

Global Market, Nasdaq does not believe that this change would result in any adverse impact on liquidity or on investors. Further, Nasdaq notes that the revised requirements exceed the requirements set forth in Rule 3a51-1(a)(2) under the Act.<sup>9</sup>

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>10</sup> in general, and with Section 6(b)(5) of the Act,<sup>11</sup> 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 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. Nasdaq believes the proposed change would continue to maintain appropriate minimum liquidity requirements for companies seeking to list on the Nasdaq Global Select Market, while also recognizing changes in the market that allow such liquidity with fewer shareholders.

### 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, 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) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective

<sup>9</sup> 17 CFR 240.3a51-1(a)(2) (excluding from the term "penny stock" certain securities).

<sup>10</sup> 15 U.S.C. 78f.

<sup>11</sup> 15 U.S.C. 78f(b)(5).

pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and Rule 19b-4(f)(6) thereunder.<sup>13</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii)<sup>14</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. Nasdaq has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Specifically, the Commission believes that the proposal would allow Nasdaq to have similar holder requirements as other exchanges and the Nasdaq Global Market.<sup>15</sup> Accordingly, the Commission designates the proposal to be effective and operative upon filing with the Commission.<sup>16</sup>

At any time within 60 days of the filing of the amended proposed rule change, the Commission may summarily abrogate such proposed 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.<sup>17</sup>

## 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2007-050 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary,

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>15</sup> See note 7 *supra* and accompanying text.

<sup>16</sup> For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>17</sup> 15 U.S.C. 78s(b)(3)(C). For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposal, the Commission considers the period to commence on June 19, 2007, the date on which Nasdaq submitted Amendment No. 1.

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2007-050. 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 a.m. and 3 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 available publicly. All submissions should refer to File Number SR-NASDAQ-2007-050 and should be submitted on or before July 18, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Florence E. Harmon,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55937; File No. SR-ASDAQ-2007-001]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change as Modified by Amendment No. 2 to Amend Nasdaq's "Clearly Erroneous" Rule

June 21, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

<sup>18</sup> 17 CFR 200.30-3(a)(12).

(“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 22, 2007, 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 June 1, 2007, Nasdaq filed Amendment No. 1 to the proposed rule change.<sup>3</sup> On June 12, 2007, Nasdaq filed Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

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

Nasdaq proposes to clarify the applicability of Nasdaq Rule 11890 to transactions resulting from unauthorized or manipulative trading activity. Nasdaq will implement the proposed rule change immediately upon approval by the Commission.

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

\* \* \* \* \*

**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)(D) below, [officers] *officials* 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] *official* 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] *official* shall decline to act upon a disputed transaction if [the officer] *he or she* believes that the transaction under dispute is not clearly erroneous. If the [officer] *official* 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] *official* 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:

- (i) the transaction is eligible for review under the Rule, and [if]
  - (ii) *either*
    - a. there is an obvious error in any term, such as price, number of shares or other unit of trading, or identification of the security, or
    - b. *the person seeking review of the transaction has represented that it resulted from an order submitted by a person that was not authorized to submit that order into Nasdaq or from an account used for the purpose of effecting a manipulation of the market for the security.*

(2) Procedures for Reviewing Transactions

(A) *Except as provided in paragraph (a)(2)(B), [A]any member[, member of a UTP Exchange,] or person associated with a[ny 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 at *any other time* [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) *In the case of an Outlier Transaction, a member or person associated with a 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. but prior to 10:00 a.m.,*

*complaints must be received by Nasdaq by 11:30 a.m.;*

(ii) *for transactions occurring prior to 9:30 a.m. or between 10:00 a.m. and the close of the Regular Session, complaints must be received by Nasdaq within ninety minutes of execution time; and*

(iii) *for transactions occurring after the close of the Regular Session, complaints must be received by Nasdaq prior to 9:30 a.m. the next trading day.*

[(B)](C) Once a complaint has been received in accord with paragraph (a)(2)(A) or (B) above, 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 factual basis for believing that the trade is clearly erroneous* [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)](D) Following the expiration of the period for submission of supporting material, a Nasdaq [officer] *official* 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)(C), and
- (ii) For trades in Nasdaq securities executed *during the Regular Session* [between 9:30 a.m. and 4:00 p.m. Eastern Time], or trades in non-Nasdaq securities executed *during the Regular Session after* [between the time when] the [p]Primary [m]Market for the security first posts an executable two-side quote [for its regular market trading session and 4:00 p.m. Eastern Time], the price of a transaction to buy (sell) that is the subject of the complaint is greater than (less than) the [best offer (best bid)] *Inside Price* by an amount that equals or exceeds the minimum threshold set forth below:

Inside price	Minimum threshold
\$0–\$0.99 .....	\$0.02 + (0.10 × Inside Price)
\$1.00–\$4.99 .....	\$0.12 + (0.07 × (Inside Price – \$1.00))
\$5.00–\$14.99 ....	\$0.40 + (0.06 × (Inside Price – \$5.00))

<sup>1</sup> 5 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Amendment No. 1 replaced the proposed rule change in its entirety. Nasdaq withdrew Amendment No. 1 on June 14, 2007.

