

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51814; File No. SR-NASD-2004-185)

June 9, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving a Proposed Rule Change and Amendment Nos. 1 and 2 Thereto to Establish a Unitary Fee Schedule for Distribution of Real Time Data Feed Products Containing Nasdaq Market Center Data

I. Introduction

On December 14, 2004, the National Association of Securities Dealers, Inc. (“NASD”), through its subsidiary, The Nasdaq Stock Market, Inc. (“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 a unitary fee schedule for distribution of real time data feed products containing Nasdaq market center data. On February 17, 2005, Nasdaq filed Amendment No. 1 to the original filing.³ Nasdaq filed Amendment No. 2 on April 14, 2005.⁴ The proposed rule change, as amended, was published for comment in the Federal Register on April 28, 2005.⁵ The Commission received one comment on the proposed rule change.⁶ This order approves the proposed rule change, as amended.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaced and superseded the original proposed rule change in its entirety.

⁴ Amendment No. 2 replaced and superseded the original proposed rule change, as amended.

⁵ See Securities Exchange Act Release No. 51598 (Apr. 21, 2005), 70 FR 22162.

⁶ See letter from Gene L. Finn to Jonathan Katz, Secretary, Securities and Exchange Commission dated May 17, 2005 (“Finn Letter”).

II. Description of the Proposal

Nasdaq proposes to modify NASD Rule 7010 to establish a unitary fee schedule for the distribution of Nasdaq Market Center real time data feed products. Nasdaq offers various data products that firms may purchase and redistribute either within their own organizations or to outside parties. According to Nasdaq, “distributor fees” are designed to encourage broad distribution of the data, and allow Nasdaq to recover what it describes as the relatively high fixed costs associated with supporting connectivity and contractual relationships with distributors. Nasdaq believes that because the data products and associated fees were established over many years, the method of calculating such fees should be updated. Accordingly, Nasdaq proposes to establish a revised monthly distributor pricing structure for its real time data feed products that it believes will allocate equitably data fees across the customer base of data distributors and consumers of Nasdaq market data.

Specifically, the proposed rule change will establish a distributor fee pricing structure for four real time data feed products: TotalView, OpenView, Mutual Fund Quotation Service (“MFQS”), and Real Time Index. The proposed fees will be assessed to distributors of these real time data feed products, defined in the proposed rule change to include any entity that receives a feed or data file of Nasdaq data directly from Nasdaq or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside the entity). The new distributor fees would not apply to Nasdaq’s Web-based historical data products, which are governed by NASD Rule 7010(p), and they would not apply to data feeds that are produced pursuant to the national market system plan governing Nasdaq stocks (“Nasdaq UTP Plan”). The proposed distributor pricing is also distinct from any per display device or per user population fees for data products such as TotalView.

The proposed pricing structure is comprised of two components for each Nasdaq real time data feed product: (1) a monthly Direct Access Fee, and (2) either a monthly Internal Distribution Fee or a monthly External Distribution Fee. The Direct Access Fee will apply to any organization that receives a real time data product directly from Nasdaq via a data feed. Distributors receiving Nasdaq real time data indirectly (i.e., via re-transmission from another entity) will not be liable for the Direct Access Fee. Nasdaq represents that this fee will allow it to recover the fixed costs of establishing and maintaining relationships with direct access distributors.

The Internal Distribution Fee will apply to any organization that receives a real time data feed product (either directly from Nasdaq or through a vendor) and distributes the data solely within its own organization. The External Distribution Fee will apply to any organization that receives a real time data feed product (either directly from Nasdaq or through a vendor) and distributes the data outside its own organization. Nasdaq states that the External Distribution Fee is higher than the Internal Distribution Fee because external distributors typically have broader distribution of the data than internal distributors. An organization that receives real time data directly from Nasdaq will pay the Direct Access Fee plus the higher of either the Internal Distribution or External Distribution Fee but not both. An organization that only receives a real time data feed indirectly and distributes it within its organization will pay the Internal Distribution Fee; an organization that receives data indirectly and distributes it outside its organization will pay the External Distribution Fee; and an organization that receives a real time data feed indirectly and distributes it both internally and externally will pay the External Distribution Fee.

Under the proposed pricing structure, Nasdaq real time data feed products that are

available for distribution will be divided into two categories: “Issuer Specific Data” and “Market Summary Statistics.” Issuer Specific Data will further be divided into a “Dynamic Intraday” subcategory and a “Daily” subcategory. Market Summary Statistics, at present, will have one subcategory: “Intraday.” Each subcategory of real time data feed product will be assigned a Direct Access Fee, Internal Distribution Fee, and External Distribution Fee.

