

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77239; File No. SR-NASDAQ-2016-027)

February 25, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Nasdaq Rule 7018

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4² thereunder, notice is hereby given that, on February 22, 2016, 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

Nasdaq is proposing changes to amend Nasdaq Rule 7018(a), governing fees and credits assessed for execution and routing of securities.

The text of the proposed rule change is available at nasdaq.cchwallstreet.com, at Nasdaq’s principal office, 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, 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 those 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 parts 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 Nasdaq Rule 7018(a), governing fees and credits assessed for execution and routing of securities listed on Nasdaq,³ listed on the New York Stock Exchange ("NYSE")⁴ and listed on exchanges other than Nasdaq and NYSE⁵ (collectively, the "Tapes").

Specifically, the purpose of the proposed rule change is to indicate that Nasdaq will not charge a fee for the use of its recently approved routing option, the Retail Order Process ("RTFY"),⁶ regardless of where the execution occurs.⁷ The RTFY order routing option is

³ Nasdaq Rule 7018(a)(1).

⁴ Nasdaq Rule 7018(a)(2).

⁵ Nasdaq Rule 7018(a)(3).

⁶ See Securities Exchange Act Release No. 76335 (Nov. 3, 2015), 80 FR 69256 (Nov. 9, 2015) (SR-NASDAQ-2015-112).

⁷ The Exchange proposed RTFY because retail order firms often send non-marketable order flow (i.e., orders that are not executable against the best prices available in the market place based on their limit price) to post and display on exchanges. Some of the orders that have been deemed to be non-marketable by the entering firm become marketable by the time the exchange receives them and ultimately remove liquidity from the exchange order book.

designed to enhance execution quality and benefit retail investors by providing price improvement opportunities to retail order flow.

Members entering RTFY orders, regardless of where the orders execute will not incur a fee if they use this optional routing strategy. Currently, unless the member is eligible for a lower charge to enter orders that execute in the Nasdaq Market Center (“remove liquidity fee” or “remove rate”),⁸ all routing strategies that execute on Nasdaq are charged \$0.0030 per share executed. Therefore, the proposed \$0.0000 per share executed for orders electing to use RTFY is a reduction from the standard remove rate of \$0.0030 per share executed that orders with routing instructions currently face.

The Exchange does not expect an order using RTFY to execute on the Exchange, but Nasdaq will cover this atypical scenario by specifically stating that no fee will be assessed if the order ultimately executes on the Exchange. Currently, if an order removes liquidity from the Exchange, unless specifically exempted in a Nasdaq rule, the standard remove rate applies. In sum, this proposed rule change reduces the remove rate from \$0.0030 to \$0.0000 per share executed for orders electing to use RTFY and establishes routing fees for RFTY as \$0.0000 per share executed.

Members using TFTY, in contrast to RTFY, which is a comparable routing strategy, incurs [sic] fees for routing. Members using TFTY are assessed a charge of \$0.0030 per share executed for orders that execute at NASDAQ OMX PSX and are assessed a charge of \$0.0007 per share executed for orders that execute on venues other than BX or NASDAQ OMX PSX. Orders using TFTY on the Exchange also incur remove liquidity fees. In the case of RTFY, the Exchange intends to provide the RFTY routing option at no charge as an incentive for members

⁸ See Nasdaq Rule 7014(d).

to use this new routing strategy. No member that uses this new routing strategy to seek price improvement opportunities for the retail orders that it routes will incur a routing fee. A member that elects not to use this new routing strategy will be assessed the routing fee applicable to the strategy it selected and will be charged the remove rate the member otherwise qualifies for on Nasdaq

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ 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 its facilities which the Exchange operates or controls, 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 SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹¹ Likewise, in NetCoalition v. Securities and

⁹ 15 U.S.C. § 78f(b).

¹⁰ 15 U.S.C. § 78f(b)(4) and (5).

¹¹ Securities Exchange Act Release No. 34-51808 (June 9, 2005) (“Regulation NMS Adopting Release”).

Exchange Commission¹² (“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.¹³ 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.”¹⁴

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’”¹⁵

Nasdaq believes that the proposed rule change to Nasdaq Rule 7018(a)(1), (2) and (3) is reasonable because it is an incentive for members to select RTFY and a price reduction versus other order types, routing strategies and services offered by the Exchange and other away venues. Additionally, the new fees of \$0.0000 per share executed will apply equally to all members entering RTFY orders that execute in the Nasdaq Market Center, as well as in a venue other than the Nasdaq Market Center. A member that elects not to use this new routing strategy will be assessed charges the member otherwise qualifies for, often \$0.0030 per share executed

¹² NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹³ Id. at 534-535.

¹⁴ Id. at 537.

¹⁵ Id. at 539 (quoting ArcaBook Order, 73 FR at 74782-74783).

when executing on Nasdaq and ranging from a rebate to a fee when routing to venues other than Nasdaq.

The new fees are being proposed in connection with the recently approved RTFY order routing option under Nasdaq Rule 4758(a)(1)(A)(v) for Designated Retail Orders (“DROs”).¹⁶ If a DRO electing the RTFY routing option is not marketable, it will rest on the Exchange book and other Nasdaq members will have the opportunity to interact with the order at its limit price.¹⁷ The RTFY order routing option is designed to enhance execution quality and benefit retail investors by providing price improvement opportunities to retail order flows. The Exchange believes that this new Exchange functionality will enhance coordination and cooperation with market participants and produce a more efficient market because the Exchange believes more retail investor orders will be sent to the Exchange to add liquidity or to obtain price improvement. Increasing retail activity on the Exchange, in turn, benefits all participants through more robust price discover opportunities on Nasdaq.