<sup>4</sup> Amendment No. 2 replaced the proposed rule change in its entirety.

Inside price	Minimum threshold
\$15 or more .....	\$1.00

[For a transaction to buy (sell) a Nasdaq 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) a non-Nasdaq 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. A "Nasdaq security" means a security for which transaction reports are disseminated under the Nasdaq UTP Plan, and a "non-Nasdaq security" means a security for which transaction reports are disseminated under the Consolidated Tape Association Plan. The "primary market" for a non-Nasdaq Security is the market designated as the primary market under the Consolidated Tape Association Plan.]

[(D)](E) If a complaint is determined to be eligible for review, the counterparty to the trade shall be notified of the complaint via telephone or other method permitted by paragraph (d) 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). Either party to a disputed trade may request the written information provided by the other party pursuant to paragraph (a)(2).

[(E)](F) Notwithstanding paragraphs (a)(2)[(B)](C) and [(D)](E) 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] official for a determination pursuant to paragraph (a)(1) above.

[(F)](G) Each member[, member of a UTP Exchange,] or person associated with a[ny 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 paragraphs (a)(2)[(B)](C) and [(D)](E) above.

[(G)](H) 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)](E).

(b) Procedures for Reviewing Transactions on Nasdaq's Own Motion.

In the event of (i) a disruption or malfunction in the use or operation of any quotation, execution, communication, or trade reporting system owned or operated by Nasdaq and approved by the Commission, or (ii) extraordinary market conditions or other circumstances in which the nullification or modification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest, the President of Nasdaq or any Executive Vice President designated by the President may, on his or her own motion, review any transaction arising out of or reported through any such quotation, execution, communication, or trade reporting system[, including transactions entered into by a member of a UTP Exchange through the use or operation of such a system, but excluding transactions that are entered into through, or reported to, a UTP Exchange]. A Nasdaq officer acting pursuant to this subsection may declare any such transaction null and void or modify the terms of any such transaction if the officer determines that (i) the transaction is clearly erroneous, or (ii) such actions are necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest; provided, however, that the officer [must] shall take action pursuant to this subsection [within thirty (30) minutes of] as soon as possible after detection of the transaction except in the event of extraordinary circumstances, in which event the officer must take action by [3:00 p.m.,]9:30 a.m. [Eastern Time,] on the next trading day following the date of the transaction at issue.

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

(1) Subject to the limitations described in paragraph (c)(2), a member[, member of a UTP Exchange,] or person associated with a[ny such] member may appeal a determination made under paragraph (a) to the MORC. A member[, member of a UTP Exchange,] or person associated with a[ny such] member may appeal a determination made under paragraph (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 the 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 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 MORC shall not operate as a stay of the determination being appealed, and the scope of the appeal shall be limited to trades which the person making the appeal is a party. Subject to the limitations described in paragraph (c)(2), once a party has appealed a determination to the 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 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 MORC, pursuant to the standards set forth in this rule, shall affirm, modify, reverse, or remand the determination.

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

(4) The party initiating the appeal shall be assessed a \$500.00 fee if the MORC upholds the decision of the Nasdaq [officer] *official*. 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) Communications

(1) All materials submitted to Nasdaq or the MORC pursuant to this Rule shall be submitted within the time parameters specified herein via such telecommunications procedures as Nasdaq may announce from time to time in a[n] Notice to Members or Head Trader Alert. Materials shall be deemed received at the time indicated by the telecommunications equipment (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. *All times stated in this rule and related Interpretive Material are Eastern Time.*

(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 paragraph (b), Nasdaq may instead provide notice to parties via Nasdaq telecommunications protocols, a press release, or any other method reasonably expected to provide rapid notice to many market participants.

(e) Definitions

*For purposes of this Rule and related Interpretive Material:*

(1) "Inside Price" means:

(A) for a transaction to buy (sell) a Nasdaq security, the best offer (best bid)

*in Nasdaq at the time that the first share of an order or the first share of a series of orders that resulted in disputed transactions was executed, and*

(B) for a transaction to buy (sell) a non-Nasdaq security, the national best offer (best bid) at the time that the first share of an order or the first share of a series of orders that resulted in the disputed transactions was executed.

(2) "Nasdaq security" means a security for which transaction reports are disseminated under the Nasdaq UTP Plan.

(3) "Non-Nasdaq security" means a security for which transaction reports are disseminated under the Consolidated Tape Association Plan.

(4) "Outlier Transaction" means a transaction that:

(A) is executed at a price that meets the following parameters:

(i) in the case of a transaction for a Nasdaq security executed during the Regular Session, the price is 50% or more away from the Inside Price;

(ii) in the case of a transaction for a non-Nasdaq security executed during the Regular Session after the Primary Market has posted its first two-sided quote, the price is 50% or more away from the Inside Price;

(iii) in the case of a transaction for a Nasdaq security or non-Nasdaq security executed outside of the Regular Session, or a non-Nasdaq security executed during the Regular Session before the Primary Market has posted its first two-sided quote, the price is 50% or more away from the closing price of the security in the most recent Regular Session; and

(B) the loss value of all transactions at issue in the complaint exceeds \$10,000. The loss value is measured by multiplying the number of shares by the difference between the execution price and price with which the execution price is compared under paragraph (e)(4)(A).

