

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82003; File No. SR-NASDAQ-2017-113)

November 2, 2017

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Fees at Rule 7058

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 20, 2017, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. 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 the Exchange's fees at Rule 7058 to: (i) offer to waive fees under this Rule for 30 days for any new, prospective, or returning purchaser of either QView or the Latency Optics add-on service; and (ii) remove language offering a subscription to TradeInfo for up to five users at no additional cost to subscribers of the Latency Optics add-on service.

The text of the proposed rule change is available on the Exchange's website at <http://nasdaq.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Exchange 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 these 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 aspects of such statements.

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

1. Purpose

The Exchange proposes to amend its fees at Rule 7058 to: (i) offer to waive fees under this Rule for 30 days for any new, prospective, or returning purchaser of either QView or the Latency Optics add-on service; and (ii) remove language offering a subscription to TradeInfo for up to five users at no additional cost to subscribers of the Latency Optics add-on service, along with conforming changes. The purposes of the proposed changes are to: (i) encourage new, prospective, and returning purchasers of either QView or the Latency Optics add-on service to examine these products more closely and thereby increase the number of customers for this product; and (ii) remove a rarely used fee provision in order to render the Latency Optics subscription easier to administer.

Current Products

QView

QView is a web-based tool designed to provide a subscribing member with the ability to track its trading activity on the Exchange through both real-time and historical order and execution summaries, available on a daily or a monthly basis. The QView dashboard allows the member to view a summary of its executions and open orders, including, but not limited to: the

number of executions and their dollar value; executions by symbol; total volume; whether an order has been added or removed; whether the order is for a buy or a sell; whether an order is open; and information related to routing strategies. QView also includes ranking and market share statistics, such as how the subscribing member firm ranks in Nasdaq market activity as compared to other Nasdaq participants. QView data may be segregated by individual Market Participant Identifiers (MPIDs) or ports. QView was developed to work in conjunction with TradeInfo (discussed below) to allow the QView purchaser to view specific order and execution information provided by the QView dashboard interface.

As set forth in Rule 7058(a), members may subscribe to QView for a fee of \$600 per month.

Latency Optics

A member that subscribes to QView may also purchase the Latency Optics add-on service, which provides the member with the ability to monitor three types of latency for order messages and compare that latency to the average on the Nasdaq system:³ (1) roundtrip time between order entry and receipt of acknowledgement; (2) roundtrip time between order entry and the time that the order appears on the TotalView ITCH multicast feed; and (3) the roundtrip time between the entry of an order cancellation request and the time that the message in reply is received by the client device. Data is displayed graphically and in table format, and may be segregated by MPID or ports. Subscribers may also set hourly or end-of-day alert notifications.

³ The service measures the historical latency of the member firm's order messages sent to and from the Nasdaq Market Center through the member firm's OUCH ports and received on ITCH ports. See Securities Exchange Act Release No. 68617 (January 10, 2013), 78 FR 3480 (January 16, 2013) (SR-NASDAQ-2013-15) [sic]. OUCH ports are used for order entry; multicast ITCH ports are used for the dissemination of ITCH multicast feeds.

As set forth in Rule 7058(b), the Latency Optics add-on is available for a fee of \$2,900 per month.

TradeInfo

TradeInfo is a web-based tool that allows a member to see the status of orders, executions, cancels and breaks, generate reports for download, and cancel or correct open orders.

As set forth in Rule 7015(f), TradeInfo is complementary as part of the Nasdaq workstation or may be purchased separately for a fee of \$95 per user per month. Under Rule 7058(b), a purchaser of the Latency Optics add-on may obtain TradeInfo for up to 5 users at no additional cost.

Proposed Changes

The Exchange proposes to: (i) introduce a fee waiver for 30 days for any new, prospective or returning purchaser of either QView or the Latency Optics add-on service to encourage testing and dissemination of the product; and (ii) remove a rarely used provision of Rule 7058 that offers subscribers of the Latency Optics add-on service a subscription to TradeInfo for up to five users at no additional cost.

The Exchange proposes to initiate the new fee waiver program to foster interest in QView or the Latency Optics add-on service and encourage sales for both products. The waiver will be available only once per customer for any version of either product. New versions will be announced by the Exchange on www.nasdaqtrader.com.

