

discriminatory.¹⁵ eSignal asserted that Nasdaq's proposal unreasonably discriminated against smaller market data distributors.¹⁶ Google, however, expressed strong support for the proposal and noted its enthusiasm regarding the opportunity to give more of its users access to real-time financial information online.¹⁷

The Commission notes that Nasdaq amended the proposed rule change so that its fees would be imposed only for a four-month pilot period. On June 4, 2008, the Commission published for public comment a draft approval order that sets forth a market-based approach for analyzing proposals by self-regulatory organizations to impose fees for "non-core" market data products that would encompass the Nasdaq Last Sale Data Feeds.¹⁸ The Commission believes that Nasdaq's proposal is consistent with the Act for the reasons noted preliminarily in the Draft Approval Order. Pending review by the Commission of comments received on the Draft Approval Order, and final Commission action thereon, the Commission believes that approving Nasdaq's proposal on a pilot basis would be beneficial to investors and in the public interest, in that it should result in broad public dissemination of real-time pricing information. Therefore, the Commission is approving Nasdaq's proposed fees for a four-month pilot beginning July 1, 2008. The broader approach ultimately taken by the Commission with respect to non-core market data fees will necessarily guide Commission action regarding fees for the Nasdaq Last Sale Data Feeds beyond the four-month pilot period.

The Commission finds good cause for approving the proposed rule change, as modified by Amendment Nos. 1 and 2 thereto, before the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. As noted above, accelerating approval of this proposal should benefit investors by facilitating their prompt access to widespread, free, real-time pricing information contained in the Nasdaq Last Sale Data Feeds. In addition, the Commission notes that the proposal is approved only on a four-month pilot period while the Commission analyzes comments on the Draft Approval Order. Therefore, the Commission finds good

cause, consistent with Section 19(b)(2) of the Act, to approve the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 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. Please include File No. SR-NASDAQ-2006-060 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR-NASDAQ-2006-060. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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-2006-060 and should be submitted on or before July 11, 2008.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule change (SR-NASDAQ-2006-060), as modified by Amendment Nos. 1 and 2, be, and it hereby is, approved on an accelerated basis until October 31, 2008.

By the Commission.

Florence E. Harmon,
Acting Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57964; File No. SR-NASD-2006-005]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Order Approving Proposed Rule Change and Amendment No. 1 Thereto To Expand the Scope of NASD Rule 2440 and Interpretive Material 2440-1 Relating to Fair Prices and Commissions To Apply to All Securities Transactions

June 13, 2008.

I. Introduction

On January 19, 2006, the National Association of Securities Dealers, Inc. ("NASD") (n/k/a Financial Industry Regulatory Authority, Inc. ("FINRA")) 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 expand the coverage of NASD Rule 2440 and Interpretive Material ("IM") 2440 relating to fair prices and commissions, to all securities transactions that involve members and their customers.³ The proposed rule change was published for comment in the **Federal Register** on April 4, 2006.⁴ The Commission received two comment letters regarding the proposal.⁵ NASD

¹⁹ 15 U.S.C. 78s(b)(2).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ IM-2440-1, which was designated as IM-2440 at the time of this filing, was proposed to be re-numbered in SR-NASD-2003-141, which was filed before this proposal was filed and approved while this proposal was pending. See Securities Exchange Act Release No. 55638 (April 16, 2007), 72 FR 20150 (April 23, 2007) (SR-NASD-2003-141).

⁴ See Securities Exchange Act Release No. 53562 (March 29, 2006), 71 FR 16849.

⁵ See submission via SEC WebForm from Dan Mayfield, President, Sanderlin Securities, dated April 6, 2006 ("First Commenter"); letter from Mary C.M. Kuan, Vice President and Assistant General Counsel, The Bond Market Association, to Nancy

¹⁵ See SIFMA Letter.

¹⁶ See eSignal Letter.

¹⁷ See Google Letter.

¹⁸ See Securities Exchange Act Release No. 57917 (June 4, 2008), 73 FR 32751 (June 10, 2008) (Notice of Proposed Order Approving Proposal by NYSE Arca, Inc. to Establish Fees for Certain Market Data and Request for Comment) ("Draft Approval Order").

responded to the comment letters on October 2, 2006.⁶ On May 30, 2008, FINRA filed Amendment No. 1 to the proposed rule change.⁷ This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

FINRA proposes to amend NASD Rule 2440, which requires that a member charge fair commissions and service charges, and buy or sell securities at fair prices, in over-the-counter ("OTC") securities transactions with a customer. FINRA also proposes to amend IM-2440-1, which provides further guidance on the commissions and prices that a member may charge a customer in an OTC transaction. Specifically, FINRA proposes to expand the scope of Rule 2440 and IM-2440-1 to include all securities transactions involving members and their customers, including transactions between members and their customers that are executed on an exchange.⁸

