

II. Summary of Comments

While the instant proposed rule change is limited to the question of a two-month waiver of fees associated with PostData for new subscribers, the commenter's concerns are broader in scope. The following is an overview of the concerns the commenter raised.

• *Nasdaq Has Failed To Evaluate Its Fee Structure*

The commenter believes that Nasdaq is able to effectively present an analysis of the PostData fees, despite Nasdaq's assertion to the contrary, by calculating the cost of operating, enhancing, and marketing the product.⁶ Additionally, the commenter notes that the fees for PostData are imposed on a per-user basis, which may provide relevant price data, as well as some basis for estimating the anticipated average number of paying users per firm.⁷

• *Cost of Enhancements to PostData*

The commenter disagrees with Nasdaq's position that enhancements to PostData do not entail any additional fees.⁸ The commenter believes that Nasdaq, by adding material enhancements to PostData "whose costs are not defrayed by the fees charged for the service" may be a burden on competition.⁹ The commenter raises the question of whether such a revenue shortfall is being offset by fees generated by the self-regulatory organization's regulatory activities.¹⁰

• *PostData Wholesale Fees Are Improper*

The commenter believes that Nasdaq's wholesale fees must "reflect only those costs that the SRO would incur if it just collected information and passed it on to private vendors."¹¹ Citing *NASD v. SEC*,¹² the commenter believes that Nasdaq's fee structure cannot mandate that vendors pay costs related to Nasdaq's own commercial service, such as costs relating to formatting PostData reports and any operating and overhead costs attributed to the retail version of PostData.¹³

III. Nasdaq's Response to Comments

Nasdaq says that the commenter has not alleged that Nasdaq's PostData product is an undue burden on competition, and that the inference that

one should draw from the commenter's failure to allege such harm is that PostData has been neither a burden on competition, nor a burden on the commenter's business.¹⁴

In response to the commenter's claim that Nasdaq should evaluate its fee structure, Nasdaq states that its fee structure is proper, and that the proposal "clearly identifies the costs attributable to market data vendors and the separate, incremental costs that are attributable to direct subscribers."¹⁵ Regarding the fees themselves, Nasdaq believes that the fees at their current levels "equitably allocate Nasdaq's costs for offering PostData to members and non-members."¹⁶

Nasdaq acknowledges that it has expanded the amount of market data available through PostData since approval of its original pilot program. However, Nasdaq does not believe that raising the PostData fees is proper because the new data "does not materially affect the costs that Nasdaq is permitted to include in the PostData fees, such as the maintenance, operation or marketing of PostData, or the operation of the web security infrastructure."¹⁷

Finally, Nasdaq asks the Commission to reject the commenter's argument that the wholesale fees associated with PostData are improper, because the Commission found in its approval order for the original PostData pilot program that the fees "are equitably allocated among members and non-members, and that the price differential between retail and wholesale fees offer market data vendors the opportunity to compete effectively" with Nasdaq.¹⁸

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 association¹⁹ and, in particular, the

requirements of sections 15A(b)(5) and (6) of the Act.²⁰ Section 15A(b)(5)²¹ requires the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that a national securities association operates or controls. Section 15A(b)(6)²² requires that the rules of a national securities association be designed to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. The Commission finds that the proposal is consistent with both of these sections of the Act.

Specifically, the Commission, in its original approval of the PostData pilot,²³ found that the fees that Nasdaq would charge for both the retail and the wholesale distribution of PostData are equitably allocated among members and non-members. In the instant proposed rule change, Nasdaq has not changed the differential between the retail and wholesale fees permanently—instead, Nasdaq seeks only to offer a waiver of those fees for two months for new subscribers to encourage such persons to use the service. The waiver will apply to subscribers that deal directly with Nasdaq (retail subscribers), as well as subscribers who are vendors (wholesale subscribers). If subscribers do take on this opportunity and like the service, they will pay for the service at the approved rates. The Commission believes, therefore, that such a waiver is reasonable.

Furthermore, the Commission believes the information contained in PostData may help to foster cooperation and coordination with persons engaged in facilitating transactions in securities, by providing consistent, reliable, and verified market data to market participants who choose to subscribe to the service or purchase the information from market data vendors. The Commission believes that investors will benefit by the timely dissemination of this reliable market data.²⁴ The Commission believes that the two month fee waiver places no undue burden on competition, and in fact, may

¹⁴ Nasdaq Letter at 1–2. The Commission notes, however, that the commenter, in arguing that Nasdaq could not have materially enhanced PostData without incurring any additional fees, states that adding enhancements without charging additional fees to defray the costs "can place a significant burden on competition. * * *

Thomson Letter at 8–9.

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ 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).

²⁰ 15 U.S.C. 78o–3(b)(5) and (6).

²¹ 15 U.S.C. 78o–3(b)(5).

²² 15 U.S.C. 78o–3(b)(6).

²³ See Securities Exchange Act Release No. 45270 (January 11, 2002), 67 FR 2712 (January 18, 2002) (SR–NASD–99–12).

²⁴ In this regard, the Commission reminds Nasdaq of its representation that Nasdaq generally will provide the PostData information to vendors approximately five minutes before it posts the information on the web site for direct end-users.

⁶ Thomson Letter at 8.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 9.

¹⁰ *Id.*

¹¹ *Id.*

¹² 801 F.2d at 1419.

¹³ Thomson Letter at 9–10.