

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 55909 / June 14, 2007

Admin. Proc. File No. 3-12384

In the Matter of the Application of  
NASDAQ STOCK MARKET, LLC  
For Review of Action Taken by the  
CONSOLIDATED TAPE ASSOCIATION

ORDER ACCEPTING JURISDICTION AND ESTABLISHING PROCEDURES

The Nasdaq Stock Market, LLC (“Nasdaq”), a member of the Consolidated Tape Association (“CTA”), has filed a petition for review, pursuant to Section 11A(b)(5) of the Securities Exchange Act of 1934 1/ and Exchange Act Rule 608(d), 2/ (formerly Exchange Act Rule 11Aa3-2(e)), 3/ of action taken by the CTA Operating Committee. On March 23, 2006, the Operating Committee voted to impose a new participant entry fee of \$833,862 for Nasdaq to join

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- 1/ 15 U.S.C. § 78k-1(b)(5) (providing that, upon application by an aggrieved person, any prohibition or limitation of access to services by a registered securities information processor “shall” be subject to Commission review). The CTA is registered as an exclusive securities information processor. See Securities Exchange Act Rel. No. 12035 (Jan. 22, 1976), 8 SEC Docket 1099 (granting registration to the CTA).
- 2/ 17 C.F.R. § 242.608(d) (providing that the Commission “may, in its discretion,” entertain appeals in connection with the implementation or operation of any effective national market system plan). The Commission has held that its authority to review national market system plan action pursuant to Rule 608(d)’s predecessor, Rule 11Aa3-2(e), is discretionary. American Stock Exchange, Inc., 54 S.E.C. 491, 497-99 (2000).
- 3/ In June 2005, Rule 11Aa3-2(e) was redesignated as Rule 608(d) without any change in substance. See Regulation NMS, Exchange Act Rel. No. 51808 (June 9, 2005), 85 SEC Docket 2264, 2338 (stating that, while Rule 608 rennumbers Rule 11Aa3-2, the substance of the provision “remains largely intact”).

the CTA Plan. <sup>4/</sup> Nasdaq alleges that the Operating Committee improperly calculated the fee by, among other things, including historical costs of operating the CTA's systems that were incurred before Nasdaq joined the Plan. Nasdaq alleges that the resulting fee is excessive and constitutes a denial of access to the CTA's systems. Nasdaq seeks a reversal of the Operating Committee's March 23, 2006, action, and an order that the entry fee be assessed at \$233,132. <sup>5/</sup> Because we find the record at this stage to be insufficient to permit the necessary determinations, we have decided that the best procedure under the circumstances is to designate an administrative law judge to preside over this matter and to conduct further proceedings consistent with this Order.

## I.

Background

In 1975, Congress directed the Commission, through enactment of Exchange Act Section 11A, to facilitate the establishment of a national market system for securities. <sup>6/</sup> Congress found that a national market system would link together the individual markets that trade securities. <sup>7/</sup> Congress contemplated that a national market system would encourage centralized trading and fair competition among markets. <sup>8/</sup>

The Commission adopted a rule that required every national securities exchange and the NASD to file a plan for collecting, processing, and disseminating on a consolidated basis reports of completed transactions ("last sale reports") in securities registered or admitted to trading on an

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<sup>4/</sup> Nasdaq also joined the Consolidated Quotation ("CQ") Plan, pursuant to which the participants disseminate bid/ask quotation information for listed securities. The Operating Committee of that Plan is not a registered securities information processor. However, the entry fee that is the subject of Nasdaq's petition for review also entitles Nasdaq to join the CQ Plan as a new participant in that Plan. Thus, Nasdaq also contests the application of the entry fee to Nasdaq's entry into the CQ Plan.

<sup>5/</sup> In addition, Nasdaq requests that any costs incurred by the CTA in defending this action, including the costs of counsel, be apportioned among the CTA Plan participants other than Nasdaq. We lack the authority to award costs. Cf. Richard J. Rouse, 51 S.E.C. 581, 587 n.20 (1993) (rejecting respondent's request for attorney fees in appeal of NASD disciplinary action; stating that "[n]o statutory basis exists for the award of attorney fees and other costs in the context of appeals to the Commission of disciplinary action by self-regulatory organizations").

