

Act should be approved, but with specific supervisory requirements that have the consent of the disqualified member, sponsoring member and/or disqualified person, then proposed FINRA Rule 9523(b) would authorize Member Regulation to approve a supervisory plan, without submitting a recommendation to the Chairman of the Statutory Disqualification Committee, acting on behalf of the NAC. Consistent with the current rule regarding the submission of supervisory plans,<sup>6</sup> proposed FINRA Rule 9523(b)(1) would provide that, by submitting an executed letter consenting to a supervisory plan, a disqualified member, sponsoring member and/or disqualified person waive the following (in summary):

(a) The right to a hearing and any right of appeal to challenge the validity of the supervisory plan;

(b) The right to claim bias or prejudice by Member Regulation or the General Counsel regarding the supervisory plan; and

(c) The right to claim a violation of the *ex parte* prohibitions or the separation of functions provisions of FINRA Rules 9143 and 9144, respectively, in connection with participation in the supervisory plan.

If the supervisory plan is rejected, the disqualified member, sponsoring member and/or disqualified person would have the right to proceed under FINRA Rule 9524.

The proposed rule change also would make several technical amendments. For example, the proposed rule change would amend FINRA Rule 9522(c) to allow a member that has filed a statutory disqualification application to withdraw that application after the start of a hearing but prior to the issuance of a decision by the NAC by filing a written notice with FINRA's Department of Registration and Disclosure and FINRA's Office of General Counsel. In addition, for purposes of clarity and consistency, the proposed rule change would amend FINRA Rule 9522(e) to replace references that Member Regulation "may grant" or "may approve" certain matters with "is authorized to approve" such matters.

### III. Discussion and Findings

After careful review of the proposed rule change, the Commission finds that 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.<sup>7</sup> In particular, the Commission believes the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>8</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission believes that the proposed rule change is consistent with the provisions of the Act noted above because it should allow FINRA to integrate filings mandated by the revised definition of disqualification into established programs that monitor subject persons and allow FINRA and the Commission to focus resources on filings that raise important investor protection concerns.

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (SR-FINRA-2008-045), 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>10</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59579; File No. SR-NASDAQ-2006-056]

### 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

March 13, 2009.

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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to establish a data filtration service called Nasdaq Custom Data Feeds ("Service"). The Service would

<sup>7</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78o-3(b)(6).

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</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.

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.<sup>3</sup> 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.<sup>4</sup>

The Commission received one comment on the proposal from the Securities Industry and Financial Markets Association ("SIFMA").<sup>5</sup> 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 the service in the release."<sup>6</sup> SIFMA also asserts that the proposed rule change "raises problems regarding how the proposed fee was calculated."<sup>7</sup> 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."<sup>8</sup>

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 exchange<sup>9</sup> and, in particular, Section 6(b)(4) of the Act,<sup>10</sup> which requires, among other things, that Nasdaq's rules provide for the equitable allocation of reasonable dues, fees and other charges among members and

<sup>3</sup> See Securities Exchange Act Release No. 54959 (December 18, 2006), 71 FR 77842 ("Notice").

<sup>4</sup> 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.

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

<sup>6</sup> *Id.* at 1.

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

<sup>8</sup> *Id.* at 2.

<sup>9</sup> 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).

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

<sup>6</sup> See FINRA Rule 9523(b)(1) (to be renumbered as FINRA Rule 9523(a)(1)).

