

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-55007; File No. SR-NASDAQ-2006-053)

December 22, 2006

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Assess Previously-Approved Fees to Former INET Data Recipients

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 7, 2006, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”), filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is proposing to, beginning February 1, 2007, assess the Commission-approved fee for its TotalView data entitlement to former INET subscribers and market data vendors that previously received only the INET ITCH 1.0 and/or INET ITCH 2.0 data feeds which were free of charge and are now receiving TotalView data from the Nasdaq Market Center execution system which is fee-liable.

Commission-approved Nasdaq Rule 7023(a) describes TotalView as follows:

The TotalView entitlement allows a subscriber to see all individual Nasdaq Market Center participant orders and quotes displayed in the system as well as the aggregate size of such orders and quotes at each price level in the execution functionality of the Nasdaq Market Center, including the NQDS feed and the Brut System Book Feed.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

Nasdaq Rule 7023 states that “for the TotalView entitlement there shall be a \$70 monthly charge” and “a charge of \$6 per month per controlled device for OpenView.” As described in detail below, as a result of the Commission’s July 14, 2006, approval of Nasdaq’s new Market Center execution system (“NMC Approval Order”),<sup>3</sup> the INET ECN no longer exists for the trading of Nasdaq stocks and, therefore, the INET System Book Feed is no longer available for those stocks.<sup>4</sup>

There is no new rule text.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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<sup>3</sup> Securities Exchange Act Release No. 54155 (Jul. 14, 2006), 71 FR 41291 (Jul. 20, 2006) (SR-NASDAQ-2006-001) (“NMC Approval Order”).

<sup>4</sup> Nasdaq has separately proposed to modify Rule 7023 governing the user fees for TotalView and OpenView as well as Rule 7019 governing the distributor fees for that data. See SR-NASDAQ-2006-048 and -049.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

In January of 2001, the Commission approved Nasdaq’s proposal to unify its two existing execution systems – SelectNet and SOES – into a single execution system<sup>5</sup> originally known as “SuperMontage” and later re-named the “Nasdaq Market Center.”<sup>6</sup> The order approving SuperMontage also approved the dissemination of quote and order data emanating from SuperMontage.

In November of 2002, Nasdaq received Commission approval to disseminate a SuperMontage “depth of book” product for Nasdaq stocks called TotalView.<sup>7</sup> TotalView originally contained data representing all quotes and orders in Nasdaq stocks trading on Nasdaq’s SuperMontage system. The Commission approved an initial TotalView fee of \$150 per user per month, and later approved Nasdaq’s proposal to reduce the fee to \$70 per month for professional users and \$14 per month for non-professional users.<sup>8</sup> The Commission later approved Nasdaq’s proposal to disseminate an equivalent full depth of book product for

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<sup>5</sup> Securities Exchange Act Release No. 43863 (Jan. 19, 2001), 66 FR 8020 (Jan. 26, 2001) (SR-NASD-99-53).

<sup>6</sup> Securities Exchange Act Release No. 50074 (Jul. 23, 2004), 69 FR 45866 (Jul. 30, 2004) (SR-NASD-2004-076).

<sup>7</sup> Securities Exchange Act Release No. 46843 (Nov. 18, 2002), 67 FR 70471 (Nov. 22, 2002) (SR-NASD-2002-33).

<sup>8</sup> Securities Exchange Act Release No. 48581 (Oct. 1, 2003), 68 FR 57945 (Oct. 7, 2003) (SR-NASD-2003-111).

NYSE/Amex stocks.<sup>9</sup> That product, called “OpenView,” contained all quotes and orders for NYSE/Amex-listed stocks in Nasdaq’s execution system. The Commission-approved fee for OpenView was \$6 per user per month.

In September of 2004, Nasdaq completed its acquisition of Brut, Inc, a registered broker-dealer operating the Brut electronic communications network (“ECN”). Nasdaq operated the Brut ECN side-by-side with the Nasdaq Market Center. Prior to Nasdaq’s acquisition, Brut disseminated a depth of book data feed containing order information from the Brut execution system – the Brut System Book Feed - free of charge to its subscribers and to market data vendors. Following Nasdaq’s acquisition, Brut continued to disseminate the Brut System Book Feed free of charge. In March of 2005, the Commission approved Nasdaq’s proposal to integrate the Brut System Book Feed into the TotalView data entitlement thereby rendering the Brut System Book Feed fee-liable at the same \$70 and \$14 monthly rates as TotalView. Nasdaq did not, however, integrate the Brut and Nasdaq Market Center execution systems; those two systems continued to operate independently and to disseminate separate data from their separate execution systems.

