

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51722; File No. SR-NASD-2004-009)

May 20, 2005

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and
Amendment Nos. 1, 2, 3, and 4 Thereto by the National Association of Securities
Dealers, Inc. to Modify Nasdaq's Clearly Erroneous Rule

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 January 21, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("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. On August 23, 2004, Nasdaq submitted Amendment No. 1 to the proposed rule change.³ On May 5, 2005, Nasdaq submitted Amendment No. 2 to the proposed rule change.⁴ On May 11, 2005, Nasdaq submitted Amendment No. 3 to the proposed rule change.⁵ On May 16, 2005, Nasdaq submitted Amendment No. 4 to the proposed rule change.⁶ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated August 20, 2004 ("Amendment No. 1"). Amendment No. 1 replaced the original rule filing in its entirety.

⁴ See Form 19b-4, dated May 5, 2005 ("Amendment No. 2"). Amendment No. 2 replaced Amendment No. 1 in its entirety.

⁵ See Partial Amendment, dated May 11, 2005 ("Amendment No. 3"). Amendment No. 3 revised incorrect cross-references in the rule text.

⁶ See Partial Amendment, dated May 16, 2005 ("Amendment No. 4"). Amendment No. 4 revised an incorrect paragraph designation in the rule text.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rule 11890 to better serve the current market environment. Nasdaq proposes to implement the proposed rule change immediately upon approval by the Commission. Below is the text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in [brackets].⁷

* * * * *

11890. Clearly Erroneous Transactions

(a) Authority to Review Transactions Pursuant to Complaint of Market Participant

(1) Scope of Authority.

(A) Subject to the limitations described in paragraph (a)(2)(C) below,
 o[O]fficers of Nasdaq designated by its President shall, pursuant to the procedures set forth in paragraph (a)(2) below, have the authority to review any transaction arising out of the use or operation of any execution or communication system owned or operated by Nasdaq and approved by the Commission, including transactions entered into by a member of a national securities exchange with unlisted trading privileges in Nasdaq-listed securities (a "UTP Exchange") through such a system; provided, however, that the parties to the transaction must be readily identifiable by Nasdaq through its systems. A Nasdaq officer shall review transactions with a view toward maintaining a fair and orderly market and the protection of investors and the public interest. Based upon this review, the officer shall decline to act upon a disputed transaction if the officer believes that

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The proposed rule change, as amended, is marked to show changes from the rule as it appears in the electronic NASD Manual available at www.nasd.com.

the transaction under dispute is not clearly erroneous. If the officer determines the transaction in dispute is clearly erroneous, however, he or she shall declare that the transaction is null and void or modify one or more terms of the transaction. When adjusting the terms of a transaction, the Nasdaq officer shall seek to adjust the price and/or size of the transaction to achieve an equitable rectification of the error that would place the parties to a transaction in the same position, or as close as possible to the same position, as they would have been in had the error not occurred. For the purposes of this Rule, the terms of a transaction are clearly erroneous if the transaction is eligible for review under the Rule and if [when] there is an obvious error in any term, such as price, number of shares or other unit of trading, or identification of the security.

(2) Procedures for Reviewing Transactions

(A) Any member, member of a UTP Exchange, or person associated with any such member that seeks to have a transaction reviewed pursuant to paragraph (a)(1) hereof shall submit a written complaint to Nasdaq MarketWatch in accordance with the following time parameters:

(i) for transactions occurring at or after 9:30 a.m., Eastern Time, but prior to 10:00 a.m., Eastern Time, complaints must be received by Nasdaq by 10:30 a.m., Eastern Time; and

(ii) for transactions occurring prior to 9:30 a.m., Eastern Time and at or after 10:00 a.m., Eastern Time, complaints must be received by Nasdaq within thirty minutes of execution time.

(B) Once a complaint has been received in accord with [sub]paragraph

(a)(2)(A) above[:], [(i)] the complainant shall have up to thirty (30) minutes, or such longer period as specified by Nasdaq staff, to submit any supporting written information concerning the complaint necessary for a determination under paragraph (a)(1)[:]. Such supporting information must include the approximate time of transaction(s), security symbol, number of shares, price(s), contra broker(s) if the transactions are not anonymous, Nasdaq system used to execute the transactions, and the reason the review is being sought. If Nasdaq receives a complaint that does not contain all of the required supporting information, Nasdaq shall immediately notify the filer that the complaint is deficient.

