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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85806; File No. SR-NASDAQ-2019-035]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Remove the Exchange's Current Primary Contingency Procedure from the Exchange's Rule Book

May 8, 2019

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 April 26, 2019, 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

The Exchange proposes to remove the Exchange's current Primary Contingency Procedure from the Exchange's rule book and designate the Exchange's current Secondary Contingency Procedure as the default contingency procedure when a disruption occurs that prevents the execution of the closing cross for a security.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaq.cchwallstreet.com>, 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

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

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

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

Nasdaq currently has two contingency plans for determining the Nasdaq Official Closing Price ("NOCP") for a security in the event that Nasdaq experiences a system disruption that precludes normal execution of the Nasdaq closing cross pursuant to Rule 4754. In the event of such disruption, the President of Nasdaq or any Senior Executive designated by the President will be authorized to invoke either the Primary Contingency Procedures set forth in Rule 4754(b)(7) or the Secondary Contingency Procedures set forth in Rule 4754(b)(8) to determine the NOCP, which would be published to the Consolidated Quote/Consolidated Tape Plan ("SIPs"). Nasdaq will employ the Primary Contingency Procedures if at all possible, and it will employ the Secondary Contingency Procedures only if it determines that both the standard procedures and the Primary Contingency Procedures are unavailable.

Under the Primary Contingency Procedures, Nasdaq will employ an offline process using stored order files to determine the size and component executions for the closing cross trade in any and all affected securities on a security-by-security basis and manually deliver execution reports to members.<sup>3</sup> Currently, Nasdaq maintains a database of all closing cross orders entered

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<sup>3</sup> Currently, under Rule 4754(b)(7), when a disruption occurs that prevents the execution of the closing cross for any security, Nasdaq will identify the last regular way trade reported by the network processor prior to 4:00 p.m. and will publish that price as the NOCP. In the event an impacted security has no consolidated trading in that security for that day, Nasdaq will have no NOCP and no contingency cross for that security. Once Nasdaq has identified the NOCP for a given security, Nasdaq will operate a modified closing cross to determine the number of shares and the specific orders that can be executed at the NOCP.

into its execution system, as well as other data regarding order processing. The database is independent of and isolated from the execution system and network and, as a result, it can operate regardless of impairment to those systems. Nasdaq will operate the Primary Contingency Procedures from a server that is also independent of and isolated from the execution system and network, and that is supported by multiple redundant backups.

In the event that Nasdaq's market is impaired and unable to execute a closing auction for all or a subset of listed securities under the standard closing procedures and the Primary Contingency Procedures are unavailable, and Nasdaq determines to follow the Secondary Contingency Procedures at or before 3 p.m. EST, Nasdaq will designate a back-up exchange.<sup>4</sup> Currently, Nasdaq has designated NYSE Arca as its official back-up exchange.<sup>5</sup> If Nasdaq

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All Market-on-Close ("MOC") orders entered prior to 3:55 p.m., Limit-on-Close ("LOC") orders entered prior to 3:58 p.m., and Imbalance Only orders entered prior to 4:00 p.m. will be eligible to participate in the Contingency Closing Cross. Nasdaq will cross and execute eligible MOC and LOC orders in price-time priority. If an order imbalance exists in the MOC and LOC interest that is marketable at the NOCP, Nasdaq will include in the cross Imbalance Only orders on the side of the market with less trading interest in price/time priority, and then execute all MOC, LOC and Imbalance Only orders at the NOCP. Once Nasdaq has completed the Contingency Closing Cross, it will report the results to the appropriate network processor and deliver execution reports to members. After hours trading will begin either as scheduled at 4:00 p.m. or upon resolution of the disruption that triggered Nasdaq to operate the Contingency Closing Cross.

<sup>4</sup> Currently, under Rule 4754(b)(8)(A), if Nasdaq determines to invoke the Secondary Contingency Procedures at or prior to 3:00 p.m. EST, the official closing price from Nasdaq's designated alternate exchange would serve as the NOCP or, if there is no official closing price on the designated alternate exchange, the NOCP would be the VWAP of the consolidated last-sale eligible prices for the last five minutes of trading during regular trading hours. If there were no consolidated last-sale eligible trades in the last five minutes of trading during regular trading hours, the NOCP would be the last consolidated last-sale eligible trade for such security during regular trading hours on that day or, if there was no last-sale eligible trade, the prior day's NOCP. If no NOCP can be calculated by any of the foregoing methods, the Exchange would not publish an official closing price for the security.

<sup>5</sup> See Securities Exchange Act Release No. 78014 (June 8, 2016), 81 FR 38755 (June 14, 2016) (SR-NASDAQ-2016-035) ("Notice of Filing of Amendment No. 1, and Order

determines to follow the Secondary Contingency Procedures after 3 p.m., the Exchange would calculate the NOCP with a volume-weighted average price (“VWAP”) calculation.<sup>6</sup> Nasdaq would invoke the Secondary Contingency Procedures only after it determines that neither the standard closing procedures nor the Primary Contingency Procedures are available. Nasdaq is proposing to eliminate the Primary Contingency Procedures so that the Secondary Contingency Procedures will be the default contingency procedures.

