THOMSON

February 7, 2003

By Hand and Electronically

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Mail Stop 6-9
Washington, D.C. 20549

Re: *Commission File Nos. SR-NASD-2003-02 and SR-NASD-2003-03*

Dear Mr. Katz:

Thomson Financial Inc. ("Thomson Financial") submits this letter to comment on the NASD's above-referenced proposals regarding Nasdaq's voluntary trading data distribution facility known as Nasdaq PostData,SM which is currently being operated on a pilot basis. These proposals replace an earlier proposal (No. SR-NASD-2002-184) in which Nasdaq sought to extend the pilot program for an additional twelve months beyond its slated January 10, 2003 expiration, to materially enhance the types of reports provided through the service, and to institute a fee waiver policy to attract new subscribers. On January 10, 2003, Thomson Financial filed comments in which it explained why the Commission should not grant the twelve-month extension or approve the PostData changes until Nasdaq supplies a credible analysis of its fee structure sufficient to show that the income Nasdaq derives from its regulatory activities will not cross-subsidize this enhanced commercial facility, and further to show that wholesale fees are cost-based.

In its current proposals, Nasdaq has separated its request to extend the pilot and add the extra reports (No. 2003-02) from its request to implement the fee waiver policy (No. 2003-03). The only material difference between the new and old proposals is that in the new proposals, Nasdaq seeks to extend the pilot only through the end of February 2003, and not for another twelve months as originally requested. With regard to the first of the new proposals, at Nasdaq's request, the Commission waived the 30-day operative delay in effectiveness provided in section 19(b)(3)(A) of the Securities Exchange Act of 1934 and rule 19b-4(f)(6) thereunder, and declared the proposed extension and content addition to be effective and operative upon its filing with the Commission.[1]

Because the substance of current proposals is virtually identical to the substance of the proposal Thomson Financial has already commented on, Thomson Financial hereby restates and resubmits its January 10, 2003 comments, a copy of which is attached hereto.

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[1] SEC Rel. No. 34-47210 (January 17, 2003), 68 Fed. Reg. 3912 (January 27, 2003).

Thomson Financial respectfully submits that the propriety of the PostData pricing structure still has not been proven, and once again we urge the Commission not to approve any further extensions or modifications to this service until it is.

Very truly yours,

/s/

Joseph L. Magill
Managing Director AutEx
Thomson Financial Banking and Brokerage

Enc.
cc: (By Hand)
Hon. Harvey Pitt
Hon. Paul S. Atkins
Hon. Roel C. Campos
Hon. Cynthia A. Glassman
Hon. Harvey J. Goldschmid
Annette Nazareth
Mary Dunbar
Joseph Morra (electronically)

January 10, 2003

By Hand and Electronically

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Mail Stop 6-9
Washington, D.C. 20549

Re: *Commission File No. SR-NASD-2002-184*

Dear Mr. Katz:

Thomson Financial Inc. ("Thomson Financial") submits this letter to comment on the NASD's above-referenced proposal regarding Nasdaq's voluntary trading data distribution facility known as Nasdaq PostData,℠ which is currently being operated on a pilot basis. In this proposal, Nasdaq seeks to extend the pilot program for an additional twelve months, materially enhance the types of reports provided through the service, and institute a fee waiver policy to attract new subscribers. For the reasons explained herein, Thomson Financial respectfully submits that the Commission should not grant the twelve-month extension or approve the PostData changes until Nasdaq supplies a credible analysis of its fee structure sufficient to show that the income Nasdaq derives from its regulatory activities will not cross-subsidize this enhanced commercial facility, and further to show that wholesale fees are cost-based.

