

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9-16314 Filed 7-9-09; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60220; File No. SR-NASDAQ-2009-064]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to NASDAQ Options Market Options Participant Membership Requirements, Order Entry Times and Confirmation Statements

July 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 26, 2009, The NASDAQ Stock Market LLC (“NASDAQ”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. NASDAQ has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,³ which renders the proposal effective upon filing with the Commission. 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 the Substance of the Proposed Rule Change

NASDAQ proposes to make three noncontroversial amendments to the NASDAQ Options Market (“NOM” or “Exchange”) rule. First, Chapter II, Section 2 would be amended to modify a requirement that NOM Options Participants at all times maintain membership in another options exchange. Second, Chapter VI, Sections 1, 2, 7 and 9 would be amended to change the time of day at which NOM begins accepting orders. Third, Chapter XI, Section 11, would be amended to make clear that the rule does not require confirmation statements to contain the name of the option exchange or

exchanges on which an option contract is executed.

The text of the proposed rule change is below. Proposed new language is underlined and proposed deletions are in brackets.

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Chapter II, Participation

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Section 2, Requirements for Options Participation

(a)–(e) No Change.

(f) Every Options Participant shall at all times maintain membership in another registered options exchange that is not registered solely under Section 6(g) of the Securities Exchange Act of 1934, *or in FINRA*. Options Participants that transact business with customers shall at all times be members of the FINRA.

(g)–(h) No Change.

Commentary .01 No Change.

Chapter VI, Trading Systems

Section 1, Definitions

The following definitions apply to Chapter VI for the trading of options listed on NOM.

(a)–(f) No Change.

(g) The term “Time in Force” shall mean the period of time that the System will hold an order for potential execution, and shall include:

(1) “Expire Time” or “EXPR” shall mean, for orders so designated, that if after entry into the System, the order is not fully executed, the order (or the unexecuted portion thereof) shall remain available for potential display and/or execution for the amount of time specified by the entering Participant unless canceled by the entering party. EXPR Orders shall be available for entry from [9 a.m.] *the time prior to market open specified by the Exchange on its website* until market close Eastern Time and for execution from 9:30 a.m. until market close.

(2) “Immediate or Cancel” or “IOC” shall mean for orders so designated, that if after entry into the System a marketable limit order (or unexecuted portion thereof) becomes non-marketable, the order (or unexecuted portion thereof) shall be canceled and returned to the entering participant. IOC Orders shall be available for entry from [9 a.m.] *the time prior to market open specified by the Exchange on its Web site* until market close and for potential execution from 9:30 a.m. until market close. IOC Orders entered between [9 a.m.] *the time specified by the Exchange on its Web site* and 9:30 a.m. Eastern Time will be held within the System

until 9:30 a.m. at which time the System shall determine whether such orders are marketable.

(3) “DAY” shall mean for orders so designated, that if after entry into the System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution until market close, unless canceled by the entering party, after which it shall be returned to the entering party. DAY Orders shall be available for entry from [9 a.m.] *the time prior to market open specified by the Exchange on its Web site* until market close and for potential execution from 9:30 a.m. until market close.

(4) “Good Til Cancelled” or “GTC” shall mean for orders so designated, that if after entry into System, the order is not fully executed, the order (or unexecuted portion thereof) shall remain available for potential display and/or execution unless cancelled by the entering party, or until the option expires, whichever comes first. GTC Orders shall be available for entry from [9 a.m.] *the time prior to market open specified by the Exchange on its Web site* until market close and for potential execution from 9:30 a.m. until market close.

(5) No Change.

(h) No Change.

Chapter VI, Trading Systems

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Section 2, Days and Hours of Business

(a) The System operates and shall be available to accept bids and offers and orders from [9 a.m.] *the time prior to market open specified by the Exchange on its Web site* to market close on each business day, unless modified by NOM. Orders and bids and offers shall be open and available for execution as of 9:30 a.m. Eastern Time and shall close as of 4 p.m. Eastern Time except for option contracts on fund shares or broad-based indexes which will close as of 4:15 p.m. Eastern Time.

(b)–(c) No Change.

Chapter VI, Trading Systems

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Section 7, Entry and Display Orders

(a) Entry of Orders—Participants can enter orders into the System, subject to the following requirements and conditions:

(1)–(2) No Change.

(3) Orders can be entered into the System (or previously entered orders cancelled) from [9 a.m.] *the time prior to market open specified by the*

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6).

Exchange on its Web site until market close.

(b) No Change.

Chapter VI, Trading Systems

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Section 9, Nasdaq Closing Cross

(a) Definitions. For the purposes of this rule the term:

(1)–(2) No Change.

