

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-71990; File No. SR-NASDAQ-2014-034)

April 22, 2014

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change Relating to Proposed Changes to Remove From the Exchange Rules Fee Provisions Regarding Re-Transmission of “Third-Party Data”

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 April 7, 2014, The NASDAQ Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by NASDAQ. 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

NASDAQ proposes changes to remove from the Exchange rules fee provisions with respect to re-transmission of “Third-Party Data” that NASDAQ receives from multiple sources and then re-transmits via multiple channels.

The text of the proposed rule change is available at <http://nasdaq.cchwallstreet.com/>, at Nasdaq’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, Nasdaq 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

below. Nasdaq 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

NASDAQ receives Third-Party Data from multiple national securities exchanges at its Co-Location facility located in Carteret, New Jersey. It then re-transmits that data for a fee to clients located in the Co-Location facility. The fee for such Third-Party Data varies by delivery method (with lower prices for data received via fiber-optic transmission and higher prices for wireless transmission) required bandwidth (lower bandwidth data requirements have lower fees) and our costs (redistribution fees charged by originating party, network costs, etc.). NASDAQ has routinely filed proposed rule changes seeking approval to receive such data and to assess fees for offering it to Co-Location clients; and the Commission has routinely approved or accepted such rule changes since 2008.

NASDAQ believes that Third-Party Data is not a facility of the Exchange within the meaning of the Act, and that previous proposed rule changes with respect to such Third-Party Data were unnecessary under the Act. Congress enacted the Exchange Act to impose federal regulation on stock exchanges, and included in its definition of “exchange” “the market facilities maintained by such exchange.”³ The Exchange Act separately defines “facility,” providing that “[t]he term ‘facility’ when used with respect to an exchange includes [1] its premises, [2] tangible or intangible property whether on the premises or not, [3] 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

³ 15 U.S.C. § 78c(a)(1).

exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and [4] any right of the exchange to the use of any property or service.” *Id.* The Commission has not separately interpreted the definition of “facility.”⁴

Third Party Data does not satisfy any of the four prongs set forth in the statutory definition of “facility.” First, it is not the “premises” of the Nasdaq Exchange. The term “premises” is generally understood to refer to a building, its land, and appurtenances. Second, the Third Party Data is not tangible or intangible property of the Nasdaq Exchange. Indeed, the Exchange has no ownership interest in the Third Party Data at all. Rather, NASDAQ merely redistributes the Third Party Data as one of many vendors of the Third Party Data. Third, the Third Party Data is not used on the Nasdaq Exchange’s premises “for the purpose of effecting or reporting a transaction” on a NASDAQ exchange.⁵ Fourth, NASDAQ, in its capacity as an exchange, does not hold any right to use the Third Party Data other than as a consumer of that data for which it pays all applicable fees.

Market data created by and emanating from NASDAQ’s execution systems is currently considered a facility of the Exchange. Likewise, the NASDAQ execution system and NASDAQ-provided means of access to the execution system are facilities of the Exchange, providing the Commission’s basis for requiring proposed rule changes regarding the NASDAQ Co-Location facility. Additionally, NASDAQ would agree that Third-Party Data is currently considered a facility of the national securities exchange that produces it (i.e., data produced by the BATS Exchange is a facility of BATS and data produced by Direct Edge is a facility of

⁴ Securities Exchange Act Release No. 26708, at 4 n.28 (1989) (recognizing that the definition of the term “facility” has not changed since it was originally adopted and that no hearing testimony referred to it because “the Committee felt that the definition was ‘self-explanatory’”) (citation omitted).

⁵ 15 U.S.C. § 78c(a)(2).

Direct Edge). Conversely, NASDAQ-produced data would not become a facility of another exchange that chooses to redistribute NASDAQ data (which is currently the case).

There is no Commission precedent for considering a facility of one exchange to be a facility of an unrelated exchange. For example, when NASDAQ separated from NASD, the Commission was asked to determine whether TRF LLC, which would operate NASD's Trade Reporting Facility, was a facility of NASD or the Nasdaq Exchange, which together owned TRF LLC.⁶ The Nasdaq Exchange was to be "primarily responsible for the management of the TRF LLC's business affairs," and all "profits and losses from the TRF LLC [were] allocated to NASDAQ." *Id.* at 15; *see also id.* at 18 ("[T]he Nasdaq Exchange's parent company controls the board of the TRF LLC, directs all business decisions, provides technology, and will reap the economic benefits of the TRF LLC."). Nevertheless, the Commission concluded that the TRF LLC was a facility of *NASD*, not the Nasdaq Exchange, because the "Trade Reporting Facility is not a service 'for the purpose of effecting or reporting a transaction' on the Nasdaq Exchange." *Id.* at 18. The TRF LLC was instead "a service for the purpose of reporting transactions to the NASD." *Id.*

Similarly, the Commission concluded that the ACES System, "a neutral communications service that allows NASDAQ members and non-members to route orders to one another," is not a facility of the NASDAQ Exchange.⁷ The Commission deemed it significant that the ACES System does not route orders to NASDAQ and does not report executed trades on the Exchange. *Id.* The Commission emphasized that, because the ACES System is "not linked to the Exchange's core systems, including the NASDAQ Market Center," it "is not possible for an order to be routed to the NASDAQ Market Center via the ACES system." *Id.* Accordingly, the

⁶ Securities Exchange Act Release No. 54084 (June 30, 2006).