Thomson Financial is a US$1.6 billion provider of information and technology solutions to the worldwide financial community. Through the widest range of products and services in the industry, Thomson Financial helps clients in more than 70 countries make better decisions, be more productive and achieve superior results. Thomson Financial is part of The Thomson Corporation (www.thomson.com), a leading provider of value-added information, software applications and tools to more than 20 million users in the fields of law, tax, accounting, financial services, higher education, reference information, corporate training and assessment, scientific research and healthcare. The Thomson Corporation reported 2001 revenues of US$7.2 billion and its common shares are listed on the New York and Toronto stock exchanges (TSX: TOC, NYSE: TOC).

Thomson Financial Banking and Brokerage (a business unit of Thomson Financial) acts as a facilitator for the global trading community, providing a suite of services designed to enhance liquidity and market intelligence. Among these is AutEx,® which since 1969 has helped traders identify, access and track liquidity in global securities markets through an electronic bulletin board of block trade indications and post-trade reports. Thomson Financial Banking and Brokerage also offers a suite of other specialized services, including BlockDATA, which gathers information and produces customized reports regarding trading activity. Introduced in 1987, BlockDATA compiles trade data on more than 300 brokerage firms that advertise trades over the AutEx network, and ranks these firms in order of highest trading volume in specific securities, particular industry sectors, countries and other categories.[2] BlockDATA reports are available in diskette, fax and hard-copy format. Another Banking and Brokerage service, BlockOnline, provides Internet access to BlockDATA's global trading market information. While the content and format of BlockOnline are the same as those of BlockDATA, BlockOnline's AutEx-derived data is updated daily.

Background of the Pilot Program

In February 1999, NASD, through its Nasdaq subsidiary, proposed to establish a new proprietary trading data distribution facility accessible to NASD members, qualified institutional buyers ("QIBs") and market data vendors through the *NasdaqTrader.com* website.[3] Dubbed "Nasdaq PostData,"℠ this commercial product was to distribute a package of three reports derived from the trade data Nasdaq collects in its capacity as a self-regulatory body.

Nasdaq amended its proposal in March, 1999, and again in May and July, 2001.[4] As ultimately proposed, the PostData package was to include the following reports:

- daily share volume reports for each Nasdaq security, containing voluntarily-posted T + 1 daily share volumes traded by NASD member firms;

- daily issue data, containing a summary of the previous day's activity for every Nasdaq issue; and

- monthly summaries of trading volume statistics for the top fifty market participants broken down by industry sector, security, or type of trading (*e.g.*, block or total).

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[2] BlockDATA's database currently covers approximately 4,000 listed equities, 8,000 NASDAQ/OTC equities, 14,000 foreign ordinaries, 1,200 American Depository Receipts (ADRs), 300 coupon convertible bonds, 50 zero coupon bonds, 200 convertible preferreds, 100 mandatory convertibles and 500 warrants.

[3] Securities Exchange Act ("Exchange Act") Rel. No. 41244 (April 1, 1999) [File No. SR-NASD-99-12] 64 Fed. Reg. 17429 (April 9, 1999) (the "1999 Release"). This proposal replaced an earlier proposal to provide proprietary trading data to NASD member firms and non-member QIBs only. Exchange Act Rel. No. 40542 (October 9, 1998) [File No. SR-NASD-98-71] 63 Fed. Reg. 55909 (October 19, 1998).

[4] Letter dated March 23, 1999 from Robert E. Aber, S.V.Pres. and General Counsel, Nasdaq to Katherine A. England, Asst. Dir., SEC Div. of Market Regulation, with attachment. The first amendment was published for comment as part of the 1999 Release. *See also* letter dated May 29, 2001 from Edward S. Knight, Exec. V. Pres. and Gen. Counsel, Nasdaq, to Katherine A. England; letter dated July 9, 2001 from Edward S. Knight to Belinda Blaine, Assoc. Dir., SEC Div. of Market Regulation. The two 2001 amendments were the subject of Exchange Act Rel. No. 44558 (July 16, 2001), 66 Fed. Reg. 38049 (July 20, 2001) (the "2001 Release").

