

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98225; File No. SR-NASDAQ-2023-030)

August 25, 2023

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule to Delay Implementation of Pending Amendments to Equity 4, Rules 4120, 4702 and 4703 and to Make Further Amendments to Rules 4702 and 4703

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 16, 2023, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (the “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 delay implementation of pending amendments to Equity 4, Rules 4120, 4702 and 4703³ as well as to make further amendments to Rules 4702 and 4703, as described further below.

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ References herein to Nasdaq Rules in the 4000 Series shall mean Rules in Nasdaq Equity 4.

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 Exchange is in the process of introducing a new upgraded version of the OUCH Order entry protocol⁴ that will, when fully implemented, enable the Exchange to make functional improvements to specific Order Types⁵ and Order Attributes.⁶ The Exchange filed its initial proposal (the “Proposal”) for these enhancements with the SEC on September 14, 2022, and in the Proposal the Exchange stated that its operative date would be November 14, 2022.⁷ The

⁴ The OUCH Order entry protocol is a proprietary protocol that allows subscribers to quickly enter orders into the System and receive executions. OUCH accepts limit Orders from members, and if there are matching Orders, they will execute. Non-matching Orders are added to the Limit Order Book, a database of available limit Orders, where they are matched in price-time priority. OUCH only provides a method for members to send Orders and receive status updates on those Orders. See <https://www.nasdaqtrader.com/Trader.aspx?id=OUCH>.

⁵ An “Order Type” is a standardized set of instructions associated with an Order that define how it will behave with respect to pricing, execution, and/or posting to the Exchange Book when submitted to Nasdaq. See Equity 1, Section 1(a)(7).

⁶ An “Order Attribute” is a further set of variable instructions that may be associated with an Order to further define how it will behave with respect to pricing, execution, and/or posting to the Exchange Book when submitted to the Exchange. See *id.*

⁷ See Securities Exchange Act Release No. 34-95768 (September 14, 2022); 87 FR 57534 (September 20, 2022) (SR-Nasdaq-2022-051).

Exchange subsequently informed the Commission that it intended to delay implementation of the migration due to ongoing development work.⁸ The Exchange now wishes to inform participants that while it has commenced and systematically affected migration on a feature-by-feature basis, as described in a series of Equity Trader Alerts,⁹ the migration will not be complete until Q1 2024 – again, due to ongoing development work. Until the migration is complete, the Exchange will continue to announce the implementation dates for the remaining new OUCH functionalities, in Equity Trader Alerts at least 30 days prior to implementation.

Additionally, the Exchange also proposes amendments to its Rules to address inconsistencies between the Rule Text and observed System behavior as well as behavior unaccounted for in the existing and pending Rule text, as follows.

FIRST RULE CHANGE

The first proposed rule change addresses an edge case of inconsistency between the Rule text and System behavior, this time regarding Market Maker Peg Orders.¹⁰ Rule 4702(b)(7)(A)

⁸ See Securities Exchange Act Release No. 34-96341 (November 17, 2022), 87 FR 71712 (November 22, 2022) (SR-Nasdaq-2022-065).

⁹ See Equity Trader Alert 2023-35 (August 2, 2023) (announcing implementation of Midpoint Peg Order functionality), available at <http://www.nasdaqtrader.com/TraderNews.aspx?id=ETA2023-35>; Equity Trader Alert 2023-28 (June 22, 2023) (announcing implementation of Market Peg functionality), available at <http://www.nasdaqtrader.com/TraderNews.aspx?id=ETA2023-28>; Equity Trader Alert 2023-20 (May 9, 2023) (announcing implementation of Primary Peg order functionality), available at <http://www.nasdaqtrader.com/TraderNews.aspx?id=ETA2023-20>; Equity Trader Alert 2023-17 (April 27, 2023) (announcing implementation of Reserve Order functionality), available at <http://www.nasdaqtrader.com/TraderNews.aspx?id=ETA2023-17>; Equity Trader Alert 2023-6 (January 31, 2023) (announcing implementation of Trade Now functionality); Equity Trader Alert 2022-96 (October 26, 2022) (announcing implementation delay until Q2/Q3 2023), available at <http://www.nasdaqtrader.com/TraderNews.aspx?id=%20ETA2022-96>.