Since June of 2002, Nasdaq has published contingency plans in the event the Nasdaq closing process was to be disrupted during the annual Russell US Index Reconstitution (“Russell Rebalance”). Nasdaq adopted the current Primary Contingency Procedures in 2013 in order to formally include the Exchange’s contingency plans in its rule manual.<sup>7</sup> In response to evolving technology and industry practice, Nasdaq adopted the Secondary Contingency Procedures in 2016.<sup>8</sup> In conjunction with or shortly after Nasdaq’s adoption of the Secondary Contingency

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Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Establish Secondary Contingency Procedures for the Exchange’s Closing Cross”).

<sup>6</sup> Currently, under Rule 4754(b)(8)(B), if Nasdaq determines to invoke the Secondary Contingency Procedures after 3:00 p.m. EST, the VWAP of the consolidated last-sale eligible prices for the last five minutes of trading during regular trading hours would serve as the NOCP. If there were no consolidated last-sale eligible trades in the last five minutes of trading during regular trading hours, the NOCP would be the last consolidated last-sale eligible trade for such security during regular trading hours on that day or, if there was no last-sale eligible trade, the prior day’s NOCP. If no NOCP can be calculated by any of the foregoing methods, the Exchange would not publish an official closing price for the security.

<sup>7</sup> See Securities Exchange Act Release No. 69880 (June 27, 2013), 78 FR 40223 (July 3, 2013) (SR-NASDAQ-2013-090) (“Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Exchange Rule 4754 Governing the NASDAQ Closing Cross (“Cross”)”).

<sup>8</sup> See supra, note 5.

procedures, NYSE,<sup>9</sup> NYSE American,<sup>10</sup> NYSE Arca,<sup>11</sup> and Cboe BZX Exchange, Inc. (“Cboe BZX”)<sup>12</sup> established contingency procedures materially similar to Nasdaq’s Secondary Contingency Procedures.<sup>13</sup> However, no other national securities exchange has established contingency procedures similar to Nasdaq’s Primary Contingency Procedures.<sup>14</sup> Further, the

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<sup>9</sup> See Securities Exchange Act Release No. 78015 (June 8, 2016), 81 FR 38747 (June 14, 2016) (SR-NYSE-2016-18) (“Notice of Filings of Amendment No. 1, and Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendment No. 1, To Provide for How the Exchanges Would Determine an Official Closing Price if the Exchanges Are Unable To Conduct a Closing Transaction”).

<sup>10</sup> See Securities Exchange Act Release No. 78015 (June 8, 2016), 81 FR 38747 (June 14, 2016) (SR-NYSEMKT-2016-31) (“Notice of Filings of Amendment No. 1, and Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendment No. 1, To Provide for How the Exchanges Would Determine an Official Closing Price if the Exchanges Are Unable To Conduct a Closing Transaction”).

<sup>11</sup> See Securities Exchange Act Release No. 78357 (July 19, 2016), 81 FR 48477 (July 25, 2016) (SR-NYSEArca-2016-94) (“Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Equities Rule 1.1 to Establish an Official Closing Price for Exchange-Listed Securities if the Exchange is Unable to Conduct a Closing Auction”).

<sup>12</sup> See Securities Exchange Act Release No. 78527 (August 10, 2016), 81 FR 54628 (August 16, 2016) (SR-BatsBZX-2016-47) (“Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish a Closing Contingency Procedure”).

<sup>13</sup> Investors Exchange LLC (“IEX”) has also adopted Secondary Closing Auction Contingency Procedures under Rule 11.350(d)(4)(B) that are similar to Nasdaq’s Secondary Contingency Procedures.

<sup>14</sup> IEX has adopted Primary Closing Auction Contingency Procedures under Rule 11.350(d)(4)(A)(i). If IEX determines to initiate the Primary Closing Auction Contingency Procedures, IEX will publicly announce that no Closing Auction will occur. The price of the Final Consolidated Last Sale Eligible Trade will be used for the IEX Official Closing Price. The IEX Official Closing Price will be published to the Consolidated Tape. IEX will execute orders on the Closing Auction Book at the IEX Official Closing Price to the extent executable buy and sell interest exists on the Closing Auction Book. All remaining orders on the Order Book will be canceled at the conclusion of the contingency process. IEX will report the resulting execution to the Consolidated Tape and deliver execution reports to Users. If a security’s IEX Official Closing Price cannot be determined by this subsection, IEX will not publish an IEX Official Closing Price for the security and will cancel all orders on the Order Book. The Post Market Session shall begin either as scheduled, or upon resolution of the disruption that triggered

Primary Contingency Procedures have never been invoked by the Exchange. Nasdaq is proposing to eliminate the Primary Contingency Procedures so that the Secondary Contingency Procedures will be the default contingency procedure.

