



June 4, 2009

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

Re: Securities Exchange Act Release No. 59875; File No. SR-NASDAQ-2009-043 (NASDAQ Optional Pre-Routing Display Period)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> appreciates the opportunity to comment on Securities Exchange Act (“Exchange Act”) Release No. 59875, in which the Securities and Exchange Commission (the “SEC” or “Commission”) requests comments on a proposal by The NASDAQ Stock Market LLC (“NASDAQ”) to establish an optional pre-routing display period (essentially, a “flash” quote capability). This rule change was designated by NASDAQ as a “non-controversial” rule change and thus filed under Rule 19b-4(f)(6) under the Exchange Act, which renders the rule change effective upon filing. Since filing this rule change, NASDAQ has issued two Equity Trading Alerts (each an “ETA”), ETA 2009-34 and ETA 2009-35, clarifying the operation of this new “flash” quote product.<sup>2</sup>

SIFMA firms believe that this rule change was not non-controversial as it raises significant substantive and implementation issues, including, among other things, compliance issues regarding Regulation NMS and best execution obligations. NASDAQ’s filing therefore does not meet the criteria for “non-controversial” in that (1) it does significantly affect the protection of investors and the public interest, (2) it does impose a significant burden on competition, and (3) it is likely to generate adverse

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<sup>1</sup> The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington, D.C. and London, and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

<sup>2</sup> <http://www.nasdaqtrader.com/TraderNews.aspx?id=ETA2009-34> and <http://www.nasdaqtrader.com/TraderNews.aspx?id=ETA2009-35>

comments (and it has). Firms are not convinced that NASDAQ's reliance, as stated in its rule change, on prior SEC approval of a similar CBOE proposal in 2006 and before the many significant Regulation NMS changes were implemented in our markets, is sufficient grounds to designate a proposal such as NASDAQ's as non-controversial. In addition to our comment letter, the recent comment letter filed by NYSE Euronext and Direct Edge ECN are evidence that NASDAQ's proposal is in fact controversial and therefore subject to further SEC scrutiny and public debate. Therefore, SIFMA firms believe that this rule change should have been filed under normal rulemaking procedures providing for adequate notice and a public comment period, extensive SEC consideration, and actual approval prior to such rule change becoming effective.

SIFMA strongly urges the Commission to abrogate this rule filing, to encourage NASDAQ to re-file it under Section 19(b)(1) under the Exchange Act for notice and comment, and to ensure that NASDAQ's subsequent rule filing provides for a reasonable implementation period. In the alternative, SIFMA requests temporary relief for firms until the end of July for certain regulatory risks.

### **NASDAQ Rule Filing Raises Controversial Issues**

NASDAQ raises significant substantive and compliance issues with this rule filing that deserve a public forum for discussion in order to ensure thoughtful consideration of the consequences, both from a regulatory perspective and a practical implementation perspective. Below is a list of such issues in brief that SIFMA firms believe, if given an appropriate notice and comment period, would benefit from industry input:

1. Issues re: identification of the best "protected" price in our markets and thus compliance with, among other things, Regulation NMS and firms' best execution obligations.
2. The creation of essentially a two tiered market (with some able to pay for a non-public direct data feed to trade with better-priced quotes versus those quotes that are accessible to the general public), thus raising fair access issues and issues re: investor confidence, transparency and our market structure in general.
3. Issues created by the fact that exchanges are now for profit entities.
4. Implementation issues – particularly the lack of sufficient time to make the appropriate changes in firms' order routing systems and to test those changes.

Regarding the last item, firms received the necessary technical specifications only a week before the June 5, 2009 implementation date and were already faced with previously-scheduled programming demands and the upcoming Russell rebalance (and related coding/technology change freezes prior to Russell). Now, firms that currently rely on NASDAQ's direct ITCH feed for order routing and Regulation NMS compliance are faced with the following difficult options: (1) do nothing and interact with what they

see on the direct feed without distinguishing between flash and protected quotes, which may raise questions regarding Reg NMS compliance and require additional guidance; (2) attempt to make quick implementation changes to pull in the new NASDAQ feed and program to distinguish between the quotes, acknowledging the possibility of making coding mistakes in the rush that could impact the firm's entire plant and their ability to route orders to any markets at all and which also has downstream impact on the firm's customers; or (3) switch to the slower SIP feed, which not only interferes with their pre-established routing logic and disadvantages their customers because of the much slower quote updates, but which also may raise questions regarding the firm's best execution obligations and require additional guidance.

