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August 22, 2012

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number SR-NASDAQ-2012-090

Dear Ms. Murphy:

UBS Securities LLC (“UBS”) appreciates the opportunity to comment on Securities Exchange Act Release No. 34-67507 (the “Release”).¹ UBS is a registered broker-dealer and investment advisor that provides financial services to private, corporate and institutional clients. We commend the Securities and Exchange Commission (the “Commission”) for considering rule amendments that could facilitate the ability of Nasdaq members and investors to file claims for losses resulting from Nasdaq’s unprecedented systemic failures during the initial public offering of Facebook, Inc. on May 18, 2012 (the “Facebook IPO”).

We are concerned, however, that the rule amendments as proposed are inadequate to address the magnitude of Nasdaq’s unprecedented failures. Specifically, we are concerned that (i) \$62 million is insufficient to provide restitution to the market participants who were directly harmed by Nasdaq’s systems failures and decision-making during the Facebook IPO, (ii) the types of claim-eligible trading losses are too narrowly defined and should be expanded to include the full extent of losses caused by Nasdaq, and (iii) the requirement that participants in the program release other legitimate claims they may have against Nasdaq is fundamentally unfair.

¹ July 26, 2012; 77 Fed. Reg. 45706 (Aug. 1, 2012).

1. \$62 million is insufficient to provide restitution to injured market participants.

First, and perhaps most significantly, the proposed accommodation policy unfairly sets a monetary cap that is vastly disproportionate to reported trading losses resulting from the Facebook IPO. Market participants reportedly suffered losses in excess of \$500 million in the aggregate as a direct result of Nasdaq's actions in the Facebook IPO.² UBS alone suffered losses in excess of \$350 million, the vast majority of which resulted directly from Nasdaq's unprecedented failure to deliver execution reports for tens of thousands of trades executed in the opening cross for the Facebook IPO. Nasdaq's failure to complete the standard opening cross procedures and to transmit execution reports for the Facebook IPO cross caused tremendous, unanticipated stress on UBS's retail market making system. As a result of this stress, and consistent with UBS system protocols designed to ensure that our clients' orders are filled consistent with regulatory guidelines and our own standards, multiple orders were entered before the necessary confirmations were received from Nasdaq and our systems were able to process them. UBS ended up with a substantial unintended long position in Facebook shares, the liquidation of which – due to the rapid decline in the price of Facebook stock both on the day of the IPO and in the days and weeks after – resulted in losses in excess of \$350 million. Simply put, Nasdaq's proposal to pay \$62 million *in the aggregate* for all Facebook-related claims is woefully inadequate. We strongly urge the Commission to reconsider the level of the proposed cap in light of the actual damages caused by Nasdaq in its mismanagement of the Facebook IPO.

2. The proposed types of claim-eligible trading losses are too narrowly defined.

The proposed rule too narrowly defines the types of trading losses eligible for compensation. Section (b)(3)(A) states that “[a]ll claims for compensation . . . shall arise solely from realized or unrealized direct trading losses arising from” just *four* types of specific orders.³ Furthermore, the proposed language of Section (b)(3)(C) expressly

² See UBS Investor Release, Second Quarter 2012 Results, July 31, 2012, *available at* www.ubs.com/global/en/about_ubs/investor_relations/releases/news-display-investor-releases.html/en/2012/07/31/2012_07_31a.html (reporting losses of CHF 349 million, or U.S.\$357 million in connection with the Facebook IPO); Knight Capital Group, Q2 2012 Earnings Press Release, July 18, 2012, *available at* www.knight.com/investorRelations/pressReleases2.asp?compid=105070&releaseID=1715693 (reporting losses of \$35.4 million in connection with the Facebook IPO).

