

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82465; File No. SR-ISE-2017-113)

January 9, 2018

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Schedule of Fees at Chapter VIII, Section J, entitled "Nasdaq ISE Trades Feed"

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 December 26, 2017, Nasdaq ISE, LLC ("ISE" 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Schedule of Fees at Chapter VIII, Section J, entitled "Nasdaq ISE Trades Feed," to introduce a monthly fee of \$1,000 for unlimited internal and/or external distribution of the Nasdaq ISE Trade Feed,³ as described further below.

The text of the proposed rule change is available on the Exchange's Website at <http://ise.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.

³ As part of this proposal, the Exchange proposes to correct a typographical error by renaming the Nasdaq ISE Trades Feed the "Nasdaq ISE Trade Feed." The Exchange hereinafter refers to the product by its corrected name.

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 purpose of the proposed rule change is to amend the Exchange's Schedule of Fees at Chapter VIII, Section J, entitled "Nasdaq ISE Trades Feed," to introduce a monthly fee of \$1,000 for unlimited internal and/or external distribution of the ISE Trade Feed.

The Nasdaq ISE Trade Feed is a direct data feed product that displays last sale information about trades that occur in the Exchange's execution system, along with opening price, cumulative volume, and high and low prices for the day. The data provided for each instrument includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and trading status. Access to real-time last sale options data from the Exchange increases transparency and enables firms to provide dynamically updated tickers, portfolio trackers and price/time charts.

The Exchange presently offers subscriptions to the Nasdaq ISE Trade Feed for free. The Exchange proposes to amend Section J to charge a fee of \$1,000 per month (for unlimited internal and external distribution) for a subscription to the Nasdaq ISE Trade Feed. Upon effectiveness of the proposal, this monthly fee will apply to all firms that choose to subscribe to the Nasdaq ISE Trade Feed, including firms that currently receive it for free.

Although the Exchange proposes to offer the Nasdaq ISE Trade Feed for a fee on a standalone basis, it notes that the Trade Feed is a purely optional product and a subscription to it is not required to receive the data that it provides. The same ISE trade information that is available on the Nasdaq ISE Trade Feed is also broadcast on two other Nasdaq ISE data feeds: the ISE Top Quote Feed and the ISE Depth of Market Feed.

The Exchange's proposal to charge a fee for the Nasdaq ISE Trade Feed reflects the value of the investments that the Exchange has made in developing, maintaining, and upgrading the ISE Trade Feed product and the Exchange trading facility that supports it, which include the following:

- Exchange Re-Platform and Harmonization of Specifications. In connection with its recent acquisition by Nasdaq, Inc. and the associated efforts to re-platform and integrate the Exchange into the Nasdaq, Inc. family of exchanges, the Exchange upgraded the ISE Trade Feed so that it is consistent with the specifications and formats of the other Nasdaq, Inc. data feeds. The re-platforming and associated upgrades will render connection to and consumption of the ISE Trade Feeds and other data products easier for customers to manage. Having one harmonized specification document format that is standardized across six exchanges makes initial onboarding and implementation of the data feeds into customers' systems more efficient than having multiple documents in disparate formats across different platforms. Furthermore, any updates or enhancements that are introduced across any of the six exchanges will now be more cost effective for customers to implement because of the standardized message format. In addition, the migration to the Nasdaq Inet technology allows customers to seamlessly

conduct business across multiple exchanges by leveraging Nasdaq's standard messaging protocols to interact with ISE data feeds as well as all Nasdaq options data feeds. Moreover, the hardware efficiencies provide a highly-distributed and efficient system for the Exchange to operate from.

- Geographic Diversity. In connection with the Exchange's integration into the Nasdaq, Inc. family of exchanges, the Exchange moved its disaster recovery system to the site utilized by the other Nasdaq, Inc. exchanges in Chicago, Illinois. Customers can both receive market data and send orders through the Chicago facility, potentially reducing overall networking costs. Additionally, this new disaster recovery location enables firms to easily connect to a multitude of multi-asset class engines currently housed in or near this Chicago facility, which also may reduce networking costs. Adding such geographic diversity helps protect the market in the event of a catastrophic event impacting the entire East Coast. Lastly, the new facility has new equipment that will offer improved performance and resiliency.

