

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59266; File No. SR-NASDAQ-2008-016)

January 16, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change to Create the Nasdaq Market Pathfinders Service and Establish Fees for the Service

I. Introduction and Description of the Proposal

On June 27, 2008, The NASDAQ Stock Market LLC (“Nasdaq”) 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 that would establish the Nasdaq Market Pathfinders Service (“Service”) and establish fees for the Service. The Service will allow subscribers to view a real time data product that tracks the aggregated market activity of certain market participants who are aggressively buying and/or selling. Nasdaq proposes to offer new subscribers a 30-day waiver of the user fees for the Service. After the conclusion of the waiver period, subscribers may avail themselves of three different subscription options at varying prices.

The proposed rule change was published in the Federal Register on July 17, 2008.³ The Commission received one comment on the proposal.⁴ Nasdaq responded to the comment letter on September 18, 2008.⁵ The Commission is approving the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 58145 (July 11, 2008), 73 FR 41143.

⁴ See August 7, 2008 letter from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association (“SIFMA”), to Florence Harmon, Acting Secretary, Commission (“SIFMA Letter”).

⁵ See September 18, 2008 letter from Jeffrey S. Davis, Deputy General Counsel and Vice President, Nasdaq, to Florence Harmon, Acting Secretary, Commission (“Nasdaq Letter”).

II. Summary of Comment Letter

The commenter suggests that the Commission cannot approve the proposed rule change for the following reasons:

- Nasdaq is proposing to make commercial use of data supplied to it in Nasdaq's capacity as a regulatory body, despite the Commission's previous statement that, with regard to OATS information, it does not believe such data should be used for non-regulatory purposes unless the data is made available to other market participants on the same terms under which it is provided to Nasdaq.⁶

- Nasdaq has failed to provide a detailed discussion of the data or analytics to be included in the Service. SIFMA stated that several firms have expressed concern with the proposal's potential to compromise the confidentiality of the transacting party's trading strategies or provide misinformation as to a transacting party.

- SIFMA questions whether the Service will provide a means to reverse engineer the algorithms and strategies Nasdaq members have created, or whether the impact on such algorithms and strategies will be such as to render them useless.

- SIFMA also raised a procedural concern, stating that Nasdaq is proposing to create a proprietary product that uses data its members are required to submit without compensation; no other exchange or market data vendor can replicate this product because necessary elements are not available to anyone but Nasdaq; and no cost data is provided to allow an opportunity to determine if the fees are fair and reasonable.

III. Nasdaq's Response to the Comment Letter

⁶ SIFMA Letter at 2, quoting the Commission's order approving Nasdaq's exchange application. See Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131), in text following footnote 136.

In response to the SIFMA Letter, Nasdaq made the following points:

- SIFMA inaccurately claims that Nasdaq is collecting data in its capacity as a regulatory body and using it for commercial purposes, stating that the Service does not use OATS information, but instead relies on trade information sent directly and only from the Nasdaq Matching Engine.

- The Service will not operate in a manner that permits users to distinguish between short and long sales; the Service will not compromise the confidentiality of the transacting party's trading strategies, nor provide misinformation as to a transacting party because there are filters in place to prevent this from occurring.

- The Service will not provide a means to reverse engineer the algorithms and strategies Nasdaq members have created, nor will it affect those algorithms and strategies in such a way as to render them useless.

- The Service is a sentiment indicator that would provide users with an indication of how a specific type of market participant feels about certain securities, making available to the public information that is sometimes referred to as "the word on the street" as compiled from order flow on the trading desks of large broker-dealers.

- Nasdaq believes that it has provided adequate justification for the fees.

IV. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change, the comment letter, and Nasdaq's response to the comment letter, and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to

a national securities exchange⁷ and, in particular, Section 6(b)(4) of the Act,⁸ which requires, among other things, that Nasdaq's rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls, and that it not unfairly discriminate between customers, issuers, brokers or dealers. The Commission believes that the proposed rule change is consistent with these statutory standards.

Nasdaq has represented that the Service is a voluntary one, and that the information provided to subscribers is not comprised of data that broker-dealers are obligated to provide to Nasdaq for regulatory purposes because of Nasdaq's status as a self-regulatory organization. Additionally, broker-dealers do not need the Service to perform their duties, so the decision to purchase the Service is truly voluntary and dependent upon each broker-dealer's business model. Finally, because the Service is voluntary, Nasdaq has met the statutory standard by pricing the Service according to free market principles; indeed, if Nasdaq priced the Service too high, broker-dealers could simply opt not to purchase the Service. The Commission believes that Nasdaq's fees for the Service are both reasonable and equitably allocated.⁹ Additionally, the

⁷ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78f(b)(4).

⁹ The proposal meets the criteria, formulated by the Commission in connection with the petition filed by NetCoalition, for approval of proposed rule changes concerning the distribution of non-core market data. See Securities Exchange Act Release Nos. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) and 55011 (December 27, 2006) (order granting petition for review of SR-NYSEArca-2006-21). In its order issued in connection with the NetCoalition petition, the Commission stated that "reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory." 73 FR at 74781-82. As such, the "existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably

Commission does not believe that the Pathfinder Service will allow reverse engineering of the algorithms and strategies created by Nasdaq members; Nasdaq has explained the various ways the information is filtered, and has stated that such filtering will prevent this from occurring.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act¹⁰, that the proposed rule change (SR-NASDAQ-2008-016) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Florence E. Harmon
Deputy Secretary

or unfairly discriminatory.” Id. at 74782. If an exchange “was subject to significant competitive forces in setting the terms of a proposal,” a proposal will be approved unless the Commission 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.” Id. At 74781.

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).