

should ensure strict compliance with the rules.

#### Effect of the Proposal on the Parties' Costs

With respect to the comments suggesting that the proposal prohibiting prehearing motions to dismiss except on limited grounds would increase all parties' costs, particularly firms', because their attorneys charge on an hourly basis (whereas claimants' attorneys charge on a contingency basis, so claimants are not incurring any costs),<sup>112</sup> the Commission is unconvinced. The Commission believes FINRA responded appropriately by highlighting the effect of motions to dismiss on all parties' costs and the potential for claimants' attorneys to be reluctant to take on small cases due to costs associated with motions to dismiss. Furthermore, the Commission agrees with FINRA's ultimate determination that the proposal's benefits of protecting investors' access to the forum and their ability to have claims heard in arbitration outweigh the possibility of increased costs and expenses firms might incur under the rule.

#### General

In general, the Commission believes that FINRA has responded to the comments adequately and appropriately, and has explained how the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association. As noted above, the Commission believes that the proposal would help achieve the overarching goal of ensuring that parties would have their claims heard in arbitration, by significantly limiting the grounds for filing motions to dismiss prior to the conclusion of a party's case in chief and by imposing stringent sanctions against parties for engaging in abusive practices under the rule. At the same time, the Commission believes that the proposal would not unduly limit the rights of parties to seek dismissal, because it would allow prehearing motions to dismiss in certain limited circumstances, and it would not affect the ability of parties to seek dismissal after the conclusion of the claimant's case in chief. As such, the Commission finds that the proposal would contribute to the fairness and efficiency of the securities arbitration process.

<sup>112</sup> See, e.g., Hartman, Kemnitz, Morgan Stanley and Schriels Letters.

#### V. Conclusions

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>113</sup> that the proposed rule change (SR-FINRA-2007-021), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>114</sup>

**Florence E. Harmon**

*Acting Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59186; File No. SR-NASDAQ-2008-103]

#### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Extend the Pilot Program for NASDAQ Last Sale Data Feeds

December 30, 2008.

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> notice is hereby given that on December 24, 2008, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend for three months the pilot that created the NASDAQ Last Sale ("NLS") market data products. NLS allows data distributors to have access to real-time market data for a capped fee, enabling those distributors to provide free access to the data to millions of individual investors via the internet and television. Specifically, NASDAQ offers the "NASDAQ Last Sale for NASDAQ" and "NASDAQ Last Sale for NYSE/Amex" data feeds containing last sale activity in U.S. equities within the NASDAQ Market Center and reported to the

<sup>113</sup> 15 U.S.C. 78s(b)(2).

<sup>114</sup> 17 CFR 200.30-3(a)(12).

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

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

jointly-operated FINRA/NASDAQ Trade Reporting Facility ("FINRA/NASDAQ TRF").

This pilot program supports the aspiration of Regulation NMS to increase the availability of proprietary data by allowing market forces to determine the amount of proprietary market data information that is made available to the public and at what price. During the current pilot period, the program has vastly increased the availability of NASDAQ proprietary market data to individual investors. Based upon data from NLS distributors, NASDAQ believes that since its launch in July 2008, the NLS data has been viewed by over 50,000,000 investors on websites operated by Google, Interactive Data, and Dow Jones, among others. The text of the proposed rule change is available at NASDAQ, the Commission's Public Reference Room, and <http://nasdaq.complinet.com>.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

Prior to the launch of NLS, public investors that wished to view market data to monitor their portfolios generally had two choices: (1) Pay for real-time market data or (2) use free data that is 15 to 20 minutes delayed. To increase consumer choice, NASDAQ proposed a four-month pilot to offer access to real-time market data to data distributors for a capped fee, enabling those distributors to disseminate the data via the internet and television at no cost to millions of internet users and television viewers. NASDAQ now proposes a three-month extension of that pilot program asset [sic] forth in the original proposal as described below.

The NLS pilot created two separate "Level 1" products containing last sale activity within the NASDAQ market and reported to the jointly-operated FINRA/

NASDAQ TRF. First, the “NASDAQ Last Sale for NASDAQ Data Product,” a real-time data feed that provides real-time last sale information including execution price, volume, and time for executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF. Second, the NASDAQ Last Sale for NYSE/Amex data product that provides real-time last sale information including execution price, volume, and time for NYSE- and Amex-securities executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF.

NASDAQ developed these product proposals in consultation with industry members and also market data vendors and purchasers. These products are designed 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 SIP Level 1 products. NASDAQ is also proposing to ease the administrative burden of market data vendors that are receiving and using data in new ways, particularly those that provide the data via the internet and various television media. Providing investors with new options for receiving market data was a primary goal of the market data amendments adopted in Regulation NMS.