Modifications to PostData during the pilot period would be limited to minor enhancements to the content of the package, and would be made in accordance with section 19(b) of the Exchange Act and Rule 19b-4 thereunder.[5]

Nasdaq proposed to charge NASD members and non-member QIBs $70 per end user per month for the service, while a data vendor would be charged $35 per month for each end user who received reports through that vendor. According to Nasdaq, the fees charged to direct subscribers were intended to offset: (1) the costs associated with the product's development, ongoing enhancement, maintenance, operation and marketing; (2) the cost associated with the ongoing maintenance and administration of the Nasdaq web security infrastructure that would be used to grant and validate access to the product by direct subscribers; and (3) allocable overhead. The fees charged to the data vendors were to cover Nasdaq's product development, enhancement, maintenance, operation, marketing and allocable overhead, but not the costs relating to Nasdaq web security infrastructure. Because Nasdaq is already paid in its role as a regulator to gather trade data from members,[6] the PostData fees were not intended to cover the contents of the facility's reports.

In a series of comment letters on the various iterations of the proposal, Thomson Financial repeatedly voiced its concern that the proposal would impose an unwarranted burden on competition.[7] In this regard, Thomson Financial first explained that PostData could be expected to compete head-to-head with Thomson Financial's pre-existing services, since like BlockDATA and BlockOnline, Nasdaq's new commercial offering was designed to allow sell-side traders to use share volume to advertise their trading activity in specific issues and to allow buy-side firms to select sell-side firms for order execution.[8]

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[5] *Id.,* 66 Fed Reg. at 38050.

[6] Nasdaq requires broker-dealers to pay transaction-related fees for mandatory trade reporting through the Automated Confirmation Transaction Service ("ACT"). Nasdaq charges approximately 3 cents per side for trade reporting on transactions not subject to trade comparison through ACT, and roughly 1 1/2 cents per side per 100 shares for trade comparisons. Additional charges are levied for late reports, browse/query functions, and risk management. Monthly fees are charged for ACT terminals, the service desk and CTCI. NASD Rule 7010(g).

[7] Letter dated April 12, 1999 from Stephen K. Lynner, President, AutEx Group to Jonathan G. Katz; letter dated June 12, 1999 from Stephen K. Lynner to Jonathan G. Katz; letter dated June 23, 1999 from Stephen K. Lynner to Katherine England, Assistant Director, SEC Division of Market Regulation; and letter dated August 9, 2001 from Stephen K. Lynner, President, Thomson Financial Sales and Trading Group to Jonathan G. Katz. Thomson voiced similar concerns in response to Nasdaq's two earlier attempt to launch this commercial data service. *See* letter dated October 22, 1998 from Roland Beaulieu, President, Thomson Trading Services, Inc. to Jonathan G. Katz, commenting on Securities Exchange Act Rel. No. 40542 (October 9, 1998) [File No. SR-NASD-98-71] 63 Fed. Reg. 55909 (October 19, 1998).

[8] One of the few differences between the products was that the PostData reports were to reflect only volume effected by reporting parties under ACT, while Thomson's data included volume effected by both sides to a trade (*i.e.,* reporting and contra-parties).

Thomson Financial also pointed out that special care is required whenever a governmental or quasi-governmental authority undertakes to compete with private enterprises, since a regulator may be able to obtain an unfair advantage if the regulator's commercial products are derived from its regulatory activities. Commentators have recognized this fact[9] and so has the SEC. In this latter regard, Thomson Financial noted that the Commission has been extremely wary of allowing self-regulatory organizations ("SROs") to stifle competition by usurping the functions of pre-existing private vendors. For example, in approving MSRB Rule G-36 (relating to the delivery of official statements on municipal bond issues), the Commission acknowledged concerns that allowing the MSRB to become designated as a nationally recognized municipal securities information repository ("NRMSIR") might unjustifiably inhibit competition among information vendors, and might thus be inconsistent with the Exchange Act.[10] Because of these concerns, the Commission warned that should the MSRB ever seek NRMSIR status, the Commission might take corrective regulatory action before granting the MSRB's request.[11] By parity of reasoning, Thomson Financial submitted that before allowing Nasdaq to vend PostData, the Commission should require the implementation of appropriate safeguards to ensure that pre-existing commercial trade reporting services would not be driven out of the market due to a business advantage conferred on Nasdaq by virtue of its status as a regulator.

