

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59579; File No. SR-NASDAQ-2006-056)

March 13, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change as Modified by Amendment No. 2 Thereto to Establish Nasdaq Custom Data Feeds

On December 12, 2006, 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 to establish a data filtration service called Nasdaq Custom Data Feeds (“Service”). The Service would permit entities to request and receive customized data feeds containing data elements from Nasdaq’s current data feeds. The proposed rule change was published in the Federal Register on December 27, 2006.³ On March 9, 2009, Nasdaq filed Amendment No. 1 to the proposed rule change. On March 10, 2009, Nasdaq filed Amendment No. 2 to the proposed rule change.⁴

The Commission received one comment on the proposal from the Securities Industry and Financial Markets Association (“SIFMA”).⁵ SIFMA believes that the proposed rule change does not meet the requirements of the Act because “there is no cost-based analysis or justification for

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 54959 (December 18, 2006), 71 FR 77842 (“Notice”).

⁴ Amendment No. 2 replaced Amendment No. 1, which was withdrawn. In Amendment No. 2, Nasdaq proposed to re-number the new rule from Rule 7038 to Rule 7047, as rule number 7038 has since been used for a subsequent rule. Nasdaq also clarified that the Service will only be available with respect to data feeds that contain non-core market data. Nasdaq also listed the current data feeds which can be customized through the Service. Because Amendment No. 2 is technical in nature, it is not subject to notice and comment.

⁵ See letter from Melissa MacGregor, Assistant Vice President and Assistant General Counsel, SIFMA, to Nancy M. Morris, Secretary, Commission, dated January 17, 2007.

the service in the release.”⁶ SIFMA also asserts that the proposed rule change “raises problems regarding how the proposed fee was calculated.”⁷ Finally, SIFMA questions if competitors will be disadvantaged by the proposal as Nasdaq will have processed the raw data into a customized data feed when the data is released, and if a commercial service should be provided by Nasdaq or if it should instead “be offered by an affiliate on the condition that the terms under which that affiliate receives the underlying market data are offered to other vendors so as to assure competition and prevent commercial conflicts of interest.”⁸

The Commission has reviewed carefully the proposed rule change 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 exchange⁹ and, in particular, Section 6(b)(4) of the Act,¹⁰ 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. The Commission also finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,¹¹ which requires, among other things, that Nasdaq’s rules not unfairly discriminate between customers, issuers, brokers or dealers.

The Commission finds that the proposed rule change is consistent with these statutory standards. Use of the Service is optional, and the fees associated with the Service will be

⁶ Id. at 1.

⁷ Id.

⁸ Id. at 2.

⁹ 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).

¹⁰ 15 U.S.C. 78f(b)(4).

¹¹ 15 U.S.C. 78f(b)(5).

imposed on all subscribers equally, based on the level of service that is selected. The fees for the Service are intended to approximate the average costs of establishing and maintaining a customized feed.¹²

In addition, the proposal meets the criteria, formulated by the Commission¹³ in connection with the petition filed by NetCoalition,¹⁴ for approval of proposed rule changes concerning the distribution of non-core market data.¹⁵ 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 terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory.”¹⁶ 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 or unfairly discriminatory.”¹⁷ If an exchange “was subject to significant competitive forces in setting the terms of a proposal,” the proposal will be approved unless the Commission determines that “there is a substantial

¹² See Notice at 77843.

¹³ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

¹⁴ See Securities Exchange Act Release No. 55011 (December 27, 2006) (order granting petition for review of SR-NYSEArca-2006-21).

¹⁵ The Commission’s order distinguishes between core market data, which is defined as “the best-priced quotations and last sale information of all markets in U.S.-listed equities that Commission rules require to be consolidated and distributed to the public by a single central processor,” and non-core market data. See 73 FR at 74771. Because the Service, which provides customized data feeds using data that is available through Nasdaq’s current proprietary data feeds, does not involve core market data, this proposed rule change is properly categorized as a non-core market data proposal.

¹⁶ Id. at 74781.