(C) Following the expiration of the period for submission of supporting material, a Nasdaq officer shall determine whether the complaint is eligible for review. A complaint shall not be eligible for review under paragraph (a) unless:

(i) the complainant has provided all of the supporting information required under paragraph (a)(2)(B), and

(ii) The price of transaction to buy (sell) that is the subject of the complaint is greater than (less than) the best offer (best bid) by an amount that equals or exceeds the minimum threshold set forth below:

<u>Inside Price</u>	<u>Minimum Threshold</u>
<u>\$0 - \$0.99</u>	<u>$\\$0.02 + (0.10 \times \text{Inside Price})$</u>
<u>\$1.00 - \$4.99</u>	<u>$\\$0.12 + (0.07 \times (\text{Inside Price} - \\$1.00))$</u>
<u>\$5.00 - \$14.99</u>	<u>$\\$0.40 + (0.06 \times (\text{Inside Price} - \\$5.00))$</u>
<u>\$15 or more</u>	<u>\$1.00</u>

For a transaction to buy (sell) a Nasdaq listed security, the inside price

shall be the best offer (best bid) in Nasdaq at the time that the first share of the order that resulted in the disputed transaction was executed, and for a transaction to buy (sell) an exchange-listed security, the inside price shall be the national best offer (best bid) at the time that the first share of the order that resulted in the disputed transaction was executed.

(D) If a complaint is determined to be eligible for review, [(ii)] the counterparty to the trade shall be notified of the complaint via telephone by Nasdaq staff and shall have up to thirty (30) minutes, or such longer period as specified by Nasdaq staff, to submit any supporting written information concerning the complaint necessary for a determination under paragraph (a)(1)[; and]. [(iii)] [e]Either party to a disputed trade may request the written information provided by the other party pursuant to [this] [sub]paragraph (a)(2).

(E) [(C)] Notwithstanding [sub]paragraphs (a)(2)(B) and (D) above, once a party to a disputed trade communicates that it does not intend to submit any further information concerning a complaint, the party may not thereafter provide additional information unless requested to do so by Nasdaq staff. If both parties to a disputed trade indicate that they have no further information to provide concerning the complaint before their respective thirty-minute information submission period has elapsed, then the matter may be immediately presented to a Nasdaq officer for a determination pursuant to paragraph (a)(1) above.

(F) [(D)] Each member, member of a UTP Exchange, or person associated with any such member involved in the transaction shall provide Nasdaq with any information that it requests in order to resolve the matter on a timely basis

notwithstanding the time parameters set forth in [sub]paragraphs (a)(2)(B) and (D) above.

(G) [(E)] Once a party has applied to Nasdaq for review and the transaction has been determined to be eligible for review, the transaction shall be reviewed and a determination rendered, unless (i) both parties to the transaction agree to withdraw the application for review prior to the time a decision is rendered pursuant to paragraph (a)(1), or (ii) the complainant withdraws its application for review prior to the notification of counterparties pursuant to paragraph (a)(2)(D).

(b) No change.

(c) Review by the Market Operations Review Committee (“MORC”)

(1) Subject to the limitations described in paragraph (c)(2), a [A] member, member of a UTP Exchange, or person associated with any such member may appeal a determination made under subsection (a) to the MORC. A member, member of a UTP Exchange, or person associated with any such member may appeal a determination made under subsection (b) to the MORC unless the officer making the determination also determines that the number of the affected transactions is such that immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest. An appeal must be made in writing, and must be received by Nasdaq within thirty (30) minutes after the person making the appeal is given notification of the determination being appealed, except that if Nasdaq notifies the parties of action taken pursuant to paragraph (b) after 4:00 p.m., the appeal must be received by Nasdaq by 9:30 a.m. the next trading day. Once a written appeal has been received, the counterparty to

