

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-65104; File No. SR-NASDAQ-2011-116)

August 11, 2011

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Clearly Erroneous Rule in Light of Changes to the Single Stock Trading Pause Process

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 August 8, 2011, The NASDAQ Stock Market LLC (“Exchange”), filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. 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

The Exchange proposes to extend the pilot period of recent amendments to Rule 11890, concerning clearly erroneous transactions, so that the rule will continue to operate in the same manner after changes to the single stock trading pause process are effective.

The text of the proposed rule change is available from NASDAQ’s website at <http://nasdaq.cchwallstreet.com/Filings/>, at NASDAQ’s principal office, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange 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

Background

The Exchanges³ and FINRA, in consultation with the Commission, have made changes to their respective rules in a concerted effort to strengthen the markets after the severe market disruption that occurred on May 6, 2010. One such effort by the Exchanges and FINRA was to adopt a uniform trading pause process during periods of extraordinary market volatility as a pilot in S&P 500 Index stocks ("Pause Pilot")⁴, approved by the Commission on June 10, 2010.⁵ On September 10, 2010, the Commission approved the Exchanges' and FINRA's proposals to add

³ For purposes of this filing, the term "Exchanges" refers collectively to BATS Exchange, Inc., BATS Y-Exchange, Inc., NASDAQ OMX BX, Inc., Chicago Board Options Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., International Securities Exchange LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE Amex LLC, NYSE Arca, Inc., National Stock Exchange, Inc., and NASDAX [sic] OMX PHLX LLC.

⁴ Rule 4120(a)(11). The pauses under Rule 4120(a)(11) occur when a security's price moves by the applicable percentage within a five minute period between 9:45 a.m. and 3:35 p.m., or in the case of an early scheduled close, 25 minutes before the close of trading. Such pauses last for five minutes. At the conclusion of the pause period, the security is opened pursuant to the Halt Cross process under Rule 4753.

⁵ Securities Exchange Act Release Nos. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (File Nos. SR-BATS-2010-014; SR-EDGA-2010-01; SR-EDGX-2010-01; SR-BX-2010-037; SR-ISE-2010-48; SR-NYSE-2010-39; SR-NYSEAmex-2010-46; SR-NYSEArca-2010-41; SR-NASDAQ-2010-061; SR-CHX-2010-10; SR-NSX-2010-05; and SR-CBOE-2010-047); 62251 (June 10, 2010), 75 FR 34183 (June 16, 2010) (SR-FINRA-2010-025).

the securities included in the Russell 1000 Index and specified ETPs to the Pause Pilot.⁶ On September 10, 2010, the Commission also approved changes proposed by the Exchanges to amend certain of their respective rules to set forth clearer standards and curtail their discretion with respect to breaking erroneous trades.⁷ The changes, among other things, provided uniform treatment of clearly erroneous execution reviews in the event of transactions that result in the issuance of an individual stock trading pause pursuant to the Pause Pilot on the listing market and those that occur up to the time the trading pause message is received by the other markets from the single plan processor responsible for consolidation and dissemination of information for the security (“Latency Trades”).

As part of the changes to the clearly erroneous process under Rule 11890, NASDAQ replaced existing Rule 11890(a)(2)(C)(4) with all new text to provide clarity in the clearly erroneous process when a Pause Pilot trading pause is triggered. Pursuant to Rule 11890(a)(2)(C)(4), Latency Trades will be broken by the exchange if they exceed the applicable percentage from the Reference Price, as noted in the table found under Rule 11890(a)(2)(C)(1).⁸

⁶ See e.g., Securities Exchange Act Release Nos. 62884 (September 10, 2010), 75 FR 56618 (September 16, 2010) (File Nos. SR-BATS-2010-018; SR-BX-2010-044; SR-CBOE-2010-065; SR-CHX-2010-14; SR-EDGA-2010-05; SR-EDGX-2010-05; SR-ISE-2010-66; SR-NASDAQ-2010-079; SR-NYSE-2010-49; SR-NYSEAmex-2010-63; SR-NYSEArca-2010-61; and SR-NSX-2010-08); and Securities Exchange Act Release No. 62883 (September 10, 2010), 75 FR 56608 (September 16, 2010) (SR-FINRA-2010-033).

