



February 12, 2009

Via Electronic Mail (rule-comments@SEC.gov)

Ms. Elizabeth Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Notice of Filing of Proposed Rule Change and Amendment No. 2 Thereto to Establish a Pilot Program for NASDAQ Basic Data Feeds (SR-NASDAQ-2008-102; Release No. 34-59244)

Dear Ms. Murphy:

The Market Data Subcommittee of the Securities Industry and Financial Markets Association ("SIFMA")¹ Technology and Regulation Committee appreciates the opportunity to comment on SR-NASDAQ-2008-102 ("NASDAQ Basic"). The NASDAQ Basic proposal would establish a five-month pilot to offer a real-time data feed containing both NASDAQ's best bid and offer ("QBBO") and NASDAQ Last Sale data. The user fees for NASDAQ Basic would be a professional rate of \$10 per month for NASDAQ-listed (Tape C) stocks, \$5 per month for NYSE-listed (Tape A) stocks, and \$5 per month for Alternext-listed (Tape B) stocks. Non-professionals would pay monthly subscriber charges of \$0.50 for Tape C, and \$0.25 each for Tapes A and B. The alternative per query fee would be \$0.0025 for Tape C and \$0.0015 each for Tapes A and B.

¹ 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.

For the reasons set forth in prior SIFMA comment letters,² SIFMA fundamentally objects to NASDAQ's application of the "fair and reasonable" test announced in the SEC's Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, Release No. 34-59039 (Dec. 2, 2008) ("NYSE ArcaBook Approval Order"). Our objection applies to the professional, non-professional, and per query fees. Please note that, on January 30, 2009, SIFMA filed a notice of appeal of the NYSE ArcaBook Approval Order.³

With its new market data feeds, NASDAQ is replicating the portions of Tapes A, B, and C (broker-dealers' best bid and offer and last sale data) that, by SEC rule, it contributes to the securities information processors for both the Consolidated Tape Association and the NASDAQ-UTP Plan (the "Consolidated Quotes"). The potential benefits to SIFMA members of these new feeds are a cheaper price and a speed advantage over the Consolidated Quotes. Therefore, we note that this may be a step forward for some firms, to the extent that they believe they can replace some usage of the Consolidated Quotes with NASDAQ Basic. We also appreciate that NASDAQ allows firms to purchase NASDAQ Last Sale data alone, or bundled with QBBO in NASDAQ Basic.⁴

The disadvantage is that, under the SEC's Quote Rule, SIFMA members are still required to purchase the Consolidated Quotes for trading purposes. Moreover, if the other exchanges repackage their own best bids and offers and last sale prices, adding together all of these fees could result in firms paying more, not less, for overall market data, and potentially cause considerable technological and administrative burdens.

In justifying the fee for NASDAQ Basic, NASDAQ classifies this data as "non-core" and therefore applies the "subject to significant competitive forces" test announced in the NYSE ArcaBook Approval Order for meeting the fair and reasonable requirements of the Securities Exchange Act of 1934. But, if any data is "core," it

² See Letter to Nancy M. Morris, Secretary, Commission, from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA (Jan. 17, 2007); Letter to Nancy M. Morris from Ira D. Hammerman (Aug. 1, 2007); Letter to Nancy M. Morris from Marc E. Lackritz, President and CEO, SIFMA (Aug. 16, 2007); Letter to Dr. Erik R. Sirri, Director, Division of Market Regulation, Commission, from Melissa MacGregor, Vice President & Assistant General Counsel, SIFMA (Nov. 7, 2007); Letter to Nancy M. Morris from Ira D. Hammerman (Feb. 7, 2008); Letter to Nancy M. Morris from Christopher Gilkerson and Gregory Babyak, Market Data Subcommittee Co-Chairs (Feb. 14, 2008); Letter to Florence Harmon from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA (July 10, 2008); and Letter to Florence Harmon from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA (Nov. 17, 2008).

³ Petition for Review, Sec. Indus. & Fin. Mkts. Ass'n v. SEC, No. 09-1045 (D.C. Cir. Jan. 30, 2009).

⁴ This is a marked improvement over the pricing approach to NASDAQ TotalView – its depth-of-book market data. To obtain TotalView, broker-dealers and vendors must also buy the expensively-priced NASDAQ Level 2 data product whether they want it or not.

should be the best bids and offers and last sale prices – whether offered directly by an exchange or through a consolidating processor.

NASDAQ's filing attempts to make the point that this is a new and innovative market data product resulting from "competitive" forces. SIFMA disagrees. The market information is the same: broker-dealer bids and offers and last sale prices that, by SEC rule, broker-dealers and exchanges are required to collect and report. For example, for the Tape C portion of NASDAQ Basic, NASDAQ has simply undercut the price of the Consolidated Quote by about 50%. Claiming that this is "market forces" at work ignores the fact that NASDAQ itself can control the NASDAQ UTP Plan pricing for market data, and that the market data fees for the Consolidated Quote were never subject to competitive forces or cost accounting. NASDAQ also ignores its own pricing for NASDAQ Last Sale data. For less data, NASDAQ Last Sale is priced higher than NASDAQ Basic at \$0.60 for each of the first 10,000 users, and at \$0.48 for each of the next 10,000 users.

We also note that, in contrast with the recent NYSE OpenBook Ultra filing,⁵ NASDAQ has not attempted to simplify administrative burdens by modernizing its unit of count for assessing fees, nor has it adopted enterprise pricing for NASDAQ Basic that would address longstanding issues such as onerous application of the "professional" definition to online investors seeking per query (non-streaming) quotes. To avoid the administrative burdens of different exchanges applying different units of count, we urge the SEC, the Consolidated Tape Association, the Nasdaq UTP Plan, NASDAQ, and the other individual exchanges to implement a uniform unit of count working in cooperation with our committee.

Thank you for your time and consideration of these views. If you have any questions regarding this letter, please contact Melissa MacGregor, SIFMA, 202-962-7385.

Respectfully submitted,



Ira D. Hammerman
Senior Managing Director and General Counsel

cc: The Hon. Mary L. Schapiro, Chairman
The Hon. Kathleen L. Casey, Commissioner
The Hon. Elise B. Walter, Commissioner
The Hon. Luis A. Aguilar, Commissioner
The Hon. Troy A. Paredes, Commissioner
Dr. Erik R. Sirri, Director, Division of Trading and Markets

⁵ Exchange Act Release No. 59198, 74 Fed. Reg. 1268 (Jan. 12, 2009).