(5) "Primary Market" means:

(A) for a Nasdaq security, the Nasdaq Market Center, and

(B) for a non-Nasdaq Security, the market designated as the primary market under the Consolidated Tape Association Plan.

(6) "Regular Session" means the primary trading session for a particular security on its Primary Market, which is generally 9:30 a.m. through 4:00 or 4:15 p.m.

**IM-11890-1. Refusal to Abide by Rulings of a Nasdaq [Officer] Official or the MORC**

It shall be considered conduct inconsistent with just and equitable principles of trade for any member to

refuse to take any action that is necessary to effectuate a final decision of a Nasdaq [officer] *official* or the MORC under Rule 11890.

**IM-11890-2. Review by Panels of the MORC**

For purposes of Rule 11890 and other Nasdaq Rules that permit review of Nasdaq decisions by the MORC, a decision of the MORC may be rendered by a panel of the MORC. In the case of a review of a determination by a Nasdaq [officer] *official* under Rule 11890(a)(2)[(C)](D) 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)](D)**

The following example is intended to assist market participants in understanding the minimum price deviation thresholds in paragraph (a)(2)[(C)](D) and their effect on the eligibility of transactions for review under Rule 11890.

ABCD, a Nasdaq [listed] security, has an [i]Inside [market]Price 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:  $\$0.40 + (0.06 \times (\text{Inside Price} - \$5.00)) = \$0.40 + (0.06 \times (\$12.05 - \$5.00)) = \$0.82$ . 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] official had made an arithmetical error in determining the

minimum price deviation threshold, or had erred in determining the applicable [inside price] *Inside Price*.

**IM-11890-4. Clearly Erroneous Transaction Guidance for Filings under Rule 11890(a) and Single Stock Events under Rule 11890(b)**

Nasdaq is providing the following guidance on how it [generally] considers:

- all complaints filed by market participants under Rule 11890(a); and
- [many] most events involving a single security considered on Nasdaq's own motion pursuant to Rule 11890(b).

Nasdaq generally considers a transaction to be clearly erroneous when the print is substantially inconsistent with the market price that existed at the time of execution of the first share of one or a series of orders that resulted in disputed transactions. Nasdaq would not consider a trade clearly erroneous, and therefore would not break or modify it, if it was priced within a range of the preceding market price, as described in detail below. In making such a determination, Nasdaq takes into account the circumstances at the time of

the transaction, the maintenance of a fair and orderly market, and the protection of investors and the public interest. Participants in Nasdaq are responsible for ensuring that the appropriate price and type of order are entered into Nasdaq's systems. Simple assertion by a firm that it made a mistake in entering an order or a quote, or that it failed to pay attention or to update a quote, may not be sufficient to establish that a transaction was clearly erroneous.

**Numerical Factors for Review**

Nasdaq primarily considers the execution price of a trade in determining whether it is clearly erroneous, and breaks trades that are more than a specified percentage away from a Reference Price that is indicative of prior market conditions. The range away from a Reference Price beyond which trades may be broken is referred to as the Numerical Threshold. As a corollary to this policy, Nasdaq does not break trades that are at the Numerical Threshold or between the Reference Price and the Numerical Threshold, as set forth in the chart below.

Execution Price	[Range Away from Reference Price] Numerical Threshold—Regular Session	Numerical Threshold—Outside Regular Session
\$0.20 and under .....	The minimum threshold required for adjudication under Rule 11890(a)(2)(D)(ii).	The minimum threshold that would be required for adjudication under Rule 11890(a)(2)(D)(ii) if it were applicable outside of the Regular Session
Over \$0.20 and up to \$1.75 [and under] .....	[Equal to or greater than t]The minimum threshold required for adjudication under Rule 11890(a)(2)(C)(D)(ii).	20%
Over \$1.75 and up to \$25 .....	10% .....	20%
Over \$25 and up to \$50 .....	5% .....	10%
Over \$50 .....	3% .....	6%

Nasdaq uses [different] Reference Prices based on the time of the trade and the listing venue of the security in order

to establish an appropriate comparison point. These Reference Prices are detailed below.

[In unusual circumstances, however, Nasdaq may use a different Reference Price.]