(3) “Imbalance Only Order” or “IO” shall mean an order to buy or sell at a specified price or better that may be executed only during the Nasdaq Closing Cross and only against MOC or LOC orders. IO orders can be entered between [9 a.m.] *the time prior to market open specified by the Exchange on its Web site* and the beginning of the Closing Cross but they cannot be modified after 10 minutes prior to the Closing Cross except to increase the number of contracts. IO orders can be cancelled between 10 and 5 minutes prior to the Closing Cross only by requesting Nasdaq to correct a legitimate error (e.g., side, size, symbol, price or duplication of an order). IO orders cannot be cancelled after 5 minutes prior to the Closing Cross for any reason. IO sell (buy) orders will only execute at or above (below) the System offer (bid) at the time of the Closing Cross.

(4) “Limit On Close Order” or “LOC” shall mean an order to buy or sell at a specified price or better that is to be executed only during the Nasdaq Closing Cross. LOC orders can be entered, cancelled, and corrected without restriction between [9 a.m.] *the time prior to market open specified by the Exchange on its Web site* and 10 minutes prior to the Closing Cross. LOC orders can be cancelled between 10 and 5 minutes prior to the Closing Cross only by requesting Nasdaq to correct a legitimate error (e.g., side, size, symbol, price or duplication of an order). LOC orders cannot be cancelled after 5 minutes prior to the Closing Cross for any reason. LOC Orders will execute only at the price determined by the Nasdaq Closing Cross.

(5) “Market on Close Order or MOC” shall mean an order to buy or sell at the market that is to be executed only during the Nasdaq Closing Cross. MOC orders can be entered, cancelled, and corrected between [9 a.m.] *the time prior to market open specified by the Exchange on its Web site* and 10 minutes prior to the Closing Cross. MOC orders can be cancelled between 10 and 5 minutes prior to the Closing Cross only by requesting Nasdaq to correct a legitimate error (e.g., side, size, symbol, price or duplication of an order). MOC

orders cannot be cancelled after 5 minutes prior to the Closing Cross for any reason. MOC orders will execute only at the price determined by the Nasdaq Closing Cross.

(6)–(7) No Change.

(b) No Change.

Chapter XI, Doing Business with the Public

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Section 11, Confirmation to Public Customers

(a) No Change.

(b) The confirmation shall, by appropriate symbols, distinguish between [NOM Transactions and other transactions in options contracts] *Exchange options transactions and other transactions in option contracts though such confirmation does not need to specify the exchange or exchanges on which such option contracts were executed.*

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ 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. NASDAQ 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 purpose of the proposed rule change is to make certain clarifying and noncontroversial changes to NOM rules, as follows.

Chapter II, Section 2

Chapter II, Section 2 currently provides that a Participant must be a member of another registered options exchange that is not registered solely under Section 6(g) of the Act.⁴ When it adopted Chapter II, Section 2, Nasdaq made clear its intent not to serve as a Designated Options Examining Authority (“DOEA”), and stated that it would work with the Commission and the other registered options exchanges to ensure that each Options Participant

would have as its DOEA a registered options exchange other than Nasdaq.⁵ The proposed amendments would provide an alternative to the options exchange membership requirement, such that a NOM Participant that was a member of Financial Industry Regulatory Authority, Inc. (“FINRA”)—itself a DOEA—would not also be required to maintain membership in another registered options exchange.⁶

Chapter VI, Sections 1, 2, 7 and 9

Chapter VI currently contains a number of provisions which permit orders to be submitted to the Exchange no earlier than 9 a.m.⁷ The amendments would eliminate this restriction, and would instead provide for orders to be submitted no earlier than the time specified by NOM on its Web site. The proposed amendments are intended to provide flexibility to permit NOM to change this beginning time for order submission as circumstances may dictate from time to time, without filing a proposed rule change with the Commission. The actual hours of trading on NOM would not be affected by this proposal. The Exchange will make information regarding new order entry times available to all market participants at the same time.

Chapter XI, Section 11

Chapter XI, Section 11, currently provides that a confirmation shall, by appropriate symbols, distinguish between NOM Transactions and other transactions in options contracts. The proposed amendments would clarify that while confirmations are required to distinguish between Exchange option transactions and other transactions in option contracts, they do not need to specify the exchange or exchanges on which such option contracts were executed.⁸ This proposal is similar to

⁵ See Securities Exchange Act Release No. 55667 (April 25, 2007), 72 FR 23869 (May 1, 2007).

⁶ See Securities Exchange Act Release No. 55532 (March 26, 2007), 72 FR 15729 (April 2, 2007).

⁷ See Chapter VI, Sections 1(g)(1), 1(g)(2), 1(g)(3), and 1(g)(4), Section 2(a), Section 7(a)(3), and Sections 9(a)(3), 9(a)(4) and 9(a)(5).

