

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59795; File No. SR-NASDAQ-2006-064)

April 20, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change as Modified by Amendments No. 2 and 3 Thereto to Modify the Fee for Connecting to a Nasdaq Data Center Over the Internet

On December 22, 2006, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) 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 modify the fee for connecting to a Nasdaq data center over the Internet. On January 19, 2007, Nasdaq filed Amendment No. 1 to the proposed rule change. On February 22, 2007, Nasdaq filed Amendment No. 2 to the proposed rule change.³ The proposed rule change, as amended, was published for comment in the Federal Register on March 21, 2007.⁴ On April 6, 2009, Nasdaq filed Amendment No. 3 to the proposed rule change.⁵ The Commission received no comment letters on the proposal. This order approves the proposed rule change as modified by Amendments No. 2 and 3.

Nasdaq proposes to increase its fees for Internet ports that deliver market data.

Following the consolidation of Nasdaq’s three order books and corresponding matching engines

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 2 replaced and superseded the original filing and Amendment No. 1 in their entirety.

⁴ See Securities Exchange Act Release No. 55457 (March 13, 2007), 72 FR 13328 (“Notice”).

⁵ In Amendment No. 3, Nasdaq made certain technical changes to the filing to reflect changes to the Nasdaq rules since filing Amendment No. 2. In addition, Nasdaq clarified that the only market data product currently delivered via Internet ports is its TotalView ITCH data product. This technical amendment did not require notice and comment, as it did not affect the substance of the rule filing.

– INET, Brut, and SuperMontage – into a single book (“SingleBook”) within the Nasdaq Market Center (“NMC”), Nasdaq users retained the ability to connect with the NMC using the legacy access protocols of all three systems. Access to the NMC via secure Internet connectivity is one of several options available to INET protocol users for entering orders and receiving market data. Other NMC connectivity options include extranet connectivity, where a user contracts directly with a third-party extranet provider, and private line connectivity, where a user leases a circuit directly from a third-party provider.

Currently, Nasdaq charges INET protocol users an additional \$200 (in addition to the established charges for port pairs) for each port used to connect to a Nasdaq data center over the Internet because making such ports available requires Nasdaq to procure and maintain appropriate telecommunications circuits connecting its data centers to the points-of-presence of an Internet service provider. By contrast, in the case of extranet and private circuit connections, Nasdaq is not responsible for the outside telecommunications circuits.

In the Notice, Nasdaq stated that since the introduction of SingleBook, the volume of market data delivered from Nasdaq to subscribers increased from a peak of approximately 5Mbs at the end of October of 2006 to a peak of approximately 25Mbs as of the date of filing of the proposal. Nasdaq stated that in order to continue to adequately support Internet market data connections, Nasdaq expanded its available Internet bandwidth. In light of the expanded Internet bandwidth requirements, Nasdaq proposes to increase its Internet port fee from \$200 to \$600 per Internet port that is used to deliver market data. The additional Internet port fee with respect to Internet ports used for order entry will remain at the current \$200 level.

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.

Nasdaq proposes to increase its Internet port fee from \$200 to \$600 per Internet port that is used to deliver non-core market data. The proposed fee will apply equally to all market participants that use an Internet port to receive market data from Nasdaq.

The Commission believes that the proposal meets the criteria, formulated by the Commission⁹ in connection with the petition filed by NetCoalition,¹⁰ for approval of proposed rule changes concerning the distribution of non-core market data.¹¹ 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

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).

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

¹⁰ See Securities Exchange Act Release No. 55011 (December 27, 2006) (order granting petition for review of SR-NYSEArca-2006-21).

¹¹ 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.

of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory.”¹² 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.”¹³ 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 countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.”¹⁴

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,¹⁵ not be designed to permit unfair discrimination under Section 6(b)(5) of the Act,¹⁶ be fair and reasonable under Rule 603(a)(1),¹⁷ and not be unreasonably discriminatory under Rule 603(a)(2).¹⁸ If the proposal involves non-core market data, an analysis of competitive forces

¹² Id. at 74781.

¹³ Id. at 74781-82.

¹⁴ 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.

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ 17 CFR 242.603(a)(1).

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

may be used, and that analysis will apply to findings under Section 6 of the Act, and to findings under Rule 603.¹⁹

In formulating the terms of the proposal, Nasdaq was subject to significant competitive forces – specifically, the availability to market participants of alternatives to purchasing Nasdaq market data. Because the proposal involves the distribution of non-core market data, and significant competitive forces are present, the proposal is thus consistent with both Section 6(b)(4)²⁰ and Section 6(b)(5) of the Act,²¹ and with Rule 603(a).²² 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 Act,²³ that the proposed rule change (SR-NASDAQ-2006-064) as modified by Amendments No. 2 and 3 be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Florence E. Harmon
Deputy Secretary

¹⁹ See 73 FR at 74779.

²⁰ 15 U.S.C. 78f(b)(4).

²¹ 15 U.S.C. 78f(b)(5).

²² 17 CFR 242.603(a).

²³ 15 U.S.C. 78s(b)(2).

²⁴ 17 CFR 200.30-3(a)(12).