Within this framework, Thomson Financial submitted that Nasdaq's PostData pricing strategy deserved special scrutiny. There were two areas of particular concern, the first of which was the question of cross-subsidization. In addition to the fact that Nasdaq's regulatory status would enable it to collect for free the data a private vendor would have to pay for, Thomson Financial was also troubled by the prospect that Nasdaq would be able to subsidize its new commercial venture with the ACT reporting fees it collects. Based on its own considerable experience in gathering and disseminating share volume data, Thomson Financial questioned whether the fees Nasdaq planned to charge would be enough to defray the costs of producing and marketing the service, even factoring in the free content Nasdaq would enjoy.[12]

In addition to the cross-subsidy concerns, Thomson Financial also questioned whether the fees Nasdaq proposed to charge data vendors were truly cost-based. As the court in *NASD v. SEC* confirmed, where the NASD distributes data simultaneously through its own commercial product and through third-party vendors, the NASD should recover from vendors

[9] Miller, Sam Scott, "Nasdaq as a Competitor," *Traders Magazine* (August 1998) p.15.

[10] SEC Rel. No. 34-28081 (June 1, 1990), 55 Fed. Reg. 23333, 23335 (June 7, 1990).

[11] *Id.*, 55 Fed. Reg. at 23337, n.26.

[12] Letter dated June 23, 1999 from Stephen K. Lynner to Katherine England, n. 1. *See also* letter dated April 12, 1999 from Stephen K. Lynner to Jonathan G. Katz at 5.

> only those costs it would incur if it operated a pure 'pass-through' system -- a system that only collected information and passed it on to vendors. The NASD should not recover any costs related to its own competing vendor service."[13]

According to Nasdaq, the $35-per-end user fee to be charged to vendors was intended to cover the costs of developing, enhancing, maintaining, operating and marketing PostData, as well as allocable overhead expenses related to the product.[14] That being the case, Thomson Financial could not agree that Nasdaq was not attempting to recover from vendors "costs related to its own competing vendor service."

In order to ensure a level competitive playing field, Thomson Financial asked that Nasdaq be required to provide detailed information demonstrating the sufficiency of the fees proposed to be charged to direct subscribers and the cost basis for the fees proposed to be charged to vendors. Thomson Financial also asked the Commission to take whatever corrective action might be necessary to offset the at least the content subsidy inherent in the PostData product.[15]
While acknowledging that PostData involved one type of regulatory subsidy (free content), Nasdaq denied that "Nasdaq-collected regulatory fees generated from ACT [would be] used to *directly* offset or 'underwrite' the costs of Post Data™" (emphasis supplied).[16] Nasdaq further denied that Thomson Financial's cost estimates -- which were based on its substantial experience in collecting and disseminating share volume data -- had any relevance to the Nasdaq venture "due to the vast differences in business objectives, regulatory oversight, and structure" between an SRO and a commercial enterprise.[17]

On the question of whether the fees charged to vendors were cost-based, Nasdaq attempted to distinguish the PostData situation from the situation in *NASD v. SEC* on the grounds that Nasdaq

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[13] 801 F.2d 1415, 1418 (D.C.Cir. 1986), *quoting* SEC order of April 17, 1984, 49 Fed. Reg. 17640, 17649.

[14] Nasdaq explained that the $35 fee differential between direct and indirect users "reflects the projected cost of the incremental web security that is required to entitle direct users of the PostData product." 2001 Release, 66 Fed. Reg. at 38050.

