

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59712; File No. SR-NASDAQ-2009-028)

April 6, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Reduce Fees for NASDAQ Basic Data Feeds

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 27, 2009, The NASDAQ Stock Market LLC (“NASDAQ” or the “Exchange”) 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 prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

NASDAQ is proposing a rule change to reduce fees for “NASDAQ Basic” which is a real time data feed combining both NASDAQ’s Best Bid and Offer (“QBBO”) and the “NASDAQ Last Sale. NASDAQ Basic was approved on March 16, 2009,³ as a pilot program (“Basic Pilot”) that included fees for usage and distribution of the data. NASDAQ has determined to further promote the deployment and usage of NASDAQ Basic by reducing the fee for its distribution. NASDAQ is seeking approval to implement this change effective April 1, 2009.

The text of the proposed rule change is available from NASDAQ’s website at <http://nasdaq.cchwallstreet.com>, at NASDAQ’s principal office, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59582 (March 16, 2009) (SR-NASDAQ-2008-102).

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. The text of these statements may be examined at the places specified in Item III [sic] below, and is set forth in Sections A, B, and C below.

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

1. Purpose

Building on the success of its NASDAQ Last Sale product, NASDAQ has implemented a pilot to offer NASDAQ Basic, real-time quotation data in combination with last sale data solely from the NASDAQ Market Center. NASDAQ Basic is a "Level 1" product containing two data elements: (1) quotation information from the NASDAQ Market Center and (2) last sale data from the NASDAQ Market Center. NASDAQ Basic is available in three forms, NASDAQ Basic for NASDAQ, NASDAQ Basic for NYSE, and NASDAQ Basic for Alternext. NASDAQ Basic is designed to meet the needs of current and prospective subscribers that do not need or are unwilling to pay for the consolidated data provided by the consolidated Level 1 products.

NASDAQ sought and received approval to assess a monthly fee for distributors of NASDAQ Basic in addition to applicable monthly per user fees. As approved, each Distributor of NASDAQ Basic for NASDAQ-listed stocks was to pay a monthly fee of \$1,500 for either internal or external distribution. Each Distributor of NASDAQ Basic for NYSE-listed stocks was to pay a monthly fee of \$250 for internal distribution or \$625 external distribution. Each Distributor of NASDAQ Basic for Alternext -listed stocks was to pay a monthly fee of \$250 for internal distribution or \$625 external distribution. In addition, each Distributor that receives

Direct Access to the NASDAQ Basic was also to pay a monthly fee of \$2,000 for NASDAQ-listed stocks, \$1,000 for NYSE-listed stocks, and \$1,000 for Alternext -listed stocks.

NASDAQ developed the NASDAQ Basic product proposals in consultation with industry members and market data vendors and, after further consultation; NASDAQ [sic] has determined to reduce the distribution fees for the product. First, NASDAQ proposes to make all three feeds available for a single monthly Distributor Fee of \$1,500, rather than add separate fees for NYSE- and Alternext-listed securities. Second, NASDAQ proposes to eliminate the fee for Direct Access to NASDAQ Basic, currently set forth in Rule 7047(b). Finally, NASDAQ proposes to credit each Distributor of NASDAQ Basic up to \$1,500 per month based upon that Distributor's monthly usage fees. In other words, a Distributor that reports \$1,500 or more of monthly usage of NASDAQ Basic will pay no net Distributor Fee, whereas a Distributor that reports \$1,000 of monthly usage will pay a net of \$500 for the Distributor Fee.

2. Statutory Basis

In its recent order approving the NASDAQ Basic Pilot, it was determined that the product and fees were consistent with the provisions of Section 6 of the Act,⁴ in general and with Section 6(b)(4) of the Act,⁵ as stated above, in that it provides an equitable allocation of reasonable fees among users and recipients of NASDAQ data. NASDAQ believes that the current proposal to eliminate the distributor fees for NASDAQ Basic is also consistent with Section 6(b)(4) of the Act in that the remaining fees will be assessed uniformly on similarly situated users and that the fees for distribution and usage of the product will be borne by the ultimate end user of the product.

⁴ 15 U.S.C. 78f.

⁵ 15 U.S.C. 78f(b)(4).

It was also determined that the product and fees are consistent with Section 6(b)(8) of the Act,⁶ [sic] 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. The Commission found that NASDAQ's ability to price NASDAQ Basic is constrained by: (i) NASDAQ's compelling need to attract order flow from market participants; and (ii) the availability to market participants of alternatives to purchasing NASDAQ's data. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,⁷ [sic] 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.

NASDAQ believes that its proposal to reduce distributor fees for NASDAQ Basic is equally consistent with these provisions of the Act. The market for non-core data is competitive, due to (1) competition between exchanges and other trading platforms that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and free delayed consolidated data, and (3) the inherent contestability of the market for proprietary last sale data.

The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market

⁶ 15 U.S.C. 78f(b)(8).

⁷ 17 CFR 242.603(a).

data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Broker-dealers currently have numerous alternative venues for their order flow, including eleven self-regulatory organization (“SRO”) markets, as well as broker-dealers (“BDs”) and aggregators such as the Direct Edge and NexTrade electronic communications network (“ECN”). Each SRO market competes to produce transaction reports via trade executions, and an ever-increasing number of FINRA-regulated Trade Reporting Facilities (“TRFs”) compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, and ECNs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ECN and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, Alternext, NYSEArca, and BATS.

Any ECN or BD can combine with any other ECN, broker-dealer, or multiple ECNs or BDs to produce jointly proprietary data products. Additionally, non-broker-dealers such as order routers like LAVA, as well as market data vendors can facilitate single or multiple broker-dealers’ production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ECNs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production

and distribution of proprietary data products, as Archipelago and BATS Trading did prior to registering as SROs. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace writ large.

Consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at \$1 per month for non-professional users. Second, consolidated data is also available at no cost with a 15- or 20- minute delay. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data (such as last sale data) that is simply a subset of the consolidated data. The mere availability of low-cost or free consolidated data provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data, by highlighting the optional nature of proprietary products.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only that data which will enable them to attract “eyeballs” that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors’ pricing discipline is the same:

they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. NASDAQ and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to successfully market proprietary data products.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, and BATS Trading. Today, BATS publishes its data at no charge on its website in order to attract order flow, and it uses market data revenue rebates from the resulting executions to maintain low execution charges for its users. Several ECNs have existed profitably for many years with a minimal share of trading, including Bloomberg Tradebook and NexTrade.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While broker-dealers have previously published their proprietary data individually, Regulation NMS encourages market data vendors and broker-dealers to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, Reuters and Thomson. New entrants are already on the horizon, including “Project BOAT,” a consortium of financial institutions that is assembling a cooperative trade collection facility in Europe. These institutions are active in the United States and could rapidly and profitably export the Project Boat technology to exploit the opportunities offered by Regulation NMS.

In light of the highly competitive market for market data, NASDAQ believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish a fair, reasonable, and not unreasonably discriminatory fee and an equitable allocation of fees among all users.

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. To the contrary, as set forth in detail above, the market for the data elements contained in NASDAQ Basic is already competitive, with both real-time and delayed consolidated data as well as the ability for innumerable entities begin rapidly and inexpensively to offer competitive last sale data products.

The Commission has recently issued an order firmly establishing that in reviewing non-core data products such as NASDAQ Basic, the Commission will utilize a market-based approach that relies primarily on competitive forces to determine the terms on which non-core data is made available to investors.⁸ The Commission adopted a two-part test:

The first is to ask whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees. If an exchange was subject to significant competitive forces in setting the terms of a proposal, the Commission will approve the proposal unless it determines that there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder. If, however, the exchange was not subject to significant competitive forces in setting the terms of a proposal for non-

⁸ Securities Exchange Act Release No. 57917 (Dec. 2, 2008) (NetCoalition Order" [sic] resolving File No. SR-NYSEArca-2006-21).

core data, the Commission will require the exchange to provide a substantial basis, other than competitive forces, in its proposed rule change demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.⁹

This standard begins from the premise that no Commission rule requires exchanges or market participants either to distribute non-core data to the public or to display non-core data to investors.¹⁰

In its NetCoalition Order the Commission concluded that “at least two broad types of significant competitive forces applied to NYSE Arca in setting the terms of its Proposal to distribute the ArcaBook data: (1) NYSE Arca’s compelling need to attract order flow from market participants; and (2) the availability to market participants of alternatives to purchasing the ArcaBook data. The Commission conducted an exhaustive 14-page review of these two competitive forces before concluding that the availability of alternatives, as well as the compelling need to attract order flow, imposed significant competitive pressure on the exchange’s need to act equitably, fairly, and reasonably in setting the terms of the fees for its non-core data product.¹¹

The market data provided in NASDAQ Basic is non-core data that is governed by the same analysis the Commission set forth in the NetCoalition Order. As with the NYSE Arca depth-of-book product, no rule requires NASDAQ or any other exchange to offer its BBO and Last Sale or vendors to display that data. Because NASDAQ Basic data is merely a subset of depth-of-book data, NASDAQ is subject to the same competitive forces that apply to depth-of-

⁹ Id. at 48 – 49.

¹⁰ Id. at 4.

¹¹ Id. at 51 – 65. The Commission then spent an additional 36 pages (65 – 101) analyzing and refuting comments challenging the Commission’s competition analysis.

book data: its compelling need to attract order flow from market participants; and the availability to market participants of alternatives to purchasing the NASDAQ Basic data. Indeed, the Commission invoked the same reasoning in approving pilot programs for NASDAQ Last Sale and NYSE Open Book which provide non-core last sale data from NASDAQ and the New York Stock Exchange, one element of this proposal.¹²

NASDAQ considerations in setting the fees for NASDAQ Basic are virtually identical to those the Commission approved in the NetCoalition [sic] Order. First, the proposed fees for NASDAQ Basic data will apply equally to all professional subscribers and equally to all non-professional subscribers. The fees therefore do not unreasonably discriminate among types of subscribers. Second, the proposed fees for the NASDAQ Basic data are substantially less than those charged by the Network Processors for the consolidated NBBO or last sale data. Third, NASDAQ projects that the total revenues generated by the fee for NASDAQ Basic data initially will amount to less than the \$8 million per year that NYSE Arca projected would be generated by its ArcaBook data.¹³

Finally, as stated above, rapid effectiveness of the proposed rule change is in the public interest and supports the protection of investors by allowing data distributors to make additional market data available to investors that choose to purchase it. Widespread availability of NASDAQ Basic benefits investors by improving access to real-time market data that investors can choose to use. It also enables member firms to reduce their costs and to pass on those cost savings to their customers through reduced commissions.

¹² See Securities Exchange Act Release No. 57966 (June 16, 2008), 73 FR 35182 (June 20, 2008) (File No. SR-NYSE-2007-04) (NYSE Real-Time Reference Prices); Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060) (NASDAQ Last Sale Data Feeds).

¹³ Id. at 101 – 104.

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 the self-regulatory organization consents, the Commission will:

- (a) by order approve such 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. Please include File Number SR-NASDAQ-2009-028 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NASDAQ-2009-028. 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, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the 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-2009-028 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Florence E. Harmon
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).