On December 7, 2005, Nasdaq acquired INET ATS, Inc., a registered broker-dealer and member of the NASD, and operator of the INET ATS (“INET”), and the Commission approved Nasdaq’s proposed rule change to establish rules governing the operation of the INET facility.<sup>10</sup> Prior to Nasdaq’s acquisition, INET disseminated a depth of book data feed containing order information from the INET execution system – the INET System Book Feed – free of charge to

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<sup>9</sup> Securities Exchange Act Release No. 49349 (Mar. 2, 2004), 69 FR 10775 (Mar. 8, 2004) (SR-NASD-2003-149).

its subscribers and to market data vendors. Following Nasdaq's acquisition, INET continued to disseminate the INET System Book Feed free of charge. Unlike Brut, Nasdaq did not propose to integrate the INET System Book Feed into the TotalView data entitlement. Nasdaq continued to operate INET independently and to disseminate the INET System Book Feed free of charge to INET subscribers and market data vendors.

On February 5, 2006, Nasdaq filed a proposal to integrate Nasdaq's three execution systems – the Nasdaq Market Center, the Brut ECN, and the INET ECN – into a single execution system commonly known as the Nasdaq Single Book.<sup>11</sup> That proposal was designed to establish the Single Book as the new Nasdaq Market Center execution system to replace the existing Nasdaq Market Center execution system formerly known as SuperMontage. Like its predecessor, the new Nasdaq Market Center execution system would have three parts: (1) an execution service, (2) a trade-reporting service, and (3) a data feed service that “can be used to display with attribution to Participants' MPIDs all Quotes and Displayed Orders on both the bid and offer side of the market for all price levels then within the Nasdaq Market Center.”<sup>12</sup>

#### The Elimination of INET and Brut

On July 14, 2006, following a lengthy and contentious comment period, the Commission approved Nasdaq's Single Book Proposal.<sup>13</sup> As a result of that approval order, two of Nasdaq's three execution facilities – Brut and INET - ceased to operate and Nasdaq emerged with a single,

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<sup>10</sup> Securities Exchange Act Release No. 52902 (Dec. 7, 2005), 70 FR 73810 (Dec. 13, 2005) (SR-NASD-2005-128).

<sup>11</sup> Securities Exchange Act Release No. 53583 (Mar. 31, 2006), 71 FR 19573 (Apr. 14, 2006) (SR-NASDAQ-2006-001) (“Single Book Proposal”).

<sup>12</sup> Compare new Nasdaq Rule 4751(a) with previous NASD Rule 4701(a).

<sup>13</sup> See NMC Approval Order, supra note 3.

unified execution system, the new Nasdaq Market Center execution system. When Brut and INET ceased operating as separate execution facilities, they consequentially lost the ability to offer separate data feeds. In the Single Book Approval Order, the Commission itself noted that the Brut and INET facilities would cease to exist:

...under this proposal Nasdaq would integrate the Brut and INET execution systems with the Nasdaq Market Center, utilizing the INET platform; only Brut's broker-dealer routing functionality would continue upon the unification of the three trading platforms. Thus, this proposal could not advantage Nasdaq-affiliated ECNs over other ECNs because Nasdaq affiliated ECNs would not exist. In addition, the Commission notes that Nasdaq's acquisitions of Brut and INET were reviewed and approved by the Commission as positive developments in the ever-changing, dynamic market environment.<sup>14</sup>

Thus, the proposal and the Commission order approving it clearly contemplated that the Brut and INET facilities were to be eliminated along with their corresponding data feeds.

In fact, the Commission contemplated the elimination of the Brut and INET facilities as early as December 2005 when it approved Nasdaq's rules for operating INET as a subsidiary, as well as in the Commission's order approving Nasdaq's application to operate as a national securities exchange:

In the Commission's approval of Nasdaq's exchange application in January 2006, the Commission emphasized that Nasdaq's approval was based on a set of rules with price/time priority. In addition, the Commission noted in the Exchange

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<sup>14</sup> NMC Approval Order, supra note 3 at 41301.

