

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR-FINRA-2011-009 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-FINRA-2011-009. 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 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 offices of FINRA. 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-FINRA-2011-009, and should be submitted on or before March 24, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63968; File No. SR-NASDAQ-2011-030]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt New Rule 4763 To Implement the Amendments to Regulation SHO

February 25, 2011.

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 February 22, 2011, 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 below, which Items have been substantially 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

The Exchange, pursuant to Section 19(b)(1) of the Act<sup>3</sup> and Rule 19b-4<sup>4</sup> thereunder, proposes to adopt new Rule 4763 as a written policy or procedure to implement the amendments to Rules 200(g) and 201 of Regulation SHO.<sup>5</sup>

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaq.cchwallstreet.com/NASDAQ/Filings/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### 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 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

On February 26, 2010, the Commission adopted amendments to Rules 200(g) and 201 of Regulation SHO.<sup>6</sup> The amendments became effective on May 10, 2010, and compliance is required by February 28, 2011.<sup>7</sup> The amendments to Rule 201 of Regulation SHO require trading centers<sup>8</sup> such as NASDAQ to establish, maintain, and enforce certain written policies and procedures reasonably designed to comply with the rule.<sup>9</sup> NASDAQ is proposing to adopt new Rule 4763 as a written policy and procedure to implement the amendments to Rules 200(g) and 201 of Regulation SHO.

Proposed Rule 4763(a) defines the terms "covered security," "listing market," and "national best bid" as having the same meaning as such terms have in Rule 201 of Regulation SHO.<sup>10</sup>

Under Proposed Rule 4763(b), entitled "Short Sale Price Test," the System<sup>11</sup> 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 if the price of that security decreases by 10% or more from the security's closing price on the listing market as of the end of

<sup>6</sup> See *supra* note 5.

<sup>7</sup> *Id.*

<sup>8</sup> Rule 201(a)(9) states the term "trading center" will have the same meaning as in Rule 600(b)(78). 17 CFR 242.201(a)(9). Rule 600(b)(78) of Regulation NMS 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>9</sup> See 17 CFR 242.201(b). The amendments to Rule 200(g) of Regulation SHO provide a "short exempt" marking requirement. See 17 CFR 242.200(g).

<sup>10</sup> See Rule 201(a) of Regulation SHO. The System will utilize the national best bid from the systems information processor. Rule 201(a)(1) defines "covered security" to mean any "NMS stock" as defined under Rule 600(b)(47) of Regulation NMS. 17 CFR 242.201(a)(1). Rule 600(b)(47) of Regulation NMS defines an "NMS stock" as "any NMS security other than an option." 17 CFR 242.600(b)(47). 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 242.600(b)(46).

<sup>11</sup> See NASDAQ Rule 4751(a). The term "Nasdaq Market Center" or "System" shall mean the automated system for order execution and trade reporting owned and operated by NASDAQ.

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(1).

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

<sup>5</sup> 17 CFR 242.200(g); 17 CFR 242.201. See Securities Exchange Act Release No. 61595 (Feb. 26, 2010), 75 FR 11232 (Mar. 10, 2010) ("Adopting Release") (amending Rules 201 and 200 of Regulation SHO to adopt a short sale price test restriction and "short exempt" marking requirement). See also Securities Exchange Act Release No. 63247 (Nov. 4, 2010), 75 FR 68702 (Nov. 9, 2010) (extending the compliance date of the amendments to Rules 201 and 200 of Regulation SHO until February 28, 2011).

<sup>8</sup> 17 CFR 200.30-3(a)(12).

regular trading hours on the prior day (“Trigger Price”).<sup>12</sup> For covered securities for which NASDAQ is the listing market, the NASDAQ Official Closing Price (“NOCP”) for each security is established by the NASDAQ Closing Cross pursuant to procedures set forth in Rule 4754.<sup>13</sup>

Under Proposed Rule 4763(c), Determination of Trigger Price, NASDAQ will continuously compare each execution by the System with the NOCP<sup>14</sup> and alert the single plan processor<sup>15</sup> when a Trigger Price has been reached.<sup>16</sup> The single plan processor will then disseminate a notice to market participants in accordance with procedures established by the single plan processor.<sup>17</sup> When the single plan processor disseminates such notice, NASDAQ will systematically apply the short sale price test restriction for short sale orders in the covered security in the manner described in Proposed Rule 4763(b).

