

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59582; File No. SR-NASDAQ-2008-102)

March 16, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change as Modified by Amendment No. 2 Thereto to Establish a Pilot Program for NASDAQ Basic Data Feeds

I. Introduction

On December 23, 2008, 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to establish a five-month pilot to offer a real-time data feed combining both NASDAQ’s Best Bid and Offer (“QBBO”) and the “NASDAQ Last Sale” (collectively, “NASDAQ Basic”). On January 8, 2009, NASDAQ filed Amendment No. 1 to the proposed rule change. On January 12, 2009, NASDAQ replaced the original filing and Amendment No. 1 by filing Amendment No. 2 to the proposed rule change. The proposed rule change, as amended, was published for comment in the Federal Register on January 22, 2009.<sup>3</sup> The Commission received one comment letter on the proposal.<sup>4</sup> NASDAQ responded to the comment letter on

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 59244 (January 13, 2009), 74 FR 4065 (January 22, 2009) (“Notice”).

<sup>4</sup> See Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association, to Elizabeth Murphy, Secretary, Commission, dated February 12, 2009 (“SIFMA Letter”).

March 3, 2009.<sup>5</sup> This order approves the proposed rule change, as modified by Amendment No 2.

## II. Description of the Proposal

NASDAQ proposes to establish NASDAQ Basic, a five-month pilot to offer real-time quotation data in combination with last sale data solely from the NASDAQ Market Center.

There will be no fees for NASDAQ Basic for the first month of the pilot.

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 will be available in three forms, NASDAQ Basic for NASDAQ, NASDAQ Basic for NYSE, and NASDAQ Basic for Alternext. NASDAQ stated that it designed NASDAQ Basic 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 proposes to charge each professional user of the NASDAQ Basic product, a per subscriber monthly charge of \$10 for NASDAQ-listed stocks, \$5 for NYSE-listed stocks, and \$5 for Alternext-listed stocks, and charge each non-professional subscriber a per subscriber monthly charge of \$0.50 for NASDAQ-listed stocks, \$0.25 for NYSE-listed stocks, and \$0.25 for Alternext-listed stocks. For users that do not require a monthly subscription, there will be a per query option available for NASDAQ Basic, with a fee of \$0.0025 for NASDAQ-listed stocks, \$0.0015 for NYSE-listed stocks, and \$0.0015 for Alternext-listed stocks. Vendors that

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<sup>5</sup> See Letter from Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ, to Elizabeth Murphy, Secretary, Commission, dated March 3, 2009 (“NASDAQ Response”).

report per query usage to NASDAQ are permitted to convert to monthly subscriptions when the cost of individual users' queries exceeds the cost of the monthly subscription.

As with the distribution of other NASDAQ proprietary products, all distributors of NASDAQ Basic will be assessed a monthly Distributor Fee in addition to any applicable usage fees. Each Distributor of NASDAQ Basic for NASDAQ-listed stocks shall pay a monthly fee of \$1,500 for either internal or external distribution or both. Each Distributor of NASDAQ Basic for NYSE-listed stocks will pay a fee of \$250 per month for internal distribution or \$625 per month external distribution. Each Distributor of NASDAQ Basic for Alternext-listed stocks will pay a fee of \$250 per month for internal distribution or \$625 per month external distribution. Distributors that pay the fee for external distribution of NASDAQ Basic for NYSE and Alternext may distribute the same data internally for no additional fee. In addition, each Distributor that receives Direct Access to the NASDAQ Basic will also pay a monthly fee of \$2,000 for NASDAQ-listed stocks, \$1,000 for NYSE-listed stocks, and \$1,000 for Alternext-listed stocks.

### III. Summary of Comments Received and NASDAQ's Responses

The Commission received one comment letter from the Market Data Subcommittee of the Securities Industry and Financial Markets Association ("SIFMA") opposing NASDAQ's proposed rule change.<sup>6</sup> As an initial matter, SIFMA objects to NASDAQ's application of the "fair and reasonable" test announced in the NYSE Arca Order<sup>7</sup> to NASDAQ Basic's fees.<sup>8</sup> NASDAQ notes that the NYSE Arca Order is a valid agency action; therefore, NASDAQ believes it is proper to apply the "fair and reasonable" test to the NASDAQ Basic proposal.<sup>9</sup>

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<sup>6</sup> Id.

<sup>7</sup> See infra note 27.

<sup>8</sup> See SIFMA Letter at 2.

<sup>9</sup> See NASDAQ Response at 1.