Application Order that the two ECNs that Nasdaq had recently acquired – Brut and INET – both applied rules that required their orders to be executed in price/time priority. As discussed above, the Single Book concept of integrating the three Nasdaq Facilities was discussed by the Commission in the Exchange Application Order and the Commission believed that such an integration would be beneficial, though the Commission permitted the three Nasdaq Facilities to operate separately for a temporary period, until September 30, 2006, because the Brut and INET facilities had only been recently acquired by Nasdaq (citations omitted).<sup>15</sup>

To reduce the impact to former Brut and INET users, the new Nasdaq Market Center system was designed to provide the same depth of book data that the previous system provided, namely all Nasdaq Market Center participants' quotes and orders displayed within the system. Like its predecessor, the new system will disseminate depth of book data in multiple formats using multiple data feeds.<sup>16</sup> Because the Nasdaq Market Center system will provide the same

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<sup>15</sup> Id. at 41303.

<sup>16</sup> Prior to the integration, the Nasdaq Market Center issued the following data: TotalView Legacy, which contains depth of book data for Nasdaq stocks aggregated by price level using the format developed by Nasdaq; OrderView, which contains depth of book data for Nasdaq stock on an order-by-order basis; NQDS, which contains each market participant's best quote in Nasdaq stocks; and OpenView, which contains each market participant's best quote in NYSE and Amex stocks. Following the integration, the Nasdaq Market Center also issues the following feeds: TotalView ITCH, which contains depth of book data on an attributed and order-by-order basis for Nasdaq, NYSE, and Amex stocks on a single feed using the ITCH format that was developed by INET; a separate TotalView ITCH feed containing depth of book data on an unattributed and order-by-order basis for Nasdaq, NYSE, and Amex stocks; and another separate TotalView ITCH feed containing depth of book data aggregated by price level and attributed for Nasdaq, NYSE, and Amex stocks.

quote and order data in multiple formats, all Nasdaq, Brut, and INET users can continue to receive depth of book data in the format that they historically use.

#### Reasonableness of the TotalView Fee

Nasdaq is required by Section 6(b)(4) of the Act to “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons” using its facilities, and by Section 11A(c)(1)(D) to make market information available on terms that are “not unreasonably discriminatory.” In light of this statutory mandate, Nasdaq is required to assess the same fee to all recipients of the same data, in this case TotalView data. Former recipients of INET ITCH 1.0 and/or INET ITCH 2.0 data feed that choose to receive Nasdaq TotalView data must pay the same fee for that data as every other recipient on an equitable and non-discriminatory basis.

In 2002, the Commission determined that Nasdaq’s TotalView fee was fair and reasonable and Nasdaq is simply proposing to assess that fee to a group of new users. TotalView is a comprehensive source of Nasdaq order and quote information, and provides the greatest level of transparency into the Nasdaq stock market. Nasdaq states that today, TotalView provides 23 times the liquidity displayed and nearly 5 times the orders disseminated by the Nasdaq Quotation Dissemination Service (“NQDS”). Nasdaq’s full depth in NYSE- and Amex-listed stocks (OpenView) also provides access to 40% more liquidity than the top-of-file quote quotes provided via the Consolidated Quotation System feed from the Securities Information Automation Corporation.

Since the Commission first approved the fee for TotalView, Nasdaq has lowered that fee from \$150 per month to \$70 per month for professional users or \$14 per month for non-professional users. In addition, Nasdaq has augmented the TotalView product many times while

holding the Commission-approved fees constant. In 2004 and 2005, Nasdaq added to TotalView all data from Nasdaq's opening and closing crosses. In March of 2005, Nasdaq added to the TotalView entitlement a separate data feed disseminating depth of book data in an unprocessed, order-by-order format. Also in 2005, Nasdaq added a separate data feed containing depth of book data from its Brut Facility. By 2006, Nasdaq was disseminating via TotalView, depth of book data from the Nasdaq Market Center (formerly, SuperMontage) and the Brut Facility using multiple formats and multiple data feeds.

