

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60776; File No. SR-NASDAQ-2009-086)

October 2, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposal to Amend NASDAQ Rule 11890 Governing Clearly Erroneous Executions

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 October 1, 2009, The NASDAQ Stock Market LLC (“Exchange” or “NASDAQ”) 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. NASDAQ has designated the proposed rule change as constituting a 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 Substance of the Proposed Rule Change

NASDAQ is proposing to amend NASDAQ Rule 11890 governing clearly erroneous executions. The text of the filing is available at <http://nasdaqomx.cchwallstreet.com> 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 self-regulatory organization 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 those statements may be examined at the places

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6).

specified in Item IV below. NASDAQ has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

NASDAQ proposes to amend NASDAQ Rule 11890 in order to improve the exchange's rule regarding clearly erroneous executions. The proposed changes are part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions. This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors and protecting the public interest. In addition, NASDAQ has attempted to shorten and combine existing sections of Rule 11890 and has incorporated all of the prior Interpretive Materials into the body of the rule. NASDAQ believes this will create a clearer and more concise rule that will assist market participants in complying with its terms. The proposed changes are more fully discussed below.

Definition

NASDAQ will amend the meaning of the definition of a clearly erroneous execution, to add clarifying language with respect to cancelled trades. The proposed change identifies that a transaction made in error and agreed to be canceled by both parties or determined by NASDAQ to be clearly erroneous will be removed from the Consolidated Tape. A trade will only be removed from the Consolidated Tape when the determination is deemed final and any applicable appeals have been exhausted.

Member Initiated Review Requests

NASDAQ proposes to amend Rule 11890 to update the procedures for requesting a review of a clearly erroneous transaction. NASDAQ proposes that requests for review must be

received by the exchange within 30 minutes of the execution time for orders initially routed to and executed on NASDAQ. This is consistent with NASDAQ's current practice and will be applied uniformly by other markets to provide a level of consistency and certainty across market centers. As is the case under the current rule, NASDAQ proposes that members submit certain essential identifying information with the request including the time of the transaction(s), security symbol(s), number of shares, price(s), side (bought or sold), and factual basis for believing that the trade is clearly erroneous. The current rule allows members additional time to file at market open. However, NASDAQ believes that a uniform 30 minutes is an appropriate time frame for all trades that affords the requesting party sufficient time to gather and submit all required information.

The proposed rule also requires NASDAQ to notify the counterparty to a trade upon receipt of a timely filed request for review that satisfies the numerical guidelines set forth within the Rule (referred to in the proposed amendments as "Numerical Guidelines," which are discussed in detail below). This proposed language eliminates the requirement that counterparties be notified of every request for a ruling and instead requires notice only when a request is filed in a timely manner and satisfies the Numerical Guidelines. This change alleviates the burden on NASDAQ of notifying the counterparties when a request for review does not merit a ruling to break the trades at issue.

In addition, notification may be by one of several means, including press release, system status, web posting or any other method reasonably expected to provide rapid notice to many market participants. For example, NASDAQ anticipates streamlining the notification process for counterparties when NASDAQ receives a high volume of clearly erroneous filings. In such circumstances it might issue an electronic system status message indicating which trades were

under review instead of more time consuming individual calls to each counterparty. This will benefit market participants by expediting notification that trades are under review and the decision with respect to particular trades. NASDAQ would advise market participants of what notification processes it will use through a Notice to Members or Head Trader Alert.

Routed Executions

NASDAQ proposes to give other market centers an additional 30 minutes from the receipt of their participant's timely filing to request a ruling, but no longer than 60 minutes from the time of the execution under review. This provision accounts for those executions initially directed to an away market center and subsequently routed by that away market center to NASDAQ.

For example, assume an order is initially routed by a participant to Market Center A and subsequently routed to NASDAQ where the order is executed at a price outside of the Numerical Guidelines. Without additional time Market Center A might be late in filing with NASDAQ if its customer takes almost 30 minutes to file the original complaint. The proposal would give Market Center A up to 30 additional minutes from the time its customer files with Market Center A to file with NASDAQ for review. This provision caps the filing deadline for an away market center at 60 minutes from the time of the execution under review.