<sup>6/</sup> 15 U.S.C. § 78k-1(a)(2).

<sup>7/</sup> 15 U.S.C. § 78k-1(a)(1)(D).

<sup>8/</sup> 15 U.S.C. § 78k-1(a)(1)(C).

exchange or over-the-counter. To meet those requirements, various self-regulatory organizations filed with the Commission a joint industry plan (the "CTA Plan") governing the implementation and operation of the consolidated reporting system. <sup>9/</sup> The CTA Plan establishes the terms, conditions, and procedures under which last sale reports are made available. The CTA Plan also engages the Securities Industry Automation Corporation, or SIAC, as the central processor of last sale information for inclusion in the consolidated tape. <sup>10/</sup> The CTA Plan is administered by the CTA, which currently consists of eleven participants, all of whom are competitors. <sup>11/</sup>

In 1993, the Commission approved an amendment to the CTA Plan that added criteria for calculating the entry fee to be paid by new participants to the Plan. <sup>12/</sup> The amendment required a new entrant to pay the current participants an amount that "attributes an appropriate value to the assets, both tangible and intangible, that CTA has created and will make available to such new [p]articipant." The CTA Plan allowed the participants to consider one or more of six factors in assessing an appropriate entry fee.

In 2002, Nasdaq expressed interest in joining the CTA and CQ Plans and inquired about the amount of the entry fee. The CTA Participants engaged Deloitte & Touche to determine a proposed new entrant's fee. In a report dated October 16, 2002, Deloitte & Touche concluded that the new entrant fee could be set at \$3,307,000, consisting of \$2,400,000 for "Historical Cost of the System," \$612,000 for a new processor, and \$295,000 for modifications to the existing processor.

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<sup>9/</sup> Exchange Act Rel. No. 15250 (Oct. 20, 1978), 15 SEC Docket 1355, 1356.

<sup>10/</sup> 15 SEC Docket at 1356. The CTA Plan provides for the collection and dissemination of "last sale" price information in "eligible securities." The CTA Plan participants report to SIAC last sale prices relating to transactions in eligible securities. SIAC disseminates the data for a fee to vendors who, in turn, distribute the data to broker-dealers, investors, and other members of the public. The CTA Plan provides for the sharing of net income from the fees charged to vendors and others for the receipt or use of the CTA systems' last sale price information. Each CTA Plan participant is entitled to receive its "annual share" of revenue, which is calculated according to the relative percentage of last sale transactions reported by that participant.

<sup>11/</sup> The current participants are the American Stock Exchange, Boston Stock Exchange, Chicago Board Options Exchange ("CBOE"), Chicago Stock Exchange, International Securities Exchange ("ISE"), Nasdaq Stock Market, NASD, National Stock Exchange (formerly the Cincinnati Stock Exchange), New York Stock Exchange, NYSE Arca, and the Philadelphia Stock Exchange.

<sup>12/</sup> See Exchange Act Rel. No. 33319 (Dec. 10, 1993), 55 SEC Docket 2062.

In 2003, the Division of Market Regulation (“Division”) expressed its concern to the CTA that the amount of the new entrant fee that the participants were considering might impose unnecessary competitive burdens on new entrants. <sup>13/</sup> In 2004, the Division twice urged the CTA to amend the CTA Plan to include “solely objective standards” for determining a new entry fee. <sup>14/</sup>

On December 3, 2004, the CTA Plan participants proposed to amend the CTA Plan to include new standards for assessing a new entrant fee (the “Entry Fee Amendments”). <sup>15/</sup> The proposed Entry Fee Amendments provided, in pertinent part:

In determining the amount of the Participation Fee to be paid by any new Participant, the Participants shall consider one or both of the following:

- the portion of costs previously paid by CTA for the development, expansion and maintenance of CTA’s facilities which, under generally accepted accounting principles, could have been treated as capital expenditures and, if so treated, would have been amortized over the five years preceding the admission of the new Participant (and for this purpose all such capital expenditures shall be deemed to have a five-year amortizable life); and
- previous Participation Fees paid by other new Participants.

