

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57965; File No. SR-NASDAQ-2006-060)

June 16, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval to Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, to Establish Nasdaq Last Sale Data Feeds

I. Introduction

On December 19, 2006, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to create, and impose fees for, the “Nasdaq Last Sale for Nasdaq” and “Nasdaq Last Sale for NYSE/Amex” data feeds (“Nasdaq Last Sale Data Feeds”). The Nasdaq Last Sale Data Feeds would provide real-time last sale information for executions occurring within the Nasdaq Market Center, as well as those reported to the jointly-operated FINRA/Nasdaq Trade Reporting Facility (“Nasdaq TRF”). On January 26, 2007, Nasdaq filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on February 14, 2007.³ The Commission received three comment letters on the proposal.⁴ On December 13, 2007,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 55255 (February 8, 2007), 72 FR 7100.

⁴ Letters to Nancy M. Morris, Secretary, Commission, from Christopher Gilkerson and Gregory Babyak, Co-Chairs of the Market Data Subcommittee of the Technology and Regulation Committee, Securities Industry and Financial Markets Association (“SIFMA”), dated March 7, 2007 (“SIFMA Letter”); Chuck Thompson, President, eSignal, Interactive Data Corporation, dated March 8, 2007 (“eSignal Letter”); and letter to Chairman Cox, Commission, from Alan Davidson, Senior Policy Counsel, Google Inc. (“Google”), dated June 12, 2007 (“Google Letter”).

Nasdaq responded to the comment letters.⁵ On June 10, 2008, Nasdaq filed Amendment No. 2 to the proposed rule change. In Amendment No. 2, Nasdaq proposed to impose fees for the Nasdaq Last Sale Data Feeds only for a four-month pilot period beginning July 1, 2008.⁶

The Commission is publishing this notice to solicit comments on the proposed rule change as modified by Amendment Nos. 1 and 2 and is simultaneously approving the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

II. Description of the Proposal

Nasdaq proposes to create two separate data products containing real-time last sale information for trades executed on Nasdaq or reported to the Nasdaq TRF.⁷ First, the Nasdaq Last Sale for Nasdaq data product would be a real-time data feed providing last sale information, including execution price, volume, and time, for Nasdaq securities executions on the Nasdaq system or reported to the Nasdaq TRF. Second, the Nasdaq Last Sale for NYSE/Amex data product would be a real-time data feed providing last sale information, including execution price, volume, and time, for NYSE and Amex securities executions on the Nasdaq system or reported to the Nasdaq TRF.

Nasdaq proposes two different pricing models, one for clients that are able to maintain username/password entitlement systems and/or quote counting mechanisms to account for usage,

⁵ Letters to Nancy M. Morris, Secretary, Commission, from Jeffrey S. Davis, Vice President and Deputy General Counsel, Nasdaq, dated December 13, 2007.

⁶ On June 2, 2008, Nasdaq filed a proposed rule change, designated as eligible for immediate effectiveness pursuant to Section 19(b)(3)(A) of the Act, to offer the Nasdaq Last Sale Data Feeds immediately without charge for one month, and thereafter impose fees for an additional five-month pilot period. See SR-NASDAQ-2008-050. On June 16, 2008, Nasdaq withdrew SR-NASDAQ-2008-050, except for the provisions permitting Nasdaq to offer the Nasdaq Last Sale Data Feeds at no charge for one month.

⁷ In Amendment No. 2, Nasdaq removed from the proposal Nasdaq Market Velocity and Nasdaq Market Forces services that Nasdaq included in its initial proposal and Amendment No. 1.

and a second for those that are not. Firms with the ability to maintain username/password entitlement systems or quote counting mechanisms would be eligible for a specified fee schedule for the Nasdaq Last Sale for Nasdaq product and a separate fee schedule for the Nasdaq Last Sale for NYSE/Amex product. This pricing would be “stair-stepped,” such that the tiered fees would be effective for incremental users in the new tier. For example, a distributor of the Nasdaq Last Sale for Nasdaq product with 20,000 users would pay \$0.60 for each of the first 10,000 users and \$0.48 for each of the next 10,000 users. Distributors may elect to pay per query for their users if, for example, a substantial portion of their users request a relatively small number of queries each month. Firms would also be permitted to “cap” their payments for individual queries at the corresponding monthly user rate.

Firms that are unable to maintain username/password entitlement systems or quote counting mechanisms would also have options for purchasing the Nasdaq Last Sale Data Feeds. These firms could choose between a “Unique Visitor” model for Internet delivery or a “Household” model for Television delivery. Unique Visitor and Household populations would have to be reported monthly and validated by a third party vendor or ratings agency approved by Nasdaq at Nasdaq’s sole discretion. This proposed pricing would also be stair-stepped such that the tiered fees would be effective for the incremental users in the new tier. For example, a distributor of Nasdaq Last Sale for Nasdaq product that reports 600,000 Unique Visitors would pay \$0.036 for the first 100,000 visitors and \$0.03 for the next 500,000 visitors. A Distributor that reports 3,000,000 households reached would pay \$0.0096 for each of the first 1,000,000 households and \$0.0084 for each of the next 2,000,000 households.