⁷ Securities Exchange Act Release No. 56237 (August 9, 2007).

Commission concluded that ACES does not have “the purpose of effecting or reporting a transaction on an exchange” within the meaning of the Exchange Act. *Id.* The Commission has also permitted NASDAQ to remove from its rule book fees related to the Mutual Fund Quotation Service and the NASDAQ Index Dissemination Service, both of which disseminated market data not properly considered “facilities” of NASDAQ within the meaning of the Exchange Act.⁸

Given the plain language of the Exchange Act and the above-referenced precedents, there is no basis in the Act for determining that a market data facility of one exchange is converted into a facility of a different exchange that receives and redistributes it. Rather, the act of one exchange making available the data from a different, third-party exchange is better viewed as a market data vendor function. This is true for multiple reasons. First, the receiving exchange, in this case NASDAQ, is not an exclusive processor of such data, unlike the data that NASDAQ produces. Second, Third-Party Data does not provide access or order entry capability to NASDAQ’s execution system; nor does it carry information from or about executions within the NASDAQ execution system. Third, NASDAQ receives Third-Party Data via an arms-length agreement and it has no inherent advantage over any other recipient of such data, unlike NASDAQ data. Moreover, Third-Party Data is available via multiple sources both inside and out of the NASDAQ Co-Location facility. It is a completely voluntary product in that NASDAQ makes it available on a voluntary basis, and NASDAQ’s Co-Location clients purchase it from NASDAQ (or another vendor) only if they voluntarily choose to do so.

For all of these reasons, NASDAQ believes that its Third-Party Data service is not a facility of a national securities exchange within the meaning of the Act and that it is not required under

⁸ See Securities Exchange Act Release No. 58392 (August 20, 2008) (removing MFQS from rule book); Securities Exchange Act Release No. 58897 (November 3, 2008) (removing NIDS from rule book).

Section 19(b)(1) of the Act⁹ and Rule 19b-4 thereunder¹⁰ to file rules regarding the applicable charges.

2. Statutory Basis

Nasdaq believes that the Third Party Data is not a facility of a national securities exchange within the meaning of the Act and the terms of this service are not rules that must be filed with the Commission under Section 19(b)(1) of the Act¹¹ and Rule 19b-4 thereunder.¹² Therefore, removing the applicable provisions from the NASDAQ rule book would be consistent with the provisions of Section 6(b) of the Act.¹³

NASDAQ's proposal to remove Third Party Data from the rule manual is also consistent with the Exchange Act insofar as it will have no impact on NASDAQ's or its members' compliance with Regulation NMS or other applicable regulations and rules. First, NASDAQ has no obligation under the Exchange Act, either as an exchange or a vendor, to offer Third Party Data to NASDAQ members. Having chosen to offer such data and to do so on non-discriminatory terms imposes no continuing obligation to do so. Second, even assuming NASDAQ did have an obligation to make Third Party Data Available, it will continue to do so in the same manner if [sic] does now. Therefore, to the extent NASDAQ members utilize Third Party Data provided by NASDAQ, that use will be uninterrupted. Third, there are multiple vendors of Third Party Data, many of whom are not subject to Commission oversight. Some of these prominent competitors are TMX Atrium, NYSE / SFTI, Interactive Data, BT Radianz as

⁹ 15 U.S.C. 78s(b)(1).

¹⁰ 17 CFR 240.19b-4.

¹¹ 15 U.S.C. 78s(b)(1).

¹² 17 CFR 240.19b-4.

¹³ 15 U.S.C. 78f(b).

well as many others. Members attempting to comply with Regulation NMS have many alternatives for obtaining Third Party Data, including NASDAQ.

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

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, NASDAQ believes that this proposed rule change removing from the NASDAQ rule manual a service improperly included, promotes competition by removing an impediment to NASDAQ's competition with unregulated market data providers with which NASDAQ competes for these services. Removing barriers to competition has the potential to promote innovation, reduce prices, and increase efficiency.

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

Written comments were neither solicited nor received.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days of such date (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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-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. Copies of the filing also will be available for inspection and copying at the

principal office of Nasdaq. 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-NASDAQ-2014-034 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.¹⁴

Kevin M. O'Neill
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).