The Participant Fee shall be paid to the Participants in this CTA Plan and the “Participants” in the CQ Plan. A single Participation Fee allows the new Participant to participate in both Plans. If a new Participant does not agree with the calculation of the “Participation Fee,” it may subject the calculation to review by the Commission pursuant to Section 11A(b)(5) of the [Exchange] Act. (Emphasis supplied).

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<sup>13/</sup> See Order Approving the Seventh Substantive Amendment to the Second Restatement of the Consolidated Tape Association Plan and the Fifth Substantive Amendment to the Restated Consolidated Quotation Plan, Exchange Act Rel. No. 51391 (Mar. 17, 2005), 84 SEC Docket 4136, 4137 n.10.

<sup>14/</sup> Id. at 4137 n.12.

<sup>15/</sup> The proposal represented the seventh substantive amendment to the Second Restatement of the CTA Plan and the fifth substantive amendment to the Restated CQ Plan. Exchange Act Rel. No. 51012 (Jan. 10, 2005), 84 SEC Docket 2508.

In addition, the Entry Fee Amendments required new participants to reimburse the Plan processor for the costs incurred in modifying the CTA's systems to accommodate the new participant and for any additional capacity costs.

On March 17, 2005, the Commission, by delegated authority, approved the Entry Fee Amendments, <sup>16/</sup> which were incorporated into the CTA Plan as Section III(c). In its adopting release, the Commission stated that "the main purpose of a participation fee is to require each new party to the [CTA and CQ] Plans to pay a fair share of the costs previously paid by the CTA for the development, expansion, and maintenance of CTA's facilities." <sup>17/</sup> It stated further that the CTA and CQ Plan participants "should only consider the costs of tangible assets that could have been treated as capital expenditures under GAAP in the fee calculation, and if so treated, would have been amortized for a five-year period preceding the new party's admission to the Plans." <sup>18/</sup> However, the Commission cautioned that participants "must not consider any historical costs of operating the systems prior to the time a new party joins the Plans, or any subjective or intangible costs such as 'good will' or any future benefits to the new party." <sup>19/</sup> The Commission concluded that "the proposed new standards, if appropriately employed by the [p]articipants, should foster a fair and reasonable method for determining the amount of a new [p]articipant's entrance fee to be paid to the Plans." <sup>20/</sup>

## II.

### Facts

In 2005, Nasdaq requested approval to join the CTA. The last entrant in the CTA Plan had been the CBOE in 1991. Nasdaq's request thus presented the first occasion for the CTA to calculate a new entrant fee based on the criteria set forth in the Entry Fee Amendments. The CTA directed SIAC to calculate a new entrant fee. In a presentation to the CTA dated October 12, 2005, SIAC calculated that Nasdaq's entry fee should be assessed at \$947,035,

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<sup>16/</sup> Order Approving the Seventh Substantive Amendment to the Second Restatement of the Consolidated Tape Association Plan and the Fifth Substantive Amendment to the Restated Consolidated Quotation Plan, Exchange Act Rel. No. 51391 (Mar. 17, 2005), 84 SEC Docket 4136.

<sup>17/</sup> Id. at 4138.

<sup>18/</sup> Id.

<sup>19/</sup> Id. (Emphasis supplied).

<sup>20/</sup> Id.

consisting of \$308,488 in “development amortization” costs and \$638,547 in “production amortization” costs. 21/ SIAC calculated the “development amortization” costs by

- totaling CTA development costs for 2000 through 2004;
- identifying “included” development costs that could be capitalized under Generally Accepted Accounting Principles (“GAAP”);
- amortizing included development costs over five years;
- adjusting that amortized amount by the Consumer Price Index (“CPI”); and
- dividing the result by ten, the then-current number of CTA Plan participants. 22/

SIAC calculated the “production amortization” costs in the same manner. In its presentation, SIAC quoted the language of the Entry Fee Amendments, but did not address the Commission’s admonition in the March 2005 adopting release that the CTA “must not consider any historical costs of operating the systems prior to the time a new party joins the Plans.” SIAC also did not attach any work papers in support of its calculations.

