NASDAQ OMX[SM]

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Elizabeth Murphy
Secretary
US Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: SR-NYSE-2008-116

Dear Ms. Murphy:

The Nasdaq Stock Market LLC[1] ("Nasdaq") welcomes the opportunity to submit comments in connection with the above-referenced rule proposal by the New York Stock Exchange ("NYSE") to (i) amend NYSE Rule 411(b) concerning certain odd-lot order handling requirements, (ii) rescind NYSE Information Memorandum ("Information Memo") 94-14 to the extent it created a distinction in the regulatory treatment of odd-lot limit and odd-lot market orders, and (iii) issue a new Information Memo that provides comprehensive and updated interpretive guidance on, and application of, current NYSE odd-lot trading practices and Rules.

For the reasons set forth below, Nasdaq opposes the proposal, and the NYSE's ongoing odd-lot policies and practices in general, in that they: (i) are vague and arbitrary, and the proposal fails to provide clarity as to a member's obligations, (ii) impede access to the NYSE's trading system for small public-customer orders, (iii) continue to allow outmoded and unnecessary segregation of small customer orders from the NYSE's main execution processes, and (iv) impede competition among markets. Therefore, Nasdaq urges the Commission to reject the NYSE's proposals and, consistent with the Commission's statutory obligations to facilitate a national market system, direct that the NYSE implement system and policy changes to bring its odd-lot processes into alignment with all other equity markets in the United States.

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1 Nasdaq also operates NYSE member Nasdaq Execution Services ('NES") a wholly-owned broker-dealer exchange facility that serves exclusively as Nasdaq's routing broker to destination markets, including the NYSE. NES sends a significant number of odd-lot orders to the NYSE on Nasdaq's behalf.

As an initial matter, Nasdaq strongly disagrees with the NYSE's characterization of its odd-lot system as being one that serves small investors. The NYSE's odd-lot system serves only the NYSE odd-lot specialist. By funneling all odd-lots in a particular security to a single specialist, the NYSE odd-lot system provides an exclusive, never-ending flow of small less-informed public customer orders for the specialist to trade against, and profit from.[2] This specialist franchise is, in turn, protected by vague and arbitrary odd-lot rules that allow the specialist to complain that NYSE rules are being violated anytime the combination or volume of odd-lot orders causes the specialist to lose money.[3] Indeed, the written standards contained in existing and proposed NYSE odd-lot guidance are rife with amorphous terms and obligations that, when combined, seem to equate impermissible odd-lot activity with anything that the exclusive odd-lot specialist doesn't like. "Inappropriate use," "more than incidental use," "trading inconsistent with traditional or standard odd-lot investment activity," and numerous other terms that defy ready definition, fail to provide any concrete standards for NYSE members to adhere to, and thus impose unnecessary complexity and regulatory exposure for NYSE members. In short, the confusing group of Information Memos and other NYSE communications related to odd-lots does not answer even the most basic questions about how to send such orders to the NYSE, including: "How may odd-lots is too many odd-lots to send to an NYSE specialist that has been specifically and exclusively designated to handle them?" Consolidating unhelpful guidance in a single location, as proposed by the NYSE, misses the point.

Further, the NYSE's odd-lot standards appear to directly contradict other regulatory obligations. For example, the NYSE's insistence that odd-lot orders be aggregated "as far as possible" into round-lots is vague and fails to take into account countervailing best-execution obligations that agency brokers have to process the orders sent to them as quickly and efficiently as possible. The NYSE's odd-lot standards again fail to answer even the most basic question: "How long should an NYSE member hold odd-lot orders from its customers to meet the aggregation requirement?" No NYSE member can know with any degree of certainty that it should hold back odd-lots from immediate processing because another odd-lot in the same issue will arrive in time, or at all, to be combined with the held order and finally sent to the exchange for potential execution. Such implied delays directly contradict the goal of ensuring access to exchange that was the basis for adoption of the NYSE's odd-lot processing system in the first place. Similar vagueness issues arise in connection with NYSE odd-lot guidance and standards that impose detailed order-by-order knowledge obligations regarding the ultimate source of odd-lot order flow as a pre-condition for access to the NYSE odd-lot system. These standards

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[2] The specialist also receives the odd-lot portion of mixed-lot orders sent to the NYSE. The NYSE system itself breaks up mixed-lot orders and, thus, creates additional odd-lots to provide to the specialist.