¹⁰ Pursuant to Rule 4702(b)(7)(A), a “Market Maker Peg Order” is an Order Type designed to allow a Market Maker to maintain a continuous two-sided quotation at a displayed price that is compliant with the quotation requirements for Market Makers set forth in

states that, if after entry of a Market Maker Peg Order that has a displayed price based on the NBBO, and the NBBO subsequently shifts such that the displayed price of the Market Maker Peg Order to buy (sell) is equal to or greater (less) than the National Best Bid (or National Best Offer), the Market Maker Peg Order will not be subsequently repriced until a new reference price is established that is more aggressive than the displayed price of the Market Maker Peg Order. System testing revealed that the System does not reprice Market Maker Peg Orders in this scenario, but only if such Orders are in round lot sizes, whereas it does reprice such Orders when they are in odd lot sizes. After evaluation, the Exchange determined to maintain this System behavior and amend the Rule to conform to it. The Exchange proposes to do so because the existing language proscribing repricing only makes sense within the context of round lot Market Maker Peg Orders, which this scenario would set a new NBBO and when they do so, cannot reprice with respect to the reference price they just set. By contrast, odd lot Market Maker Peg Orders are ineligible to set the NBBO, and do not have this same problem. Accordingly, the Exchange proposes to amend Rule 4702(b)(7)(A) to clarify that the prohibition against repricing only applies to Market Maker Peg Orders in odd lot sizes.

Equity 2, Section 5(a)(2). The displayed price of the Market Maker Peg Order is set with reference to a "Reference Price" in order to keep the displayed price of the Market Maker Peg Order within a bounded price range. The Reference Price for a Market Maker Peg Order to buy (sell) is the then-current National Best Bid (National Best Offer) (including Nasdaq), or if no such National Best Bid or National Best Offer, the most recent reported last-sale eligible trade from the responsible single plan processor for that day, or if none, the previous closing price of the security as adjusted to reflect any corporate actions (e.g., dividends or stock splits) in the security.

SECOND RULE CHANGE

The second proposed amendment addresses how the System prices a Market on Open Order¹¹ with the Market Pegging Attribute¹² and an offset assigned to it that a participant enters after the Nasdaq Opening Cross occurs. Rule 4702(b)(8)(B) currently provides as follows with respect to this scenario:

An MOO Order entered through RASH or FIX with a Time-in-Force of IOC and flagged to participate in the Nasdaq Opening Cross that is entered after the time of the Nasdaq Opening Cross will be accepted but will be converted into a Non-Displayed Order with a Time-in-Force of IOC and a price established using the Market Pegging Order Attribute with no offset.¹³

In testing System behavior, the Exchange observed that the System does not, in fact, operate in this manner. Instead, the System determines the price of the Order in this scenario using the offset. In evaluating whether to modify System behavior to match the Rule, the Exchange determined to retain the current System behavior because it did not see any reasonable basis to ignore the offset in this scenario. The Exchange proposes to amend the Rule accordingly.

¹¹ See Rule 4702(b)(8) (defining a “Market on Open Order” or “MOO” as follows: “an Order Type entered without a price that may be executed only during the Nasdaq Opening Cross. Subject to the qualifications provided below, MOO Orders may be entered between 4 a.m. ET and immediately prior to 9:28 a.m. ET. An MOO Order may be cancelled or modified until immediately prior to 9:25 a.m. ET. An MOO Order shall execute only at the price determined by the Nasdaq Opening Cross.”).

¹² See Rule 4703(d)(8) (defining “market pegging” as pegging “with reference to the Inside Quotation on the opposite side of the market.”).

