

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62380; File No. SR-NASDAQ-2010-052)

June 25, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change to Establish the Nasdaq Short Sale Volume and Monthly Short Sale Transaction Service and Related Fees

I. Introduction

On April 26, 2010, 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”)¹ and Rule 19b-4 thereunder,² a proposed rule change to establish the Nasdaq Short Sale Volume and Monthly Short Sale Transaction files (the “Service”). The Service is comprised of aggregate reported share volume of executed short sale trades during regular market hours on a daily basis, as well as every short sale executed on the Nasdaq execution system and reported to a consolidated tape for Nasdaq, the New York Stock Exchange (“NYSE”) and regional exchange-listed securities, including the price of the trade and the number of shares for every short sale transaction, on a monthly basis, separated into daily files. On May 13, 2010, Nasdaq filed Amendment No. 1. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on May 25, 2010.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 62112 (May 14, 2010), 75 FR 29371.

Nasdaq is proposing to establish a new service and related fees. The Service is comprised of aggregate reported share volume of executed short sale trades during regular market hours on a daily basis, as well as every short sale executed on the Nasdaq execution system and reported to a consolidated tape for Nasdaq, the NYSE and regional exchange-listed securities, including the price of the trade and the number of shares for every short sale transaction, on a monthly basis, separated into daily files. Nasdaq proposes to offer the Service at \$500 per subscriber, per month, which would allow a distributor access to the downloadable FTP files and to distribute the product internally and externally.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,⁵ 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,⁶ which requires, among other things, that the rules of an exchange 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 Section 6(b)(8) of the Act,⁷ in that it

⁴ 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).

⁵ 15 U.S.C. 78f(b)(4).

⁶ 15 U.S.C. 78f(b)(5).

⁷ 15 U.S.C. 78f(b)(8).

does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.⁸

The Commission has reviewed the proposal using the approach set forth by the Commission for non-core market data fees, and finds that the proposal meets the criteria for approval. 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 the terms of the proposal fail to meet the applicable requirements of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis.

Nasdaq has represented that the Service is a voluntary one, and that the information provided is not comprised of data that Nasdaq receives because of Nasdaq's status as a self-regulatory organization. Because the Service is voluntary, Nasdaq has met the statutory standard by pricing the Service according to free market principles; indeed, if Nasdaq priced the Service too high, those in the marketplace could simply opt not to purchase the Service. The Commission believes that Nasdaq's fees for the Service are reasonable and equitably allocated.

⁸ The proposal meets the criteria, formulated by the Commission in connection with the petition filed by NetCoalition, for approval of proposed rule changes concerning the distribution of non-core market data. See Securities Exchange Act Release Nos. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) and 55011 (December 27, 2006) (order granting petition for review of SR-NYSEArca-2006-021). 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." 73 FR at 74781-82. 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." *Id.* at 74782. If an exchange "was subject to significant competitive forces in setting the terms of a proposal," a 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." *Id.* at 74781.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act⁹, that the proposed rule change (SR-NASDAQ-2010-052), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Florence E. Harmon
Deputy Secretary

⁹ 15 U.S.C. 78s(b)(2).

¹⁰ 17 CFR 200.30-3(a)(12).