Time of Trade and Listing Venue	Reference Price
Nasdaq[-listed] securities during [for trades executed between 9:30 am and 4:00 pm Eastern Time ("Regular Session")].	<i>Inside Price</i> [The best bid (best offer) ("BBO") in Nasdaq at the time of execution of first share of the disputed order]
Non-Nasdaq[-listed] securities for trades executed during Regular Session and after [p]Primary [m]Market has posted first two-sided quote.	<i>Inside Price</i> [The national BBO at the time of execution of first share of the disputed order]
Non-Nasdaq[-listed] securities for trades executed during Regular Session and before [p]Primary [m]Market has posted first two-sided quote.	<i>Inside Price</i> [The national BBO at the time of execution of first share of the disputed order]. If [national BBO]the <i>Inside Price</i> does not appear substantially related to the market, Nasdaq may consider other Reference Prices including the opening trade, indication of interest and first two-sided quote in the [p]Primary [m]Market (which may occur after the execution) and the closing price for the prior Regular Session [for the security's primary market].
Nasdaq[-listed] securities and non-Nasdaq[-listed] securities outside of Regular Session [for trades executed after 4:00 pm and before 9:30 am Eastern Time].	Closing price of security for the last Regular Session on the security's [p]Primary [m]Market. If the closing price does not appear substantially related to the market, Nasdaq may consider other Reference Prices, including the prices of other trades in the trading session or the <i>Inside Price</i> .

*In unusual circumstances, Nasdaq may use a different Reference Price in determining which trades to break. For example, in the case of several large orders that execute at multiple prices, a Reference Price based on a weighted average of the best bid (best offer) ("BBO") at relevant times may be used rather than a Reference Price based solely on the Inside Price.*

*It may also be necessary to use a higher Numerical Threshold if, after market participants have been alerted to the existence of erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price at which trades would normally be broken. Nasdaq also may use different Numerical Thresholds in events that involve other markets in an effort to coordinate a Numerical Threshold that is consistent across markets.*

*Finally, Nasdaq could break or adjust 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 crosses, either due to a Nasdaq system error or because an underlying erroneous order resulted in an erroneous opening or closing price, Nasdaq may break or adjust all of the affected trades.*

#### Additional Factors

In occasional circumstances, Nasdaq may consider additional factors in determining whether a transaction is clearly erroneous (*provided the applicable Numerical Threshold is exceeded*). These include:

- Material news released for the security
- Suspicious trading activity
- System malfunctions or disruptions
- Locked or crossed markets
- Trading in the security was recently halted/resumed
- The security is an initial public offering
- Volume and volatility for the security
- Stock-split, reorganization or other corporate action
- Validity of consolidated tape trades and quotes and Nasdaq BBO comparison to national BBO
- General volatility of market conditions
- Reason for the error

#### Suspicious Trading Activity

*As reflected in Rule 11890(a)(1)(A), Nasdaq may determine that a transaction is clearly erroneous if the person seeking review has represented that it resulted from an order submitted by a person that was not authorized to submit that order into Nasdaq or from an account used for the purpose of effecting a manipulation of the market for the security. Nasdaq may adjudicate such transactions under Rule 11890(a), or may address them under Rule 11890(b) if their effect on the market is such that nullification or modification of a large number of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest.*

*While an assertion of suspicious trading activity may provide the basis for reviewing transactions, it does not provide a basis for altering the application of the factors used in determining whether to nullify or modify trades. Thus, the minimum price threshold required for adjudication under Rule 11890(a)(2)(D)(ii) would be applicable in the case of unauthorized or manipulative transactions being adjudicated under Rule 11890(a). Moreover, Nasdaq would apply the Numerical Thresholds described above in determining which trades to break. For example, if the best offer in a security during the Regular Session was \$20 prior to the execution of the first share of a series of unauthorized buy orders that executed at prices ranging from \$20 to \$30, the usual Numerical Threshold would be 10%, or \$22.00, and trades above that price could be broken.*

#### Additional Information Concerning Rule 11890(b)

Nasdaq may on its own motion review transactions in any security in the event of:

- A disruption or malfunction in the use or operation of any quotation, execution, communication, or trade reporting system owned or operated by Nasdaq and approved by the SEC;
- Extraordinary market conditions or other circumstances in which the nullification or modification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest.

Consequently, Rule 11890(b) is focused on systemic problems that involve large numbers of parties or trades, or market conditions where it would not be in the best interests of the market to proceed under the processes set forth in Rule 11890(a). Sometimes

events involving a single security will meet the standards of Rule 11890(b). However, market participants should not assume that Rule 11890(b) will be available where, for example, they failed to file a complaint within the time periods specified in Rule 11890(a). The rule could be available, however, in cases where a trade not eligible for adjudication under Rule 11890(a) nevertheless could present systemic risks if permitted to stand.

The guidance set forth in IM-11890-4 applies to many events involving a single security adjudicated pursuant to Rule 11890(b). However, Nasdaq may apply the guidance set forth in IM-11890-5 to some events involving a single security, such as some situations where trading activity occurs in multiple market centers and Nasdaq is acting in consultation with other markets.

#### IM-11890-5. Clearly Erroneous Transaction Guidance for Multi-Stock Events

Nasdaq is providing the following guidance on how it [generally] considers multi-stock events adjudicated on Nasdaq's own motion pursuant to Rule 11890(b).