⁷ Securities Exchange Act Release No. 62886 (September 16 [sic], 2010), 75 FR 56613 (September 16, 2010) (File Nos. SR-BATS-2010-016; SR-BX-2010-040; SR-CBOE-2010-056; SR-CHX-2010-13; SR-EDGA-2010-03; SR-EDGX-2010-03; SR-ISE-2010-62; SR-NASDAQ-2010-076; SR-NSX-2010-07; SR-NYSE-2010-47; SR-NYSEAmex-2010-60; and SR-NYSEArca-2010-58).

⁸ Pursuant to Rule 11890(a)(2)(C)(1), a security with a Reference Price of greater than zero and up to an including \$25 is subject to a 10% threshold; a security with a Reference Price of greater than \$25 and up to and including \$50 is subject to a 5% threshold; and a security with a Reference Price of greater than \$50 is subject to a 3% threshold.

The Reference Price, for purposes of Rule 11890(a)(2)(C)(4), is the price that triggered a trading pause pursuant to the Pause Pilot (the “Trading Pause Trigger Price”). As such, Latency Trades that occur on NASDAQ would be broken by the exchange pursuant to Rule 11890(a)(2)(C)(4) if the transaction occurred at either three, five or ten percent above the Trading Pause Trigger Price.⁹

On June 23, 2011, the Commission approved a joint proposal to expand the respective Pause Pilot rules of the Exchanges and FINRA to include all remaining NMS stocks (“Phase III Securities”).¹⁰ The new pilot rules, which will be implemented on August 8, 2011, not only expand the application of the Pause Pilot, but also apply larger percentage moves that trigger a pause to the Phase III Securities. NASDAQ amended its Pause Pilot rule, Rule 4120(a)(11), by adding three new subparagraphs to address the treatment of the Phase III Securities. The rule applicable to the original Pause Pilot securities was placed in new Rule 4120(a)(11)(A). The rules applicable to the Phase III Securities were placed in new Rules 4120(a)(11)(B) and (C). A pause under Rule 4120(a)(11)(B) is triggered by a 30 percent price move within a five minute period in a Phase III Security that had a closing price on the previous trading day of \$1 or more. A pause under Rule 4120(a)(11)(C) is triggered by a 50 percent price move within a five minute period in a Phase III Security that had a closing price on the previous trading day of less than \$1. If no prior day closing price is available, the last sale reported to the Consolidated Tape on the previous trading day is used.

⁹ Rule 11890(a)(2)(C)(4).

¹⁰ Securities Exchange Act Release No. 64735 (June 23, 2011), 76 FR 38243 (June 29, 2011) (File Nos. SR-BATS-2011-016; SR-BYX-2011-011; SR-BX-2011-025; SR-CBOE-2011-049; SR-CHX-2011-09; SR-EDGA-2011-15; SR-EDGX-2011-14; SR-FINRA-2011-023; SR-ISE-2011-028; SR-NASDAQ-2011-067; SR-NYSE-2011-21; SR-NYSEAmex-2011-32; SR-NYSEArca-2011-26; SR-NSX-2011-06; SR-Phlx-2011-64).

The Issue

The recently-approved changes to the Pause Pilot will have the unintended effect of removing the Phase III Securities from the normal clearly erroneous process and potentially result in unfair outcomes in the face of severe volatility in such securities. Phase III Securities are currently subject to the clearly erroneous process under Rules 11890(a)(2)(C)(1)-(3), which apply to all securities except the current Pause Pilot securities subject to a pause. For purposes of transactions in securities not involving Pause Pilot securities, or transactions involving Pause Pilot securities that occur when there is not a pause pursuant to the Pause Pilot, the Reference Price is the consolidated last sale price immediately prior to the execution(s) under review, subject to certain exceptions.¹¹ As noted above, the Trading Pause Trigger Price is used as the Reference Price when a Pause Pilot pause is in effect. As a consequence, under the current rules a Latency Trade is subject to the clearly erroneous thresholds based on the Trading Pause Trigger Price, which represents a ten percent or greater move in the transacted price of the security in a five minute period.

Under the new Pause Pilot rules, a Latency Trade in a Phase III Security occurs only after either a 30 or 50 percent (or greater) move in the transacted price of the security in a five minute period. As a result, a member firm that trades in a Phase III Security that triggers a clearly erroneous threshold of three, five or ten percent from the Reference Price, yet falls below the Pause Pilot trigger of either 30 or 50 percent, would be able to avail themselves of a clearly erroneous review. A similarly situated member firm that transacts in the same security as a Latency Trade at a price equal to or greater than the Phase III Security thresholds, yet less than the clearly erroneous thresholds under Rule 11890(a)(2)(C)(1), would not be able to avail

¹¹ Id.

themselves of the clearly erroneous process. Another member firm that transacts in the same security as a Latency Trade that exceeds three, five or ten percent from the Trading Pause Trigger Price would automatically receive clearly erroneous relief. NASDAQ believes that this would be an inequitable result and an arbitrary application of the clearly erroneous process. Specifically, NASDAQ believes that, since the 30 and 50 percent triggers of the Pause Pilot are substantially greater than the 10 percent threshold of the original Pause Pilot, the Phase III Securities should remain under the current clearly erroneous process of Rules 11890(a)(2)(C)(1)-(3).

