

activities of the Company during that fiscal year.

6. If any purchase or sale is made by a Company from or to an entity affiliated with the Company by reason of an officer, director or employee of a WB Entity (a) serving as an officer, director, general partner or investment adviser to the entity, or (b) having a 5% or more interest in the entity, such individual will not participate in the Manager's determination of whether or not to effect the purchase or sale.

For the Commission, by the Division of Investment Management, under delegated authority.

Elizabeth M. Murphy,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59795; File No. SR-NASDAQ-2006-064]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change as Modified by Amendments No. 2 and 3 Thereto To Modify the Fee for Connecting to a Nasdaq Data Center Over the Internet

April 20, 2009.

On December 22, 2006, The NASDAQ Stock Market LLC ("Nasdaq" or "Exchange") 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 modify the fee for connecting to a Nasdaq data center over the Internet. On January 19, 2007, Nasdaq filed Amendment No. 1 to the proposed rule change. On February 22, 2007, Nasdaq filed Amendment No. 2 to the proposed rule change.³ The proposed rule change, as amended, was published for comment in the **Federal Register** on March 21, 2007.⁴ On April 6, 2009, Nasdaq filed Amendment No. 3 to the proposed rule change.⁵ The Commission

received no comment letters on the proposal. This order approves the proposed rule change as modified by Amendments No. 2 and 3.

Nasdaq proposes to increase its fees for Internet ports that deliver market data. Following the consolidation of Nasdaq's three order books and corresponding matching engines—INET, Brut, and SuperMontage—into a single book ("SingleBook") within the Nasdaq Market Center ("NMC"), Nasdaq users retained the ability to connect with the NMC using the legacy access protocols of all three systems. Access to the NMC via secure Internet connectivity is one of several options available to INET protocol users for entering orders and receiving market data. Other NMC connectivity options include extranet connectivity, where a user contracts directly with a third-party extranet provider, and private line connectivity, where a user leases a circuit directly from a third-party provider.

Currently, Nasdaq charges INET protocol users an additional \$200 (in addition to the established charges for port pairs) for each port used to connect to a Nasdaq data center over the Internet because making such ports available requires Nasdaq to procure and maintain appropriate telecommunications circuits connecting its data centers to the points-of-presence of an Internet service provider. By contrast, in the case of extranet and private circuit connections, Nasdaq is not responsible for the outside telecommunications circuits.

In the Notice, Nasdaq stated that since the introduction of SingleBook, the volume of market data delivered from Nasdaq to subscribers increased from a peak of approximately 5Mbs at the end of October of 2006 to a peak of approximately 25Mbs as of the date of filing of the proposal. Nasdaq stated that in order to continue to adequately support Internet market data connections, Nasdaq expanded its available Internet bandwidth. In light of the expanded Internet bandwidth requirements, Nasdaq proposes to increase its Internet port fee from \$200 to \$600 per Internet port that is used to deliver market data. The additional Internet port fee with respect to Internet ports used for order entry will remain at the current \$200 level.

The Commission has reviewed carefully the proposed rule change 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 exchange⁶ and, in particular, Section 6(b)(4) of the Act,⁷ which requires, among other things, that Nasdaq's rules 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 Nasdaq operates or controls. The Commission also finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,⁸ which requires, among other things, that Nasdaq's rules are not designed to unfairly discriminate between customers, issuers, brokers or dealers.

Nasdaq proposes to increase its Internet port fee from \$200 to \$600 per Internet port that is used to deliver non-core market data. The proposed fee will apply equally to all market participants that use an Internet port to receive market data from Nasdaq.

The Commission believes that the proposal meets the criteria, formulated by the Commission⁹ in connection with the petition filed by NetCoalition,¹⁰ for approval of proposed rule changes concerning the distribution of non-core market data.¹¹ 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."¹² 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."¹³ If an exchange "was subject to significant competitive forces in setting the terms of a proposal," the proposal will be approved unless the Commission determines that "there is a substantial countervailing basis to find that the

⁶ 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).

⁷ 15 U.S.C. 78f(b)(4).

⁸ 15 U.S.C. 78f(b)(5).

⁹ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

¹⁰ See Securities Exchange Act Release No. 55011 (December 27, 2006) (order granting petition for review of SR-NYSEArca-2006-21).

¹¹ The Commission's order distinguishes between core market data, which is defined as "the best-priced quotations and last sale information of all markets in U.S.-listed equities that Commission rules require to be consolidated and distributed to the public by a single central processor," and non-core market data. See 73 FR at 74771.

¹² *Id.* at 74781.

¹³ *Id.* at 74781-82.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 2 replaced and superseded the original filing and Amendment No. 1 in their entirety.

⁴ See Securities Exchange Act Release No. 55457 (March 13, 2007), 72 FR 13328 ("Notice").

