

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59369; File No. SR-NASDAQ-2008-097)

February 6, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of Proposed Rule Change to Adopt a Limited Exemption from OATS Order Data Recordation Requirements for Registered Options Market Makers

On December 12, 2008, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt a limited exemption from OATS order data recordation requirements for registered options market makers. The proposed rule change was published in the Federal Register on January 2, 2009.³ The Commission received one comment letter expressing support for the proposal.⁴ This order approves the proposed rule change.

The Exchange proposes to amend the definition of “Order” contained in Nasdaq Rule 6951 to create a limited exemption from OATS order recordation requirements for bona fide hedging transactions in Nasdaq-listed equity securities originated by a trading desk in the ordinary course of the member’s market making activity in options. The proposal applies to an options transaction on any options market in any standardized option made available for clearing through the Options Clearing Corporation.

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59163 (December 24, 2008), 74 FR 160.

⁴ See letter from Greg O’Connor, Compliance Manager, Wolverine Execution Services, LLC to Florence E. Harmon, Acting Secretary, Commission, dated January 23, 2009.

securities exchange, in particular, with Section 6 of the Act⁵ and the rules and regulations thereunder. Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,⁶ which requires, among other things, that the Exchange's proposal be 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.⁷

OATS is an integrated audit trail of order, quote, and trade information for Nasdaq-listed equity securities used to recreate events in the life cycle of orders and more completely monitor the trading practices of member firms. 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. Thus, OATS captures information that can be used to surveil for trading abuses that would undermine the integrity of the market and harm investors.⁸ There is an exemption from the OATS requirements for instructions to effect proprietary transactions originated by a trading desk in the ordinary course

⁵ 15 U.S.C. 78f.

⁶ 15 U.S.C. 78f(b)(5).

⁷ In approving the proposed rule change the Commission has considered the propose rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

⁸ See Securities Exchange Act Release No. 39729 (March 6, 1998), 63 FR 12559 (March 13, 1998).

of a member's market making activities.⁹ Further, the Nasdaq rules provide an exemption from OATS transmission requirements for orders entered by proprietary trading firms.¹⁰

The Commission notes that Nasdaq believes that because 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, submitting bona fide hedging transactions to OATS recording requirements provides no customer protection or equivalent regulatory benefit. Additionally, the Commission notes that Nasdaq believes that it is 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.

Similarly to the aforementioned OATS exemptions, the Commission does not believe that the limited exemption proposed in this filing by Nasdaq would negatively impact the objectives of OATS. The Commission therefore believes that it is consistent with the Act to adopt a limited exemption from the OATS order recordation requirement for bona fide hedging transactions in

⁹ See Nasdaq Rule 6951(i).

¹⁰ See Nasdaq Rule 6955(b).

Nasdaq-listed equity securities that are part of a Nasdaq's member's market making activity in options.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (SR-NASDAQ-2008-097) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Florence E. Harmon
Deputy Secretary

¹¹ 15 U.S.C. 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).