The lower cost (\$0.0000 per share executed) of this routing strategy as compared with other existing routing strategies is reasonable because of the lower costs that Nasdaq is charged by the venues to which the RTFY orders are routed. For the majority of orders routed, Nasdaq believes it will not be charged a fee for the orders that become marketable and route to other market centers using this routing strategy.

Equally important, the \$0.0000 per share executed is a fee reduction versus an assessed a charge of \$0.0030 per share executed for a member who elects not to use this new routing strategy, as well as a fee reduction versus other choices currently available on Nasdaq. The Exchange believes that the lower cost of this routing strategy is reasonable since it is designed to

¹⁶ Supra note 6.

¹⁷ Supra note 7.

act as an incentive to encourage members to try this new routing strategy. Members have a wide range of options of where to send their orders and the proposed pricing is influenced by these factors. While Nasdaq believes that this new functionality is novel and desired by market participants, Nasdaq equally believes that the proposed rate of \$0.0000 per share executed is the appropriate incentive to encourage market participants to use this innovative order routing strategy in lieu of other choices in the market place. The practice of exchanges offering lower rates for new services or those geared toward investors or customers is not novel. For example, there are a variety of programs that exist today that offer incentives and execution opportunities for retail orders, as long as they use specific programs or functionality.

One such program is the retail price improvement (“RPI”) programs that exist on the New York Stock Exchange LLC, NYSE ARCA, Inc., BATS Y-Exchange, Inc., and NASDAQ OMX BX, Inc. (“BX”). For example, on BX a retail order in the RPI program receives higher rebates than an otherwise situated order because of its use of the program’s specific order types. Similar to how members currently take advantage of other price reductions, discounts or rebates via volume discounts and tiers, members may elect to use the RTFY routing strategy to receive a reduced fee, just as members may use RPI programs and various order types to receive enhanced rebates or reduced fees. Further, Chicago Board Options Exchange, Incorporated (“CBOE”) and NASDAQ PHLX LLC (“Phlx”) all offer incentive programs designed to attract customer orders.¹⁸ While not identical to the CBOE and Phlx programs, the proposed rate is an incentive designed to attract member’s that act as agent for retail orders to choose RTFY over all other alternatives in the market place in the same manner as the CBOE and Phlx supplemental rebates encourage members that rout customer order flow to choose their respective exchanges for

¹⁸ See CBOE Fee Schedule, Volume Incentive Program; see also Section B of the Phlx Pricing Schedule, Customer Rebate Program.

execution. The Exchange believes that offering lower fees, even if for a new routing strategy, is consistent with the Exchange Act.

The Exchange also believes that the proposed rule change is an equitable allocation and is not unfairly discriminatory because the new fees will be applied uniformly across all members that are willing to use Nasdaq's routing services and opt to use the RTFY routing strategy.¹⁹ All members sending DROs may elect to use the RTFY routing strategy when sending orders. Moreover, assessing different rates when a member elects to use a routing strategy but executes on the venue where the order was originally entered is not novel. BX provided a higher rebate to remove liquidity for members if they elected to use specific routing strategies (the "BX filing").²⁰ In the BX filing, a member using the BDRK or BCST routing strategy was able to receive a \$0.0014 rebate for removing liquidity in the BX Equities System rather than the standard \$0.0004 rebate for removing liquidity on the BX Equities System. Thus, the same order (apart from the routing strategy used) was eligible for a different rebate when removing liquidity on BX solely because of its routing strategy. This is similar to the proposed \$0.0000 fee for RTFY orders that execute on the Nasdaq Market Center in that the member receives a different rate for an otherwise similar order, but by using a specific routing strategy.

Additionally, the proposed rule change also is not unfairly discriminatory because all members sending DROs to Nasdaq for execution are eligible to use RTFY. Each member may elect to use the RTFY routing strategy as they see fit.

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

¹⁹ See Securities Exchange Act Release No. 66763 (April 6, 2012), 77 FR 22008 (April 12, 2012) (SR-EDGA-2012-13) (an example of another exchange using a proposed rate of \$0.0000 per share executed that is an equitable allocation of reasonable dues, fees, and other charges).

²⁰ See Securities Exchange Act Release No. 69053 (March 7, 2013), 78 FR 15999 (March 13, 2013) (SR-BX-2013-019).

The proposed rule change will not result in a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.²¹ 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 credit opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and credits to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges.

Because competitors are free to modify their own fees and credits 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 new fees applicable across the Tapes apply to member firms entering RTFY orders that execute in the Nasdaq Market Center, as well as in a venue other than the Nasdaq Market Center (although the proposed new fees are \$0.0000 per share executed) do not impose a burden on competition because the Exchange's execution services are voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. The Exchange believes that the competition among exchanges and other venues will help to drive price improvement and overall execution quality higher for end retail investors.

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

²¹ 15 U.S.C. § 78f(b)(8).

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

Written comments were neither solicited nor received.

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

The foregoing change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act²². 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 necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-2016-027 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.

²² 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to File Number SR-NASDAQ-2016-027. 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; 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-2016-027 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.²³

Robert W. Errett
Deputy Secretary

²³ 17 CFR 200.30-3(a)(12).