NASDAQ established two different pricing models, one for clients that are able to maintain username/password entitlement systems and/or quote counting mechanisms to account for usage, and a second for those that are not. Firms with the ability to maintain username/password entitlement systems and/or quote counting mechanisms will be eligible for a specified fee schedule for the NASDAQ Last Sale for NASDAQ Product and a separate fee schedule for the NASDAQ Last Sale for NYSE/Amex Product: Firms that were unable to maintain username/password entitlement systems and/or quote counting mechanisms will also have multiple options for purchasing the NASDAQ Last Sale data. These firms chose between a “Unique Visitor” model for internet delivery or a “Household” model for television delivery. Unique Visitor and Household populations must be reported monthly and must be validated by a third-party vendor or ratings agency approved by NASDAQ at NASDAQ’s sole discretion. In addition, to reflect the growing confluence between these media outlets, NASDAQ offered a reduction in fees when a single distributor distributes NASDAQ Last Sale Data Products via multiple distribution mechanisms. Finally, NASDAQ established cap of

\$100,000 per month for NASDAQ Last Sale for NASDAQ and \$50,000 per month for NASDAQ Last Sale for NYSE/Amex. NASDAQ believed that it is reasonable and appropriate to benefit small and medium-sized vendors by proposing a progressive fee schedule and to benefit large vendors by proposing to cap the monthly fees.

As with the distribution of other NASDAQ proprietary products, all distributors of the NASDAQ Last Sale for NASDAQ and/or NASDAQ Last Sale for NYSE/Amex products would pay a single \$1500/month NASDAQ Last Sale Distributor Fee in addition to any applicable usage fees. The \$1,500 monthly fee will apply to all distributors and will not vary based on whether the distributor distributes the data internally or externally or distributes the data via both the internet and television.

## 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>3</sup> in general and with Section 6(b)(4) of the Act,<sup>4</sup> as stated above, in that it provides an equitable allocation of reasonable fees among users and recipients of NASDAQ data. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

The NASDAQ Last Sale market data products proposed here appear to be precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act’s goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.<sup>5</sup>

By removing “unnecessary regulatory restrictions” on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether, proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

NASDAQ’s ability to price its Last Sale Data Products is constrained by (1) Competition between exchanges and other trading platforms that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and free delayed consolidated data, and (3) the inherent contestability of the market for proprietary last sale data.

The market for proprietary last sale data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Broker-dealers currently have numerous alternative venues for their order flow, including eleven self-regulatory organization (“SRO”) markets, as well as broker-dealers (“BDs”) and aggregators such as the BATS electronic communications network (“ECN”).<sup>6</sup> Each SRO market competes to produce transaction reports via trade executions, and an ever-increasing number of FINRA-regulated Trade Reporting Facilities (“TRFs”) compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, and ECNs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products.

<sup>3</sup> 15 U.S.C. 78f.

<sup>4</sup> 15 U.S.C. 78f-3(b)(4).

<sup>5</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

<sup>6</sup> The Commission notes that BATS no longer operates as an ECN, rather BATS operates as a national securities exchange. See Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008).

Each SRO, TRF, ECN and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, Amex, NYSEArca, and BATS.

Any ECN or BD can combine with any other ECN, broker-dealer, or multiple ECNs or BDs to produce jointly proprietary data products. Additionally, non-broker-dealers such as order routers like LAVA, as well as market data vendors can facilitate single or multiple broker-dealers' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ECNs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS does today by publishing its proprietary book data on the Internet.<sup>7</sup> Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace writ large.

Consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at \$1 per month for non-professional users. Second, consolidated data is also available at no cost with a 15- or 20-minute delay. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data (such as last sale data) that is simply a subset of the consolidated data. The mere availability of low-cost or free consolidated data provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data, by highlighting the optional nature of proprietary products.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose

a discipline by providing only that data which will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. NASDAQ and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to successfully market proprietary data products.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, and BATS Trading. Several ECNs have existed profitably for many years with a minimal share of trading, including Bloomberg Tradebook and NexTrade.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While broker-dealers have previously published their proprietary data individually, Regulation NMS encourages market data vendors and broker-dealers to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, Reuters and Thomson. New entrants are already on the horizon, including "Project BOAT," a consortium of financial institutions that is assembling a cooperative trade collection facility in Europe. These institutions are active in the United States and could rapidly and profitably export the Project Boat technology to exploit the opportunities offered by Regulation NMS.