SIFMA arranged a call with NASDAQ on June 2, 2009 to request additional implementation time of limited duration, and many firms called NASDAQ directly to explain the programming and testing difficulties and to request the same. NASDAQ, however, declined to push back the date beyond June 5. Firms remain very concerned that there could be considerable unintended consequences of any quick programming fixes that they have had to make.

As a general matter, SIFMA firms do not believe that rule changes that impact the behavior of traders and firms' order routing strategies, which require technology and code changes to smart order routers and other systems and also potential data feed changes, should be permitted to go effective immediately – and certainly should not be designated as non-controversial.<sup>3</sup> A week is not sufficient time for firms to pull in a new feed and to codify the necessary systems changes into its smart order routers and other applications to distinguish between the quotes, and certainly not sufficient time to also test these changes before NASDAQ's go live date of June 5 to ensure that the changes made enable firms to remain compliant. Exchanges should not be permitted to put firms in the difficult position of potentially being out of regulatory compliance in order to advance their own commercial, competitive agendas.

SIFMA firms do appreciate that NASDAQ issued two ETAs that clarified the operation of the rule change. Among other things, NASDAQ announced that it would (i) introduce a new version of the TotalView-ITCH data feed that would enable customers to differentiate flash orders from its other quotes, (ii) clarified the application of certain rebate credits for those that permitted it to "flash" their orders, and (iii) delayed the implementation date from June 1 to June 5. However, as a general matter, a series of ETAs does not appear to be an appropriate way to proceed in establishing rules that impact market structure.

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<sup>3</sup> As SIFMA stated in its comment letter on SEC guidance regarding rule filings, dated Nov. 25, 2008, implementation and testing periods should be key considerations for determining whether a rule filing is controversial or not. Any SRO rule change that requires modifications to broker-dealers' operational systems should be subject to notice and comment regardless of how similar that rule change may be to one previously approved for another SRO by the Commission. This requirement would pertain, for example, to such rules that require firms to utilize new messaging protocols; require firms to change quoting sizes, increments, etc.; eliminate SRO systems or functions previously relied upon by firms; or allow an SRO automatically to forward orders to, or trade with, another marketplace. <http://www.sifma.org/WorkArea/showcontent.aspx?id=9454>

Finally, SIFMA notes that, under long-held NASDAQ policy and many of their own agreements,<sup>4</sup> they generally provide 90 days advance notice of any material changes to their technical specifications. This new rule change appears to be taking place in a manner inconsistent with these policies.

### **Request for Abrogation of the Rule Change or, in the Alternative, Temporary Relief for Firms**

SIFMA respectfully requests that the Commission abrogate this NASDAQ rule change and not permit other exchanges to file similar rule changes on an immediately effective basis until all of the above-mentioned policy and compliance issues have been subject to public comment and the Commission is assured that a sufficient implementation time period will be provided for in any such future rule filing. It may be that, in the end, no firm will oppose this NASDAQ initiative or any similar ones of other exchanges; however, there simply has not been sufficient time to study the issues these initiatives raise and, most certainly to date, sufficient time provided to ensure that appropriate programming and testing of systems changes has taken place.

With regard to this NASDAQ rule change, firms remain very concerned that they are risking regulatory non-compliance, Russell rebalance complications, and other unforeseen consequences – not only internally at their firms but for the market and investors. Should the Commission decide not to abrogate this rule filing, firms request temporary relief, or some sort of guidance, such that firms will not be subject to certain regulatory risks (compliance with Regulation NMS, best execution, etc.) or examination queries for certain records until the end of July 2009, which constitutes a reasonable period of time for firms to ensure that they have made and tested all appropriate systems changes. Firms should not bear the risk of failure to comply with certain regulatory requirements because of NASDAQ's competitive interests, and the integrity of the market system and the protection of investors should not be put at risk for this reason either.

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<sup>4</sup> <http://www.nasdaqtrader.com/Content/AdministrationSupport/AgreementsData/globaldataagreement.pdf>

We would be pleased to discuss these comments in greater detail with the SEC staff. I can be reached in this regard at 202-962-7300 or at [avlcek@sifma.org](mailto:avlcek@sifma.org).

Sincerely,

A handwritten signature in cursive script, appearing to read "Ann L. Vlcek".

Ann Vlcek  
Managing Director and  
Associate General Counsel

cc: Jamie Brigagliano, Co-Acting Director, Division of Trading and Markets, SEC  
Daniel Gallagher, Co-Acting Director Division of Trading and Markets, SEC  
David Shillman, Associate Director, Division of Trading and Markets, SEC  
Robert Greifeld, CEO, NASDAQ  
Brian Hyndman, Senior Vice President, NASDAQ  
Randy Snook, Executive Vice President, SIFMA  
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