On November 4, 2005, Nasdaq formally requested entry into the CTA and CQ Plans. In its request, Nasdaq questioned whether SIAC had properly calculated the entry fee. It expressed concern that “production costs that are more on the order of operating expenses and should not be capitalized may have been included in the [entry fee] calculation.” It sought to meet with SIAC to ascertain the nature of the expenses included in both development costs and production costs.

In a memorandum dated January 9, 2006, SIAC’s Internal Audit Department reported on an “Agreed-Upon Procedures” engagement that it had performed for the purpose of “validat[ing] the assumptions used in the calculation of the Participation Fee.” 23/ The memorandum recited that SIAC’s auditors were asked to validate the “assumptions” that SIAC used in calculating the new entry fee for Nasdaq. However, the memorandum was silent as to what those assumptions were. Nor did the memorandum indicate the “clearly defined criteria” on which the “Agreed-Upon Procedures” engagement was based. In the memorandum, SIAC’s auditors focused solely on whether an expense could be capitalized under GAAP. SIAC’s auditors did not address the question whether an expense was an historical cost of operating the CTA’s systems. Nor did

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21/ From the record, it appears that SIAC and the CTA traditionally billed participants for two categories of expenses, “development” and “production.”

22/ The calculation was performed for only a tenth CTA Plan Participant because ISE had not yet asked to have the entry fee calculated for it.

23/ According to the January 9, 2006, memorandum, an Agreed-Upon Procedures engagement was “one in which the auditor agrees to perform specific audit procedures based upon a set of clearly defined criteria. The client or customer sets forth the procedures and is solely responsible for their sufficiency.”

they identify any category of historical operating costs to be excluded from the calculation. Rather, SIAC's auditors simply identified one category of costs that should be "included" under GAAP and another that should be "excluded" under GAAP. SIAC's auditors concluded that they found the costs and assumptions used in the calculations to be "reasonable."

At the CTA's January 20, 2006, meeting, SIAC presented its January 9, 2006, audit memorandum. When NASD, Nasdaq's parent at the time, raised questions regarding SIAC's calculations, the CTA granted NASD an opportunity to have its accountants meet with SIAC's accountants to address NASD's concerns. In its brief, the CTA asserts, and Nasdaq does not dispute, that NASD availed itself of the opportunity on February 2, 2006.

On February 9, 2006, SIAC issued a second estimate of Nasdaq's new entry fee. SIAC applied the same methodology used in making the first estimate, but arrived at a slightly lower fee of \$912,918, which reflected the exclusion of certain production costs that were previously included in the calculation.

In a memorandum to the CTA dated March 6, 2006, Nasdaq objected to SIAC's inclusion of production costs in the calculation of Nasdaq's entry fee. Nasdaq stated, in pertinent part:

In the absence of instructions from the Operating Committee, however, SIAC included in its figures all expenditures that could have been capitalized for a five-year period not only for development, but also for production. Fortunately, SIAC did separate expenditures into two categories, development expenses which are permitted under the Plan and operating or production expenses which are not. As a result, impermissible operating expenses can readily be excluded by striking all production expenses in the presentation provided by SIAC.

Nasdaq also objected to SIAC's use of a CPI inflator. Based on SIAC's February 9, 2006, presentation, which identified \$2,839,747 in total development expenses without a CPI inflator, Nasdaq proposed that it pay an entry fee of \$283,975 (\$2,839,747 divided by ten, the then-current number of CTA Participants).

On March 22, 2006, SIAC issued an updated calculation of CTA costs based on the five-year period ending December 2005. The calculation also reflected the fact that the International Securities Exchange, or ISE, had requested to join the CTA Plan. This circumstance required the CTA to calculate entry fees for both a tenth and an eleventh participant. SIAC's calculation showed that a tenth entrant should pay \$873,381, and that an eleventh entrant should pay \$793,983.

At the CTA's March 23, 2006, meeting, the participants discussed costs to be included in the calculation of the new entry fee. Nasdaq moved for a vote on its proposal to pay a \$283,975 entry fee, but no participant seconded the motion. Another motion was made to admit Nasdaq

and ISE as participants for an entry fee of \$833,682 each ( $\$873,381 + \$793,983 = 1,667,364$  divided by two is \$833,682). This motion was seconded and approved.