⁸ The proposed filing is being done pursuant to an industry-wide initiative under the auspices of the Options Self-Regulatory Council (“OSRC”), which is a committee comprised of representatives from each of the options exchanges functioning pursuant to the OSRC Plan (the “Plan”). See Securities Exchange Act Release No. 20158 (September 8, 1983), 48 FR 41256 (September 14, 1983). The Plan is not a National Market System (“NMS”) plan under Section 11A of the Act, but rather is a plan to allocate regulatory responsibilities under Rule 17d-2 under the Act. 17 CFR 240.17d-2. As a result of the introduction of multiply listed options and the introduction of the Plan for the Purpose of Creating and Operating an Intermarket Options Market Linkage (“Options

⁴ 15 U.S.C. 78ff(g).

rule change proposals that have been filed by the American Stock Exchange LLC, the Financial Industry Regulatory Authority, Inc., the Chicago Board Options Exchange, Inc. the NASDAQ OMX PHLX, Inc., the Boston Stock Exchange, Inc., the International Securities Exchange, LLC and NYSE Arca, Inc.⁹ The Exchange believes that with the expansion of multi-listing of options and the introduction of new options exchanges, it has become operationally inefficient to require the disclosure of the market center on which an order was executed on the confirmation. As an example, a customer may have a single option order containing numerous option contracts executed on multiple exchanges. As such, it would be inefficient for the executing firm to be required to identify the exchange symbol for each contract executed on that customer's order. This proposal would clarify that written confirmations furnished to a customer will not need to specify the exchange or exchanges on which such option contracts were executed.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act¹¹ 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 Exchange believes that the proposed rules rationalize and clarify existing rules, in a manner that will benefit all market participants. In particular, the

Linkage Plan"), the contracts in a customer options order could be executed on more than one options exchange, and the significance of the options exchange, or exchanges, that execute a particular options transaction has diminished significantly. See Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000). Furthermore, the OSRC believes that in light of best execution and disclosure requirements, the usefulness of including on an options confirmation the name of the options exchange, or exchanges, on which the options transaction was effected does not outweigh the operational difficulties of capturing the information given the multiple trading of options and the application of the Options Linkage Plan industry wide.

⁹ See Securities Exchange Act Release Nos. 58814 (October 20, 2008), 73 FR 63527 (October 24, 2008); 58932 (November 12, 2008), 73 FR 69696 (November 19, 2008); 58980 (November 19, 2008), 73 FR 72091 (November 26, 2008); 59166 (December 29, 2008), 74 FR 328 (January 5, 2009); 59434 (February 23, 2009), 74 FR 9012 (February 27, 2009); 59806 (April 21, 2009), 74 FR 19254 (April 28, 2009); and 59978 (May 27, 2009), 74 FR 26451 (June 2, 2009).

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

proposed amendments to Chapter XI, Section 11 clarify the Exchange's options confirmation rule to better reflect the realities of the modern options market.

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: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 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 investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹² and Rule 19b-4(f)(6) thereunder.¹³

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.¹⁴ However, Rule 19b-4(f)(6)¹⁵ 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. The Exchange believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it would provide market participants with clarified and rationalized rules on an expedited basis. For this reason, the Commission

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6). When filing a proposed rule change pursuant to Rule 19b-4(f)(6) under the Act, an Exchange is required 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 met this requirement.

¹⁴ 17 CFR 240.19b-4(f)(6)(iii).

¹⁵ *Id.*

designates the proposal to be operative upon filing with the Commission.¹⁶

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate 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 the furtherance of the purposes of the Act.

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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2009-064 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-NASDAQ-2009-064. 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 inspection and copying 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 such filing also will be available for inspection and copying at

¹⁶ For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

the principal office of Nasdaq. 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-NASDAQ-2009-064 and should be submitted on or before July 31, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Elizabeth M. Murphy,
Secretary.

[FR Doc. E9-16315 Filed 7-9-09; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60215; File No. SR-NYSE-2006-92]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 4, To Amend NYSE Rule 452 and Corresponding Listed Company Manual Section 402.08 To Eliminate Broker Discretionary Voting for the Election of Directors, Except for Companies Registered Under the Investment Company Act of 1940, and To Codify Two Previously Published Interpretations That Do Not Permit Broker Discretionary Voting for Material Amendments to Investment Advisory Contracts With an Investment Company

July 1, 2009.