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,<sup>11</sup> 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 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.<sup>12</sup>

In addition, the proposal meets the criteria, formulated by the Commission<sup>13</sup> in connection with the petition filed by NetCoalition,<sup>14</sup> for approval of proposed rule changes concerning the distribution of non-core market data.<sup>15</sup> 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."<sup>16</sup> 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."<sup>17</sup> 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."<sup>18</sup>

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,<sup>19</sup> not be designed to permit unfair discrimination under Section 6(b)(5) of the Act,<sup>20</sup> be fair and reasonable under Rule 603(a)(1),<sup>21</sup> and not be unreasonably discriminatory under Rule 603(a)(2).<sup>22</sup> 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.<sup>23</sup>

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 consumers, and that it fully expects its competitors to quickly replicate the Service.<sup>24</sup> 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)<sup>25</sup> and Section 6(b)(5) of the Act,<sup>26</sup> and with Rule

603(a).<sup>27</sup> 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.<sup>28</sup> Rather, the criteria for review should be "appropriate to the circumstances," and the existence of competitive forces is "particularly appropriate" when assessing a proposed fee.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

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

<sup>12</sup> See Notice at 77843.

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

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

<sup>15</sup> 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.

<sup>16</sup> *Id.* at 74781.

<sup>17</sup> *Id.* at 74781-82.

<sup>18</sup> *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.*

<sup>19</sup> 15 U.S.C. 78f(b)(4).

<sup>20</sup> 15 U.S.C. 78f(b)(5).

<sup>21</sup> 17 CFR 242.603(a)(1).

<sup>22</sup> 17 CFR 242.603(a)(2). See 73 FR at 74782.

<sup>23</sup> See 73 FR at 74779.

<sup>24</sup> See Notice at 77844.

<sup>25</sup> 15 U.S.C. 78f(b)(4).

<sup>26</sup> 15 U.S.C. 78f(b)(5).

<sup>27</sup> 17 CFR 242.603(a).

<sup>28</sup> See 73 FR at 74787.

<sup>29</sup> *Id.*

<sup>30</sup> See FR at 74775 (summarizing comments received on the proposed rule change from, among others, SIFMA).

<sup>31</sup> *Id.* at 74787.

<sup>32</sup> 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 Act,<sup>33</sup> 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.<sup>34</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59580; File No. SR–NASDAQ–2007–006]

### 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

March 13, 2009.

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”) <sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> 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.<sup>3</sup> 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.

The proposed rule change was published in the **Federal Register** on March 16, 2007.<sup>4</sup> The Commission received no comments on the proposal. On March 6, 2009, Nasdaq filed Amendment No. 1 to the proposed rule change.<sup>5</sup>

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 exchange<sup>6</sup> and, in particular, Section 6(b)(4) of the Act,<sup>7</sup> 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,<sup>8</sup> 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 on all subscribers equally. The fee for the Service is intended to cover the costs of establishing and maintaining the Service.<sup>9</sup>

In addition, the proposal meets the criteria, formulated by the Commission<sup>10</sup> in connection with the petition filed by NetCoalition,<sup>11</sup> for approval of proposed rule changes

concerning the distribution of non-core market data.<sup>12</sup> 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.”<sup>13</sup> 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.”<sup>14</sup> 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.”<sup>15</sup>

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,<sup>16</sup> not be designed to permit unfair discrimination under Section 6(b)(5) of the Act,<sup>17</sup> be fair and reasonable under Rule 603(a)(1),<sup>18</sup> and not be unreasonably discriminatory under Rule 603(a)(2).<sup>19</sup> If the proposal involves non-core market data, an analysis of competitive forces may be used, and that analysis will apply to findings

<sup>12</sup> 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.

<sup>13</sup> *Id.* at 74781.

<sup>14</sup> *Id.* at 74781–82.

<sup>15</sup> *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.*

<sup>16</sup> 15 U.S.C. 78f(b)(4).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

<sup>18</sup> 17 CFR 242.603(a)(1).

<sup>19</sup> 17 CFR 242.603(a)(2). See 73 FR at 74782.

<sup>4</sup> See Securities Exchange Act Release No. 55444 (March 12, 2007), 72 FR 12648 (“Notice”).

<sup>5</sup> 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.

<sup>6</sup> 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).

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> See Notice at 12649.

<sup>10</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

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

<sup>33</sup> 15 U.S.C. 78s(b)(2).

<sup>34</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.

<sup>3</sup> 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*.