The Exchange notes while it and its sister exchange, Nasdaq GEMX, LLC, are unique among their competitors in offering a standalone Trade Feed, the Exchange proposes to price the product at or below the prices that competing exchanges charge for their data feeds. The Exchange notes that although fees for external distribution of data feeds are typically higher than internal distribution fees, the Exchange proposes to charge the same price for both internal and external distribution of the Trade Feed as a means of incentivizing external distribution.

The Exchange also notes that it proposes to price its Trade Feed higher than that of the Nasdaq GEMX product. The Exchange believes that this price differential is reasonable given

the fact that the Exchange has more listings, strike volume, and market makers than does Nasdaq GEMX, such that the Exchange's Trade Feed product has greater potential value to customers than does the Nasdaq GEMX product. Specifically, the ISE market has 3,788 listed options on its platform, totaling 732,000 strikes. Comparatively, GEMX has 2,642 listed options and 619,000 [sic] strikes. ISE also has 33% more market makers providing liquidity than does GEMX.

Finally, offering valuable trade data as a standalone feed allows for a much lower bandwidth option that customers can utilize instead of having to subscribe to other ISE feeds that may include quotes and orders and require much more system effort to consume and utilize due to the larger number of messages required for processing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁵ 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 Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and self-regulatory organization ("SRO") revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4) and (5).

competition in its broader forms that are most important to investors and listed companies.”⁶

Likewise, in NetCoalition v. Securities and Exchange Commission⁷ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.⁸ 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.”⁹

Further, “[n]o 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’”¹⁰ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that its proposal is reasonable to charge a monthly fee for all subscriptions to the Nasdaq ISE Trade Feed because this product provides valuable data to firms. As noted above, access to real-time last sale options data from the Exchange increases

⁶ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁷ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

⁸ See NetCoalition, at 534 - 535.

⁹ Id. at 537.

¹⁰ 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)).

transparency and enables firms to provide dynamically updated tickers, portfolio trackers and price/time charts.

Moreover, the Exchange believes its proposal to charge a monthly fee of \$1,000 for a subscription to the Nasdaq ISE Trade Feed is a reasonable reflection of the Exchange's costs in producing, maintaining, and upgrading the product to provide value to subscribers. The Exchange notes, for example, that in connection with its recent acquisition by Nasdaq, Inc. and the associated efforts to re-platform and integrate the Exchange into the Nasdaq, Inc. family of exchanges, the Exchange upgraded the Trade Feed so that it is consistent with the specifications and formats of the other Nasdaq, Inc. data feeds. The re-platforming and associated upgrades will render connection to and consumption of the Trade Feeds and other data products easier for customers to manage.

Moreover, the Exchange's integration into Nasdaq, Inc. has also resulted in its migration to a more robust and geographically diverse disaster recovery facility, located in Chicago, IL. Customers can both receive market data and send orders through the Chicago facility, potentially reducing overall networking costs. Adding such geographic diversity helps protect the market in the event of a catastrophic event impacting the entire East Coast.

The Exchange notes that while it and its sister exchange, Nasdaq GEMX, LLC, are unique among its competitors in offering a standalone Trade Feed, the Exchange proposes to price the product at or below the prices that competing exchanges charge for their data feeds. The Exchange notes that although fees for external distribution of data feeds are typically higher than internal distribution fees, the Exchange proposes to charge the same price for both internal and external distribution of the ISE Trade Feed as a means of incentivizing external distribution.

The Exchange also notes that it proposes to price its Trade Feed higher than that of the Nasdaq GEMX product. The Exchange believes that this price differential is reasonable given the fact that the Exchange has more listings, strike volume, and market makers than does Nasdaq GEMX, such that the Exchange's Trade Feed product has greater potential value to customers than does the Nasdaq GEMX product.

The Exchange believes that the proposal is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all, regardless of membership.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed establishment of the Nasdaq ISE Trade Feed fee does not impose an undue burden on competition because a subscription to the Nasdaq ISE Trade Feed is completely voluntary and subject to extensive competition from other exchanges. In sum, if the change proposed herein is unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed

change will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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.¹¹ 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-ISE-2017-113 on the subject line.

¹¹ 15 U.S.C. 78s(b)(3)(A)(ii).

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-ISE-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-ISE-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.¹²

Eduardo A. Aleman
Assistant Secretary

¹² 17 CFR 200.30-3(a)(12).