[15] Letter dated August 9, 2001 from Stephen K. Lynner to Jonathan G. Katz at 7.

[16] Letter dated June 1, 1999 from S. William Broka, Senior V. President, Nasdaq Trading and Market Services to Katherine A. England, Assistant Director, SEC Division of Market Regulation at 4. Nasdaq later amended this assertion to say that "no regulatory fees will be used to offset the costs of PostData." Undated letter filed with the SEC on September 27, 2001 from Edward S. Knight to Belinda Blaine (hereafter, "September 2001 Rebuttal Letter") at 2.

[17] Letter dated June 1, 1999 from S. William Broka, to Katherine A. England, *supra. See also* September 2001 Rebuttal Letter. While dismissing Thomson's cost analysis out of hand, Nasdaq did not offer any analysis of its own as to how many paying subscribers it would take, at the proposed prices, to offset the cost of producing the service.

was planning to charge separate retail and wholesale fees for PostData, whereas in the earlier case, it had established a single fee for all users, be they direct subscribers or those accessing Nasdaq data through an independent vendor.[18] As explained more fully below, in making such an argument, Nasdaq misconstrued this controlling legal precedent.[19]

On January 11, 2002, the SEC approved PostData on a pilot basis, for a period extending through January 10, 2003.[20] In so doing, the Commission said that it expected "that Nasdaq will evaluate the fees it has established for PostData and provide the Commission with a report of its findings before the expiration of, or extension of, the one-year pilot program."[21] The Commission also noted that while minor modifications to the facility were anticipated, should Nasdaq wish to modify the contents of PostData in any substantive way, it must comply with Section 19(b) of the Exchange Act and Rule 19b-4 thereunder.[22]

Nasdaq did substantively change the content of the PostData reports during the pilot period. In August 2002, Nasdaq added four reports to the PostData package: buy volume report, sell volume report, crossed volume report and consolidated activity volume report.[23] These additional reports changed the character of the PostData package from one that attributed volume solely to the firm that has the reporting obligation based on ACT rules, to one that reflects volume attributed to both reporting and contra parties to a trade. In so doing, Nasdaq removed the primary distinction between its voluntary trading data distribution facility and Thomson Financial's, which already gave a more complete picture of share volume.

Although the August modification more than doubled the amount of data delivered through Nasdaq's facility, the price of the PostData package did not change.

Nasdaq's Current Proposal

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[18] *Id.* In addition to discussing the questions of subsidies and cost basis, Nasdaq also addressed two other issues Thomson had raised in its comments. Nasdaq's letter resolved those issues, which need not be raised again here.

[19] *See* discussion at pp. 9-10, *infra.*

[20] Exchange Act Rel. No. 45270 (January 11, 2002) [File No. SR-NASD-99-12] 67 Fed. Reg. 2712 (January 18, 2002) (the "Approval Release").

[21] *Id.,* 67 Fed. Reg. at 2714.

[22] *Id.*

[23] Exchange Act Rel. No. 46316 (August 6, 2002) [File No. SR-NASD-2002-90] 67 Fed. Reg. 52504 (August 12, 2002) (the "Enhancement Release"). Nasdaq filed this proposal pursuant to section 19(b)(3) of the Exchange Act and rule 19b-4(f)(6) thereunder. At Nasdaq's request, the Commission waived the applicable five-day pre-filing notice requirements and the 30-day operative delay, making the changes effective upon filing.

