

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57534; File No. SR-NASDAQ-2008-015)

March 20, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, and Amendment No. 1 Thereto, to Modify Fees Associated with Proceedings under Rule 11890

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 February 29, 2008, 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 substantially prepared by Nasdaq. On March 18, 2008, Nasdaq submitted Amendment No. 1 to the proposed rule change.³ Nasdaq filed the proposal pursuant to Section 19(b)(3)(A)(ii) of the Act⁴ and Rule 19b-4(f)(2)⁵ thereunder, as establishing or changing a due, fee, or other charges applicable to a member, which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq proposes to modify fees associated with proceedings under Rule 11890. Nasdaq will implement this rule change on March 3, 2008.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, the Exchange made clarifying changes to the proposed rule text and the purpose section of the filing.

⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

⁵ 17 CFR 240.19b-4(f)(2).

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.⁶

11890. Clearly Erroneous Transactions

(a) - (b) No change.

(c) Review by the Market Operations Review Committee ("MORC")

(1) – (3) No change.

[(4) The party initiating the appeal shall be assessed a \$500.00 fee if the MORC upholds the decision of the Nasdaq officer. In addition, in instances where Nasdaq, on behalf of a member, requests a determination by another market center that a transaction is clearly erroneous, Nasdaq will pass any resulting charges through to the relevant member.]

(d) No change.

(e) Fees

(1) Filing Fees

No fee shall be assessed to a member for filing two or fewer unsuccessful clearly erroneous complaints pursuant to paragraph (a)(2) during a calendar month. A member shall be assessed a fee of \$250.00 for each additional unsuccessful complaint filed thereafter during the calendar month. An unsuccessful complaint is one in which Nasdaq does not break any of the trades included in the complaint. Each security filed on is considered a separate complaint. In cases where the member files on multiple securities at the same time, Nasdaq calculates the fee separately for each security depending upon whether Nasdaq breaks any trades filed on by the member in that security. Adjustments

⁶ Changes are marked to the rule text that appears in the electronic Nasdaq Manual found at <http://nasdaq.complinet.com>.

or voluntary breaks negotiated by Nasdaq to trades executed at prices that meet the percentage thresholds in IM-11890-4 count as breaks by Nasdaq for purposes of this paragraph. A member is defined by each unique broker Web CRD Number. All MPIDs associated with that Web CRD Number shall be included when calculating the number of unsuccessful clearly erroneous complaints for that member during the calendar month. No fee pursuant to this paragraph (e)(1) shall be assessed for a complaint that is (A) successful, where the final decision by Nasdaq (including after appeal, if any) is to break at least one of the trades filed on by the member, (B) not timely filed under the parameters in paragraph (a)(2)(A), (C) withdrawn by the complainant within five (5) minutes of filing and before Nasdaq has performed any substantial work on the complaint, or (D) adjudicated by Nasdaq on its own motion under Rule 11890(b).

(2) Appeal Fees

The party initiating an appeal shall be assessed a \$500.00 fee if the MORC upholds the decision of the Nasdaq officer.

(3) Fees Charged By Another Market Center

In instances where Nasdaq, on behalf of a member, requests a determination by another market center that a transaction is clearly erroneous, Nasdaq will pass any resulting charges through to the relevant member.

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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

Nasdaq is amending Rule 11890, which covers the breaking of trades determined to be clearly erroneous, to add a new Rule 11890(e) that would consolidate Nasdaq's existing appeal fee, without substantive change, with a new fee of \$250.00 for the filing of certain unsuccessful clearly erroneous adjudication complaints.

Self-regulatory organizations like Nasdaq have authority to adjudicate trade disputes and break trades in appropriate circumstances to maintain a fair and orderly market. This authority is codified in Nasdaq Rule 11890. Nasdaq believes that this authority provides an important protection to the market by preventing trading errors and system problems from distorting the price discovery process. Rule 11890 also provides a number of procedural steps intended to protect the integrity of the adjudicatory process.

While these steps are a necessary part of the process, they require significant staff time to process each complaint. This benefits all market participants, including Nasdaq members. Despite this, Nasdaq historically has not charged members for this process.

