



August 7, 2008

**Via Electronic Mail (rule-comments@sec.gov)**

Ms. Florence Harmon  
Acting Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

**Re: Proposed Rule Change by The NASDAQ Stock Market LLC to Establish Fees for Nasdaq Market Pathfinders Service, File No. SR-NASDAQ-2008-0016, SEC Release No. 34-57917**

Dear Ms. Harmon,

The Securities Industry and Financial Markets Association<sup>1</sup> (“SIFMA”) appreciates the opportunity to comment on the above-referenced proposed rule change filed by The NASDAQ Stock Market LLC (“Nasdaq”) (“Proposal”). This Proposal offers a new market data service called Nasdaq Market Pathfinders, which would provide aggregated market activity of certain market participants who are aggressively buying and selling securities. This service would be made available through either a web-based data product or a data feed. Nasdaq plans to offer a 30-day free trial period for this new service, and then subscriptions at varying rates thereafter. We respectfully advise the Commission that this service raises certain substantive concerns and, since the Proposal is not accompanied by any cost justification for the levels of fees, the

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<sup>1</sup> The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington, D.C., and London, and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. (More information about SIFMA is available at: [www.sifma.org](http://www.sifma.org).)

Commission cannot lawfully approve it. For many of the same reasons as SIFMA presented to the Commission in its July 10, 2008 letter concerning the Commission's proposed order with respect to the NetCoalition petition (the "SIFMA July 10 Letter"),<sup>2</sup> a Commission order approving the Proposal without Nasdaq providing sufficient cost information therein would be arbitrary and capricious and thus reversible in a United States Court of Appeals as a matter of law.

We have both substantive and procedural concerns with this Proposal. Regarding our substantive concerns, we first note that Nasdaq is proposing to make commercial use of data supplied to it in its capacity as a regulatory body. The Commission has previously held that Nasdaq may not lawfully do this. Indeed, the Commission articulated this policy conclusion in its January 13, 2006 order approving Nasdaq's exchange application:

The Commission shares commenters' concerns about the use by the Nasdaq Exchange of OATS information for non-regulatory purposes, particularly since it includes information about members' trading activities on competitors of the Exchange. The Nasdaq Exchange's OATS rules would require Exchange members to report, on a daily basis, extensive information with respect to the handling of orders for Nasdaq securities, including when all or portions of orders are executed on markets other than the Nasdaq Exchange. A member's failure to provide this information could give rise to disciplinary action by the Exchange pursuant to its authority as a self-regulatory organization under the Exchange Act. Because this information is obtained from members through the exercise of the Exchange's regulatory powers, the Commission does not believe it should be used for non-regulatory purposes, unless the NASD makes available such OATS data to other market participants on the same terms as it is provided to the Exchange.<sup>3</sup>

Second, we note that, even if Nasdaq's use of this data could be deemed to be appropriate, Nasdaq has not yet provided in the Proposal a sufficiently detailed discussion of the data or analytics to be included in this new, unique Pathfinder market data product. For example, will the information be provided in a way that permits the user to distinguish between short sales and long sales? Could the data that is included compromise the confidentiality of the transacting party's trading strategies, or provide misinformation as to a transacting party? Several firms have expressed concern with the Proposal's potential in this regard. In particular, they note that, even if no names of firms are provided, it is often easy for others to identify the firms involved.

Third and finally, many industry professionals have expended considerable sums to develop proprietary and confidential trading algorithms and other strategies. In this regard, we question whether the Pathfinder product will provide means to reverse engineer the algorithms

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<sup>2</sup> Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Florence Harmon, Acting Secretary, Commission (July 10, 2008). We incorporate that letter by reference herein.

<sup>3</sup> Securities Exchange Act Release No. 53128 (Jan. 13, 2006) in text following n. 136.

and strategies Nasdaq members have created, or whether the impact on such algorithms and strategies will be such as to render them useless.

In summary, the substantive concerns mentioned above underscore the fundamental unfairness of allowing Nasdaq to make commercial use of information its members are required by regulation to provide to Nasdaq in its capacity as a regulator. And, the lack of sufficient information in the Proposal on the data and analytics to be included makes it difficult if not impossible to comment fully on the Proposal and to ensure that it does not have detrimental effects upon firms and their trading strategies.

Regarding our procedural concerns, SIFMA has emphasized in many past comment letters (including the SIFMA July 10 Letter) concerning market data products proposed by a national securities exchange and exclusive securities information processor such as Nasdaq that it is important for the Commission to conduct a proper examination of the fairness and reasonableness of the related fees to be charged.<sup>4</sup> This Proposal is another instance where (1) an exchange is proposing to create a proprietary product that uses data its members are required to submit without compensation, (2) no other exchange or market data vendor can replicate this product because necessary elements (such as the identity of the traders of the securities analyzed in the Proposal) are not available to anyone but that particular exchange, and (3) no cost data is provided with the proposal that would give the Commission or commenters an opportunity to determine whether the proposed fees are fair and reasonable.<sup>5</sup>

Nasdaq offered in this Proposal only a summary assertion, without any cost data, that “the proposed fees will cover the costs associated with establishing the service, responding to customer requests, configuring Nasdaq’s systems, programming to user specifications, and administering the service, among other things.” There is no further information on these costs, on the “other things,” or on whether the proposed fees are expected to cover more than those costs and “other things” and, if so, by how much. Nasdaq’s assertion that “Nasdaq anticipates that this filing will not be contentious in that no firm or individual will be forced to purchase the product *or pay a fee to which they object*,” is without merit or sound basis in light of the statutory tests the Commission must apply (emphasis added). Also, as we stated in the SIFMA July 10 Letter, the Commission cannot reasonably rely on competitive forces to ensure that the exclusive market data sold by an exchange – in this case, Nasdaq with this Proposal – would be made available on “fair and reasonable” terms. Finally, even assuming the Commission as a

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<sup>4</sup> See Sections 6(b)(4) and 11A(c)(1)(C) of the Securities Exchange Act of 1934.

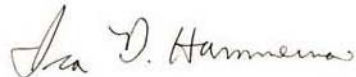
<sup>5</sup> On the subject of fees, the Commission may wish to recall that it was Nasdaq that initiated the proceeding against the Consolidated Tape Association on the basis that the CTA fees were not rigorously cost-justified. The Commission agreed with the need for such justification, including the provision of work papers to support calculations of costs used to establish the fees, and thus assigned the matter to an administrative law judge who took hundreds of pages of testimony on the issue of allowable costs. See, *In re Application of Nasdaq Stock Market, LLC for Review of Action Taken by the Consolidated Tape Association (the “Nasdaq/CTA Dispute Release”)*, SEC Release No. 55909 (Jun. 14, 2007). In the wake of that ongoing proceeding, the Proposal underscores the arbitrariness and capriciousness of a governmental approach that would require that fees be rigorously cost-justified when Nasdaq is paying a fee but that costs are irrelevant when Nasdaq is charging a fee.

theoretical matter could rely on such competitive forces, neither Nasdaq nor the Commission in this case has applied the SEC's proposed test as set forth in the Commission's proposed order in the NYSE Arca matter.

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Thank you for the opportunity to comment on this Proposal. We would be happy to discuss our views further with the Commission and the Staff. I can be reached in this regard at 202-962-7300.

Respectfully submitted,



Ira D. Hammerman  
Senior Managing Director and General Counsel

cc: The Hon. Christopher Cox, Chairman  
The Hon. Kathleen L. Casey, Commissioner  
The Hon. Elisse B. Walter, Commissioner  
The Hon. Luis A. Aguilar, Commissioner  
The Hon. Troy A. Paredes, Commissioner  
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