

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59580; File No. SR-NASDAQ-2007-006)

March 13, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change as Modified by Amendment No. 1 Thereto to Establish the Nasdaq Daily Share Volume Service and to Establish Fees for the Service

On February 7, 2007, 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 the Nasdaq Daily Share Volume Service (“Service”) and to establish fees for the Service. The Service will provide the volume of shares traded each day by issue for participating market participants on a T+1 basis. The volume data will consist of trades from the Nasdaq Execution System.³ Subscribers will have File Transfer Protocol (“FTP”) access to the full underlying data set to create custom reports. Subscribers will also be able to redistribute the data, although the subscriber will be required to enter into a distributor agreement.

Nasdaq proposes to charge \$2,500 per month for the Service. Participation by eligible market participants will be voluntary, and eligible market participants who choose to participate will be able to decide whether to advertise their trade volume by market participant ID code and issue.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Nasdaq also proposed to include internalized prints from the FINRA/Nasdaq Trade Reporting Facility (“TRF”) in the Service. However, as part of Amendment No. 1, Nasdaq has represented that it will not include any TRF data in the Service until FINRA has submitted a separate filing to include TRF data in the Service, and the Commission has acted favorably upon that filing. See note 5 infra.

The proposed rule change was published in the Federal Register on March 16, 2007.⁴

The Commission received no comments on the proposal. On March 6, 2009, Nasdaq filed Amendment No. 1 to the proposed rule change.⁵

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 exchange⁶ and, in particular, Section 6(b)(4) of the Act,⁷ 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 Section 6(b)(5) of the Act,⁸ which requires, among other things, that Nasdaq's rules are not designed to 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 fee associated with the Service will be imposed

⁴ See Securities Exchange Act Release No. 55444 (March 12, 2007), 72 FR 12648 ("Notice").

⁵ In Amendment No. 1, Nasdaq clarified certain aspects of the Service. For example, Nasdaq noted that it will not include any data in the Service that is received from the FINRA/Nasdaq TRF until FINRA has submitted a separate filing to include TRF data in the Service, and the Commission has acted favorably upon that filing. Nasdaq also noted that it is eliminating the individual access fee for web subscribers from the Service, and deleted the corresponding portion of the proposed rule text. Because the Amendment is technical in nature, it is not subject to notice and comment.

⁶ 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).

⁷ 15 U.S.C. 78f(b)(4).

⁸ 15 U.S.C. 78f(b)(5).

on all subscribers equally. The fee for the Service is intended to cover the costs of establishing and maintaining the Service.⁹

In addition, the proposal meets the criteria, formulated by the Commission¹⁰ in connection with the petition filed by NetCoalition,¹¹ for approval of proposed rule changes concerning the distribution of non-core market data.¹² 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.”¹³ 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.”¹⁴ 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

⁹ See Notice at 12649.

¹⁰ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

¹¹ See Securities Exchange Act Release No. 55011 (December 27, 2006) (order granting petition for review of SR-NYSEArca-2006-21).

¹² 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 daily traded share volume for trades executed by, or reported to, Nasdaq systems, does not involve core market data, this proposed rule change is properly categorized as a non-core market data proposal.

¹³ Id. at 74781.

¹⁴ Id. at 74781-82.

“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.”¹⁵

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,¹⁶ not be designed to permit unfair discrimination under Section 6(b)(5) of the Act,¹⁷ be fair and reasonable under Rule 603(a)(1),¹⁸ and not be unreasonably discriminatory under Rule 603(a)(2).¹⁹ 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 603.²⁰

As noted above, use of the Service is voluntary, and the fee for the Service will be imposed equally on all purchasers. In addition, vendors and other exchanges currently make daily broker volume reports available. For example, the New York Stock Exchange LLC (“NYSE”) provides a broker volume report in a database format on a T+1 basis, which compiles

¹⁵ 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.

¹⁶ 15 U.S.C. 78f(b)(4).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ 17 CFR 242.603(a)(1).

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

²⁰ See 73 FR at 74779.

the trading volume of member firms based on trades reported to NYSE.²¹ The cost of receiving the Service is comparable to the cost for receiving the NYSE broker volume report.²²

In formulating the terms of the Service, Nasdaq was thus subject to significant competitive forces – specifically, the availability to market participants of alternatives to purchasing the Service. Because the proposed Service here involves the distribution of non-core market data, and significant competitive forces are present, the Service is thus consistent with both Section 6(b)(4)²³ and Section 6(b)(5) of the Act,²⁴ and with Rule 603(a).²⁵ There is not a substantial countervailing basis that would render the proposal inconsistent with the Act or the rules thereunder.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act²⁶, that the

²¹ See <http://www.nyxdata.com/page/584> (listing of NYSE data products, including NYSE Broker Volume Database).

²² Id.

²³ 15 U.S.C. 78f(b)(4).

²⁴ 15 U.S.C. 78f(b)(5).

²⁵ 17 CFR 242.603(a).

²⁶ 15 U.S.C. 78s(b)(2).

proposed rule change (SR-NASDAQ-2007-006), as modified by Amendment No. 1 be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

Florence E. Harmon
Deputy Secretary

²⁷ 17 CFR 200.30-3(a)(12).