the trade that is the subject of the appeal will be notified of the appeal and both parties shall be able to submit any additional supporting written information up until the time the appeal is considered by the [Committee] MORC. Either party to a disputed trade may request the written information provided by the other party during the appeal process. An appeal to the [Committee] MORC shall not operate as a stay of the determination being appealed, and the scope of the appeal shall be limited to trades to which the person making the appeal is a party. Subject to the limitations described in paragraph (c)(2), o[O]nce a party has appealed a determination to the [Committee] MORC, the determination shall be reviewed and a decision rendered, unless (i) both parties to the transaction agree to withdraw the appeal prior to the time a decision is rendered by the [Committee]MORC, or (ii) the party filing the appeal withdraws its appeal prior to the notification of counterparties under this paragraph (c)(1). Upon consideration of the record, and after such hearings as it may in its discretion order, the [Committee] MORC, pursuant to the standards set forth in this section, shall affirm, modify, reverse, or remand the determination.

(2) If a Nasdaq officer determines under paragraph (a)(2)(C) that a transaction is not eligible for review, a party appealing such determination must allege in its appeal a mistake of material fact upon which it believes the officer's determination was based. If the MORC concludes that an appeal of such a determination does not allege a mistake of material fact, the determination shall become final and binding. If the MORC concludes that an appeal of such a determination alleges a mistake of material fact, Nasdaq shall notify the counterparty to the transaction and the determination shall be reviewed by the MORC as provided under paragraph (c)(1). If the MORC then finds that the

determination was based on a mistake of material fact, the MORC shall remand the matter for adjudication under paragraph (a); otherwise, the determination shall become final and binding.

(3) [(2)] The decision of the [Committee] MORC pursuant to an appeal, or a determination by a Nasdaq officer that is not appealed, shall be final and binding upon all parties and shall constitute final Association action on the matter in issue. Any determination by a Nasdaq officer pursuant to paragraph (a) or (b) or any decision by the [Committee] MORC pursuant to paragraph (c)[(1)] shall be rendered without prejudice as to the rights of the parties to the transaction to submit their dispute to arbitration.

(d) Communications

(1) All materials submitted to Nasdaq or the MORC pursuant to this Rule shall be submitted [via facsimile machine and] within the time parameters specified herein via such telecommunications procedures as Nasdaq may announce from time to time in an NASD Notice to Members or Nasdaq Head Trader Alert [; provided, however, that if requested, Nasdaq staff may authorize submission of material via electronic mail on a case-by-case basis]. Materials shall be deemed received at the time indicated by the telecommunications equipment ([i.e.]e.g., facsimile machine or computer) receiving the materials. Nasdaq, in its sole and absolute discretion, reserves the right to reject or accept any material that is not received within the time parameters specified herein.

(2) Nasdaq shall provide affected parties with prompt notice of determinations under this Rule via facsimile machine, electronic mail, or telephone (including voicemail); provided, however, that if an officer nullifies or modifies a large number of transactions pursuant to subsection (b), Nasdaq may instead provide notice to parties via

[the] Nasdaq [Workstation II Service] telecommunications protocols, a press release, or any other method reasonably expected to provide rapid notice to many market participants.

IM-11890-1. No change.

IM-11890-2. Review by Panels of the MORC. For purposes of Rule 11890 and other NASD rules that permit review of Nasdaq decisions by the MORC, a decision of the MORC may be rendered by a panel [of three or more members] of the MORC. In the case of a review of a determination by a Nasdaq officer under Rule 11890(a)(2)(C) that a transaction is not eligible for review (including a review of the sufficiency of allegations contained in an appeal regarding such a determination), the panel may consist of one or more members of the MORC, provided that no more than 50 percent of the members of any panel are directly engaged in market making activity or employed by a member whose revenues from market making activity exceed ten percent of its total revenues. In all other cases, the panel shall consist of three or more members of the MORC, provided that no more than 50 percent of the members of any panel are directly engaged in market making activity or employed by a member firm whose revenues from market making activity exceed ten percent of its total revenues.

IM-11890-3. Application of Rule 11890(a)(2)(C). The following example is intended to assist market participants in understanding the minimum price deviation thresholds in subparagraph (a)(2)(C) and their effect on the eligibility of transactions for review under Rule 11890.

