

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77392; File No. SR-NASDAQ-2016-036)

March 17, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Include U.S. Non-Display Policies in the Nasdaq Rule Book

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 March 4, 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

The Exchange proposes to include U.S. non-display policies in the Nasdaq rule book under Nasdaq Rule 7023.

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.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Nasdaq Rule 7023 (NASDAQ Depth-of-Book Data) by adding IM-7023-1. Nasdaq Rule 7023(a)(2)(B) defines “Non-Display Usage” as any method of accessing depth-of-book³ “data that involves access or use by a machine or automated device without access or use of a display by a natural person or persons.” IM-7023-1 will incorporate guidance regarding U.S. non-display policies into the Nasdaq rule book to provide additional detail with regard to specific data usages and thereby ensure greater transparency. The inclusion of these policies into the Nasdaq rule book will lessen ambiguity in this area without necessitating any changes by market participants. The Exchange has been working with both the industry and customers to ensure that they understand these policies.

Specifically, IM-7023-1 will, in large part, include guidance regarding: (i) devices (or servers) used in the transportation, dissemination or aggregation of data and ways to count such devices; (ii) examples and details of what constitutes fee-liable Non-Display Usage; (iii) examples and details of what Non-Display Usage does not include; and (iv) examples of how to report Non-Display Usage.

IM-7023-1 will apply most specifically to distributors⁴ who access Nasdaq U.S information and use it in a non-display manner. IM-7023-1 will also provide guidance in the

³ See Nasdaq Rule 7023(a)(1), which states that “Depth-of-Book” refers to data feeds containing price quotations at more than one price level. These Nasdaq data feeds include Nasdaq Level 2, Nasdaq OpenView, and Nasdaq TotalView.

⁴ See Nasdaq Rule 7023(a)(4).

form of examples of use cases and details on how the Nasdaq U.S. non-display policies should be applied and reported.

The Exchange believes that it will be beneficial to both distributors specifically and to market participants more generally to incorporate these policies into the Nasdaq rule book through the addition of IM-7023-1, as well as adding IM-7026-1, IM-7037-1, IM-7039-1, IM-7047-1, and IM-7057-1 (collectively, the “IMs”) that will be added following each of their respective rules and each refers back to IM-7023-1.

The result will be to provide distributors additional clarity through increased transparency into U.S. non-display policies, including reporting requirements pertaining to non-display usage. The presentation of this guidance in a more transparent manner will, in turn, provide distributors with greater precision in making fee-liable Non-Display Usage determinations.

These policies are a result of the Exchange working with the industry, as well as soliciting feedback from customers. Technology changes that create any new use cases will result in a separate Nasdaq filing. These U.S. non-display policies already are publicly available and can be found at https://www.nasdaqtrader.com/Trader.aspx?id=GDP_Ops , but their inclusion into the Exchange’s rule book provides an additional way for market participants to easily find and review such policies.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act⁵ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act⁶ 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 or system which the Exchange operates

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4) and (5).

or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, and is consistent with the Section 6(b)(5)⁷ requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and practices, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest.

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.”⁸ Likewise, in NetCoalition v. Securities and Exchange Commission⁹ (“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.¹⁰ 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

⁷ 15 U.S.C. 78f(b)(5).

⁸ Securities Exchange Act Release No. 51808 at 37499 (June 9, 2005) (“Regulation NMS Adopting Release”).

⁹ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹⁰ See NetCoalition, at 534.

and at what cost.”¹¹

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’”¹² 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 proposed rule change to add IM-7023-1 and the other IMs to the rule book will, in large part, include guidance regarding: (i) devices (or servers) used in the transportation, dissemination or aggregation of data and ways to count such devices; (ii) examples and details of what constitutes fee-liable Non-Display Usage; (iii) examples and details of what Non-Display Usage does not include; and (iv) examples of how to report Non-Display Usage.

The Exchange believes that the proposed rule change is reasonable because it does not change any of the current practices or any dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls. Rather, it adds transparency for market participants and provides for the equitable treatment for distributors through making all such U.S. non-display policies easily available and accessible to all distributors on an equal basis.

¹¹ Id. at 537.

¹² Id. at 539 (quoting ArcaBook Order, 73 FR at 74782-74783).

In sum, the Exchange believes that the proposed rule change will provide transparency, clarity, and eliminate potential confusion that may exist for distributors and market participants regarding Non-Display Usage and, thereby, will promote just and equitable principles of trade.

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

The Exchange does not believe that the proposed rule change will impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change will provide market participants guidance and greater clarity in making fee-liable Non-Display Usage determinations and, as a result, will serve to enhance competition.

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 change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act¹³. 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:

¹³ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2016-036 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2016-036. 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-2016-036, 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

Robert W. Errett
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).