In establishing the price for the NASDAQ Last Sale Products, NASDAQ considered the competitiveness of the market for last sale data and all of the implications of that competition. NASDAQ believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish a fair, reasonable, and not unreasonably discriminatory fee and an

equitable allocation of fees among all users.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the NASDAQ Last Sale Products respond to and enhance competition that already exists in the market.

On May 28, 2008, the internet portal Yahoo! announced that it would offer its Web site viewers real-time last sale data provided by BATS Trading. NASDAQ's last sale data products would compete directly with the BATS product disseminated via Yahoo! because BATS Trading has substantially less market share in NASDAQ-listed issues and its market data is less complete.<sup>8</sup> Preventing NASDAQ from responding to this competition from its less-regulated competitor runs counter to the pro-competitive goals of the Act.

In addition, as set forth in detail above, the market for last sale data is already competitive, with both real-time and delayed consolidated data as well as the ability for innumerable entities begin rapidly and inexpensively to offer competitive last sale data products. Moreover, the New York and American Stock Exchanges have each proposed to distribute competing last sale data products. Under the deregulatory regime of Regulation NMS, there is no limit to the number of competing products that can be developed quickly and at low cost. The Commission should not stand in the way of enhanced competition.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Three comment letters were filed regarding the proposed rule change as originally published for comment. NASDAQ responded to these comments in a letter dated December 13, 2007. Both the comment letters and NASDAQ's response are available on the SEC Web site at <http://www.sec.gov/comments/sr-nasdaq-2006-060/nasdaq2006060.shtml>.

### **III. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2008-103 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2008-103. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2008-103 and should be submitted on or before January 28, 2009.

#### IV. Commission's Findings and Order Granting Accelerated Approval of a Proposed Rule Change

The Commission finds that the proposed rule change, to extend the pilot program for three months, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>9</sup> In particular, it is

<sup>9</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).

consistent with Section 6(b)(4) of the Act,<sup>10</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>11</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>12</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>13</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 an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.<sup>14</sup>

The Commission approved the fee for the NASDAQ Last Sale Data Feeds for a pilot period which runs until December 31, 2008.<sup>15</sup> The Commission notes that the Exchange proposes to extend the pilot program for three months. The Exchange proposes no other changes to the existing pilot program.

On December 2, 2008, the Commission issued an approval order ("Order") that sets forth a market-based approach for analyzing proposals by self-regulatory organizations to impose fees for "non-core" market data products, such as the NASDAQ Last Sale Data Feeds.<sup>16</sup> The Commission

<sup>10</sup> 15 U.S.C. 78f(b)(4).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> 15 U.S.C. 78f(b)(8).

<sup>13</sup> 17 CFR 242.603(a).

<sup>14</sup> NASDAQ is an exclusive processor of its last sale 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 data on an exclusive basis on its own behalf.

<sup>15</sup> See Securities Exchange Act Release Nos. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060) and 58894 (October 31, 2008), 73 FR 66953 (November 12, 2008) (SR-NASDAQ-2008-086).

<sup>16</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9,

believes that Nasdaq's proposal to temporarily extend the pilot program is consistent with the Act for the reasons noted in the Order.<sup>17</sup> The Commission believes that approving NASDAQ's proposal to temporarily extend the pilot program that imposes a fee for the NASDAQ Last Sale Data Feeds for an additional three months will be beneficial to investors and in the public interest, in that it is intended to allow continued broad public dissemination of increased real-time pricing information. In addition, extending the pilot program for an additional three months will allow NASDAQ, consistent with its representation,<sup>18</sup> to file, the public to comment on, and the Commission to analyze consistent with the Order and in light of Section 19(b) of the Act, a proposal to permanently approve the fee for NASDAQ Last Sale Data Feeds.

The Commission finds good cause for approving the proposed rule change before the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Accelerating approval of this proposal is expected to benefit investors by continuing to facilitate their access to widespread, free, real-time pricing information contained in the NASDAQ Last Sale Data Feeds. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>19</sup> to approve the proposed rule change on an accelerated basis to extend the operation of the pilot until March 31, 2009.

#### Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NASDAQ-2008-103) is hereby approved on an accelerated basis until March 31, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E9-10 Filed 1-6-09; 8:45 am]

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2008) (Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data).

<sup>17</sup> See *supra* note 15.

<sup>18</sup> Telephone conversation between Jeffrey Davis, Vice President and Deputy General Counsel, NASDAQ, and John Roeser, Assistant Director, Division of Trading and Markets, Commission, on December 29, 2008.

<sup>19</sup> 15 U.S.C. 78s(b)(2).

<sup>20</sup> 17 CFR 200.30-3(a)(12).