SIFMA notes that SIFMA members that sign up for NASDAQ's new market data feeds will still be required to purchase the consolidated data for trading purposes,<sup>10</sup> and, if the other exchanges also repackage their own best bids and offers and last sale prices, adding together all of these fees could result in firms paying more, not less, for overall market data, and could potentially cause considerable technological and administrative burdens.<sup>11</sup> NASDAQ agrees that NASDAQ Basic is not a substitute for consolidated data when trading and order routing decisions can be implemented,<sup>12</sup> but rather a less expensive alternative to consolidated data when consolidated data is not required to be displayed, including portfolio measurement, back-office operations, and certain communications with the public.<sup>13</sup>

SIFMA also argues that NASDAQ's classification of this data as "non-core" is inaccurate and that the resulting application of the "subject to significant competitive forces" test announced in the NYSE Arca Order for meeting the fair and reasonable requirements of the Act is misplaced. SIFMA argues that that best bids and offers and last sale prices -- whether offered directly by an exchange or through a consolidating processor -- should be classified as "core data."<sup>14</sup> NASDAQ notes that in the NYSE Arca Order the Commission states that core data is only the data that Commission rules require to be consolidated and distributed to the public by a single central processor. NASDAQ notes that it produces NASDAQ Basic data voluntarily, and while NASDAQ Basic contains a subset of core data that overlap does not transform it into core

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<sup>10</sup> 17 CFR 242.603(c).

<sup>11</sup> See SIFMA Letter at 2.

<sup>12</sup> 17 CFR 242.603(c).

<sup>13</sup> See NASDAQ Response at 1-2.

<sup>14</sup> See SIFMA Letter at 2-3.

data.<sup>15</sup> In addition, SIFMA disagrees with NASDAQ's assertion that this is a new and innovative market data product resulting from "competitive" forces.<sup>16</sup> NASDAQ notes that even though the price of consolidated data is not subject to competitive forces, NASDAQ Basic is nevertheless competitively constrained by the price of consolidated data.<sup>17</sup>

SIFMA finally notes that, in contrast with the NYSE OpenBook Ultra filing,<sup>18</sup> NASDAQ has not attempted to simplify administrative burdens by modernizing its unit of count for assessing fees, nor has it adopted enterprise pricing for NASDAQ Basic that would address longstanding issues that SIFMA identifies, such as the "onerous" application of the "professional" definition to online investors seeking per query (non-streaming) quotes. SIFMA urges the Commission, the Consolidated Tape Association, the NASDAQ UTP Plan, NASDAQ, and the other individual exchanges to implement a uniform unit of count working in cooperation with its committee to avoid the administrative burdens of different exchanges applying different units of count.<sup>19</sup> NASDAQ acknowledges SIFMA's suggestion to decrease the administrative burden of purchasing NASDAQ market data, but notes that the issue is unrelated to the Commission's review of the NASDAQ Basic proposal.<sup>20</sup>

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<sup>15</sup> See NASDAQ Response at 2.

<sup>16</sup> See SIFMA Letter at 3.

<sup>17</sup> See NASDAQ Response at 2.

<sup>18</sup> See Securities Exchange Act Release No. 59198 (January 5, 2009), 74 FR 1268 (January 12, 2009) (SR-NYSE-2008-131).

<sup>19</sup> See SIFMA Letter at 3.

<sup>20</sup> See NASDAQ Response at 2.

#### IV. Discussion

The Commission 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 exchange.<sup>21</sup> In particular, it is consistent with Section 6(b)(4) of the Act,<sup>22</sup> which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,<sup>23</sup> which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,<sup>24</sup> 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. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,<sup>25</sup> 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

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<sup>21</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>22</sup> 15 U.S.C. 78f(b)(4).

<sup>23</sup> 15 U.S.C. 78f(b)(5).

<sup>24</sup> 15 U.S.C. 78f(b)(6).

<sup>25</sup> 17 CFR 242.603(a).

an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.<sup>26</sup>

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.<sup>27</sup> In the NYSE Arca Order, the Commission stated that “when possible, 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.”<sup>28</sup> It noted that 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.”<sup>29</sup> If an exchange “was subject to significant competitive forces in setting the terms of a proposal,” the Commission will approve a 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.”<sup>30</sup>

As noted in the NYSE Arca Order, the standards in Section 6 of the Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data. Core data is the best-priced quotations

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<sup>26</sup> NASDAQ is an exclusive processor of NASDAQ Basic data under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes information with respect to quotations or transactions on an exclusive basis on its own behalf.

<sup>27</sup> Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) (“NYSE Arca Order”). In the NYSE Arca Order, the Commission describes in great detail the competitive factors that apply to depth-of-book market data products. The Commission hereby incorporates by reference the data and analysis from the NYSE Arca Order into this order.

<sup>28</sup> Id. at 74771.

<sup>29</sup> Id. at 74782.

<sup>30</sup> Id. at 74781.

and comprehensive last-sale reports of all markets that the Commission, pursuant to Rule 603(b), requires a central processor to consolidate and distribute to the public pursuant to joint-SRO plans.<sup>31</sup> In contrast, individual exchanges and other market participants distribute non-core data voluntarily. The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees. Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. The Commission therefore is able to use competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of Section 6 and Rule 603. Because NASDAQ's instant proposal relates to the distribution of non-core data, the Commission will apply the market-based approach set forth in the NYSE Arca Order.