Nasdaq believes that removing the Primary Contingency Procedures and utilizing the Secondary Contingency Procedures in the event Nasdaq is unable to execute a closing cross would harmonize the Exchange's contingency procedures with those of other national securities exchanges, which would provide market participants with consistency and predictability in the event that an exchange is impaired and cannot conduct a closing auction. Furthermore, Nasdaq believes that the Secondary Contingency Procedures best preserves Nasdaq's ability to move quickly to establish a reliable closing price under unusual conditions, as compared to the Primary Contingency Procedures, which utilize an offline process that requires Nasdaq to determine the size and component executions for the closing cross on a security-by-security basis using stored order files and manually deliver execution reports to members. The Exchange believes that having robust, efficient contingency procedures is particularly important on high volume trading days, such as the Russell Rebalance, which occurs annually in June.<sup>15</sup>

In addition, Nasdaq proposes to delete text in Rule 4754(b)(7) describing the information that the Exchange will use when determining whether to employ the Primary or Secondary Contingency Procedures because the Secondary Contingency Procedures will be the default

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IEX to operate the Primary Contingency Procedures. In contrast, if Nasdaq determines to initiate the Primary Contingency Procedures, Nasdaq will identify the last consolidated regular way trade reported by the network processor prior to 4:00 p.m. and shall publish that price as the Nasdaq Official Closing Price for that security. Once Nasdaq has identified the NOCP for a given security, Nasdaq will operate a modified closing cross to determine the number of shares and the specific orders that can be executed at the NOCP. See *supra*, note 3.

<sup>15</sup> See FTSE Russell, "Russell US Index Reconstitution", available at: <https://www.ftserussell.com/index-series/index-resources/russell-reconstitution>.

contingency procedure under the proposed rule change. The Exchange also proposes to add “VWAP” as a defined term that was inadvertently omitted in the previous version of Rule 4754(b)(8)(A)(ii); update Rule 4754(b)(8)(B)(i) to include the new defined term “VWAP”; and add an “or” that was inadvertently omitted in the previous version of Rule 4754(b)(8)(B)(ii) and Rule 4754(b)(8)(B)(iii). Lastly, the Exchange proposes renumbering the current Rule 4754(b)(8) as Rule 4754(b)(7) to maintain a clear and organized rule structure.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>16</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>17</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. The proposal is consistent with this provision of the Act in that it will ensure that the Exchange continues to operate a fair and orderly market and to provide for an effective pricing mechanism for the critical period of the market close in the event of a disruption where Nasdaq is unable to execute a closing cross in a way that is consistent with the contingency procedures utilized by other national securities exchanges, which helps ensure transparency, consistency and predictability for market participants. The Exchange believes that having robust contingency procedures is particularly important on high volume trading days, such as the Russell Rebalance, which occurs annually in June.

With respect to the Exchange’s proposals to delete text in Rule 4754(b)(7) describing the information that the Exchange will use when determining whether to employ the Primary or Secondary Contingency Procedures; add “VWAP” as a defined term that was inadvertently

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<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

omitted in the previous version of Rule 4754(b)(8)(A)(ii); update Rule 4754(b)(8)(B)(i) to include the new defined term “VWAP”; and add an “or” that was inadvertently omitted in the previous version of Rule 4754(b)(8)(B)(ii) and Rule 4754(b)(8)(B)(iii), the Exchange believes that these changes are consistent with the Act because they will improve the readability and clarity of the Rule. These changes are not substantive. Lastly, the Exchange believes that its proposal to renumber the current Rule 4754(b)(8) as Rule 4754(b)(7) is consistent with the Act because it will allow the Exchange to maintain a clear and organized rule structure and prevent investor confusion.

**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. The proposed rule change is not designed to address any competitive issues, but rather to provide for how the Exchange would determine the NOCP for Exchange-listed securities in the event that Nasdaq experiences a system disruption that precludes normal execution of the Nasdaq closing cross. This is designed to reduce the burden on competition by having similar back-up procedures across other primary listing exchanges<sup>18</sup> if such exchange is impaired and cannot conduct a closing auction. This proposal will maintain the Secondary Contingency Procedures, which were crafted with input from industry participants, the Exchange, and the SIPs, and remove the Primary Contingency Procedures, which are inconsistent with industry practices.

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<sup>18</sup> NYSE, NYSE American, NYSE Arca and Cboe BZX have established contingency procedures materially similar to Nasdaq’s Secondary Contingency Procedures and do not have primary contingency procedures. IEX has established a secondary contingency procedure similar to Nasdaq’s and a primary contingency procedure that differs from Nasdaq’s. See supra, notes 9 to 14.

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 from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>19</sup> and Rule 19b-4(f)(6) thereunder.<sup>20</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 change 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:

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<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>20</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give 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.

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-2019-035 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-2019-035. 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.

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 Number SR-NASDAQ-2019-035

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>21</sup>

Eduardo A. Aleman,  
Deputy Secretary.

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<sup>21</sup> 17 CFR 200.30-3(a)(12).

[FR Doc. 2019-09871 Filed: 5/13/2019 8:45 am; Publication Date: 5/14/2019]