The Exchange also proposes to remove a rarely used provision of Rule 7058 that offers subscribers of the Latency Optics add-on service a subscription to TradeInfo for up to five users at no additional cost. As stated in Rule 7015(f), TradeInfo is complementary as part of the Nasdaq workstation. Because TradeInfo is already available free of charge with the Nasdaq

workstation, customers have expressed little interest in this discount, and that provision has been rarely, if ever, used. As such, the Exchange proposes to eliminate that provision.⁴

The proposed changes do not affect the cost of any other Nasdaq product.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁵ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁶ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The fee waiver proposal is an equitable allocation of reasonable dues, fees and other charges because it will reduce fees for new, prospective, and returning purchasers of QView or Latency Optics, while not disadvantaging continuing subscribers because their fees will not change. Moreover, the additional subscriptions resulting from the fee waiver will increase market transparency, and, as the total number of subscribers increases, the additional subscriptions will decrease the likelihood of future fee increases as a result of rising fixed costs.

Removal of the provision in Rule 7058(b) allowing a free subscription to TradeInfo for five users is an equitable allocation of reasonable dues, fees and other charges because all members will be charged the same fees for the same product. Moreover, the proposed change will have little substantive impact on fees because the discount was rarely, if ever, used. This proposed change will not permit unfair discrimination between customers, issuers, brokers, or

⁴ As a conforming change, the Exchange proposes to delete an obsolete reference to a free trial period that expired in September 2013. In addition, a comma is added after the phrase “In addition,” in Rule 7058(b) to correct a grammatical error.

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4) and (5).

dealers because the proposal will remove a basis for price differentiation among customers that currently exists.⁷

In adopting Regulation NMS,⁸ the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. Regulation NMS—deregulating the market in proprietary data—furthers the Act’s goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.⁹

Nasdaq believes that QView, the Latency Optics add-on and TradeInfo—which provide members with the ability to track order flow, observe latency and obtain order data—is precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS.

In NetCoalition v. Securities and Exchange Commission¹⁰ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of

⁷ Availability of QView, the Latency Optics add-on service and TradeInfo is already limited to members of the Exchange, which is not unfair discrimination because the information provided solely concerns a member firm’s trading activity on the Exchange.

⁸ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁹ Id.

¹⁰ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

market data fees against a challenge claiming that Congress mandated a cost-based approach.¹¹ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”¹² “No one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹³

Data products such as QView, the Latency Optics add-on and TradeInfo are a means by which exchanges compete to attract order flow. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they are able to provide. The need to compete for order flow places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.¹⁴

Fees for QView, the Latency Optics add-on and TradeInfo are optional in that they apply only to firms that elect to purchase these products, which, like all proprietary data products, they may cancel at any time.

¹¹ See NetCoalition, at 534 - 535.

¹² Id. at 537.

¹³ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

¹⁴ See Sec. Indus. Fin. Mkts. Ass’n (SIFMA), Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (ALJ June 1, 2016) (finding the existence of vigorous competition with respect to non-core market data).

For all of the reasons set forth above, the Exchange has provided a substantial basis demonstrating that the proposed fee is equitable, fair, reasonable and not unreasonably discriminatory, and therefore consistent with and in furtherance of the purposes of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Introduction of the proposed fee waiver will enhance competition by increasing customer familiarity with the product, thereby leading to more informed purchase decisions. Further, the product itself enhances competition by promoting transparency, and the increased use of the product generated by the fee waiver will increase the amount of information available to the market. Moreover, removal of the provision in 7058(b) allowing a free subscription to TradeInfo for five users will enhance competition by simplifying the fee structure for these products.

The market for data products is extremely competitive and firms may freely choose alternative venues and data vendors based on the aggregate fees assessed, the data offered, and the value provided. Exchanges compete with each other for listings, trades, and market data itself. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price, and distribution of its data products.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation

and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (e.g., if the software can be downloaded over the internet after being purchased).¹⁵ In Nasdaq's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and are each subject to significant scale economies.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products. The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including SRO markets, as well as internalizing BDs and various forms of alternative trading systems ("ATs"), including dark pools and electronic communication networks ("ECNs"). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated TRFs compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to

¹⁵ See William J. Baumol and Daniel G. Swanson, "The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power," Antitrust Law Journal, Vol. 70, No. 3 (2003).

multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, BDs, and ATSS that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including Nasdaq, NYSE, NYSE MKT, NYSE Arca, and the BATS exchanges.

Firms make decisions regarding market data based on the total cost of interacting with the Exchange, and an “excessive” price for one product has the potential to impair revenues from all products. If the price of QView, the Latency Optics add-on or TradeInfo were to become unattractive to member firms,¹⁶ those firms would opt not to purchase the product, or may reduce their purchases of other products sold by the Exchange.

For all of the reasons set forth above, the Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.¹⁷

¹⁶ Only member firms can purchase QView, the Latency Optics add-on, and TradeInfo.

¹⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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 Number SR-NASDAQ-2017-113 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-2017-113. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2017-113 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

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Assistant Secretary

¹⁸ 17 CFR 200.30-3(a)(12).