I. Introduction

On October 24, 2006, the New York Stock Exchange LLC ("Exchange" or "NYSE") 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 amend NYSE Rule 452 and corresponding Section 402.08 of the Listed Company Manual ("Manual") to eliminate broker discretionary voting for the election of directors. On May 23, 2007, the Exchange filed Amendment No. 1 to the proposed rule change to exempt companies registered under the Investment Company Act of 1940 ("1940 Act") from the ban on broker discretionary voting for the election of

directors. On June 28, 2007, the Exchange filed Amendment No. 2 to the proposed rule change, to codify two previously published interpretations³ that do not permit broker discretionary voting for material amendments to investment advisory contracts with an investment company. On February 26, 2009, the Exchange filed and withdrew Amendment No. 3 to the proposed rule change for technical reasons. On February 26, 2009, the Exchange filed Amendment No. 4 to the proposed rule change. Amendment No. 4 superseded and replaced the proposal in its entirety. The Commission published the proposed rule change, as modified by Amendment No. 4, for comment in the **Federal Register** on March 6, 2009.⁴ The Commission received 153 comments from 137 commenters on the proposal.⁵ This order approves the proposed rule change, as modified by Amendment No. 4.

II. Description of the Proposal and Background

A. Description of the Proposal

The Exchange proposes amending NYSE Rule 452 and Section 402.08 of the Manual (together, "NYSE Rule 452") to eliminate broker discretionary voting for all elections of directors at shareholder meetings held on or after January 1, 2010,⁶ whether contested or not, except for companies registered under the 1940 Act. Currently, NYSE Rule 452 permits brokers to vote without voting instructions from the beneficial owner on uncontested elections of directors.⁷ Specifically, the

³ See Securities Exchange Act Release Nos. 30697 (May 13, 1992), 57 FR 21434 (May 20, 1992) (SR-NYSE-92-05) (approval order) and 52569 (October 6, 2005), 70 FR 60118 (October 14, 2005) (SR-NYSE-2005-61) (notice of filing and immediate effectiveness).

⁴ See Securities Exchange Act Release No. 59464 (February 26, 2009), 74 FR 9864 (March 6, 2009) ("Notice").

⁵ See Comment letters in the Commission's Public Reference Room or on the Commission's Web site at <http://www.sec.gov>. For a complete list of comment letters and the short cites to letters used here, see Appendix A, attached hereto.

⁶ The proposed change to NYSE Rule 452 would not apply to a meeting that was originally scheduled to be held prior to January 1, 2010, but was properly adjourned to a date on or after the effective date.

⁷ As discussed in more detail below, under current NYSE Rule 452 a broker can vote without instruction from the beneficial owner provided "the person in the member organization giving or authorizing the giving of the proxy has no knowledge of any contest as to the action to be taken at the meeting and provided such action is adequately disclosed to stockholders and does not include authorization for a merger, consolidation or any matter which may affect substantially the rights or privileges of such stock." See current NYSE Rule 452.10(3). Items where a broker is allowed to vote without specific instructions from the beneficial

NYSE proposal would add to the list of enumerated items for which a member generally may not give a proxy to vote without instructions from the beneficial owner, the "election of directors." The proposal contains a specific exception, however, for companies registered under the 1940 Act.

In addition, the Exchange proposes amending NYSE Rule 452 to codify two previously published interpretations.⁸ First, the NYSE proposes codifying that NYSE Rule 452 would preclude broker discretionary voting on a matter that materially amends an investment advisory contract with an investment company. Second, the NYSE proposes codifying that a material amendment to an investment advisory contract would include any proposal to obtain shareholder approval of an investment company's investment advisory contract with a new investment adviser for which shareholder approval is required by the 1940 Act and the rules thereunder.

B. Background

A shareholder of a public company may hold shares either directly, as the record holder, or indirectly, as the beneficial holder, with the shares held in the name of the beneficial shareholder's broker-dealer, bank nominee, or custodian ("securities intermediary"), which is the record holder. The latter generally is referred to as holding securities in "street name."

The NYSE's discretionary voting rule dates back to 1937. Historically, the majority of shareholders held their shares directly as record holders. In 1976, for example, shareholders held approximately 71% of securities of record (in their own name), while only approximately 29% of securities were held by securities intermediaries in street name.⁹ The number of beneficial owners holding securities in street name, however, has increased significantly since 1976,¹⁰ with the result that securities intermediaries, on behalf of beneficial owners, now hold a substantial majority of exchange traded

owner under Rule 452 are often referred to as "routine" matters. NYSE Rule 452 also currently contains a list of eighteen enumerated items where the broker may not vote without specific voting instructions from the beneficial owner. See Notice, *supra* note 4 and *infra* note 14.

⁸ The codification will place the interpretations into the rule text of Rule 452.

⁹ Final Report of the U.S. Securities and Exchange Commission on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other Than the Name of the Beneficial Owner of Such Securities (December 3, 1976), at 54.

¹⁰ This is due, among other things, to the advent of margin accounts, technological developments, and clearing efficiencies.

¹⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.