In addition, Nasdaq proposes to offer reduced fees for a single distributor of Nasdaq Last Sale Data Feeds via multiple distribution mechanisms. Specifically, Nasdaq would discount the

applicable fees for distribution of Nasdaq Last Sale Data Feeds via Television for Distributors that also distribute those products via the Internet and achieve a new pricing tier for Unique Visitors, Users, or Queries. Nasdaq proposes the following tiered discounts for a firm's Television fees based on its number of Unique Visitors, Users, or Queries -- 10% discount for the second tier, 15% discount for the third tier, and a 20% discount for the fourth tier. In addition, Nasdaq proposes to establish a cap of \$100,000 per month for Nasdaq Last Sale for Nasdaq data product and \$50,000 per month for Nasdaq Last Sale for NYSE/Amex data product.

As with other Nasdaq proprietary products, all distributors of the Nasdaq Last Sale for Nasdaq and/or Nasdaq Last Sale for NYSE/Amex products would pay a single \$1500/month Nasdaq Last Sale Distributor Fee in addition to any applicable usage fees. The \$1,500 monthly fee would apply to all distributors and would not vary based on whether the data is distributed internally or externally or via both the Internet and Television.

III. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change, to be implemented on a four-month pilot basis, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁸ In particular, it is consistent with Section 6(b)(4) of the Act,⁹ which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,¹⁰ which requires, among other things, that the rules of a national securities exchange be designed to promote just and

⁸ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78f(b)(4).

¹⁰ 15 U.S.C. 78f(b)(5).

equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,¹¹ which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,¹² adopted under Section 11A(c)(1) of the Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.¹³

The Commission received two comment letters expressing concerns with the proposed rule change, and one comment letter supporting the proposed rule change. Generally, SIFMA and eSignal suggested that Nasdaq did not adequately demonstrate that the proposed rule change was consistent with the Act.¹⁴ SIFMA asserted that Nasdaq had failed to demonstrate that its proposal met the relevant requirements of the Act, including that its market data fees be fair and reasonable and not unreasonably discriminatory.¹⁵ eSignal asserted that Nasdaq's proposal

¹¹ 15 U.S.C. 78f(b)(8).

¹² 17 CFR 242.603(a).

¹³ Nasdaq is an exclusive processor of its last sale data under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes data on an exclusive basis on its own behalf.

¹⁴ See SIFMA Letter and eSignal Letter.

¹⁵ See SIFMA Letter.

unreasonably discriminated against smaller market data distributors.¹⁶ Google, however, expressed strong support for the proposal and noted its enthusiasm regarding the opportunity to give more of its users access to real-time financial information online.¹⁷

The Commission notes that Nasdaq amended the proposed rule change so that its fees would be imposed only for a four-month pilot period. On June 4, 2008, the Commission published for public comment a draft approval order that sets forth a market-based approach for analyzing proposals by self-regulatory organizations to impose fees for “non-core” market data products that would encompass the Nasdaq Last Sale Data Feeds.¹⁸ The Commission believes that Nasdaq’s proposal is consistent with the Act for the reasons noted preliminarily in the Draft Approval Order. Pending review by the Commission of comments received on the Draft Approval Order, and final Commission action thereon, the Commission believes that approving Nasdaq’s proposal on a pilot basis would be beneficial to investors and in the public interest, in that it should result in broad public dissemination of real-time pricing information. Therefore, the Commission is approving Nasdaq’s proposed fees for a four-month pilot beginning July 1, 2008. The broader approach ultimately taken by the Commission with respect to non-core market data fees will necessarily guide Commission action regarding fees for the Nasdaq Last Sale Data Feeds beyond the four-month pilot period.

The Commission finds good cause for approving the proposed rule change, as modified by Amendment Nos. 1 and 2 thereto, before the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. As noted above, accelerating approval of this proposal should

¹⁶ See eSignal Letter.

¹⁷ See Google Letter.

¹⁸ See Securities Exchange Act Release No. 57917 (June 4, 2008), 73 FR 32751 (June 10, 2008) (Notice of Proposed Order Approving Proposal by NYSE Arca, Inc. to Establish Fees for Certain Market Data and Request for Comment) (“Draft Approval Order”).

benefit investors by facilitating their prompt access to widespread, free, real-time pricing information contained in the Nasdaq Last Sale Data Feeds. In addition, the Commission notes that the proposal is approved only on a four-month pilot period while the Commission analyzes comments on the Draft Approval Order. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act, to approve the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-NASDAQ-2006-060 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2006-060. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications

relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. 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-2006-060 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule change (SR-NASDAQ-2006-060), as modified by Amendment Nos. 1 and 2, be, and it hereby is, approved on an accelerated basis until October 31, 2008.

By the Commission.

Florence E. Harmon
Acting Secretary

¹⁹ 15 U.S.C. 78s(b)(2).