Nasdaq generally considers a transaction to be clearly erroneous when the print is substantially inconsistent with the market price that existed at the time of execution of the first share of one or a series of orders that resulted in disputed transactions. Nasdaq would not consider a trade clearly erroneous, and therefore would not break or modify it, if it was priced within a range of the preceding market price, as described in detail below. In making such a determination, Nasdaq takes into account the circumstances at the time of the transaction, the maintenance of a fair and orderly market, and the protection of investors and the public interest. Participants in Nasdaq are responsible for ensuring that the appropriate price and type of order are entered into Nasdaq's systems. Simple assertion by a firm that it made a mistake in entering an order or a quote, or that it failed to pay attention or to update a quote, may not be sufficient to establish that a transaction was clearly erroneous.

Nasdaq may on its own motion review transactions in any security in the event of:

- A disruption or malfunction in the use or operation of any quotation, execution, communication, or trade reporting system owned or operated by Nasdaq and approved by the SEC; or
- Extraordinary market conditions or other circumstances in which the

nullification or modification of transactions may be necessary for the maintenance of a fair and orderly market or the protection of investors and the public interest.

Consequently, Rule 11890(b) is focused on systemic problems that involve large numbers of parties or trades, or market conditions where it would not be in the best interests of the market to proceed under the processes set forth in Rule 11890(a). Even in cases involving multiple securities, however, market participants should not assume that Rule 11890(b) will be available where, for example, they failed to file a complaint within the time periods specified in Rule 11890(a). The rule

could be available, however, in cases where a trade not eligible for adjudication under Rule 11890(a) nevertheless could present systemic risks if permitted to stand. The determination of whether to adjudicate an event under Rule 11890(b) is made by Nasdaq in its sole discretion pursuant to the terms of the rule.

**Numerical Factors for Review**

Nasdaq primarily considers the execution prices of the trades in question in determining whether trades should be nullified in a multi-stock event pursuant to Rule 11890(b). [Generally all trades more than 10% away from the Reference Price would be

clearly erroneous.] *The range away from a Reference Price beyond which trades may be broken is referred to as the Numerical Threshold, and is 10% (except in the circumstances described below). As a corollary to this policy, Nasdaq does not break trades that are at the Numerical Threshold or between the Reference Price and the Numerical Threshold.*

NASDAQ uses [different] Reference Prices based on time of the trade in order to establish an appropriate comparison point. These Reference Prices are detailed below. [In unusual circumstances, however, Nasdaq may use a different Reference Price.]

Time of Trade	Reference Price
All trades executed <i>during the Regular Session</i> after the market opening process [of trading during regular market hours and until the end of regular market hours]	<p><i>Inside Price</i>                      [For Nasdaq-listed securities, the best bid (best offer) (“BBO”) in Nasdaq at the time of execution of first share of the disputed order]                      [For Non-Nasdaq-listed securities, the national BBO at the time of execution of first share of the disputed order]                      The closing price of the security for the <i>Regular Session</i> [regular market hours] on the security’s [primary market] <i>Primary Market</i>. <i>If the closing price does not appear substantially related to the market, Nasdaq may consider other Reference Prices, including the prices of other trades in the trading session or the Inside Price.</i></p>
All securities for trades executed: <ul style="list-style-type: none"> <li>■ <i>outside of the Regular Session</i></li> <li>■ after 4:00 p.m., Eastern Time (ET)</li> <li>■ before 9:30 a.m., ET]</li> <li>■ during the market opening process [for regular market hours]</li> </ul>	

*In unusual circumstances, however, Nasdaq may use a different Reference Price in determining which trades to break. For example, in the case of several large orders that execute at multiple prices, a Reference Price based on a weighted average of the best bid (best offer) (“BBO”) at relevant times may be used rather than a Reference Price based solely on the Inside Price.*

*It may also be necessary to use a higher Numerical Threshold if, after market participants have been alerted to the existence of erroneous activity, the price of the security returns toward its prior trading range but continues to trade beyond the price at which trades would normally be broken. Nasdaq also may use different Numerical Thresholds in events that involve other markets in order to coordinate a Numerical Threshold that is consistent across markets.*

*Finally, Nasdaq could break or adjust 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 crosses, either due to a Nasdaq system error or*

*because an underlying erroneous order resulted in an erroneous opening or closing price, Nasdaq may break or adjust all of the affected trades.*

In occasional circumstances, Nasdaq may consider additional factors in determining whether the transactions are clearly erroneous (*provided the applicable Numerical Threshold is exceeded*). These include:

- Material news released for individual securities
- Suspicious trading activity

Nasdaq may also apply the guidance set forth in IM 11890-5 to some events involving a single security, such as some situations where trading activity occurs in multiple market centers and Nasdaq is acting in consultation with other markets.