Integrating the Brut, INET and Nasdaq Market Center systems and liquidity into a unified whole will further enhance the data available via TotalView, again with no fee increase to recipients. This integration came at significant cost to Nasdaq, as the Commission is aware:

In addition, Nasdaq endured significant cost in 2005 to acquire INET and, through the Single Book Proposal, Nasdaq seeks to use the INET platform as the basis for its Integrated System going forward in order to provide a faster and more efficient system with greater capacity. As competition increases both in the United States and globally, and with the Commission's approval of Regulation NMS, nearly all national securities exchanges are in the process of transforming their systems to better compete. Through implementation of its Single Book Proposal, Nasdaq seeks to maximize the advantages of the INET trading platform – faster executions and increased certainty (citations omitted).<sup>17</sup>

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<sup>17</sup> NMC Approval Order, supra note 3 at 41302.

In assessing its Commission-approved fee for TotalView, Nasdaq is seeking to recover on a reasonable, equitable and non-discriminatory basis some of the “significant cost” it endured to acquire INET.

#### Application of the Fee

This proposal seeks to impose the Commission-approved TotalView fee to all new TotalView distributors that: (1) distributed INET ITCH 1.0 and/or INET ITCH 2.0 data feed free of charge, and (2) did not previously distribute TotalView data. Prior to completing the integration of its execution systems, Nasdaq identified 63 distributors that meet this test. Of those, 45 chose to execute TotalView distributor agreements indicating their intentions to distribute TotalView data at the prevailing TotalView fee schedule and 18 chose not to execute such agreements. Therefore, Nasdaq believes this proposal will impact 45 TotalView distributors and their customers.

Distributors that previously received either TotalView only or both TotalView and either INET ITCH 1.0 or INET ITCH 2.0 data (or both), would continue to pay TotalView rates at the TotalView fee schedule. For those firms in this category who had previously provided only the INET ITCH 1.0 and/or INET ITCH 2.0 data to certain customers, and who are able to separately identify these users from those users as receiving TotalView data via the INET ITCH 1.0 and/or INET ITCH 2.0 data feed, these users also would be afforded the same period (until February 1, 2007) to begin their TotalView fee liability.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act<sup>18</sup> in general, and Section 6(b)(4) of the Act<sup>19</sup> in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data, and it makes TotalView data available on a non-discriminatory basis to similarly situated recipients.

### B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As a general matter, the Commission has long held the view that “competition and innovation are essential to the health of the securities markets. Indeed, competition is one of the hallmarks of the national market system.”<sup>20</sup> The Commission has also stated “that the notion of competition is inextricably tied with the notion of economic efficiency, and the Act seeks to encourage market behavior that promotes such efficiency, lower costs, and better service in the interest of investors and the general public.”<sup>21</sup>

The Commission goes on to state its belief “that the appropriate analysis to determine a proposal's competitive impact is to weigh the proposal's overall benefits and costs to competition based on the particular facts involved, such as examining whether the proposal would promote economically efficient execution of securities and fair competition between and among exchange markets and other market centers, as well as fair competition between the participants of a particular

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<sup>18</sup> 15 U.S.C. 78f.

<sup>19</sup> 15 U.S.C. 78f(b)(4).

<sup>20</sup> Securities Exchange Act Release No. 43863 (Jan. 19, 2001), 66 FR 8020 (Jan. 26, 2001) (SR-NASD-99-53) at 8049.

<sup>21</sup> NMC Approval Order, supra note 3 at 41298.

market.”<sup>22</sup> The current proposal is designed to increase transparency and the efficiency of executions by enabling vendors to provide additional market data in a cost efficient manner.

There is significant competition for the provision of market data to broker-dealers and other market data consumers, as well as competition for the orders that generate the data. Nasdaq fully expects its competitors to quickly respond to this proposal as they have responded to other Nasdaq data products in the past. Moreover, market forces have shaped the market data fees that Nasdaq has charged for this product in the past and will continue to shape those fees in the future. As noted above, the Commission originally approved a fee of \$150 for TotalView. Nasdaq lowered that fee to \$70 and \$14 in response to the lack of demand by vendors and users. Furthermore, NASDAQ introduced both professional and non-professional Enterprise License pricing to accommodate firms interest in paying a fixed fee for unlimited distribution of TotalView data. Vendors simply will only utilize the service unless and until they conclude that it is economically beneficial to them and to their users.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which Nasdaq consents, the Commission will:

- (A) by order approve such proposed rule change; or

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Id.

- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2006-053 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2006-053. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2006-053 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>23</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>23</sup> 17 CFR 200.30-3(a)(12).