III. Summary of Comments

The Commission received two comment letters in response to the proposed rule change.⁹ One commenter, using the example of a municipal bond that had not sold in several years, stated that the proposed rule was problematic for the same reason that the existing rule was problematic; specifically, that a mark-up, especially in a highly illiquid market, may have little relation to fair pricing.¹⁰

The main concern the other commenter raised was which self-regulatory organization had jurisdiction over the pricing of an exchange transaction.¹¹ The commenter stated that NASD did not explain how Rule 2440 would be applied to exchange transactions.¹² The commenter questioned whether, under the proposal,

NASD and the exchanges would have overlapping authority over exchange transactions,¹³ as well as whether NASD had authority under Section 15A of the Act to regulate exchange transactions.¹⁴ The commenter noted that the proposal would result in increased surveillance by NASD of exchange transactions, which NASD could use to justify increasing its regulatory fees for broker-dealers.¹⁵ Finally, the commenter said that, in the event the Commission approves the proposal, it should require NASD to enter into Rule 17d-2 agreements with the various exchanges to minimize regulatory duplication.¹⁶

In response to the comment letters, NASD said that the First Commenter's submission was not relevant to the proposed rule change, and that the Second Commenter only raised procedural, not substantive, issues.¹⁷ According to NASD, the First Commenter's submission was not germane to the proposed rule change, as it dealt with municipal securities.¹⁸ NASD stated that Rule 2440 and IM-2440-1 do not currently apply to municipal securities, and will not apply to municipal securities under the proposed rule change.¹⁹

In response to the Second Commenter, NASD said that its regulatory jurisdiction is not limited to OTC trading, but encompasses members' conduct on all markets with respect to customer transactions.²⁰ As such, the application of Rule 2440 and IM-2440-1 should not vary according to where the order is ultimately executed.²¹ According to NASD, the proposal will not create duplicative regulation, as it was not aware of another SRO that had established similar rules relating to a member's pricing of transactions with a customer.²² NASD stated that a Rule 17d-2 agreement was thus inapplicable in this context.²³ Even if another SRO maintained similar rules relating to the pricing of customer transactions, however, NASD said that some regulatory overlap is inevitable, given the existence of multiple SROs.²⁴ NASD also asserted that it did not intend to change its current formula for calculating regulatory fees for members,

and that the proposal would not extend to non-members.²⁵

IV. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change, the comment letters, and NASD's response to the comment letters, and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association²⁶ and, in particular, Section 15A(b)(6) of the Act,²⁷ which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission believes that the response to comments addressed the concerns the commenters raised. In addition, in Amendment No. 1, FINRA stated that the proposed rule change will apply to charges imposed by members on customers for trades that are executed on an exchange, and not to the execution prices that are obtained on the exchange.

The proposed rule change extends broker-dealer fair pricing obligations to all securities transactions between members and their customers, except for those transactions involving municipal and exempt securities. By extending the requirement to charge fair commissions and mark-ups to customers in connection with exchange transactions, in addition to OTC transactions, the proposed rule change should enhance investor protection.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NASD-2006-005), 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.²⁸

Florence E. Harmon,

Acting Secretary.

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M. Morris, Secretary, Commission, dated May 4, 2006 ("Second Commenter").

⁶ See letter from Stephanie M. Dumont, Vice President and Associate General Counsel, NASD, to Nancy M. Morris, Secretary, Commission, dated October 2, 2006 ("NASD letter").

⁷ In Amendment No. 1, FINRA clarified that the proposed rule change will regulate the charges imposed by members on customers for trades that are executed on an exchange, and not the execution prices that are obtained on the exchange. Because the Amendment is technical in nature, it is not subject to notice and comment.

⁸ The proposed amendments would only apply to transactions between members and their customers, and not to transactions among members.

Rule 2440 and IM-2440-1 do not currently apply to municipal securities or exempt securities. This would be unchanged by the proposal.

⁹ *Supra* note 5.

¹⁰ First Commenter at 1.

¹¹ Second Commenter at 1.

¹² *Id.* at 4.

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 4.

¹⁷ NASD letter at 1, 4.

¹⁸ *Id.* at 1-2.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 3.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 4.

²⁴ *Id.* at 3-4.

²⁵ *Id.* at 4.

²⁶ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

²⁷ 15 U.S.C. 78o-3(b)(6).

²⁸ 17 CFR 200.30-3(a)(12).