*Suspicious Trading Activity*

*As reflected in Rule 11890(a)(1)(A), Nasdaq may determine that a transaction is clearly erroneous if the person seeking review has represented that it resulted from an order submitted by a person that was not authorized to submit that order into Nasdaq or from an account used for the purpose of effecting a manipulation of the market for the security. Nasdaq may adjudicate such transactions under Rule 11890(b) if their effect on the market is such that nullification or modification of a large number of transactions may be necessary for the maintenance of a fair*

*and orderly market or the protection of investors and the public interest.*

*While an assertion of suspicious trading activity may provide the basis for reviewing transactions, it does not provide a basis for altering the application of the factors used in determining whether to nullify or modify trades. Thus, Nasdaq would apply the Numerical Thresholds described above in determining which trades to break. For example, if the best offer in a security during the Regular Session was \$20 prior to the execution of the first share of a series of unauthorized buy orders that executed at prices ranging from \$20 to \$30, the usual Numerical Threshold would be 10%, or \$22.00, and trades above that price could be broken.*

\* \* \* \* \*

**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

Application of Rule 11890 to Suspicious Trading Activity

Nasdaq is amending Rule 11890, which covers the breaking or adjusting of trades determined to be clearly erroneous, to clarify the scope of its application to unauthorized and/or manipulative trading activity that could disrupt fair and orderly markets. In recent months, financial regulators have become aware of market manipulation schemes in which criminals manipulate stock prices by illegally gaining access to legitimate accounts.<sup>5</sup> Accordingly, Nasdaq is proposing to amend the definition of "clearly erroneous," which currently refers to an obvious error in any term of a transaction, to make it clear that unauthorized trading activity fits within the definition. However, Nasdaq believes that the rule should not be drafted in a manner that makes an artificial distinction between manipulative activity undertaken through "hijacked" accounts and similar manipulations effected through accounts where an individual is technically authorized to enter orders but may take other measures to conceal identity. In short, Nasdaq believes that the scope of Rule 11890 should be broad enough to allow an appropriate response to any form of unauthorized or manipulative trading activity, including "cyber attacks" on the infrastructure of the financial system by terrorist organizations or attempts to manipulate stock prices by illegally gaining access to legitimate accounts or opening new accounts using false information.<sup>6</sup>

The rule change further provides that although suspicious trading activity may provide a basis for determining a trade to be clearly erroneous, it would not provide a basis for altering the application of price-based numerical factors in determining whether to break particular trades. As described in SR-

NASDAQ-2006-046,<sup>7</sup> Nasdaq primarily considers the execution price of a trade in determining whether it is clearly erroneous, and breaks trades that are more than a specified percentage away from a Reference Price that is indicative of prior market conditions. The range away from a Reference Price beyond which trades may be broken, expressed as a percentage or minimum deviation, is referred to as the Numerical Threshold.<sup>8</sup> Thus, Nasdaq would apply the numerical factors described in IM-11890-4 and IM-11890-5 in determining which trades to break.<sup>9</sup> For example, if the best offer in a security during a market's Regular Session<sup>10</sup> was \$20 prior to the execution of the first share of a series of unauthorized buy orders that executed at prices ranging from \$20 to \$30, the usual Numerical Threshold would be 10%, or \$22.00, and higher-priced trades could be broken. Similarly, the minimum price threshold required for adjudication under Rule 11890(a)(2)(D)(ii) would be applicable in the case of unauthorized or manipulative transactions being adjudicated under Rule 11890(a).

Nasdaq believes that it is important to allow transactions priced close to the inside market or other reference price to stand, even if the transactions directly resulted from a mistake, system error or account intrusion. This ensures that market participants have economic incentives to develop and maintain internal controls with a goal of preventing erroneous trading activity. It should also be noted that Nasdaq refers market participants for investigation by the NASD in its capacity as Nasdaq's regulatory services provider in all

<sup>7</sup> Securities Exchange Act Release No. 54854 (December 1, 2006), 71 FR 71208, 71211 (December 8, 2006) (SR-NASDAQ-2006-046).

<sup>8</sup> As a corollary to its policy, Nasdaq does not break trades that are at the Numerical Threshold or between the Reference Price and the Numerical Threshold.

<sup>9</sup> IM-11890-4 provides guidance on how Nasdaq considers: (1) all complaints filed by market participants under Rule 11890(a) and (2) most events involving a single security considered on Nasdaq's own motion pursuant to Rule 11890(b). IM-11890-5 provides guidance on the remaining events involving a single security considered on Nasdaq's own motion pursuant to Rule 11890(b), such as some situations where trading activity occurs in multiple market centers and Nasdaq is acting in consultation with other markets. IM-11890-5 also provides guidance on how Nasdaq considers multi-stock events adjudicated on Nasdaq's own motion pursuant to Rule 11890(b). Telephone conversation by and between John Yetter, Senior Associate General Counsel, Nasdaq, and David Hsu, Special Counsel, Division of Market Regulation, Commission, on June 20, 2007.