At the CTA's May 10, 2006, meeting, the participants determined that Nasdaq and ISE could each pay their \$833,682 entry fee in two equal installments, one within thirty days of that meeting and the other by the end of calendar year 2006. On June 16, 2006, Nasdaq wired payment of the first half of the entry fee. 24/ This petition for review followed. 25/

### III.

#### Parties' Contentions

##### A. Nasdaq

Nasdaq contends that the CTA made three errors in calculating the entry fee. First, the CTA improperly included \$492,678 of historical operating costs in the calculation. As SIAC's documents reveal, the CTA historically has segregated all of its costs into one of two categories: development costs, *i.e.*, the costs of developing, expanding, and maintaining the CTA's facilities, and production or operating costs, *i.e.*, the costs of operating the CTA's systems. To calculate Nasdaq's fee, the CTA began with its "existing separation of Development Costs and Production Costs and then excluded costs in each category that could not be capitalized under GAAP." In Nasdaq's view, "[w]hat [the CTA] should have done – to adhere to the Commission's warning that the Participants must not consider any historical costs of operating the systems prior to the time a new party joins the Plans – was to begin with its existing Development Costs and then exclude those Development Costs that could be capitalized under GAAP." Nasdaq contends that the CTA, by including production, or operating, costs in its fee calculation, erroneously included \$492,678 of historical operating costs. 26/

Second, the CTA improperly applied a CPI inflator. Nasdaq argues that the Entry Fee Amendments do not authorize application of a CPI inflator or the practice of inflating historical costs to present day dollars. Moreover, application of a CPI inflator runs counter to accounting

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24/ The record does not indicate whether Nasdaq has paid the second half of the entry fee.

25/ ISE has not petitioned for review.

26/ Nasdaq states that it arrived at this figure by taking SIAC's Production Cost Amortization Through December 2005 of \$5,419,466 and dividing it by eleven, the number of CTA Plan participants including Nasdaq and ISE.



principles of fixed assets. By applying a CPI inflator, the CTA overstated its costs by \$68,172. 27/

Third, the CTA improperly treated Nasdaq and ISE as the tenth and eleventh participants, respectively, of the CTA Plan, and averaged the entry fees. In Nasdaq's view, Nasdaq and ISE each should be treated as the eleventh participant.

#### B. CTA

The CTA responds that it properly excluded historical operating costs in calculating the entry fee. It deliberated over the fee calculation at no fewer than eight meetings, with three different presentations from SIAC. Commission staff members were present at each of the meetings and presentations and never suggested that the CTA had performed the calculation improperly.

The CTA acknowledges that, for recordkeeping purposes, it categorizes costs as either "development" costs or "production" costs. However, contrary to Nasdaq's claim, "production" costs are not synonymous with "operating" costs. The CTA asserts that whether it categorizes a cost as a "development" or "production" cost for recordkeeping purposes is irrelevant to the calculation of an entry fee. "What is relevant is whether a cost that CTA has placed in the 'production cost' category is a cost that CTA incurs in order to enhance or maintain the system or a cost that CTA incurred in order to operate the system." The CTA asserts that the "CTA incurs a portion of total production costs in enhancing and maintaining CTA systems, separate and apart from the production costs that [the] CTA incurs in operating the systems. The [Entry Fee Amendments] require [the] CTA to include the former in the entry-fee calculation, but prohibits [the] CTA from including the latter."

The CTA notes that, in an exhibit ("Exhibit A") to its December 3, 2004, letter transmitting the Entry Fee Amendments to the Commission for approval, the CTA included a hypothetical example of the calculation of an entry fee. The example set forth total production costs. It then carved out of total production costs those costs that were to be included in the calculation. The CTA asserts that it calculated Nasdaq's entry fee according to the methodology reflected in the hypothetical calculation. 28/ It suggests that the Commission's staff, which had

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27/ Using SIAC's March 22, 2006 Presentation, Nasdaq subtracted "Development Cost Amortization - CPI Adjusted" from "Development Cost Amortization" and then divided by eleven, the number of CTA Plan participants. Nasdaq then repeated the same process for Production costs. As set forth above, Nasdaq argues that all Production Costs should be excluded from the calculation of the new entry fee.