The costs to Nasdaq of providing this service to members have increased in recent years as the number of complaints has increased. In 2005, 2006 and 2007, Nasdaq processed 841, 3,859 and 5,676 complaints, respectively. In addition, the size and complexity of trading events have increased. There has been an increase in the number of large events (defined as 8 or more counterparties), from 81 such filings in 2005 to 394 in 2007. There also has been a significant increase in the number of complaints involving trades routed to or from other market centers,

further increasing the complexity of processing filings. Discussions with other electronic market centers suggest that these markets also are receiving significantly more trade break requests.

In order to increase transparency in the adjudication process, Nasdaq provided guidance in IM-11890-4 on which trades are likely to be considered clearly erroneous. This guidance focused on numerical thresholds below which trades would likely stand⁷ and above which trades would likely be broken.⁸ Despite this guidance, Nasdaq continues to receive a significant number of filings that do not meet the thresholds or have material news that seemed to affect the price of the security.⁹

Nasdaq considered the amount of effort incurred to process complaints in calculating the \$250 filing fee. Rule 11890 outlines a number of procedural steps for processing complaints. Once MarketWatch receives a complaint, an analyst must complete the following steps:¹⁰

- Review the filing for completeness and call the filer to confirm the information, which must often be updated or revised;
- Confirm the trades at issue and the events surrounding the error;

⁷ As provided in the guidance, the circumstances in which trades below the thresholds could be broken are extremely limited. Trades in a stock subject to an initial public offering that execute prior to the opening of the offering are an example of trades that would be broken at prices below the threshold.

⁸ The guidance also included factors Nasdaq would consider in deviating from these numerical thresholds, including material news, trading activity and reasons for the error.

⁹ Nasdaq received 1,478 timely clearly erroneous complaints during 2007 where it declined to break any trades because the trades did not meet the guidance or parameters in the rule. This represents approximately 26% of the total complaints received that year.

¹⁰ In certain circumstances where Nasdaq is processing a large number of complaints, the call out process may be streamlined in order to provide rapid decisions and market certainty as to which trades will stand.

- Call each of the counterparties and see if they are interested in an adjustment of the terms, or a mutual break of, the trade(s), which may require additional rounds of calls to relay the offer or further negotiate the settlement;
- Identify portions of the disputed trades that were routed to other markets and requesting adjudication by those markets;
- Present the information to the Nasdaq Officer for a decision;
- Notify the filer and counterparties of Nasdaq's decision on the complaint; and
- Assemble the required documentation for Nasdaq's records.

Nasdaq estimates that on average it takes 20-25 minutes to process a small complaint and may take up to an hour to process larger events under Rule 11890(a). Nasdaq is required to go through these steps even in cases where the guidance in IM-11890-4 makes it clear that all trades will stand.

Under Nasdaq's proposal, the filing fee would only apply to unsuccessful clearly erroneous complaints, where Nasdaq does not break any of the trades filed on by the member. Adjustments or voluntary breaks negotiated by Nasdaq to trades executed at prices that meet the percentage thresholds in IM-11890-4 count as a break by Nasdaq for purposes of determining whether a complaint is successful. The fee would not apply to the first two unsuccessful complaints filed by the member during a calendar month. The \$250 fee would only apply to any additional unsuccessful complaints filed by the member during that month. The fee is calculated on a per-security basis so that each security filed on is considered a separate complaint, even if there are multiple securities included in the firm's clearly erroneous filing. For example, if a firm files on trades in three securities and Nasdaq breaks trades in one of the three, Nasdaq would consider the firm to have filed two unsuccessful complaints and one successful complaint. Only

the two unsuccessful complaints would be counted for purposes of the fee. The fee would apply to final decisions of Nasdaq. Therefore, if the Nasdaq officer refused to break trades and the Market Operations Review Committee (“MORC”) overturned the officer and broke at least some of the trades, no fee would be due with respect to that security and the complaint would not count towards the unsuccessful complaint calculation.¹¹

In calculating how many unsuccessful complaints a member had filed during the month, Nasdaq will look to the member’s broker Web CRD Number.¹² All Market Participant Identifiers (“MPIDs”) associated with that Web CRD Number shall be included in the calculation for that member. This removes any incentive for firms to request additional MPIDs solely to avoid paying the fee.