<sup>10</sup> The proposed rule change adds the defined term "Regular Session" to the rule, and defines it as "the primary trading session for a particular security on its Primary Market, which is generally 9:30 a.m. through 4:00 or 4:15 p.m.

circumstances where a firm's erroneous trades raise questions as to the adequacy of its computer systems and internal controls. Nasdaq believes that enhanced controls by brokerage firms may play an important role in reducing the incidence of account intrusions, as well as system and human errors.<sup>11</sup>

Numerical Thresholds

The proposed rule change also amends IM-11890-4 and -5 to provide some additional guidance regarding the application of price-based factors under Rule 11890. The Reference Price generally used under Rule 11890 is the best bid/best offer ("BBO") in Nasdaq, or the national BBO, for trading during the Regular Session, and the closing price on a stock's primary market for late and early trading. As described in SR-NASDAQ-2006-046,<sup>12</sup> however, Nasdaq may use a different Reference Price in unusual circumstances. Thus, in a case where material news about a security was released after market close for the security and a trade occurring after 4 p.m. and before 9:30 a.m. is at issue, Nasdaq may use a Reference Price derived from after-hours trading activity rather than the closing price of the security. Similarly, in the case of several large orders that execute at multiple prices, a Reference Price based on a weighted average of the BBO at relevant times may be used rather than a Reference Price based solely on the BBO immediately prior to the execution of the first share of the order. Nasdaq believes that it would enhance the clarity of the Interpretive Material to add these examples from the prior filing directly to the text. Nasdaq also proposes to amend the Interpretive Material to add examples of cases where Nasdaq may apply alternative Numerical Thresholds in determining which trades to break. For example, it may be necessary to use a higher Numerical Threshold if, after market participants have been alerted to the

<sup>11</sup> Nasdaq maintains records of each clearly erroneous complaint that it receives. This file includes: the filer's written complaint as required by Rule 11890(a)(2), any further written correspondence or notes of oral communications made by the Nasdaq MarketWatch analyst, any relevant screen shots or other market information retained by the analysts, and a record of the decisions by the Nasdaq official and the Market Operations Review Committee, if the official's decision is appealed. In the event of an account intrusion, Nasdaq requires written confirmation from the filer that the erroneous trade resulted from an account intrusion unless provided in the filer's original written complaint. Nasdaq refers all clearly erroneous complaints that raise regulatory concerns, including all cases alleging account intrusion, to NASD on a timely basis and also provides NASD with information on all complaints on a monthly basis.

<sup>12</sup> See *supra* note 7.

<sup>5</sup> See, e.g., SEC Litigation Release No. 20037 (March 12, 2007).

<sup>6</sup> Clay Wilson, Congressional Research Service, *Computer Attack and Cyber Terrorism: Vulnerabilities and Policy Issues for Congress* (April 1, 2005); Jeffrey Garten, *Markets' resilience to terror is no reason to relax*, Financial Times (September 11, 2006); Financial Services Sector Coordinating Council, *Protecting the U.S. Critical Financial Infrastructure: An Agenda for 2005* (2005).



existence of erroneous activity, the price of a security returns toward its prior trading range but continues to trade beyond the price at which trades would normally be broken. Nasdaq also may use different Numerical Thresholds in events that involve other markets in order to coordinate a break point that is consistent across markets. For example, if the bulk of trades in a stock not listed on Nasdaq occurred in the stock's primary market, Nasdaq would generally seek to reach a result consistent with the primary market.

Finally, the amended Interpretive Material provides that Nasdaq could break or modify 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 crosses, either due to a Nasdaq system error or because an underlying erroneous order resulted in an erroneous opening or closing price, Nasdaq may break or adjust all of the affected trades.

Nasdaq is also amending the Numerical Thresholds under IM-11890-4 for trading outside the Regular Session, to establish wider ranges within which trades are permitted to stand. The change reflects the diminished depth of the market during after hours and pre-market trading sessions; market participants trading during these sessions must accept the fact that orders are more likely to exhaust liquidity available at the inside price than is the case during the Regular Session. Accordingly, Nasdaq believes that the Numerical Thresholds should be doubled during these times. For example, a trade at \$40 per share could be broken if more than 10% away from the Reference Price during the Regular Session, but could not be broken during the pre-market or after hours sessions unless it was more than 20% away from the Reference Price.

Nasdaq is also amending the language of Rule 11890(a)(2)(B) to make it clear that persons seeking review of transactions must present a factual basis for believing that the trade is clearly erroneous. Nasdaq cannot, within the context of an adjudication that must be conducted within a short period of time, determine all of the factual circumstances associated with a particular trade or set of trades. Thus, for example, if a trader files for adjudication and states that he

mistakenly entered an order for 400,000 shares rather than the intended order size of 4,000, Nasdaq cannot, on a real-time basis, determine whether this is accurate. Nevertheless, Nasdaq believes that it is generally incumbent on persons seeking review actually to allege a human or system error, rather than merely stating that the order was "filled away" or at "a bad price."<sup>13</sup> Requiring the statement of a factual basis also allows NASD to evaluate, after the fact, whether a particular market participant is abusing the clearly erroneous process or employing poor internal controls. Individuals and firms found to have misled Nasdaq about the cause of the alleged error would be subject to disciplinary action for misleading a self-regulatory organization.