¹⁷ Id. at 74781-82.

countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.”¹⁸

In its order approving NYSEArca-2006-21, the Commission also stated that the terms of a proposed rule change to distribute market data for which the exchange is the exclusive processor must provide for an equitable allocation of fees under Section 6(b)(4) of the Act,¹⁹ not be designed to permit unfair discrimination under Section 6(b)(5) of the Act,²⁰ be fair and reasonable under Rule 603(a)(1),²¹ and not be unreasonably discriminatory under Rule 603(a)(2).²² If the proposal involves non-core market data, an analysis of competitive forces may be used, and that analysis will apply to findings under Section 6 of the Act, and to findings under Rule 603.²³

The Service customizes the information that is available through Nasdaq’s current proprietary data feeds. These current data feeds serve as an alternative to the Service, and potential subscribers to the Service can determine if the Service provides a benefit over the current data feeds that justifies its added cost. In addition, Nasdaq has represented that there is significant competition in the distribution of market data to broker-dealers and to other

¹⁸ Id. at 74781. In approving NYSEArca-2006-21, the Commission found that the proposed rule change was consistent with Section 6(b)(4) of the Act, 15 U.S.C. 78f(b)(4). See 73 FR at 74779. The Commission also found that the proposal was consistent with Section 6(b)(5) of the Act, 15 U.S.C. 78f(b)(5), Section 6(b)(8) of the Act, 15 U.S.C. 78f(b)(8), and Rule 603(a) of Regulation NMS, 17 CFR 242.603(a). See 73 FR at 74779. The Commission noted that the presence of competitive forces guided its analysis under both Section 6 of the Act and Rule 603 of Regulation NMS. Id.

¹⁹ 15 U.S.C. 78f(b)(4).

²⁰ 15 U.S.C. 78f(b)(5).

²¹ 17 CFR 242.603(a)(1).

²² 17 CFR 242.603(a)(2). See 73 FR at 74782.

²³ See 73 FR at 74779.

consumers, and that it fully expects its competitors to quickly replicate the Service.²⁴ In that scenario, potential subscribers to the Service would have the added option of selecting a customized product offered by a competitor.

Nasdaq was subject to significant competitive forces in formulating the terms of the Service – specifically, the availability to market participants of alternatives to purchasing the Service. Because the proposed Service involves the distribution of non-core market data, and significant competitive forces are present, the Service is thus consistent with Section 6(b)(4)²⁵ and Section 6(b)(5) of the Act,²⁶ and with Rule 603(a).²⁷ There is not a substantial countervailing basis that would render the proposal inconsistent with the Act or the rules thereunder.

As described above, SIFMA submitted a comment letter in which it asserted that Nasdaq did not include a cost-based analysis or justification for the Service in its proposed rule change. SIFMA also questioned whether competitors would be disadvantaged by the proposal, and queried whether the Service should be offered through an affiliate of Nasdaq, with Nasdaq offering the underlying data to its affiliate and to other vendors on equal terms.

With respect to the basis for the proposed fees for the Service, Nasdaq has represented that those fees are intended to approximate the average costs of establishing and maintaining a customized feed. Moreover, the Commission has stated that proposed fees need not be subject to a cost-based review in order to conclude that such fees are fair and reasonable.²⁸ Rather, the

²⁴ See Notice at 77844.

²⁵ 15 U.S.C. 78f(b)(4).

²⁶ 15 U.S.C. 78f(b)(5).

²⁷ 17 CFR 242.603(a).

²⁸ See 73 FR at 74787.

criteria for review should be “appropriate to the circumstances,” and the existence of competitive forces is “particularly appropriate” when assessing a proposed fee.²⁹ As noted above, Nasdaq was subject to significant competitive forces in formulating the terms of the Service. A cost-based review is therefore not necessary here.

With respect to SIFMA’s proposal that the Service be offered through an affiliate of Nasdaq, and that Nasdaq offer the underlying data on equal terms to its affiliate and competitors alike, a similar proposal was made in the context of SR-NYSEArca-2006-21.³⁰ In its order approving that rule change, the Commission found that such a proposal was not necessary or appropriate, as NYSE Arca, Inc. was subject to significant competitive forces in setting the terms of its data product.³¹ Given the presence of significant competitive forces here, SIFMA’s proposal that Nasdaq offer the Service through an affiliate, and provide Nasdaq and other vendors access to the underlying data on equal terms, is also unnecessary.³²

²⁹

Id.

³⁰

See 73 FR at 74775 (summarizing comments received on the proposed rule change from, among others, SIFMA).

³¹

Id. at 74787.

³²

In its filing, Nasdaq represented that it would make the data delivered by the Service available at the same time that the data is made available through Nasdaq’s current data feeds. In addition, Nasdaq stated that, due to factors such as bandwidth and equipment capacity, a subscriber to the Service may receive the current data feed before receiving its customized data feed. See Notice at 77843.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act³³, that the proposed rule change (SR-NASDAQ-2006-056), as modified by Amendment No. 2 be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁴

Florence E. Harmon
Deputy Secretary

³³ 15 U.S.C. 78s(b)(2).

³⁴ 17 CFR 200.30-3(a)(12).