

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-72654; File No. SR-NASDAQ-2014-034)

July 22, 2014

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Instituting Proceedings to Determine Whether to Disapprove a Proposed Rule Change Relating to Proposed Changes to Remove from the Exchange Rules Fee Provisions Regarding Re-Transmission of “Third-Party Data”

I. Introduction

On April 7, 2014, The NASDAQ Stock Market LLC (“NASDAQ” or the “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 remove from its rules all provisions relating to the market data feeds that NASDAQ receives from other registered exchanges and other non-NASDAQ sources and then re-transmits to its co-located firms, including the provisions setting fees for providing this market data to its co-located firms. The proposed rule change was published for comment in the Federal Register on April 28, 2014.³ The Commission received no comments on the proposal. On June 5, 2014, the Commission extended the time to act on the proposal until July 25, 2014. This order institutes proceedings under Section 19(b)(2)(B) of the Act⁴ to determine whether to disapprove the proposed rule change.

II. Description of the Proposal

NASDAQ offers co-location services for clients at its co-location facility. NASDAQ Rule 7034 lists the services and the fees provided under its co-location program, which include

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 71990 (Apr. 22, 2014), 79 FR 23389 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2)(B).

cabinet space, electric power, installation and use of cables, and connectivity to various affiliated market centers. NASDAQ Rule 7034 also offers co-located clients connectivity to market data feeds from a variety of sources and lists the fees for these market data feeds.

The current proposal would remove from NASDAQ's rules the provisions relating to all third-party market data feeds (i.e., all market data feeds other than NASDAQ's own market data feeds) that NASDAQ makes available to co-located member firms. NASDAQ does not propose to cease offering third-party data feeds to its co-located clients or to cease assessing the associated fees; it simply proposes to eliminate these offerings and fees from the NASDAQ rulebook.

NASDAQ argues that this proposed change is consistent with the Act because third-party data feeds are not a "facility" of the Exchange.⁵ As described in the Notice,⁶ NASDAQ argues that the third-party data it provides to its co-located member firms are facilities of the exchanges that originally produce the data, not a facility of an exchange that receives and distributes the data as a voluntary service to its member firms.

III. Proceedings to Determine Whether to Disapprove SR-NASDAQ-2014-034 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act⁷ to determine whether the proposal should be disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposals. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the

⁵ See Section 3(a)(2) of the Act, 15 U.S.C 78c(a)(2) (defining the term "facility" as applied to an exchange).

⁶ See, supra, n.3.

⁷ 15 U.S.C. 78s(b)(2)(B).

Commission seeks and encourages interested persons to provide additional comment on the proposal.

Pursuant to Section 19(b)(2)(B),⁸ the Commission is providing notice of the grounds for disapproval under consideration. NASDAQ's proposal, if approved, would allow a national securities exchange to offer third-party market data (e.g., the proprietary data feeds of other exchanges in the National Market System) to member firms that are co-located on the exchange's premises at its trading facilities, and to charge fees for that market data, without Commission oversight through the proposed rule change process. An exchange's provision of third-party market data feeds to co-located clients appears to be an integral feature of its co-location program, and co-location programs are subject to the rule filing process. The Commission believes that permitting exchanges to provide third-party data feeds to co-located clients without subjecting the offerings and associated fees to review through the Rule 19b-4 process presents a novel issue that warrants further consideration.

Accordingly, the Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the proposed rule change's consistency with Section 3(a)(2) of the Act, which defines the term "facility" when used with respect to an exchange to include its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service; Section 6(b)(1) of the Act, which requires that a national securities exchange be so organized and

⁸ See id.

have the capacity to be able to carry out the purposes of the Act; Section 6(b)(4) of the Act, which requires that the rules of an exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities; Section 6(b)(5) of the Act, which requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market system, and in general to protect investors and the public interest; and Section 6(b)(8), which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any others they may have with the proposed rule change. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is inconsistent with Sections 3(a)(2), 6(b)(1), 6(b)(4), 6(b)(5), and 6(b)(8) of the Act or any other provision of the Act, or the rules and regulation thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁹

⁹ Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule changes should be [approved or] disapproved by [insert 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

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-2014-034 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-2014-034. 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. 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 publicly available. All submissions should refer to File Number SR-NASDAQ-2014-034 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Kevin M. O'Neill
Deputy Secretary

¹⁰ 17 CFR 200.30-3(a)(57).