#### Other Changes

Nasdaq is amending the time limits for market participants to file for an adjudication under Rule 11890(a) in cases where the price of the transaction at issue is more than 50% away from the applicable inside price (or the closing price, for trading outside the Regular Session or before the primary market has posted its first two-sided quote), provided that the value of the transactions at issue is more than \$10,000.<sup>14</sup> If these criteria are met, the transaction is defined as an "Outlier Transaction," and the parties to the trade are given an extra hour to petition for review if the trade occurred during the Regular Session or during pre-market hours, or until 9:30 a.m. the next trading day if the trade occurred after hours. The reason for the change is to provide greater assurance that trades that are egregiously out of line with prevailing market prices are not

<sup>13</sup> Nasdaq notes, however, that several circumstances exist in which price itself may provide a conclusive basis for determining that an error occurred. For example, if a market participant entered an order in a non-Nasdaq security for execution after 9:30 a.m., but the primary market delayed its opening in the security until a later time, an execution may occur at a price substantially unrelated to the primary market's opening price of the security. Similarly, an execution of an order for an exchange-traded fund at a price that is substantially out-of-line with the intraday indicative value for the fund may provide *prima facie* evidence of an error. There have also been circumstances in which an employee of a member firm notices an execution at a price a substantial percentage (*i.e.*, well in excess of 10%) away from the best bid/best offer, is unable to contact the responsible trader to obtain an explanation, and files for a nullification of the trade based solely on its price.

<sup>14</sup> Measured by multiplying the number of shares at issue in the trades by the difference between the execution price and price with which the execution price is compared under the rule.

permitted to stand, provided that the dollar value of the trades is significant.

Nasdaq is also making several minor procedural modifications to the rule. First, Nasdaq is amending the language of Rule 11890(a)(2)(E) to allow Nasdaq to notify the counterparty to a trade about an erroneous event by telephone or other means consistent with the communications provisions of Rule 11890(d). While Nasdaq currently intends to continue notifying counterparties by telephone, the proposed change would give Nasdaq the flexibility to incorporate more electronic communications in the future. Pursuant to Rule 11890(d), any change to the method of communication must be announced by Nasdaq in a Notice to Members or Head Trader Alert.

Second, Nasdaq is amending Rule 11890(b) to replace a statement that Nasdaq should, except in extraordinary circumstances, take action under the subsection within thirty (30) minutes of detection of an erroneous transaction, with a statement that Nasdaq should act as soon as possible. Time is always of the essence when determinations must be made under the rule, but as a practical matter, many events adjudicated under Rule 11890(b) involve coordination between multiple market centers, and the time required to gather and evaluate information needed to make a determination is often in excess of 30 minutes. Accordingly, Nasdaq is amending the rule to provide that a determination must be made as soon as possible, except in extraordinary circumstances, in which case the outside time limit for a determination under the paragraph (b) will be 9:30 a.m. the next trading day (rather than 3 p.m., as currently provided).

Third, Nasdaq is amending Rule 11890 and the Interpretive Material in several places to replace the word "officer" with the word "official." The intent of this change is to allow adjudications under Rule 11890(a) to be made by any duly designated Nasdaq employee, rather than limiting that authority to persons that are officers of Nasdaq within the meaning of its limited liability company agreement (*e.g.*, persons with the title of Vice President or President). The change will broaden the scope of persons permitted to adjudicate claims under the Rule, thereby allowing more efficient adjudications. All persons designated under the Rule will have appropriate background in market structure and the requirements of the Rule; designated persons are likely to be employees of Nasdaq's MarketWatch regulatory unit. Nasdaq is not, however, modifying Rule

11890(b), which requires decisions to break or modify trades on Nasdaq's own motion to be made by senior officers only. Consistent with current practice, all adjudications under 11890(a) and (b) will continue to be made on a "no-names basis" (i.e., the adjudicator does not know the identities of the market participants that will be affected by the decision).

Finally, Nasdaq is amending the rule to add a consolidated paragraph of definitions of terms used in the rule and to delete obsolete references to transactions entered into by a member of a national securities exchange with unlisted trading privileges in Nasdaq securities. Although Nasdaq's former SuperMontage system allowed other exchanges to enter orders directly, the current Nasdaq Market Center does not retain this functionality. Rather, other exchanges and their members can access Nasdaq through broker-dealers that are members of Nasdaq, including broker-dealers owned by exchanges.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>15</sup> in general, and with Section 6(b)(5) of the Act,<sup>16</sup> 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 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.

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

(A) By order approve the 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 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2007-001 on the subject line.

#### 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-2007-001. 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 a.m. and 3 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-2007-001 and should be submitted on or before July 18, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E7-12426 Filed 6-26-07; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-55932; File No. SR-NYSEArca-2007-54]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish Position and Exercise Limits for Options on the KBW Bank Index

June 20, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 13, 2007, NYSE Arca, Inc. ("NYSE Arca" or "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 substantially prepared by the Exchange. The Exchange has designated the proposed rule change as "non-controversial" under Section 19(b)(3)(A)(iii)<sup>3</sup> of the Act and Rule 19b-4(f)(6) thereunder,<sup>4</sup> 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

NYSE Arca proposes to amend NYSE Arca Rule 5.16 in order to increase the position and exercise limits for options

<sup>17</sup> 17 CFR 200.30-3(a)(12).

<sup>15</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> 15 U.S.C. 78f.

<sup>16</sup> 15 U.S.C. 78f(b)(5).