28/ In its reply brief, Nasdaq asserts that the CTA's hypothetical calculation has no place in the record because it was not included in the Entry Fee Amendments presented to, and

(continued...)

“considerable” input into the methodology, placed its imprimatur on the CTA’s calculation of Nasdaq’s entry fee. 29/

The CTA acknowledges that it applied a CPI inflator, but asserts that it did so in compliance with the hypothetical calculation contained in Exhibit A. Exhibit A demonstrates that the CTA Plan participants, acting under the Commission’s guidance, “clearly intended” that changes in the CPI would be factored into the calculation. The CTA states, moreover, that it is “perfectly appropriate” to take into account the time value of money by adding back the inflation factor.

The CTA acknowledges that the CTA Plan is silent on the sharing of new entrant fees by multiple participants who enter the Plan in the same year. As a strict time priority, Nasdaq would be the tenth, and not the eleventh, CTA Plan participant because Nasdaq took the necessary steps to become a new participant sooner than ISE did. Having Nasdaq and ISE share the entry fees payable by the tenth and eleventh participants was considered by the participants to be a fair and reasonable way to proceed since Nasdaq and ISE were proposing to enter the CTA Plan at approximately the same time.

#### IV.

#### Analysis

As a threshold matter, we believe that Exchange Act Section 11A(b)(5) provides us with authority to review Nasdaq’s petition. Section 11A(b)(5)(A) authorizes the Commission, on its own motion or upon application by an aggrieved party, to review any prohibition or limitation of access to services provided by a registered securities information processor, in this case, the

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28/ (...continued)

approved by, the CTA Plan participants, not included in the Commission’s release approving the Entry Fee Amendments, and not published in the Federal Register.

29/ The CTA relies on SIAC’s February 9, 2006, presentation as evidence that it included only those production costs that could be capitalized under GAAP. The February 9, 2006, presentation cites as included production costs “Data Processing, e.g., System Hardware (Non-Stop CPU’s, UNIX/Linux Servers),” “Communications Equipment Leases, e.g., Network Routers and Switches,” and “Afterhours Development/ Testing (Shared Data Center).” The CTA further relies on the January 9, 2006, audit report as providing verification that its calculations were proper.

In its reply brief, Nasdaq disputes the propriety of the CTA’s inclusion of the costs of Data Processing and Communications Equipment Leases. Nasdaq also takes issue with the CTA’s apparent capitalization of its direct labor costs under the labels “Product Planning” and “Communications Engineering.”

CTA. Section 11A(b)(5)(B) provides that if the Commission finds, after notice and opportunity for a hearing, that the prohibition or limitation is consistent with the provisions of the Exchange Act and the rules and regulations thereunder, and the aggrieved party has not been discriminated against unfairly, the Commission, by order, must dismiss the proceeding. Section 11A(b)(5)(B) also provides that if the Commission does not make any such finding, or if the Commission finds that the prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, the Commission, by order, must set aside the prohibition or limitation and require the securities information processor to permit the aggrieved party access to the services offered by the processor.

Section 11A(b)(5) thus vests the Commission with the substantive power to review prohibitions or limitations on access by registered securities information processors. The Commission previously has concluded that “the level of charges, or the terms at which facilities and services are offered by a registered securities information processor, can constitute a prohibition or limitation on access to those facilities and services.” <sup>30/</sup> In the March 2005 release adopting the Entry Fee Amendments, the Commission stated that any disagreement among Plan participants and a new entrant regarding the calculation of a proper fee would be subject to review by the Commission under Section 11A(b)(5). <sup>31/</sup>

Turning to the merits, we have reviewed the record assembled by the CTA. It consists primarily of minutes of CTA/CQ meetings between January 2005 and May 2006, the January 9, 2006, memorandum from SIAC’s auditors, and SIAC’s proposed calculations of the entry fee, as reflected in its presentations of October 12, 2005, February 9, 2006, and March 22, 2006. We conclude that, at this stage, we lack sufficient information to make the necessary determinations under Section 11A(b)(5). Accordingly, we direct the parties to address the following questions:

- (1) Does the CTA maintain its books and records on a GAAP basis?
  - (a) If so, what is the CTA’s policy regarding the capitalization of costs?
  - (b) Does that policy establish a capitalization threshold?
  - (c) What literature does the CTA rely on to capitalize its costs?
- (2) Did the CTA include in its calculation any development, expansion, or maintenance expenditures that are not capitalizable under GAAP?
  - (a) If so, what was the nature of those expenditures and the basis for including them in the calculation of Nasdaq’s entry fee?