Under Proposed Rule 4763(d), Duration of Short Sale Price Test, once triggered, the short sale price test restriction shall remain in effect until the next trading day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system,<sup>18</sup> as provided

for in Regulation SHO Rule 201(b)(1)(ii) (the “Short Sale Period”). There are two exceptions in the proposed rule.<sup>19</sup> First, if the Exchange determines pursuant to Proposed Rule 4763(d)(1) that the short sale price test restriction for a covered security was triggered because of a clearly erroneous execution,<sup>20</sup> NASDAQ may lift the short sale price test restriction before the Short Sale Period ends for covered securities for which the Exchange is the listing market.<sup>21</sup> Second, if NASDAQ determines pursuant to Proposed Rule 4763(d)(2) that the prior day’s closing price for a covered security is incorrect in the System and resulted in an incorrect determination of the Trigger Price, the Exchange may correct the prior day’s NOCP and lift the short sale price test restriction before the Short Sale Period ends.

Under Proposed Rule 4763(e), Re-pricing of Orders during Short Sale Period, during a Short Sale Period, short sale orders that are limited to the current 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. During the Short Sale Period, immediate or cancel (“IOC”) orders requiring that all or part of the order be executed immediately will be executed to the extent possible at a Permitted Price and higher and then

cancelled, and will not be re-priced. Inter-market sweep orders not marked “short exempt” will be handled in the same manner as IOC orders.

Also during the Short Sale Period, Limit-on-Open and Market-on-Open Orders defined in NASDAQ Rule 4752(a)(3) and (a)(4) and Limit-on-Close and Market-on-Close Orders defined in NASDAQ Rule 4754(a)(4) and (a)(5) shall be re-priced as described above unless the spread between the national best bid and offer is \$0.01.<sup>22</sup> In that case, such orders shall be converted to Mid-Point Peg Orders defined in NASDAQ Rule 4751(f)(4). Once converted, such orders will be priced at the midpoint of the national best bid and offer and may execute in sub-pennies if necessary to obtain a midpoint price.<sup>23</sup> Converting and re-pricing on-open and on-close orders will facilitate that such orders are permitted to execute in the critical opening and closing crosses. As noted in the Adopting Release, the “short sale price test restrictions of Rule 201 will accommodate matching systems that execute trades at an independently-derived price because such systems are designed so that matches occur above the current national best bid.”<sup>24</sup>

Pursuant to Proposed Rule 4763(f), Execution of Permissible Orders during the Short Sale Period, during the Short Sale Period, the System will execute and display a short sale order without regard to whether the order is at a Permitted Price or higher if, at the time of initial display of the short sale order, the order was at a price above the then current national best bid. This determination is consistent with Rule 201(b)(1)(iii)(A) of Regulation SHO. Short sale orders that are entered into the System prior to the Short Sale Period but are not displayed will be re-priced as described in Proposed Rule 4763(e) as set forth above.

Finally, under Proposed Rule 4763(g), Short Exempt Orders, during the Short Sale Period, the System will execute and display orders marked “short exempt” without regard to whether the

<sup>12</sup> See Rule 201(b)(1)(i) of Regulation SHO. Such execution or display needs to be in compliance with applicable rules concerning minimum pricing increments. See 17 CFR 242.612.

<sup>13</sup> See NASDAQ Rule 4754. The NASDAQ Closing Cross will begin at 4 p.m. EST. The process begins at 3:50 p.m. EST, when NASDAQ begins to electronically disseminate order imbalance indicator messages every 5 seconds, to which participants may send orders in response. This occurs until 4 p.m. EST when the NASDAQ Closing Cross is executed by bringing together all of NASDAQ’s order books at a single price which maximizes the number of shares of eligible interest that can be executed.

<sup>14</sup> Under Proposed Rule 4763(c)(2), if a covered security did not trade on NASDAQ on the prior trading day (due to a trading halt, trading suspension, or otherwise), NASDAQ’s determination of the Trigger Price shall be based on the last sale price on the Exchange for that security on the most recent day on which the security traded. See also Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, Q&A No. 3.1

<sup>15</sup> See 17 CFR 242.201(a)(6).