In its current proposal, Nasdaq seeks to do three things: (1) extend the PostData pilot program for an additional twelve months; (2) expand the content of the package from voluntary data to data regarding all Nasdaq market participants; and (3) give the service away free for two months to new subscribers and potential subscribers.[24] Unfortunately, missing from this proposal is the fee evaluation report that the SEC instructed Nasdaq to submit before the expiration or extension of the initial pilot program.[25]

Despite Nasdaq's previous assertions that PostData was "a direct response to requests from professional Nasdaq market participants,"[26] Nasdaq now reports that over the past year, it had difficulty recruiting both sell-side contributing firms and buy-side subscribers. Because PostData has not received the anticipated market acceptance, Nasdaq claims that it is "unable to effectively study the fees assessed" for the product.[27]

Instead of providing the information necessary to analyze its initial fee structure as the Commission directed, Nasdaq proposes to make two changes to the product to enhance its marketability. First, it seeks to change the nature of PostData from a *voluntary* trading data distribution facility[28] to one that includes information regarding all Nasdaq market participants. In particular, Nasdaq proposes to add the following two reports to the PostData package:

- Daily share volume for **all** market participants per Nasdaq security on a T + 10 basis, including the ACT Reported, Buy, Sell, Crossed and Total Activity reports and

- Daily share volume aggregates for **all** market participants per Nasdaq index on a T + 10 basis, including the ACT Reported, Buy, Sell, Crossed and Total Activity reports.

Because Nasdaq does not intend to charge for this material enhancement, it contends that its rule filing should be made effective immediately.[29]

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[24] Letter dated December 30, 2002 from Mary Dunbar, V. Pres. and Deputy General Counsel, Nasdaq to Katherine A. England, with attachment ("Extension Proposal").

[25] Approval Release, 67 Fed. Reg. at 2714.

[26] 2001 Release, 66 Fed. Reg. at 38049; 1999 Release, 64 Fed. Reg. at 17430.

[27] Extension Proposal at 6.

[28] That is, a facility that distributes data regarding firms that voluntarily choose to permit dissemination of their share volume information.

[29] Extension Proposal at 8, n. 5.

The second change Nasdaq suggests is the institution of a fee waiver program to assist in the marketing of the product. In this regard, Nasdaq proposes to deliver PostData for free to new and potential subscribers for a period of up to two months, and to permit vendors (if any) to offer the same deal to indirect subscribers.

Thomson Financial respectfully submits that the proposed enhancements exacerbate the lingering questions regarding the PostData fee structure from the original pilot period. Thomson Financial requests that the current proposal not be approved until these issues are resolved.

Concerns Relating to the Current Proposal

Nasdaq's Failure to Evaluate Its Fee Structure

Given the importance of the PostData fee structure to an extension of the pilot program, Thomson Financial is puzzled by Nasdaq's assertion that it is unable to effectively study the PostData fees. The propriety of the fee structure can be determined in large measure by calculating the costs of producing the service. Since Nasdaq has been operating the facility since March 18, 2002, it must have some idea what its costs are. Nasdaq presumably also knows the cost of the August enhancements to the PostData content package, and either knows or should be able to estimate the cost of the additional content enhancements that are now proposed. Furthermore, even though attracting PostData contributors and subscribers has proven more difficult than Nasdaq would have liked, by this time it should have some idea of what it costs to market this product. Likewise, there must be some way of estimating the effect on the bottom line of the proposed new fee waiver.

On the revenue side, Thomson Financial notes that Nasdaq reports the low number of subscribing firms, but says nothing about the number of users currently accessing the data.[30] Since fees are imposed on a per-user, not per-firm basis, it appears that Nasdaq may have more valuable price data than it realizes. At the very least, it has some basis for estimating an expected average number of paying users per firm, which is certainly relevant to an evaluation of the propriety of its fee structure.

The Cost of Enhancements to the PostData Content

Since the initial pilot was approved a year ago, Nasdaq has materially added to the PostData content once, and now proposes to do so again. Nasdaq contended last August and contends in the current proposal that its PostData enhancements should be effective immediately upon filing because they do not entail any additional fees.[31] Thomson Financial cannot agree with this contention.

One of the requirements for immediate rule change effectiveness under Section 19(b)(3) of the

[30] *Id.* at 6.

[31] Enhancement Release, 67 Fed. Reg. at 52505-06; Extension Proposal at n.5.