Outlier Transactions

The proposed amendments to Rule 11890 provide that an Official⁴ may consider requests for review received after thirty minutes, but not longer than sixty minutes after the execution in question in the case of an Outlier Transaction. An Outlier Transaction is a transaction where (1)

⁴ As is the case under the current Rule 11890, designated employees of NASDAQ ("Officials") would have authority to review member initiated requests under Rule 11890(a).

the execution price of the security is greater than three times the current Numerical Guidelines, or (2) the execution price of the security breaches the 52-week high or low, in which case NASDAQ may consider Additional Factors to determine if the transaction qualifies for review or if NASDAQ shall decline to act.

Deletion of Current Rule 11890(a)(2)(D) Inside Price Minimum Thresholds

NASDAQ proposes to delete the inside price minimum thresholds that currently apply to transactions during regular market hours (9:30 a.m. to 4:00 p.m.). These thresholds establish which trades are eligible for review and are different than the Numerical Guidelines. NASDAQ believes that these thresholds, which predate the use of Numerical Guidelines, add an extra layer of complexity to the filing process without providing any meaningful benefit to investors or NASDAQ.

Numerical Guidelines

Currently, the Interpretive Materials to Rule 11890 provide specific numerical guidelines for determining what constitutes a clearly erroneous transaction. NASDAQ proposes codifying these numerical thresholds, referred to as “Numerical Guidelines,” in the rule to explicitly state what constitutes a clearly erroneous execution. The proposal also adds Numerical Guidelines for leveraged ETFs and ETNs, which are securities that have become increasingly popular since the original numerical thresholds were adopted. The proposed Numerical Guidelines state that a transaction executed during the Core Trading Session⁵ or the Opening and Late Trading

⁵ The Core Trading Session begins at 9:30:00 a.m. and ends at 4:00:00 p.m. The Core Trading Session includes the NASDAQ Closing Crosses, which are sometimes disseminated to the market a few seconds after 4 p.m. due to the cross calculation process.

Sessions⁶ may be found to be clearly erroneous only if the price of the transaction is greater in the case of a buy, or less in the case of a sale, than the reference price by an amount that equals or exceeds the Numerical Guidelines for a particular transaction category. The Reference Price shall be equal to the consolidated last sale immediately prior to the execution under review, unless unusual circumstances are present.

The proposed Numerical Guidelines for sales greater than \$0.00 and up to and including \$25.00 are 10% for the Core Trading Session and 20% for the Opening and Late Trading Sessions. The proposed Numerical Guidelines for sales greater than \$25.00 up to and including \$50.00 are 5% for the Core Trading Session and 10% for Opening and Late Trading Sessions. The proposed Numerical Guidelines for sales greater than \$50.00 are 3% for the Core Trading Session and 6% for Opening and Late Trading Sessions. A filing involving five or more securities by the same member may be considered a “Multi-Stock Event.” In the case of a Multi-Stock Event, the proposed guidelines are 10% for the Core Trading Session and 10% for the Opening and Late Trading Sessions. In the case of Leveraged ETF/ETN securities, the above guidelines are to be multiplied by the leverage multiplier of the security. Executions that do not meet or exceed the Numerical Guidelines will not be eligible to be broken under this section. The following chart summarizes the proposed Numerical Guidelines.

Reference Price: Consolidated Last Sale	Core Trading Session Numerical Guidelines (Subject transaction’s % difference from the	Opening and Late Trading Session Numerical Guidelines (Subject transaction’s % difference
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⁶ The Opening Session begins at 07:00:00 a.m. and concludes with the start of the Core Trading Session. The Late Trading Session begins at the end of the Core Trading Session and continues until 8:00:00 p.m.

	Consolidated Last Sale):	from the Consolidated Last Sale):
Greater than \$0.00 up to and including \$25.00	10%	20%
Greater than \$25.00 up to and including \$50.00	5%	10%
Greater than \$50.00	3%	6%
Filings involving five or more securities by the same participant may be considered a “Multi-Stock Event”	10%	10%
Leveraged ETF/ETN securities	Core Trading Session Numerical Guidelines multiplied by the leverage multiplier (ie. 2x)	Core Trading Session Numerical Guidelines multiplied by the leverage multiplier (ie. 2x)

The following example explains the application of these guidelines. ABC has a consolidated last sale of \$10.00. During the Core Trading Session Customer A enters a market order to buy 10,000 shares, although it had intended a market order for 1,000 shares. Executions occur, moving through the depth of the NASDAQ Book, as follows:

Trade #1 – 1000 shares @ \$10.00 (0% difference from Reference Price)

Trade #2 – 5000 shares @ \$10.50 (5% difference from Reference Price)