ABCD, a Nasdaq listed security, has an inside market of (bid) \$12.00 – \$12.05 (ask). Market Maker A (MMA) enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. The size of the order is such that the order ‘sweeps’ the Nasdaq

Market Center order file, which reflects 1,000 shares of liquidity offered at each of ten prices ranging from \$12.05 to \$12.95. Executions occur, moving through the depth of file, as follows:

- Trade #1 - 1000 shares @ \$12.05 (9000 remaining)
- Trade #2 - 1000 shares @ \$12.10 (8000 remaining)
- Trade #3 - 1000 shares @ \$12.15 (7000 remaining)
- Trade #4 - 1000 shares @ \$12.25 (6000 remaining)
- Trade #5 - 1000 shares @ \$12.35 (5000 remaining)
- Trade #6 - 1000 shares @ \$12.45 (4000 remaining)
- Trade #7 - 1000 shares @ \$12.55 (3000 remaining)
- Trade #8 - 1000 shares @ \$12.65 (2000 remaining)
- Trade #9 - 1000 shares @ \$12.90 (1000 remaining)
- Trade #10 - 1000 shares @ \$12.95 (complete)

The inside offer at the time the first share of the order was executed is \$12.05, so the minimum price deviation threshold is determined using the following formula:

$$\underline{\$0.40 + (0.06 \times (\text{Inside Price} - \$5.00)) = \$0.40 + (0.06 \times (\$12.05 - \$5.00)) = \$0.82}$$

Thus, to be eligible for review, a transaction must be at a price that is at least \$0.82 higher than the original best offer price (i.e., \$12.05 + \$0.82 = \$12.87). MMA could petition for review of trades #9 and #10, priced at \$12.90 and \$12.95 respectively, but trades #1 through #8 would not be eligible for review. The sole basis for an appeal to the MORC of the determination that trades #1 through #8 are not eligible for review would be an assertion of a mistake of material fact. For example, an appeal could be based upon an assertion that the Nasdaq officer had made an arithmetical error in determining the minimum price deviation threshold, or had erred in determining the applicable inside price.

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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

In April 1990, the Commission approved an NASD proposal to add Section 70 to the Uniform Practice Code (now NASD Rule 11890) to permit the NASD to declare clearly erroneous transactions null and void if they arise out of the use or operation of any automated quotation, execution or communication system owned or operated by the NASD.⁸ Previously, the NASD had no authority to cancel a transaction, even if one or more terms of the transaction clearly was in error. NASD Rule 11890 gives Nasdaq the ability to resolve, in an expeditious manner, disputes involving obvious errors.

In 1998, an amendment to NASD Rule 11890 was approved which provided additional specificity regarding declarations of clearly erroneous transactions. The amendment clarified procedures and provided Nasdaq officials with the authority to modify the price or size of an erroneous transaction, alter the period in which to submit complaints and subsequent appeals, and cancel or modify clearly erroneous transactions on their own motion during system

⁸ See Securities Exchange Act Release No. 27867 (Apr. 2, 1990), 55 FR 12978 (Apr. 6, 1990) (SR-NASD-90-6).

disruptions or malfunctions.⁹ In January 2003, NASD Rule 11890 was amended, to its current state, to further clarify procedures and the scope of Nasdaq officials' authority to cancel or modify clearly erroneous transactions on their own motion to maintain fair and orderly markets and protect investors and the public interest.¹⁰

In June 2003, Nasdaq MarketWatch assumed responsibility for administering Rule 11890.¹¹ As a corollary to assuming responsibilities, MarketWatch and Nasdaq staff undertook a review of the clearly erroneous process and its application in an automated order execution environment. Nasdaq staff researched NASD Rule 11890 with respect to erroneous trades as well as erroneous trade procedures used by other exchanges and ECNs.¹² As a result of the review, Nasdaq is proposing the following changes to NASD Rule 11890: (1) clarifying the requirements for complaint documentation; (2) establishing minimum price deviation thresholds for seeking a review; (3) stipulating that complaints failing to meet documentation requirements or minimum price deviation thresholds would be rejected, and limiting the grounds for review of such rejections by the MORC; and (4) making several other clarifying changes to the rule text.

