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 Number SR–BX–2009–001 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–BX–2009–001. 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 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–BX–2009–001 and should be submitted on or before February 17, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1671 Filed 1–26–09; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59266; File No. SR–NASDAQ–2008–016]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change To Create the Nasdaq Market Pathfinders Service and Establish Fees for the Service

January 16, 2009.

I. Introduction and Description of the Proposal

On June 27, 2008, The NASDAQ Stock Market LLC (''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 that would establish the Nasdaq Market Pathfinders Service (''Service'') and establish fees for the Service. The Service will allow subscribers to view a real time data product that tracks the aggregated market activity of certain market participants who are aggressively buying and/or selling. Nasdaq proposes to offer new subscribers a 30-day waiver of the user fees for the Service. After the conclusion of the waiver period, subscribers may avail themselves of three different subscription options at varying prices.

The proposed rule change was published in the **Federal Register** on July 17, 2008.[3] The Commission received one comment on the proposal.[4] Nasdaq responded to the comment letter on September 18, 2008.[5] The Commission is approving the proposed rule change.

II. Summary of Comment Letter

The commenter suggests that the Commission cannot approve the proposed rule change for the following reasons:

—Nasdaq is proposing to make commercial use of data supplied to it in Nasdaq's capacity as a regulatory body, despite the Commission's previous statement that, with regard to OATS information, it does not believe such data should be used for non-regulatory purposes unless the data is made available to other market participants on the same terms under which it is provided to Nasdaq.[6]

—Nasdaq has failed to provide a detailed discussion of the data or analytics to be included in the Service. SIFMA stated that several firms have expressed concern with the proposal's potential to compromise the confidentiality of the transacting party's trading strategies or provide misinformation as to a transacting party.

—SIFMA questions whether the Service will provide a means to reverse engineer the algorithms and strategies Nasdaq members have created, or whether the impact on such algorithms and strategies will be such as to render them useless.

—SIFMA also raised a procedural concern, stating that Nasdaq is proposing to create a proprietary product that uses data its members are required to submit without compensation; no other exchange or market data vendor can replicate this product because necessary elements are not available to anyone but Nasdaq; and no cost data is provided to allow an opportunity to determine if the fees are fair and reasonable.

III. Nasdaq's Response to the Comment Letter

In response to the SIFMA Letter, Nasdaq made the following points:

—SIFMA inaccurately claims that Nasdaq is collecting data in its capacity as a regulatory body and using it for commercial purposes, stating that the Service does not use OATS information, but instead relies on trade information sent directly and only from the Nasdaq Matching Engine.

—The Service will not operate in a manner that permits users to distinguish between short and long sales; the Service will not compromise the confidentiality of the transacting party's trading strategies, nor provide misinformation as to a transacting party because there are filters in place to prevent this from occurring.

—The Service will not provide a means to reverse engineer the algorithms and strategies Nasdaq members have created, nor will it affect those

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58145 (July 11, 2008), 73 FR 41143.

[4] *See* August 7, 2008 letter from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association (''SIFMA''), to Florence Harmon, Acting Secretary, Commission (''SIFMA Letter'').

[5] *See* September 18, 2008 letter from Jeffrey S. Davis, Deputy General Counsel and Vice President, Nasdaq, to Florence Harmon, Acting Secretary, Commission (''Nasdaq Letter'').

[6] SIFMA Letter at 2, quoting the Commission's order approving Nasdaq's exchange application. *See* Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10–131), in text following footnote 136.

algorithms and strategies in such a way as to render them useless.

—The Service is a sentiment indicator that would provide users with an indication of how a specific type of market participant feels about certain securities, making available to the public information that is sometimes referred to as ''the word on the street'' as compiled from order flow on the trading desks of large broker-dealers.

—Nasdaq believes that it has provided adequate justification for the fees.

IV. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change, the comment letter, and Nasdaq's response to the comment letter, 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 exchange [7] and, in particular, Section 6(b)(4) of the Act,[8] 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, and that it not unfairly discriminate between customers, issuers, brokers or dealers. The Commission believes that the proposed rule change is consistent with these statutory standards.

Nasdaq has represented that the Service is a voluntary one, and that the information provided to subscribers is not comprised of data that broker-dealers are obligated to provide to Nasdaq for regulatory purposes because of Nasdaq's status as a self-regulatory organization. Additionally, broker-dealers do not need the Service to perform their duties, so the decision to purchase the Service is truly voluntary and dependent upon each broker-dealer's business model. Finally, because the Service is voluntary, Nasdaq has met the statutory standard by pricing the Service according to free market principles; indeed, if Nasdaq priced the Service too high, broker-dealers could simply opt not to purchase the Service. The Commission believes that Nasdaq's fees for the Service are both reasonable and equitably allocated.[9] Additionally, the Commission does not believe that the Pathfinder Service will allow reverse engineering of the algorithms and strategies created by Nasdaq members; Nasdaq has explained the various ways the information is filtered, and has stated that such filtering will prevent this from occurring.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act [10], that the proposed rule change (SR–NASDAQ–2008–016) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1674 Filed 1–26–09; 8:45 am]

BILLING CODE 8011–01–P

[7] 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).

[8] 15 U.S.C. 78f(b)(4).

[9] The proposal meets the criteria, formulated by the Commission in connection with the petition filed by NetCoalition, for approval of proposed rule changes concerning the distribution of non-core market data. *See* Securities Exchange Act Release Nos. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21) and 55011 (December 27, 2006) (order granting petition for review of SR–NYSEArca–2006–21). 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.'' 73 FR at 74781–82. 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.'' *Id.* at 74782. If an exchange ''was subject to significant competitive forces in setting the terms of a proposal,'' a proposal will be approved unless the Commission determines that ''there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.'' *Id.* at 74781.

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59264; File No. SR–NYSEArca–2009–02]

Self-Regulatory Organizations; Notice of Filing of and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. To Amend or Eliminate Unnecessary Rule Text

January 16, 2009.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 8, 2009, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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

The Exchange proposes to amend or eliminate several of its rules in order to remove unnecessary rule text related to terms or systems that are now obsolete. The text of the proposed rule change is attached to the proposed rule change as Exhibit 5. A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com*, at the Exchange's principal office and at the Commission's Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The purpose of this filing by NYSE Arca is to correct certain NYSE Arca cross-references and remove obsolete and unnecessary rule text. By abolishing these out-dated references and correcting cross-references, the Exchange is not changing or altering any obligation, rights, policies or practices enumerated within its rules.

The specific proposed changes are discussed in further detail below.

• Rule 5.3(g). Criteria for Underlying Securities: The Exchange is changing the numbering within the rule because two separate rule filings were approved at different times which affected the numbering within the rule.[4]

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* SR–NYSEArca–2008–108, Securities Exchange Act Release No. 34–59004 [sic] (November 24, 2008) 73 FR 207 [sic] (October 24, 2008) [sic] (filing seeking approval for listing and trading of options on Managed Fund Shares) and SR–NYSEArca–2008–66, Securities [sic] Act Release No. 34–59055 [sic] (December 4, 2008) 73 FR 238 [sic] (December 10, 2008) (filing seeking approval for Listing and Trading Options on Shares of the iShares COMEX Gold Trust and the iShares Silver Trust).