Trade #3 – 2000 shares @ \$11.00 (10% difference from Reference Price)

Trade #4 – 1000 shares @ \$11.50 (15% difference from Reference Price)

Trade #5 – 1000 shares @ \$12.00 (20% difference from Reference Price)

In this example, to be clearly erroneous the trades must be at a price that is at least 10% higher than the consolidated last sale prior to the series of executions. Absent any Unusual Circumstances or Additional Factors (each discussed below), the NASDAQ Official would break trades #3 through #5, priced at \$11.00 and above, as clearly erroneous, but would let stand trades #1 and #2. If instead the trade happened in the Late Trading Session, where the a 20% difference from the Reference Price is required for trades to be clearly erroneous, the NASDAQ Official would break only Trade #5 and trades #1 through #4 would stand.

Establishing Numerical Guidelines within the rule gives regulatory transparency and consistency in the application of the rules of NASDAQ. These Numerical Guidelines, which are substantially similar to existing NASDAQ guidance, represent the general consensus developed based on the collective experiences of a market-wide group. NASDAQ believes that the Numerical Guidelines are fair and appropriate and apply evenly to all participants.

Unusual Circumstances

NASDAQ further proposes that in unusual circumstances NASDAQ may, in its discretion and with a view toward maintaining a fair and orderly market and protecting investors and the public interest, use a Reference Price other than the consolidated last sale. “Unusual Circumstances” may include periods of extreme market volatility, sustained illiquidity, or widespread system issues. Other Reference Prices that NASDAQ may use would include the consolidated inside price, the consolidated opening price, the consolidated prior close, or the consolidated last sale prior to a series of executions.

Under the proposed rule NASDAQ may also use a higher Numerical Guideline if, after market participants have been alerted to erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price it would have normally been broken.

Joint Market Rulings

In the interest of achieving consistency across markets, the proposal would give NASDAQ the ability to use a different Reference Price and/or Numerical Guideline in events that involve other markets. In these instances the Reference Price would be determined based on a consensus among the exchanges where the transactions occurred.

Additional Factors

The proposed amendments to Rule 11890 also enumerate some additional factors that an Official may consider when determining whether an execution is clearly erroneous. These factors include, but are not limited to, system malfunctions or disruptions, volume and volatility for the security, derivative securities products that correspond to greater than 100% in the direction of a tracking index, news released for the security, whether trading in the security was recently halted/resumed, whether the security is an IPO, whether the security was subject to a stock-split, reorganization, or other corporate action, overall market conditions, Opening and Late Session executions, validity of the consolidated tapes trades and quotes, consideration of primary market indications, and executions inconsistent with the trading pattern in the stock. Each additional factor shall be considered with a view toward maintaining a fair and orderly market, the protection of investors and the public interest. NASDAQ believes market participants recognize that such factors will be considered in reviewing potentially erroneous trades because Rule 11890 currently includes similar provisions.

Numerical Guidelines Applicable to Volatile Market Opens

The proposed amendments give NASDAQ the ability to expand the Numerical Guidelines applicable to transactions occurring between 9:30 a.m. and 10:00 a.m. based on the disseminated value of the S & P 500 Futures at 9:15 a.m. When the S & P Futures are up or down 3%, or up to but not including 5% at 9:15 a.m., the Numerical Guidelines are doubled. When the S & P Futures are up or down 5% or greater at 9:15 a.m., the Numerical Guidelines are tripled. NASDAQ believes that the S&P 500 futures contract is an appropriate and reliable barometer of market activity prior to the market opening due to its broad based market coverage and deep liquidity. Using the S&P 500 Futures disseminated value at 9:15 a.m. as the barometer of market activity, NASDAQ is providing a transparent means of offering adjusted guidelines in times of volatile market activity.

Review Procedures

Initial Determination

NASDAQ proposes adding language stating that a determination shall be made generally within 30 minutes of receipt of the complaint, but in no case later than the start of Core Trading on the following trading day. Rulings made outside of 30 minutes will not fail for lack of timeliness. The guideline simply provides participants an appropriate expectation that a ruling will generally be made within 30 minutes and in no case later than the start of Core Trading on the following trading day.

