

market does not accurately reflect the prevailing market for the security. In addition, the Commission notes that Nasdaq will use objective numerical thresholds in determining whether a trade report is eligible to have an Aberrant Trade Indicator appended to it. The Commission further notes that Nasdaq's appending the Aberrant Trade Indicator to a trade report has no effect on the validity of the underlying trade. Finally, waiving the 30-day operative delay will allow Nasdaq to apply the proposed change to future aberrant trades immediately.<sup>12</sup> Based on the above, the Commission designates the proposal to become operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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 the 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-2008-100 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 Number SR-NASDAQ-2008-100. 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. 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-2008-100 and should be submitted on or before January 23, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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**BILLING CODE 8011-01-P**

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59163; File No. SR-NASDAQ-2008-097]

#### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by The NASDAQ Stock Market LLC Adopting a Limited Exemption From OATS Order Data Recordation Requirements for Registered Options Market Makers

December 24, 2008.

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 December 12, 2008, The NASDAQ Stock Market LLC ("Nasdaq"), 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 Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

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

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

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to adopt a limited exemption from OATS order data recordation requirements for Bona Fide Hedging Transactions in Nasdaq-listed equities that are transacted by Nasdaq members that are registered market makers in standardized options.

The text of the proposed rule change is below. Proposed new language is in *italics*; proposed deletions are in [brackets].<sup>3</sup>

\* \* \* \* \*

##### 6951. Definitions

*For purposes of the Rule 6950 Series:*

(a)-(h) No change.

(i) "Order" shall mean any oral, written, or electronic instruction to effect a transaction in an equity security listed on The Nasdaq Stock Market that is received by a member from another person for handling or execution, or that is originated by a department of a member for execution by the same or another member, other than any such instruction to effect (1) a proprietary transaction originated by a trading desk in the ordinary course of a member's market making activities *in a Nasdaq-listed equity security* or (2) effect a *Bona Fide Hedge Transaction involving a Nasdaq-listed equity security originated by a trading desk in the ordinary course of the member's options market making activities.*

(j)-(n) No change.

\* \* \* \* \*

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq 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. Nasdaq 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

Nasdaq proposes to modify its OATS rules to adopt a limited exemption from OATS order recordation requirements for bona fide hedging transactions in Nasdaq-listed equity securities that are part of a Nasdaq member's market

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

<sup>12</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the impact of the proposed rule on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

making activity in options. The proposal applies to options transaction on any option market in any standardized option made available for clearing through the Options Clearing Corporation.

OATS is an integrated audit trail of order, quote, and trade information for Nasdaq equity securities used to recreate events in the life cycle of orders and more completely monitor the trading practices of member firms. The basis for OATS is customer protection through the transparency of the executions of customer orders in equity securities. OATS was designed to provide an accurate, time-sequenced record of orders and transactions, beginning with the receipt of an equity order at the first point of contact between the broker-dealer and the customer or counterparty and further documenting the life of the equity order through the process of execution.

Consistent with that basis, there is currently no OATS requirement with respect to options listed on the NASDAQ Options Market. Additionally, there are currently exemptions from OATS requirements for orders entered by market makers in Nasdaq securities and by proprietary trading firms because such orders are not submitted on behalf of customers and therefore do not necessitate the customer protection provided by OATS.

The proposed rule change does not impact the customer protection orientation of OATS since, by definition, bona fide hedging transactions in equity securities that are undertaken by options market makers do not involve customer orders in those equity securities. Rather, bona fide hedging transactions in equity securities are undertaken by an options market maker to hedge against the firm risk that it creates through its conduct as a registered options market maker. Accordingly, submitting bona fide hedging transactions to OATS recording requirements provides no customer protection or equivalent regulatory benefit. It is also very expensive for firms that are not currently FINRA members or that do not currently trade NASDAQ equities to develop and maintain the compliance systems and compliance staff required to continuously monitor the daily transmission of OATS data.

Additionally, information regarding bona fide hedging transactions retained by a registered NOM market maker is otherwise available to FINRA and Nasdaq Regulation through Nasdaq's electronic delivery systems, upon request. This information includes trade reporting data, including order time and

sales data captured by the Nasdaq system.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>4</sup> in general, and with Section 6(b)(5) of the Act,<sup>5</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.

### *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.

### *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

Within 35 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 the 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:

<sup>4</sup> 15 U.S.C. 78f.

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

### *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-2008-097 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 Number SR-NASDAQ-2008-097. 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 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-2008-097 and should be submitted on or before January 23, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>6</sup>

**Florence E. Harmon,**  
*Acting Secretary.*

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<sup>6</sup> 17 CFR 200.30-3(a)(12).