³ The specific Cross orders eligible for compensation claims are: “(i) SELL Cross orders that were submitted between 11:11 a.m. ET and 11:30 a.m. ET on May 18, 2012, that were priced at \$42.00 or less, and that did not execute. (ii) SELL Cross orders that were submitted between 11:11 a.m. ET and 11:30 a.m. ET on May 18, 2012, that were priced at \$42.00 or less, and that executed at a price below \$42.00. (iii) BUY Cross orders priced exactly at \$42 or less and that were executed in the Cross but not immediately confirmed. (iv) CROSS orders priced above \$42.00 and that were executed in the Cross but not immediately confirmed, but only to the extent entered with respect to a customer that was permitted by the member to cancel its order prior to 1:50 p.m. and for which a request to cancel the order was submitted to Nasdaq by the member,

states that “[a]lleged losses arising in any form or that in any way result from any other causes . . . shall not be considered losses subject to potential accommodation” by Nasdaq.⁴ Significantly, the proposed rule excludes any and all losses that resulted from downstream operational, technological and customer issues (*e.g.*, losses resulting from “individual member firm technology issues or system failures, or member firm operational issues or operational failures”).⁵ To exclude these losses is to ignore a very substantial portion of the damage caused by Nasdaq’s mismanagement of the Facebook IPO. Nasdaq’s systems failures – most importantly, its unprecedented failure to deliver execution reports for trades executed in the opening cross for more than *two hours* after the opening of trading in Facebook stock – caused direct and severe damage to the systems of UBS and reportedly other market participants, and led directly to the trading losses suffered by UBS. In the interest of fundamental fairness, the definition of claim-eligible trading losses should be broadened to include such losses.

3. *The requirement that participants release Nasdaq from other legitimate claims is fundamentally unfair.*

The proposed rule unfairly requires participants to release Nasdaq from all claims related to the Facebook IPO as a condition to receiving compensation through the member accommodation program. Specifically, Section (b)(3)(H) requires a release “of all claims by [a member] or its affiliates against Nasdaq or its affiliates for losses that arise out of, are associated with, or relate in any way to the Facebook, Inc. IPO Cross or to any actions or omissions related in any way to that Cross, including but not limited to the execution or confirmation of orders in Facebook, Inc. on May 18, 2012.”⁶

The release requirement creates a fundamentally unfair dilemma for members: choose to execute the release and participate in the accommodation program – but at the risk of receiving a payment that, given the \$62 million cap and limitations on the types of claim-eligible trades, is vastly disproportionate to its actual losses resulting from Nasdaq’s unprecedented system failures on May 18 – or else forego participation and pursue potentially cost- and resource-intensive alternative avenues of recovery. If the rule is adopted as proposed, we suspect that a number of firms may be left with no choice but to decline to participate in the program in order to preserve their rights. This would lead to a perverse outcome, with the firms that suffered the smallest harm participating in the program and those that suffered the greatest harm excluded from the program.

also prior to 1:50 p.m.” NASDAQ Stock Market Form Form 19b-4, File No. SR-2012-090, July 23, 2010 at Ex. 5 (“NASDAQ Form 19b-4”).

⁴ NASDAQ Form 19b-4 at Ex. 5; *see also* Release at 17.

⁵ NASDAQ Form 19b-4 at Ex. 5.

⁶ NASDAQ Form 19b-4 at Ex. 5; *see also* Release at 24.

In addition, the proposed rule clearly intends for recovery to be used (where appropriate) not only for the benefit of broker-dealers, but also for the benefit of their customers.⁷ To require market participants to release their claims as a condition of obtaining redress for the benefit of their customers would be unreasonable and unfair.

For these reasons, we strongly urge the Commission to work with Nasdaq to reformulate the proposed rule to eliminate the condition and to clarify that participation in the program is without prejudice to any other legitimate claims a participant may have against Nasdaq.

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UBS appreciates the opportunity to comment on the Release. Again, we commend the Commission for considering rule amendments that would facilitate the recovery of losses by market participants harmed by Nasdaq's gross mismanagement of the Facebook IPO. However, the current proposed rule – one that limits the overall pool of available funds to just \$62 million, notwithstanding that Nasdaq caused market participants to lose *hundreds of millions* of dollars as a result of its failures, limits losses to particular categories of claims that do not account for members who were harmed by downstream system consequences resulting from Nasdaq's failures, and requires waiver of any and all other claims against Nasdaq – is simply neither fair nor equitable. Accordingly, we urge the Commission to consider UBS's comments before implementing any changes to Rule 4626.

Respectfully submitted,

UBS Securities LLC

By: 

Mark Shelton
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⁷ See, e.g., Release at 29 (Nasdaq believes that the “proposed process for distributing accommodation payments will benefit investors and promote the public interest by providing incentives for members to use accommodation funds *for the benefit of investors*”) (emphasis added).