<sup>16</sup> See Rule 201(b)(3) of Regulation SHO. See Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, Q&A No. 1.1 (explaining calculation of the Trigger Price).

<sup>17</sup> See NASDAQ UTP Vendor Alert 2010–9 (July 15, 2010), available at <http://www.nasdaqtrader.com/TraderNews.aspx?id=uva2010-009>.

<sup>18</sup> See 17 CFR 242.201(b)(1)(ii). See also Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, Q&A No. 2.1.

<sup>19</sup> If the price of a covered security declines intraday by at least 10% on a day on which the security is already subject to the short sale price test restriction of Rule 201, the restriction will be re-triggered and, therefore, will continue in effect for the remainder of that day and the following day. See Adopting Release, 75 FR at 11253, n. 290. In addition, Rule 201 does not place any limit on the frequency or number of times the circuit breaker can be re-triggered with respect to a particular stock. See Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, Q&A No. 2.2.

<sup>20</sup> See NASDAQ Rule 4762 which cross-references NASDAQ Rule 11890 for the standard of determining when a trade is “clearly erroneous.” The terms of a transaction executed on NASDAQ are “clearly erroneous” when there is an obvious error in any term, such as price, number of shares or other unit of trading, or identification of the security. A transaction made in clearly erroneous error and cancelled by both parties or determined by NASDAQ to be clearly erroneous will be removed from the consolidated tape.

<sup>21</sup> See 17 CFR 242.201(a)(3).

<sup>22</sup> In the event of a locked market, the short sale on-open or on-close orders will be re-priced one minimum allowable price increment above the current national best bid.

<sup>23</sup> Re-pricing of orders, including conversion to midpoint orders in the case of on-open and on-close orders, occurs simultaneously with the execution of the opening and closing crosses. NASDAQ’s system takes a snapshot of the orders on the book and the current national best bid, validates for compliance with Rule 201 of Regulation SHO, and simultaneously executes all orders that are available for execution at the crossing price.

<sup>24</sup> See Adopting Release, 75 FR 11232, at fn. 242–244 and accompanying text.

order is at a Permitted Price or higher.<sup>25</sup> The System will accept orders marked "short exempt" at any time when the System is open for order entry regardless of whether the short sale price test has been triggered in the covered security. NASDAQ member firms marking orders "short exempt" in reliance on Rule 201(c) or 201(d) are responsible for ensuring that any such orders meet the criteria of these provisions and are accurately marked as "short exempt."<sup>26</sup>

## 2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,<sup>27</sup> which requires, among other things, the rules of an exchange to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1) of the Act<sup>28</sup> in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it implements rules adopted by the Commission in Regulation SHO under the Act.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

### 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

Because the foregoing 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 after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A)

of the Act<sup>29</sup> and Rule 19b-4(f)(6)<sup>30</sup> thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>31</sup> normally may not become operative prior to 30 days after the date of filing.<sup>32</sup> However, Rule 19b-4(f)(6)(iii)<sup>33</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. NASDAQ has requested that the Commission waive the 30-day operative delay so that it may implement the change no later than February 28, 2011 to coincide with the compliance date for the amendments to Rules 200(g) and 201 of Regulation SHO. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposed rule change, among other things, implements the amendments to Rules 200(g) and 201 of Regulation SHO which have a February 28, 2011 compliance date.<sup>34</sup> For this reason, the Commission designates the proposed rule change to be operative upon filing with the Commission.<sup>35</sup>

At any time within 60 days of the filing of the 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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>29</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>30</sup> 17 CFR 240.19b-4(f)(6).

<sup>31</sup> *Id.*

<sup>32</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission 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 satisfied this requirement.

<sup>33</sup> *Id.*

<sup>34</sup> See *supra* note 5.

<sup>35</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

### 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-2011-030 on the subject line.

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For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>36</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

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<sup>25</sup> See 17 CFR 242.201(b)(1)(iii)(B).

<sup>26</sup> See Rules 200(g)(2), 201(c) and 201(d) of Regulation SHO. See also Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, Q&A Nos. 4.2, 5.4 and 5.5.

<sup>27</sup> 15 U.S.C. 78f(b)(5).

<sup>28</sup> 15 U.S.C. 78k-1(a)(1).

<sup>36</sup> 17 CFR 200.30-3(a)(12).