¹³ A Time-in-Force or “TIF” is a period of time that the Exchange will hold an Order for potential execution. See Rule 4703(a). An Order with a TIF of Immediate-or-Cancel or “IOC” is designated to deactivate immediately after determining whether it is marketable. See *id.*

THIRD RULE CHANGE

The third proposed rule change regards an Order with the Pegging Attribute that a participant: (1) enters before the Nasdaq Closing Cross occurs at 4:00 P.M.; and (2) assigns a TIF which designates the Order for extended hours trading if it remains unexecuted after the Cross concludes (while bypassing the Extended Trading Close). Under the Rule, as amended by SR-Nasdaq-2022-051, such an Order would be booked into the System, but if it remains unexecuted after the Nasdaq Closing Cross concludes, the Order would remain booked and commence extended hours trading, but the System would deactivate its Pegging Attribute when doing so. In other words, the Order would cease managing the pegged price of the Order after 4 P.M. This practice is consistent with Equity 4, Rule 4703(d), which states that “Pegging is available only during Market Hours.”

The Exchange now proposes to amend Rule 4703(d) to state that if a participant enters a Peg Managed Order¹⁴ prior to the Nasdaq Closing Cross with a TIF that allows for extend hours trading (other than in the Extended Trading Close), the System will cancel that Order if unexecuted after the Nasdaq Closing Cross concludes. By contrast, if a participant enters a Fixed Midpoint Order¹⁵ in the same scenario, the System will act as it does now – it will deactivate the Pegging Attribute for the Order once extend hours trading commences.

In time, the proposed treatment of Peg Managed Orders during extended hours trading is that which the Exchange intends to apply to all Midpoint Pegging Orders. However, this

¹⁴ A “Peg Managed Order” is a Primary Pegged, Market Pegged, or Managed Midpoint Order. See 4703(d) (as amended by SR-Nasdaq-2022-051). A “Managed Midpoint Order,” in turn, is a Midpoint Pegging Order which the System may update in response to changes to the Midpoint. See id.

¹⁵ A “Fixed Midpoint Order” is a Midpoint Pegging Order which the System will cancel in response to changes to the Midpoint. See id.

functionality is not yet ready to make it available for Fixed Midpoint Orders. Thus, in the interim, existing practice will continue,

FOURTH RULE CHANGE

The fourth proposal would amend Equity 4, Rule 4703(h), to correct its description of behavior of the Non-Displayed portion of Orders with the Reserve Attribute.¹⁶ As amended by SR-Nasdaq-2022-051, Rule 4703(h) provides as follows, in pertinent part:

In all cases, if the remaining size of the Non-Displayed Order is less than the fixed or random amount stipulated by the Participant, the full remaining size of the Non-Displayed Order will be displayed and the Non-Displayed Order will be removed.

As stated, this Rule requires that the entire Non-Displayed portion of a Reserve Order will become Displayed the moment the size of the Non-Displayed portion¹⁷ drops below an amount that a participant designates or has directed the System to randomly designate (the “Max Floor”). In conducting a test of System behavior, however, the Exchange observed that the

¹⁶ “Reserve Size” is, in part, an Order Attribute that “permits a Participant to stipulate that an Order Type that is displayed may have its displayed size replenished from additional non-displayed size.” Rule 4703(h). The Rule also states that Reserve “is not available for Orders that are not displayed; provided, however, that if a Participant enters Reserve Size for a Non-Displayed Order with a Time-in-Force of IOC, the full size of the Order, including Reserve Size, will be processed as a Non-Displayed Order.” Id. In addition to the change proposed above, the Exchange proposes to eliminate from the immediately preceding language “with a Time-in-Force of IOC” because the Exchange does not assess a reason to include this qualifier. The statement that a Non-Displayed Order with Reserve will be entirely non-displayed is true even as to Non-Displayed Orders with other TIFs.

¹⁷ Whenever a participant enters an Order with Reserve Size, the full size of the Order will be presented for potential execution in compliance with Regulation NMS; thereafter, unexecuted portions of the Order will be processed as two Orders: a Displayed Order (with the characteristics of its selected Order Type) and a Non-Displayed Order. See id. When an Order with Reserve Size is posted, if there is an execution against the Displayed Order that causes its size to decrease below a normal unit of trading, another Displayed Order will be entered at the limit price and size stipulated by the Participant while the size of the Non-Displayed Order will be reduced by the same amount. See id.