[3] The specialist's willingness to complain is also likely to be influenced by its relationships with the source of its odd-lot order flow, raising the risk of unequal scrutiny simply based on whether a specialist likes, or dislikes, the party sending it odd-lots.

likewise fail to take adequately take into account the operations of brokers that receive orders for submission to the NYSE from other registered brokers and markets.

As the NYSE's proposal make clear, the vast bulk of its policy-making related to odd-lot processing took place many years ago in a far different trading environment than exists today. Decimalization, and its attendant reduction in order size, improved speed and efficiency of inter-market linkages, the expanded movement of orders among brokers, and increased partial execution remainders being routed to other executing markets, have all combined to create an even greater disconnect between the NYSE's odd-lot system and the efficient and transparent operations of other markets and NYSE members. In short, while Nasdaq agrees that certain odd-lot order submissions have negative impacts on the NYSE's systems as currently constituted, Nasdaq does not agree that the solution is the issuance of more guidance and enforcement that merely perpetuates an antiquated odd-lot execution and regulatory system that imposes significant compliance and competitive burdens on NYSE members and other market centers that route small customer orders.

This is particularly true given that the majority of the NYSE's odd-lot problems are entirely self-inflicted. While the NYSE provided an extensive review of the history of its attempts to regulate odd-lot trading and the problems that certain odd-lot submissions can have on the "economic viability" of its specialists and its odd-lot system, the NYSE fails to mention that such results are directly attributable to its own decision to separate odd-lot order flow from its normal execution processing and other voluntary programming actions. As the Commission is aware, no other equity market in the United States has a separate execution process for odd-lot orders like that of the NYSE.[4] Instead, all other equity markets in the United States operate using SEC-approved "actual share" systems wherein all orders, regardless of size, are executed through a single uniform execution process.[5] Such systems ensure the fair and equal processing of orders for all market participants as well as the free and unrestricted ability to quickly send orders of any size to other markets to meet fiduciary best execution obligations owed to those orders. By segregating odd-lots, and some cases creating more of them by breaking off the odd-lot portions off mixed-lot orders, the NYSE's odd-lot processes do just the opposite. The NYSE has had numerous opportunities as part of its many enhancements to its hybrid market system to modify its approach to odd-lot processing and eliminate many of its complaints about how the system is currently being used.[6] Instead of taking those opportunities, the NYSE has apparently determined to follow its well-established course of allowing odd-lot specialists to maintain their monopoly over the trading of odd-lots while continuing to expand the range of restricted odd-lot conduct to ensure that a specialist/monopolist's market risk does not become too great.

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4 The NYSE very recently expanded its version of odd-lot processing to its NYSE Alternext system.

5 The overwhelming majority of European markets likewise use actual share systems and do not segregate odd-lot orders for special processing.

6 Nasdaq notes that at one time the NYSE proposed a version of its hybrid market that did not include a separate odd-lot processing component.

Finally, there are there inter-market competitive impacts that occur anytime a single market in linked national market system imposes materially different processing or regulatory standards than all other markets. While Nasdaq's strong preference is for individual markets to make their own determinations regarding their operations, such freedom should not be used to place unnecessary and unjustified burdens on other markets or market participants. Because of the obligation to interact imposed by Regulation NMS, and the desire to efficiently serve users, market centers faced with such burdens are forced to expend time, money and resources to comply with outlier market standards and modify their activities in a manner that does not improve the overall quality of executions for the trading public. By letting the NYSE's odd-lot system tail wag the national market system dog, the Commission moves further way from its goal of a linked and efficient market, a market that is especially important for small public investors and their odd-lot orders. Having imposed rough uniformity in order handling, routing, and execution for round-lot share amounts via Regulation NMS, it is now time for the Commission to bring the same market standards and benefits to odd-lot orders and the small public customers that submit them. Given the financial crisis we face today, now is the time to remind small investors that they are a focus of Commission concern.

If, despite the above, the Commission is inclined to approve the NYSE's proposals, Nasdaq specifically requests that the Commission first issue definitive guidance regarding the interaction of best-execution obligations generally, and as they relate to routing, and the dictates of the NYSE's odd-lot standards. In addition, the Commission should require as a prerequisite for approval that the NYSE fully and objectively define, and provide specific examples of, what conduct related to odd-lots is permitted and prohibited.

The small orders of public customers deserve to be treated fairly. It is time for the Commission to take formal action to mandate their inclusion in the same market execution processes that are now generally available to all other market participants. It can begin by rejecting the NYSE's instant proposal.

Sincerely,

Joan C. Conley

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