Clarify Requirements For Complaint Documentation

The proposed rule change would amend NASD Rule 11890 to require that a complaint, to be eligible for review, include the following information: approximate time of transaction(s), security symbol, number of shares, price(s), contra broker(s) if transactions are not anonymous,

⁹ See Securities Exchange Act Release No. 39550 (Jan. 14, 1998), 63 FR 4333 (Jan. 28, 1998) (SR-NASD-96-51).

¹⁰ See Securities Exchange Act Release No. 47233 (Jan. 22, 2003), 68 FR 4525 (Jan. 29, 2003) (SR-NASD-2002-127).

¹¹ The rule had previously been administered by Nasdaq's Market Operations Department.

¹² See PCX Equities, Inc. Rule 7.11 and www.tradearca.com/exchange/pdfs/ErroneousExecutionPolicy.pdf; instinetgroup.com/legal/trade_policy_guidelines.shtml. Telephone conversation between John M. Yetter, Senior Associate General Counsel, Nasdaq, David Hsu, Special Counsel, Division, Commission, on May 11, 2005 (clarifying that the correct citation is PCX Equities, Inc. Rule 7.11 and not Pacific Exchange Inc. Rule 7.11).

the Nasdaq system used to execute the transactions, and the reason that the review is being sought. Nasdaq believes that the proposed changes provide clarity for market participants as to the minimum data necessary to seek review, allowing for meaningful review as well as providing a better understanding of the issues in question to the contra (non-requesting) participant of the situation. Nasdaq also believes that requiring a member to assert a basis for seeking a review increases transparency in the process and provides clarity to market participants.

Establish Minimum Price Deviation Thresholds

The proposed rule change establishes a minimum price deviation threshold that would provide a “bright line” rule standard for determining when transactions are considered eligible for review. A transaction price that meets these thresholds does not automatically trigger a clearly erroneous determination, but, if the transaction price does not meet these thresholds, the transaction would not be considered for clearly erroneous review. Thus, there would be a conclusive presumption that a transaction to buy (sell) is not clearly erroneous unless its price is greater than (less than) the best offer (best bid) by an amount that equals or exceeds the minimum threshold set forth below:

<u>Inside Price</u>	<u>Minimum Threshold</u>
\$0 - \$0.99	$\$0.02 + (0.10 \times \text{Inside Price})$
\$1.00 - \$4.99	$\$0.12 + (0.07 \times (\text{Inside Price} - \$1.00))$
\$5.00 - \$14.99	$\$0.40 + (0.06 \times (\text{Inside Price} - \$5.00))$
\$15 or more	\$1.00

For a transaction to buy (sell) a Nasdaq listed security, the inside price shall be the best offer (best bid) in Nasdaq at the time that the first share of the order that resulted in the disputed transaction was executed, and for a transaction to buy (sell) an exchange-listed security, the

inside price shall be the national best offer (best bid) at the time that the first share of the order that resulted in the disputed transaction was executed.¹³ Nasdaq is also proposing to adopt IM-11890-3 to assist market participants in understanding the minimum price deviation thresholds by providing an example of their application.

Nasdaq believes that the threshold at each price tier is set at a level that would protect normal trading activity from challenge and thereby allow a focus on trades whose distance away from the inside market may be seen to support a claim as to their inadvertence. Nasdaq believes that this approach would better balance the goals of rapid and efficient execution and price discovery while protecting market participants from inadvertent price volatility and market confusion that can result from a mis-priced or mis-sized quote/order. As authority under NASD Rule 11890 is exercised “with a view toward maintaining a fair and orderly market and the protection of investors and the public interest,” Nasdaq believes that establishing price deviation thresholds for review offers guidance to defining “clearly erroneous” and, as such, provides clarity, transparency, and consistency for review. Nasdaq also believes that certainty in pricing is crucial to an orderly market.

Reject, As Ineligible, Non-Conforming Clearly Erroneous Petitions

In conjunction with providing guidelines as to required minimum documentation and minimum thresholds, the proposed rule sets out clearly defined consequences for failing to meet minimum filing requirements. Except as provided below, members failing to meet the minimum documentation requirements within the initial 30-minute filing time frame or failing to meet the minimum price deviation parameters would not be eligible to maintain an action under NASD

¹³ Trades in exchange-listed securities are reviewed under NASD Rule 5265, which incorporates Rule 11890 by reference.