⁵ In Amendment No. 3, Nasdaq made certain technical changes to the filing to reflect changes to the Nasdaq rules since filing Amendment No. 2. In addition, Nasdaq clarified that the only market data product currently delivered via Internet ports is its TotalView ITCH data product. This technical

amendment did not require notice and comment, as it did not affect the substance of the rule filing.

terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.”¹⁴

In its order approving NYSEArca-2006-21, the Commission also stated that the terms of a proposed rule change to distribute market data for which the exchange is the exclusive processor must provide for an equitable allocation of fees under Section 6(b)(4) of the Act,¹⁵ not be designed to permit unfair discrimination under Section 6(b)(5) of the Act,¹⁶ be fair and reasonable under Rule 603(a)(1),¹⁷ and not be unreasonably discriminatory under Rule 603(a)(2).¹⁸ If the proposal involves non-core market data, an analysis of competitive forces may be used, and that analysis will apply to findings under Section 6 of the Act, and to findings under Rule 603.¹⁹

In formulating the terms of the proposal, Nasdaq was subject to significant competitive forces—specifically, the availability to market participants of alternatives to purchasing Nasdaq market data. Because the proposal involves the distribution of non-core market data, and significant competitive forces are present, the proposal is thus consistent with both Section 6(b)(4)²⁰ and Section 6(b)(5) of the Act,²¹ and with Rule 603(a).²² There is not a substantial countervailing basis that would render the proposal inconsistent with the Act or the rules thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²³ that the proposed rule change (SR-NASDAQ-2006-064) as modified by Amendments No. 2 and 3 be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Florence E. Harmon,
Deputy Secretary.

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¹⁴ *Id.* at 74781. In approving NYSEArca-2006-21, the Commission found that the proposed rule change was consistent with Section 6(b)(4) of the Act, 15 U.S.C. 78f(b)(4). See 73 FR at 74779. The Commission also found that the proposal was consistent with Section 6(b)(5) of the Act, 15 U.S.C. 78f(b)(5), Section 6(b)(8) of the Act, 15 U.S.C. 78f(b)(8), and Rule 603(a) of Regulation NMS, 17 CFR 242.603(a). See 73 FR at 74779. The Commission noted that the presence of competitive forces guided its analysis under both Section 6 of the Act and Rule 603 of Regulation NMS. *Id.*

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ 17 CFR 242.603(a)(1).

¹⁸ 17 CFR 242.603(a)(2). See 73 FR at 74782.

¹⁹ See 73 FR at 74779.

²⁰ 15 U.S.C. 78f(b)(4).

²¹ 15 U.S.C. 78f(b)(5).

²² 17 CFR 242.603(a).

²³ 15 U.S.C. 78s(b)(2).

²⁴ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59802; File No. SR-FICC-2009-03]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Granting Approval of a Proposed Rule Change To Impose a Charge on Members With a Fail-to-Deliver in Treasury Securities

April 20, 2009.

I. Introduction

On February 25, 2009, The Fixed Income Clearing Corporation (“FICC”) filed with the Securities and Exchange Commission (“Commission”) proposed rule change SR-FICC-2009-03 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”).¹ Notice of the proposal was published in the **Federal Register** on March 19, 2009.² The Commission received two comment letters.³ For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

The Treasury Markets Practices Group (“TMPG”), a group of market participants that is active in the treasury securities market and is sponsored by the Federal Reserve Bank of New York (“FRBNY”), has been devising ways to address the persistent settlement fails in treasury securities transactions that have arisen, according to the TMPG, due to the recent market turbulence and low short-term interest rates. In order to encourage market participants to resolve fails promptly, the TMPG has proposed for adoption a “best practice” that would call for the market-wide assessment of a charge on fail-to-deliver positions. As part of the implementation of this “best practice,” the TMPG has asked the Government Securities Division (“GSD”) of FICC to impose a charge on failed positions involving treasury securities within FICC.

The charge FICC is adopting will be equal to the product of net money due on the failed position and three (3) percent per annum minus the Target Fed funds target rate that is effective at 5 p.m. Eastern Standard Time on the business day prior to the originally scheduled settlement date and will be capped at three (3) percent per annum. The charge will be applied daily and

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 59569 (March 12, 2009), 74 FR 11797.

³ Letters from Leslie Rosenthal, Rosenthal Collins Group, L.L.C. (March 31, 2009) and Murray Pozmanter, Managing Director, FICC (April 3, 2009).

will be a debit on a member’s GSD monthly bill for a fail-to deliver position and a credit on a member’s GSD monthly bill for fail-to-receive position.

The following example illustrates the manner in which the proposed fails charge would apply.

Member A fails to deliver today on a \$50 million position on which he is owed \$50.1 million. The Target Fed funds rate yesterday at 5 p.m. was one (1) percent. The fails charge will be the product of two (2) percent per annum applied to the funds amount of \$50.1 million, thus equaling a charge of \$2,783.33 for that day. The bill of the member failing to deliver will reflect a debit of \$2,783.33.

In the event that FICC is the failing party because, for example, it received securities too close to the close of the Fedwire for redelivery, the fail charge will be distributed pro rata to the netting members based upon usage of the GSD’s services, which is the same methodology that is used when FICC incurs finance charges.⁴

The rule change provides that the Credit and Market Risk Management Committee of FICC’s Board of Directors will retain the right to revoke application of the charge if industry events or practices warrant such revocation.

III. Comment Letters

The Commission received two letters, one from a registered broker-dealer raising concerns about the “unintended consequences” of the proposed rule change and the other from FICC responding to the commenter’s letter.⁵ The broker-dealer, a member of FICC, raised concerns that the pervasive fails situation that FICC intends to remedy with the rule change no longer exists because the market corrected itself when fails became an issue, and therefore the instances of fails can be held to a minimum if the industry commits to follow best practices. Further, this broker contends that the rule may potentially increase counterparty risk because firms would shift from clearing through FICC to clearing through individual counterparties, where fails are more easily controlled, in an effort to avoid the fails penalty. The unintended consequences of the rule change, the commenter asserted, may be detrimental to the global market by reducing market liquidity caused by the reduction in the supply of securities, by eroding investor confidence, by decreasing securities available for lending, and by

⁴ FICC Rules, Section 6 of Rule 12.

⁵ *Supra* note 3.