Appeals

The current rule provides that the Market Operation Review Committee (“MORC”) shall review and render a decision upon an appeal. The proposed rule offers more definite guidelines to ensure the expedient resolution of appeals. It requires the MORC to review appeals as soon as

practicable, but generally on the same day as the executions under review. Appeals received between 3:00 p.m. ET and the close of trading in the Late Trading Session should be made as soon as practicable, but in no case later than the trading day following the date of the execution under review. While decisions by the MORC that do not meet these time guidelines will still be valid, these guidelines will provide participants with reasonable expectations of when a ruling on appeal will generally be made. As is currently the case, all decisions rendered under Rule 11890(a) (complaints of market participants) will be subject to appeal to the MORC as will decisions rendered by a NASDAQ Senior Official under Rule 11890(b) (decisions on NASDAQ's own motion), except in cases where the Senior Official determines that the ruling should not be eligible for appeal because finality is necessary to maintain a fair and orderly market and to protect investors and the public interest. This provision simply clarifies the fact that nothing in the proposed rule limits or impedes the rights of the parties to arbitrate their dispute.

NASDAQ Acting on Its Own Motion

The proposed rule would allow a designated "Senior Official" of NASDAQ⁷ to review executions pursuant to Rule 11890(b). NASDAQ's Rule 11890(b) is consistent with NYSE ARCA, Inc.'s Rule 7.10 (g). The Senior Official's decision would still be guided by the Numerical Guidelines (including the Multi-Stock Event 10% threshold), Unusual Circumstances and Additional Factors outlined above. In extraordinary circumstances a Senior Official may apply a lower Numerical Guideline if such action is necessary to maintain a fair and orderly

⁷ Currently only NASDAQ Executive Vice Presidents designated by NASDAQ's President are eligible to make rulings under Rule 11890(b). NASDAQ proposes to expand this to include other officers and senior level employees of NASDAQ as "Senior Officials" eligible to make rulings. NASDAQ's Chief Regulatory Officer would designate Senior Officials with relevant market experience to adjudicate these matters.

market or protect investors and the public interest. In some instances NASDAQ may detect a single execution that breaches the Numerical Guidelines but is not the subject of a ruling request. This provision gives NASDAQ the ability to review such executions. In other cases, clearly erroneous executions commonly involve multiple parties and multiple executions. All affected parties may not request a ruling. NASDAQ proposes this provision to permit a Senior Official to rule on a group of transactions related to the same occurrence or event as a whole, without a formal request for a ruling from every affected party.

As is currently the case, NASDAQ could break all trades in a security if a pervasive mistake resulted in trading that should not have occurred. For example, trades in a security that was incorrectly authorized for trading prior to the date of its actual initial public offering would all be broken. Similarly, if NASDAQ systems executed orders in the NASDAQ opening cross or closing cross at a price that was inconsistent with the rules governing the operation of the cross, either due to a NASDAQ system error or because an underlying erroneous order resulted in an erroneous opening or closing price, NASDAQ may break all of the affected trades. Under Rule 11890(b), a NASDAQ Senior Official may adjust trades, but this adjustment authority is limited to extraordinary circumstances involving the closing cross.

This rule change shall be effective October 5, 2009.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁸ in general, and with Section 6(b)(5) of the Act,⁹ in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in

⁸ 15 U.S.C. 78f.

⁹ 15 U.S.C. 78f(b)(5).

regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 would coordinate standards of review of clearly erroneous trades across markets, thereby eliminating conflicting rulings among exchanges and disparate treatment of similarly priced trades.

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

Nasdaq 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

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 Act¹⁰ and Rule 19b-4(f)(6) thereunder.¹¹

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act¹² normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)¹³

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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 has satisfied this requirement.

¹² 17 CFR 240.19b-4(f)(6).

permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it may implement the new rule on October 5, 2009, the same date as the other equities exchanges. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to begin applying the new rule on the same date as the other equities exchanges.¹⁴ Application of the new rule on this date should help foster transparency and consistency among those exchanges that adopt clearly erroneous execution rules substantially similar to those previously approved by the Commission.¹⁵ For these reasons, the Commission designates that the proposed rule change become operative on October 5, 2009.

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.

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

¹³ 17 CFR 240.19b-4(f)(6).

¹⁴ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁵ See Securities Exchange Act Release No. 60706 (September 22, 2009), 74 FR 49416 (September 28, 2009) (NYSEArca-2009-36).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2009-086 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-2009-086. 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 the Exchange. 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-2009-086 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.¹⁶

Florence E. Harmon
Deputy Secretary

¹⁶ 17 CFR 200.30-3(a)(12).