Rule 11890. The reviewing Nasdaq staff would notify the filer immediately of any deficiencies in the filing so that the filer can revise and submit, if possible, within the 30-minute time frame. In cases where a claim is not eligible for review because the transaction does not meet the minimum price deviation thresholds or because the complaint does not include the supporting documentation required by paragraph (a)(2)(B), the party appealing to the MORC must allege a mistake of material fact upon which it believes the officer's determination was based. The MORC would not substantively¹⁴ review an appeal of such a determination that does not allege a mistake of material fact. Accordingly, if a panel of the MORC comprised of one or more non-market-making member finds that a mistake has not been alleged in an appeal, Nasdaq is not required to notify the counterparty to the trade concerning the appeal or to submit the decision for further review by the MORC. If the panel of the MORC concludes that the appeal alleges a mistake of material fact, the counterparty would be notified and the determination would be reviewed by the same panel.¹⁵ If the MORC then finds that the determination was based on a mistake of material fact, the MORC shall remand the matter for adjudication under paragraph (a); otherwise, the determination shall become final and binding.

Other Proposed Changes

In order to clarify the Rule text and expedite procedures under the Rule, Nasdaq is proposing the following additional changes:

¹⁴ Telephone conversation among John M. Yetter, Senior Associate General Counsel, Nasdaq, Terri Evans, Special Counsel, Division, Commission, and David Hsu, Special Counsel, Division, Commission, on May 9, 2005 (clarifying that the MORC would not substantively review an appeal of a determination that does not allege a mistake of material fact).

¹⁵ Id. (clarifying that panels may consist of more than one member of the MORC).

- The text of IM-11890-2 would be amended to reflect the proposed use of panels of one or more members¹⁶ of the MORC for purposes of reviewing determinations under proposed NASD Rule 11890(a)(2)(C) that a transaction is not eligible for review.
- The rule would be amended to provide that adjudication of a complaint or an appeal is not required if the party submitting the complaint or appeal withdraws it prior to the notification of counterparties.
- The rule would be amended to provide that appeals are focused solely on trades to which the party submitting the appeal is a party. Thus, for example, if Broker A submits a complaint regarding two separate trades with Broker B and Broker C, the trades are broken, and Broker B appeals but Broker C does not, the appeal would focus solely on the trade between Broker A and Broker B.
- The rule currently provides that facsimile machines are the preferred method for submitting materials regarding clearly erroneous adjudications. Nasdaq proposes to amend the rule to provide that parties should use such telecommunications methods as are announced from time to time through an NASD Notice to Members or a Nasdaq Head Trader Alert. Pursuant to this change, Nasdaq proposes to make electronic mail the preferred method, and may, in the future, develop a web-based form for use in submitting complaints and appeals. In light of the upcoming retirement of the Nasdaq Workstation II Service, Nasdaq is also proposing to replace a reference to that service with a more general reference to Nasdaq telecommunications protocols.
- Cross references in the rule would be amended to reflect preferred NASD style, and references to the “Committee” would be replaced with references to the “MORC.”

¹⁶Id.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹⁷ in general, and with Section 15A(b)(6) of the Act,¹⁸ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, 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. Nasdaq believes that the proposed rule change would provide market participants with clearer information about Nasdaq's requirements for filing a clearly erroneous petition. In Nasdaq's view, this in turn would ensure that Nasdaq staff and the MORC would have more complete information when adjudicating a clearly erroneous petition, and would also provide Nasdaq staff with clearer bases for rejecting clearly erroneous petitions that fail to provide complete information or that relate to transactions at prices sufficiently close to the inside market that they should not be deemed clearly erroneous.

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

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is 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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds

¹⁷ 15 U.S.C. 78q-3.

¹⁸ 15 U.S.C. 78q-3(b)(6).

such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- A. by order approve such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be 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, as amended, 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-NASD-2004-009 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-009. 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 Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. 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-NASD-2004-009 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Margaret H. McFarland
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).