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<sup>30/</sup> Institutional Networks Corp., Exchange Act Rel. No. 20088 (Aug. 16, 1983), 28 SEC Docket 980, 982 & n.18 (Order Instituting Proceedings and Granting Temporary Stay).

<sup>31/</sup> Exchange Act Rel. No. 51391 (Mar. 17, 2005), 84 SEC Docket 4136, 4138 n.23.

- (3) How did CTA construe the phrase “could have been treated as capital expenditures” (as that phrase is used in CTA Plan Section III(c)) for purposes of calculating Nasdaq’s entry fee?
  - (a) What was the total amount of costs included in the fee calculation which were not actually capitalized in CTA’s books and records?
  - (b) What was the reason for not capitalizing the costs identified in (3)(a)?
  - (c) What portion of the costs identified in (3)(a) related to development, expansion, and maintenance expenditures?
- (4) Describe the types of costs within each category (development, expansion, and maintenance) that the CTA treated as capitalizable under GAAP for purposes of the fee calculation.
  - (a) In calculating Nasdaq’s entry fee, what was the total amount of costs for each category (development, expansion, and maintenance)?
- (5) What is meant by “CTA’s facilities” (as that term is used in CTA Plan Section III(c)) for purposes of calculating Nasdaq’s entry fee?
- (6) What software development activities were capitalized in accordance with Statement of Position 98-1 32/?
- (7) Were any assets reviewed for impairment following the guidance in FASB Statement No. 144, Accounting for Impairment or Disposal of Long-Lived Assets?
  - (a) If so, how was the impairment of those assets considered in the calculation of Nasdaq’s entry fee?
- (8) Did the CTA include any leases in its calculation of Nasdaq’s entry fee?
  - (a) If so, which leases were included in the fee calculation?
  - (b) How were those leases accounted for under GAAP?
- (9) In its amortization of capitalized expenditures, how did the CTA treat those capitalized expenditures that were incurred before the five-year period set forth in CTA Plan Section III(c), i.e., were all, some, or none of the amortized expenditures included?

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32/ American Institute of Certified Public Accountants (“AICPA”) Statements of Position (“SOP”) provide guidance on financial accounting and reporting issues. Statement of Position 98-1 was cited by SIAC’s auditors in the January 9, 2006, memorandum.

- (10) What weight should be given to the hypothetical calculations contained in Exhibit A to the CTA's December 3, 2004, letter transmitting the Entry Fee Amendments to the Commission for approval?

The parties are free to address any other matters that they deem relevant. We also invite any interested persons, including the Division of Market Regulation, to address these issues. 33/

Disputes involving registered securities information processors, national market system plans, or transaction reporting plans under Exchange Act Section 11A and the rules thereunder are governed by the Rules of Practice. 34/ We have determined to appoint a law judge to preside over this proceeding. 35/

Accordingly, it is ORDERED that the petition for review of the Nasdaq Stock Market, LLC, be, and it hereby is, accepted; and it is further

ORDERED that the Chief Administrative Law Judge Brenda P. Murray shall designate an administrative law judge to preside over this proceeding in accordance with this Order; and it is further

ORDERED that submissions may be received from the parties and any interested party, as well as from our Division of Market Regulation.

By the Commission.

Nancy M. Morris  
Secretary

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33/ See Rule of Practice 210(d), 17 C.F.R. § 201.210(d) (providing for amicus participation and setting forth procedure for filing amicus brief).

34/ 17 C.F.R. § 201.101(a)(9); see 17 C.F.R. § 201.100(c) (authorizing the Commission, by order, to direct an alternative procedure if it determines that doing so would serve the interests of justice and not result in prejudice to any party).

35/ See, e.g., Cincinnati Stock Exchange, 54 S.E.C. 857 (2000) (in Section 11A(b)(5) case in which record required further development, Commission appointed law judge to preside over proceeding and directed parties to address certain issues).