Applying the clearly erroneous process under Rules 11890(a)(2)(C)(1)-(3) to the Phase III Securities would allow NASDAQ to review all transactions that exceed the normal clearly erroneous thresholds and Reference Price, and, importantly, avoid arbitrary selection of “winners” and “losers” in the face of severe volatile moves in a security of 30 or 50 percent over a five minute period. For example, A member firm that trades in a security subject to Rule 4120(a)(11)(B) or (C) that triggers a clearly erroneous threshold of three, five or ten percent, yet falls below the Pause Pilot trigger threshold trading at 29 percent from the prior day’s closing price, would be potentially entitled to a clearly erroneous break pursuant Rule 11890(a)(2)(C)(1). Should trading in that same stock trigger a trading pause at a price of 30 or 50 percent greater than the prior day’s close, the member firm would not be entitled to a clearly erroneous trade break unless that trade exceeded three, five or ten percent beyond the price that triggered the pause. This scenario causes an inequity among a group of member firms that have transactions in the Phase III Securities falling between the three, five and ten percent thresholds from the Reference Price under the normal Rule 11890(a)(2)(C)(1) clearly erroneous process and the Pause Pilot clearly erroneous triggers of three, five or ten percent away from the Trading Pause

Trigger Price. Such member firms would not be provided relief under the clearly erroneous rules merely due to the imposition of a Pause Pilot halt, notwithstanding that other member firms with transactions that occur at the same rolling five minute percentage difference. NASDAQ believes a better outcome is to afford all members transacting in Phase III Securities the opportunity of having such trades reviewed.

Summary

The expansion of the Pause Pilot to the Phase III Securities will have the unintended consequence of setting the point at which a clearly erroneous transaction occurs once a Pause Pilot pause is initiated far beyond the triggers applied prior to the expansion, which will, in turn, prevent certain market participants from availing themselves of the clearly erroneous rules, notwithstanding that other similarly situated participants are able to do so. NASDAQ believes that this would be an arbitrary application of the clearly erroneous process in a manner that is unfair and not consistent with the spirit and purpose of the rule. Accordingly, NASDAQ is proposing to amend Rules 11890(a)(2)(C)(1)-(4) to specify that Rule 11890(a)(2)(C)(4) applies only to the current securities of Pause Pilot, as found under Rule 4120(a)(11)(A).¹²

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Securities Exchange Act of 1934 (the “Act”),¹³ which requires the rules of an exchange 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 proposed rule change also is designed to support the principles of Section

¹² NASDAQ notes that the Exchanges are filing similar proposals to make the changes proposed herein.

¹³ 15 U.S.C. 78f(b)(5).

11A(a)(1)¹⁴ of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. NASDAQ believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning decisions to break erroneous trades, yet also ensures fair application of the process so that similarly situated member firms are provided the same opportunity of a clearly erroneous review. NASDAQ notes that the changes proposed herein will in no way interfere with the operation of the Pause Pilot process, as amended.

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

The Exchange 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, as amended.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁵ and Rule 19b-4(f)(6)(iii) thereunder.¹⁶ The Exchange has asked the Commission to waive

¹⁴ 15 U.S.C. 78k-1(a)(1).

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to 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 filing of the proposed rule change, or such shorter

the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will allow the clearly erroneous rules to continue to operate as they did prior to the effectiveness of the Pause Pilot expansion to Phase III Securities so that similarly situated member firms are provided the same opportunity of a clearly erroneous review. Accordingly, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing with the Commission.¹⁷

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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 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-2011-116 on the subject line.

time as designated by the Commission. The Commission notes that the Exchange has satisfied this requirement.

¹⁷ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-2011-116. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at 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 publicly available. All submissions should refer

to File Number SR-NASDAQ-2011-116 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Elizabeth M. Murphy
Secretary

¹⁸ 17 CFR 200.30-3(a)(12).