Exchange Act and Rule 19b-4(f)(6) thereunder is that the proposed change does not impose any significant burden on competition. Adding material enhancements whose costs are not defrayed by the fees charged for the service can place a significant burden on competition, since it raises once again the question of whether the revenue shortfall is being made up -- at least indirectly -- by fees generated by the SRO's regulatory activities.

Thomson Financial respectfully submits, therefore, that material changes to the PostData content (including the changes Nasdaq currently proposes) should not be effective upon filing, but rather should be effective only when and if the Commission determines that their cost will be properly defrayed by commercial revenue.

The PostData Wholesale Fees

In its prior filings with the Commission, Nasdaq seems to have misapprehended the standard that applies where an SRO seeks to enter a commercial data market also served by private vendors.[32] It is not enough simply to have separate retail and wholesale fee schedules; rather, an SRO must also ensure that its wholesale fees reflect only those costs that the SRO would incur if it just collected information and passed it on to private vendors. The fee structure cannot require vendors to pay the costs related to the SRO's own commercial service.

Contrary to Nasdaq's description of the fee dispute in *NASD v. SEC*, by the time that case reached the Court of Appeals, the NASD had abandoned its contention that vendors should be charged the same $150-per-user fee that was charged to retail subscribers. In the court's words:

> Apparently recognizing that its original position was unreasonable, NASD now concedes that the [data service] subscriber fee must be cost-based. Indeed, counsel for NASD conceded at oral argument that, in view of NASD's most recent cost-based fee proposal, the Commission's April and November orders should be affirmed insofar as they reject a subscriber fee in excess of $79 per month. Counsel for Instinet and the Commission argued, on the other hand, that the $8.75 per month figure selected by the Commission as an interim fee is a much closer approximation of the actual cost to NASD of providing [the] service.[33]

The court affirmed the Commission's determination of the proper cost-based fee, which was substantially lower than the cost-based fee calculated by the NASD.

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[32] September 2001 Rebuttal Letter at 3.

[33] 801 F.2d at 1419.

Applying the standard articulated in *NASD v. SEC* to PostData indicates that the only charges that may be included in a wholesale fee are the cost of scrubbing[34] and organizing the ACT data and transmitting that data to the vendors. Not properly includable are, among other things, costs relating to formatting PostData reports,[35] marketing the Nasdaq facility, and any incremental operating costs and overhead attributable to the retail version of the product.

According to Nasdaq, the only PostData-related cost not charged to vendors is the cost of operating the secured website; all other marketing, operating and PostData-related overhead charges are included in the wholesale fee. It appears, therefore, that Nasdaq's fee structure still does not comport with what the law requires.

Conclusion

Thomson Financial believes in open and fair competition. In filing these comments, Thomson Financial's intent is not to prevent the entry of another data vendor into the market, but rather to ensure that where that new vendor is also a regulatory body, the ground on which the competitors meet is level. The Commission has long recognized that special vigilance is required in this area. One of the hallmarks of that vigilance is ensuring the propriety of the fee structure applicable to an SRO's commercial products. In establishing fees for a commercial product, an SRO such as Nasdaq must take into account the costs it has and will incur in developing and producing the product, just as a purely commercial vendor would do. The SRO also must ensure that it charges competing vendors no more for the service than it would charge if it operated a pure data pass-through system.

Thomson Financial respectfully submits that the propriety of the PostData pricing structure has not yet been proven, and we urge the Commission not to approve Nasdaq's current proposal until it is.

Thomson Financial very much appreciates the opportunity to comment on this proposal.

Very truly yours,

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[34] "Scrubbing" refers to the process of verifying data and removing improper information (*e.g.,* a reported trade that ultimately failed) from the ACT database.

[35] Vendors will format the Nasdaq data into reports with the vendors' own "look and feel."

Joseph L. Magill
Managing Director AutEx
Thomson Financial Banking and Brokerage

cc: (By Hand)
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