The change will effect distributor fees for the aforementioned products as follows: Currently, the monthly distribution fee for Nasdaq TotalView (set forth at Rule 7010(q)) is based on whether the data distributor receives the TotalView data in an aggregate or detailed form. The current monthly fee for TotalView data in aggregate form is \$1,000 per distributor and in detailed form is \$7,500 per distributor. There is no current monthly distributor fee for Open View. Under the proposed fee structure, TotalView and OpenView, whether in aggregate or detailed form, will fall into the “Issue Specific Data- Dynamic Intraday” subcategory, for which the proposed monthly fees are \$2,500 for Direct Access, \$1,000 for Internal Distribution, and \$2,500 for External Distribution.⁷ Organizations that currently purchase detailed TotalView information, particularly internal distributors and non-direct connection recipients, will pay less in the future; organizations that currently purchase aggregate TotalView data, particularly those that access the data directly, will pay higher fees.

The current monthly fee for distribution of the MFQS is \$1,000 for each external distributor. Under the proposed fee structure, MFQS data will fall into the “Issue Specific Data –

⁷ Nasdaq believes that because OpenView provides the same depth and scope of information for exchange-listed securities as TotalView does for Nasdaq-listed securities, and entails similar costs, it is appropriate to put into place the same distribution fee structure for OpenView at this time. Telephone conversation between Bill O’Brien, Senior Vice President, Market Data Distribution, Nasdaq, and Ira Brandriss, Assistant Director, Division of Market Regulation, Commission, April 21, 2005.

Daily” subcategory, for which the proposed monthly fees are \$500 for Direct Access, \$500 for External Distribution, and no charge for Internal Distribution. The proposed pricing will benefit external distributors that do not take their data directly from Nasdaq. Organizations that take their data directly from Nasdaq but only distribute it internally will pay the Direct Access Fee.

Under the current monthly fee structure set forth in NASD Rule 7030, the fee for Real-Time Index data is \$2,000 for external distributors. Under the proposed fee structure, Real-Time Index data will be labeled as “Market Summary Statistics – Intraday.” The proposed monthly fees for Market Summary Statistics will involve a Direct Access fee of \$500, an Internal Distribution Fee of \$50, and an External Distribution fee of \$1,500. The proposed pricing will decrease the costs of non-direct connection external distributors, but increase them for organizations that distribute the data internally.

Nasdaq is also proposing a more flexible policy for distributor reporting of, and payment for, market data usage. NASD Rule 7060 currently provides that such reporting be based on a pro-rated accounting of the specific installation and termination dates for service. Because some data distributors prefer to report data usage on a “full-month” basis, Nasdaq will offer its market data distributors the option of reporting and paying based on either a pro-rated or full-month basis. The selection of pro-rated or full-month reporting will be the business decision of each market data distributor based on its needs and the needs of its customers.

III. Discussion and Commission Findings

After careful review of the proposal and consideration of the comment letter, the Commission finds that the proposed rule change, as amended, is consistent with the Act and the

rules and regulations thereunder applicable to a national securities association.⁸ In particular, the Commission believes that the proposed rule change, as amended, is consistent with Section 15A(b)(5) of the Act,⁹ which requires that the rules of a national securities association 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 the association operates or controls. Specifically, the Commission believes that the proposed pricing structure is reasonable and notes that it would apply across-the-board to distributors of the aforementioned Nasdaq real time data feed products. In approving the proposed rule change, the Commission notes that, pursuant to Section 19(b)(1) of the Act¹⁰ and Rule 19b-4 thereunder,¹¹ Nasdaq will be required to file with the Commission proposed rule changes relating to any additional Nasdaq real time data feed products to which it plans to apply the new pricing structure in the future.

The Commission received one comment letter on the proposal.¹² Referring to “Section 7030 – Special Options” of the NASD Marketplace Rules, the commenter stated that the proposed rule change continues to apply a discriminatory access fee to nonprofessional online investors. The commenter also set forth a series of reasons why he believes generally that non-professional access fees for online investors should be eliminated, noting that he has enumerated these reasons in comment letters to the Commission in the past. The Commission notes that the continuance of fees for the data products included in NASD Rule 7030 is not the subject of the proposed rule change, although a different pricing structure for the fees charged to distributors

⁸ The Commission has considered the proposed rule’s impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78o-3(b)(5).

¹⁰ 15 U.S.C. 78s(b)(1).

¹¹ 17 CFR 240.19b-4.

¹² See Finn Letter, supra note 6.

for the Nasdaq Market Index, which is being moved from NASD Rule 7030 to Rule 7010, is being proposed. With respect to the commenter's more general concerns about non-professional access fees for online investors, the Commission notes that it has recently solicited public comment as part of a comprehensive review it has undertaken regarding market data fees and revenues,¹³ and the commenter's views will be taken into account in that review.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁴ that the proposed rule change (SR-NASD-2004-185), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

J. Lynn Taylor
Assistant Secretary

¹³ See Securities Exchange Act Release No. 50700 (Nov. 18, 2004), 69 FR 71256 (Dec. 8, 2004). See also Securities Exchange Act Release No. 50699 (Nov. 18, 2004), 69 FR 71126 (Dec. 8, 2004).

¹⁴ 15 U.S.C. 78s(b)(2).

¹⁵ 17 CFR 200.30-3(a)(12).