In the NYSE Arca Order, the Commission discussed two broad types of competitive forces that generally apply to exchanges in their distribution of a non-core data product – the need to attract order flow and the availability of data alternatives. These forces also applied to NASDAQ in setting the terms of this proposal for the NASDAQ Basic data product: (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.

Table 1 below provides a recent snapshot of the state of competition in the U.S. equity markets in the month of January 2009:<sup>32</sup>

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<sup>31</sup> See 17 CFR 242.603(b). (“Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.”).

<sup>32</sup> Source: ArcaVision (available at [www.arcavision.com](http://www.arcavision.com)).



<b>Table 1</b>			
Reported Share Volume in U.S.-Listed Equities during January 2009 (%)			
<b>Trading Venue</b>	<b>All Stocks</b>	<b>NYSE-Listed</b>	<b>NASDAQ- Listed</b>
NASDAQ	27.1	20.5	39.9
All Non-Exchange	26.7	26.2	31.0
NYSE Arca	17.9	15.7	15.8
NYSE	14.8	26.2	0.0
BATS	10.7	9.0	10.8
International Stock Exchange	1.3	1.4	1.4
National Stock Exchange	0.6	0.7	0.7
Chicago Stock Exchange	0.4	0.4	0.3
CBOE Stock Exchange	0.2	0.0	0.1
NYSE Alternext	0.1	0.0	0.0
NASDAQ OMX BX	0.0	0.0	0.0

The market share percentages in Table 1 strongly indicate that NASDAQ must compete vigorously for order flow to maintain its share of trading volume. The need to attract order flow imposes significant pressure on NASDAQ to act reasonably in setting its fees for NASDAQ market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NASDAQ must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that sought to charge unreasonably high data fees would

risk alienating many of the same customers on whose orders it depends for competitive survival. Moreover, distributing data widely among investors, and thereby promoting familiarity with the exchange and its services, is an important exchange strategy for attracting order flow.<sup>33</sup>

In addition to the need to attract order flow, the availability of alternatives to NASDAQ Basic significantly affect the terms on which NASDAQ can distribute this market data.<sup>34</sup> In setting the fees for its NASDAQ Basic service, NASDAQ must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data. For example, although the NASDAQ Basic data feed is separate from the core data feed made available pursuant to the joint-SRO plans,<sup>35</sup> all the information available in NASDAQ Basic is included in the core data feed. This core data must be provided to customers when

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<sup>33</sup> See NYSE Arca Order, 73 FR at 74784 nn. 218-219 and accompanying text (noting exchange strategy of offering data for free as a means to gain visibility in the market place).

<sup>34</sup> See Richard Posner, Economic Analysis of Law § 9.1 (5<sup>th</sup> ed. 1998) (discussing the theory of monopolies and pricing). See also U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. See, e.g., FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. See, e.g., Leegin Creative Leather Products v. PSKS, Inc., 127 S. Ct. 2705 (2007); Atlanta Richfield Co. v. United States Petroleum Co., 495 U.S. 328 (1990); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); State Oil Co. v. Khan, 522 U.S. 3 (1997); Northern Pacific Railway Co. v. U.S., 356 U.S. 1 (1958).

<sup>35</sup> The three joint-industry plans are (1) the CTA Plan, which disseminates transaction information for securities primarily listed on an exchange other than Nasdaq, (2) the CQ Plan, which disseminates consolidated quotation information for securities primarily listed on an exchange other than Nasdaq, and (3) the Nasdaq UTP Plan, which disseminates consolidated transaction and quotation information for securities primarily listed on Nasdaq.

trading and order-routing decisions can be implemented.<sup>36</sup> Data users will have a choice of purchasing NASDAQ Basic data for those contexts where core data is not required to be displayed, such as portfolio management, or simply providing core data in all contexts.

The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data, as well as the core data feed, are all sources of competition in non-core data products. As Table 1 illustrates, share volume in U.S.-listed equities is widely dispersed among trading venues, and these venues are able to offer competitive data products as alternatives to NASDAQ Basic. The Commission believes that the availability of those alternatives, as well as the NASDAQ's compelling need to attract order flow, imposed significant competitive pressure on the NASDAQ to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because NASDAQ was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. An analysis of the proposal and the comment letter does not provide such a basis.

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<sup>36</sup> Rule 603(c) of Regulation NMS requires broker-dealers, if they provide any data to customers, also to provide core data in a context in which a trading or order-routing decision can be implemented. 17 CFR 242.603(c). The Commission emphasizes that NASDAQ Basic may not be used as a substitute for the distribution of core data that is required under Rule 603(c).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>37</sup> that the proposed rule change (SR-NASDAQ-2008-102), as modified by Amendment No. 2, be, and it hereby is, approved on a five month pilot basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>38</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>37</sup> 15 U.S.C. 78s(b)(2).

<sup>38</sup> 17 CFR 200.30-3(a)(12).