Nasdaq considered whether each complaint should be subject to the filing fee in light of the administrative costs associated with both successful and unsuccessful filings, but concluded that the fee should be limited to unsuccessful filers. Nasdaq believes that this application encourages appropriate use of clearly erroneous complaints by assessing costs on firms who do not properly consider the merits of their request. Instead of filing on any trading error, the filing fee may incentivize firms to consider carefully whether:

- the trades meet the thresholds set forth in IM-11890-4;

¹¹ The MORC is composed of independent persons who are not employees of Nasdaq and who have no economic interest in the trades or the assessment of the fee.

¹² The Financial Industry Regulatory Authority (“FINRA”) maintains the Central Registration Depository (“CRD”). This data base includes information on more than half a million registered securities employees of member firms through the automated Web CRD system. Each member receives a unique Web CRD Number.

- the amount of money at risk merits filing a complaint;¹³ and
- an investment in system safeguards that might reduce trading errors.

Charging firms only for unsuccessful complaints is consistent with Nasdaq's existing appeal fee, which is assessed only on unsuccessful appeals. In addition, Nasdaq believes that exempting two unsuccessful complaints from the fee will assist members in close calls where news or other factors might result in Nasdaq not breaking trades that otherwise meet the numerical thresholds for trade breaks. Based on an analysis of complaint filings in December 2007, 13 members had more than two unsuccessful erroneous complaints.¹⁴

The proposed filing fee would not be assessed for a complaint that is:

- successful, in that Nasdaq breaks at least one of the trades on which the member filed;
- filed late under the time parameters in Rule 11890(a)(2)(A) and therefore rejected;
- withdrawn by the complainant within five (5) minutes of filing and before Nasdaq has performed any substantial work on the complaint; or
- adjudicated by Nasdaq under its motion pursuant to Rule 11890(b) as part of a large market event.

While Nasdaq may incur some cost in reviewing complaints for timeliness and prior to withdrawal, this exception will allow firms to withdraw or correct mistaken complaints without such filings counting towards their monthly allotment. While Nasdaq incurs considerable

¹³ During December 2007, Nasdaq received 48 complaints for fewer than 100 shares, including six filings for fewer than 5 shares.

¹⁴ Nasdaq received complaints from an average of 98 members a month during 2007. Accordingly, a comparatively small number of members would be affected by the filing fee.

expense in processing clearly erroneous events under Rule 11890(b), such large systemic events often impact multiple filers and may not easily be billed to a particular party. Therefore, Nasdaq will continue to absorb costs related to Rule 11890(b) adjudications. Any filer with trades included in such events will not be charged and the filing will not count towards calculation of a member's unsuccessful complaints.

Finally, the proposal reorganizes Rule 11890 to consolidate the fee-related provisions in one section, Rule 11890(e), titled "Clearly Erroneous Fees." Nasdaq believes this will make it easier for readers to locate these provisions in the rule. No substantive change has been made to the existing fee for appeal of clearly erroneous decisions or the provisions enabling Nasdaq to pass through to members charges it is assessed by other markets for requesting erroneous review by that venue on behalf of members.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁵ in general, and with Section 6(b)(4) of the Act,¹⁶ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using any facility or system which Nasdaq operates or controls. Nasdaq believes that the fees will be reasonably allocated to members that file unsuccessful complaints under Rule 11890, thereby allowing Nasdaq to recoup a portion of the costs associated with filings that lack merit.

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.

¹⁵ 15 U.S.C. 78f.

¹⁶ 15 U.S.C. 78f(b)(4).

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

The foregoing proposed rule change has become effective upon filing with the Commission pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁷ and Rule 19b-4(f)(2)¹⁸ thereunder, because it establishes or changes a due, fee, or other charge applicable only to a member.

At any time within 60 days of the filing of the 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 furtherance of the purposes of the Act.¹⁹

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-2008-015 on the subject line.

¹⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁸ 17 CFR 240.19b-4(f)(2).

¹⁹ See 15 U.S.C. 78s(b)(3)(C). For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on March 18, 2008, the date on which Nasdaq submitted Amendment No. 1.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2008-015. 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 10:00 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 available publicly. All submissions should refer to File Number SR-NASDAQ-2008-015 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.²⁰

Florence E. Harmon
Deputy Secretary

²⁰ 17 CFR 200.30-3(a)(12).