

SECURITIES AND EXCHANGE COMMISSION
(Release No. 59933; File No. SR-NASDAQ-2009-028)

May 15, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change to Reduce Fees for NASDAQ Basic Data Feeds

I. Introduction

On March 27, 2009, The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to reduce the fees for NASDAQ Basic, a real time data feed combining both NASDAQ’s Best Bid and Offer (“QBBO”) and the NASDAQ Last Sale. The proposed rule change was published for comment in the Federal Register on April 14, 2009.³ The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

NASDAQ Basic is a “Level 1” data product containing quotation information from the NASDAQ Market Center and last sale data from the NASDAQ Market Center. NASDAQ Basic was approved on March 16, 2009,⁴ as a pilot program and includes fees for usage and distribution of the data. NASDAQ Basic is available in three forms, NASDAQ Basic for NASDAQ, NASDAQ Basic for NYSE, and NASDAQ Basic for Alternext. NASDAQ Basic is 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 consolidated Level 1 products.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59712 (April 6, 2009), 74 FR 17273.

⁴ See Securities Exchange Act Release No. 59582 (March 16, 2009) 74 FR 12423 (March 24, 2009) (SR-NASDAQ-2008-102) (“Pilot Approval Order”).

NASDAQ assesses a monthly fee for distributors of NASDAQ Basic in addition to applicable monthly per user fees. Currently, each Distributor of NASDAQ Basic for NASDAQ-listed stocks currently pays a monthly fee of \$1,500 for either internal or external distribution, each Distributor of NASDAQ Basic for NYSE-listed stocks pays a monthly fee of \$250 for internal distribution or \$625 for external distribution, and each Distributor of NASDAQ Basic for Alternext -listed stocks pays a monthly fee of \$250 for internal distribution or \$625 for external distribution. In addition, each Distributor that receives Direct Access to the NASDAQ Basic pays a monthly fee of \$2,000 for NASDAQ-listed stocks, \$1,000 for NYSE-listed stocks, and \$1,000 for Alternext -listed stocks.

NASDAQ proposes to reduce the distribution fees for NASDAQ Basic. First, NASDAQ proposes to make all three feeds available for a single monthly Distributor Fee of \$1,500, rather than add separate fees for NYSE- and Alternext-listed securities. Second, NASDAQ proposes to eliminate the fee for Direct Access to NASDAQ Basic, currently set forth in Rule 7047(b). Finally, NASDAQ proposes to credit each Distributor of NASDAQ Basic up to \$1,500 per month based upon that Distributor's monthly usage fees. For example, a Distributor that reports \$1,500 or more of monthly usage of NASDAQ Basic will pay no net Distributor Fee, whereas a Distributor that reports \$1,000 of monthly usage will pay a net of \$500 for the Distributor Fee.

III. Discussion and Commission Findings

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.⁵ In particular, it is consistent with Section 6(b)(4) of the Act,⁶ which requires that the rules of a

⁵ 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).

⁶ 15 U.S.C. 78f(b)(4).

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,⁷ 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,⁸ 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,⁹ 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.¹⁰

This proposal would reduce the distribution fees for NASDAQ Basic by charging a single monthly Distributor Fee of \$1,500 for all three NASDAQ Basic feeds, eliminating the fee for Direct Access to NASDAQ Basic, and providing a credit to each Distributor of NASDAQ Basic up to \$1,500 per month based upon that Distributor's monthly usage fees. The Commission has

⁷ 15 U.S.C. 78f(b)(5).

⁸ 15 U.S.C. 78f(b)(6).

⁹ 17 CFR 242.603(a).

¹⁰ NASDAQ is an exclusive processor of NASDAQ Basic 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.

reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.¹¹ The Commission recently found that NASDAQ was subject to competitive forces in setting fees for NASAQ Basic in the Pilot Approval Order.¹² There are a variety of alternative sources of information that impose significant competitive pressures on NASDAQ in setting the terms for distributing NASAQ Basic. The Commission believes that the availability of those alternatives, as well as NASDAQ's compelling need to attract order flow, imposed significant competitive pressure on 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 does not provide such a basis.

¹¹ See 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 the competitive factors that apply to non-core market data products. The Commission hereby incorporates by reference the data and analysis from the NYSE Arca Order into this order.

¹² See Pilot Approval Order, supra note 4.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-NASDAQ-2009-028), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Florence E. Harmon
Deputy Secretary

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).