BATS Exchange and the BATS Y-Exchange, which already allow their Participants to do so. NASDAQ further believes that the other changes will not have any effect on competition.

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

Written comments were neither solicited nor received.

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

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup> 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

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change.

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-2013-012 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-2013-012. 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-2013-012 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>13</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).