System does not, in fact, operate in this manner. Instead, the System maintains the Non-Displayed portion of a Reserve Order as such when the size of that Non-Displayed Portion drops below the Max Floor. Rather than correct the current System behavior to match the Rule, the Exchange determined that users of Reserve Orders prefer the current System behavior because it is true to the underlying intent of Reserve functionality, which is to help limit the price impacts of trading large quantities of shares by displaying only small portions of such shares at a given time, while hiding the rest in reserve. Thus, the Exchange proposes to address the inconsistency between the Rule text and the behavior of the System by deleting the aforementioned language from Rule 4703(d) [sic]. Going forward, the System will not convert to a Displayed Order the Non-Displayed remainder of a Reserve Order that falls below the Max Floor, and the System will not remove it.

2. Statutory Basis

The Exchange believes that its proposals are consistent with Section 6(b) of the Act,¹⁸ in general, and further the objectives of Section 6(b)(5) of the Act,¹⁹ in particular, in that they are 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.

It is consistent with the Act and in the best interests of investors and the public to announce a delay in its completion of implementing the amendments to the Exchange's Rulebook set forth in SR-Nasdaq-2022-051. Doing so will avoid confusion as to which rules and functionality will apply during the interim period. As noted earlier, the Exchange has and will

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(5).

continue to notify market participants through Equity Trader Alerts in advance of implementing any new functionality set forth in SR-Nasdaq-2022-051.

It is also consistent with the Act to amend the Exchange's Rules to address inconsistencies between the Rule text and observed System behavior, including by adapting the Rule text to codify observed System behavior, where the observed behavior is more consistent with the underlying purpose of an Order Attribute than is the Rule text (maintaining the Non-Displayed status of a reserve portion of a Reserve Order that drops below the Max Floor), where the Exchange discerns no logical reason to maintain the existing Rule text (ignoring an offset assigned to MOOs with Market Pegging entered after the Nasdaq Opening Cross occurs), and where System behavior reflects a nuance not contemplated by the existing Rules (clarifying that the prohibition against repricing Market Maker Peg Orders that have prices equal to or better than the NBBO only applies to round lot Market Maker Peg Orders, and not to odd lots).

Likewise, it is consistent with the Act to amend the Exchange's Rules to provide for the System to cancel Managed Peg Orders designated for extended hours trading, when such Orders remain unexecuted in the Nasdaq Closing Cross, due to the fact that the Rule text provides that pegging is only available during market hours. It is also consistent with the Act to maintain its existing practice for Fixed Midpoint Orders, in the same scenario, of deactivating the Pegging Attribute during extended hours trading. Although the proposal will create disparate treatment of Managed Peg Orders and Fixed Midpoint Orders, the Exchange intends to eliminate this disparity over time by providing for Fixed Midpoint Orders to behave in the same way as Managed Peg Orders. Until that occurs, maintaining existing practice for Fixed Midpoint Orders is consistent with the Rule.

Finally, it is consistent with the Act to amend Rule 4703(h) to delete qualifying language which erroneously suggests that Non-Displayed Orders with Reserve are only non-displayed when such Orders have a TIF of IOC. Investors and the public have an interest in the Exchange maintaining a Rulebook that is accurate.

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

The Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposals merely delay completion of its implementation of SR-Nasdaq-2022-051 as well as address inconsistencies between Rule text and System behavior that became apparent during the course of this implementation. The Exchange neither intends nor perceives that these rule changes will have any impact on competition.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act²⁰ and Rule 19b-4(f)(6) thereunder.²¹ 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 prior to 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

²⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

²¹ 17 CFR 240.19b-4(f)(6).

investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act²² and Rule 19b-4(f)(6)(iii) thereunder.²³

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 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 under Section 19(b)(2)(B)²⁴ of the Act 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:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number

SR-NASDAQ-2023-030 on the subject line.

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) 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.

²⁴ 15 U.S.C. 78s(b)(2)(B).

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-2023-030. This file number should be included on the subject line if email 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 (<https://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 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. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-NASDAQ-2023-030 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

J. Matthew DeLesDernier,

Deputy Secretary.

²⁵ 17 CFR 200.30-3(a)(12).