

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-79701; File No. SR-NASDAQ-2016-175)

December 29, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 7022(d)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 15, 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7022(d) to increase the monthly fee for Nasdaq’s Daily List and Fundamental Data report from \$1,500 to \$1,750.

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

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 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 purpose of the proposed rule change is to amend Rule 7022(d) to increase the monthly fee for Nasdaq's Daily List and Fundamental Data report from \$1,500 to \$1,750. The Daily List provides important corporate action data – including new listings, delistings, symbol and name changes, and dividends – for the Nasdaq Stock Market and the Mutual Fund Quotation Service (“MFQS”) to the trading and market data community. Specifically, the Daily List is comprised of the following four data sets:

- Nasdaq Equity Data: Provides advance notification of new listings, delistings, corporate name changes, trading symbol changes, market tier changes, and Financial Status Indicator changes that occur on all tiers of the Nasdaq Stock Market.
- Mutual Fund Data: Provides advance notification of new listings, delistings, corporate name changes and fund identifier changes for mutual funds, money market funds and unit investment trusts that report via MFQS.
- Dividends: Provides advance notification of cash dividends, stock dividends, and stock splits for Nasdaq securities.
- Next Day Ex-Date: Summarizes the securities with dividend adjustments to be applied to the previous closing price on the next business day.

In addition, Nasdaq recently enhanced the Daily List by adding (i) a tick pilot indicator that provides information about the status of each security under the Tick Size Pilot Program<sup>3</sup> and (ii) a flag to identify securities that are exchange-traded funds (“ETFs”) and exchange-traded managed funds (“ETMFs”).

Daily List files are available via secured website or secured file transfer protocol server and are posted and updated intraday. The Daily List also includes access to historical Daily List data dating back to either 1998 or 1999 (depending on the information).

The Fundamental Data report provides a summary file of the prior day’s trading activity for all Nasdaq-listed issues. Specifically, the report includes the following elements:

- Security Master Information: Issue Name, Issue Symbol, Issue Type, Issue Class, Listing Market Tier, Total Shares Outstanding, Public Float and Nasdaq Index Membership.
- Consolidated Market Statistics: Daily High Price, Daily Low Price, Daily Last Sale Price, Daily Share Volume, 52 Week High Price, 52 Week Low Price, Year-To-Date Volume
- Nasdaq Market Center Statistics: Nasdaq Official Closing Price and Nasdaq Closing Bid/Ask Quotation Prices.

Like the Daily List, Fundamental Data files are available via secured website or secured file transfer protocol server. The information is provided on a T+1 basis.

Current fees for the Daily List and Fundamental Data were established in 2013.<sup>4</sup> Since

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<sup>3</sup> Order Approving the National Market System Plan to Implement a Tick Size Pilot Program by BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc., as Modified by the Commission, For a Two-Year Period, Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27514 (May 13, 2015) (File No. 4-657).

<sup>4</sup> Securities Exchange Act Release No. 68636 (January 11, 2013), 78 FR 3940 (January 17, 2013) (SR-NASDAQ-2013-009).

that time, Nasdaq has implemented the enhancements to the Daily List product described above. Additionally, in 2014 Nasdaq introduced several enhancements to the MFQS portion of the Daily List product: a new “test Symbol Flag” field to clearly delineate MFQS test instruments from production instruments; a new “Symbol Reuse Flag” to alert market data vendors that a previously used MFQS symbol is being issued to a new MFQS instrument; and a new “Instrument Registration” field to clearly identify the U.S. regulatory agent responsible for oversight of a given MFQS instrument. Accordingly, to the extent that the proposed price increase exceeds the rate of overall inflation during the preceding four years, Nasdaq believes that it is warranted in light of the increased value of the product to market participants. Moreover, as discussed below, Nasdaq believes that the price of the product is constrained by market forces, such that any increase in the price of the product that was not reasonable in light of the product’s value would be met with a competitive response.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>6</sup> 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

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<sup>5</sup> 15 U.S.C. 78f(b).

<sup>6</sup> 15 U.S.C. 78f(b)(4) and (5).

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.”<sup>7</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>8</sup> (“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.<sup>9</sup> 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.”<sup>10</sup>

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’....”<sup>11</sup>

Nasdaq believes that periodically it must adjust prices to reflect more accurately the value of its products and the investments made to enhance them. Given that the fee for the Daily List and Fundament Data product has not been adjusted for four years, Nasdaq believes that it is an

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<sup>7</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>8</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>9</sup> See NetCoalition, at 534 - 535.

<sup>10</sup> Id. at 537.

<sup>11</sup> 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)).

appropriate time to adjust the fee to more accurately reflect its value, as well as the investments made to enhance it through the addition of additional data to the product.

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 overall fee levels associated with interacting with a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing and data consumption 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 change to the fee for the Daily List and Fundamental Data product does not impose a burden on competition because the product is completely voluntary and is not necessary in order to interact with the Exchange. Thus, if the fee proposed herein is disproportionate to the value provided by this product, it is likely that the Exchange will lose sales. Moreover, to the extent that market participants use the product in order to enhance their participation with the Exchange, an excessive fee may encourage them to route orders to other venues. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

Specifically, market forces constrain fees for the Daily List and Fundamental Data product in three respects. First, fees related to data products that support interaction with an

exchange are constrained by competition among exchanges and other entities attracting order flow. Nasdaq believes that firms make decisions regarding order routing and consumption of proprietary data based on the total cost of interacting with the Exchange, and order flow could be harmed by the supracompetitive pricing of any proprietary data product. Second, prices for the data are constrained by the potential for other exchanges and non-exchange data distributors to create products that replicate the Daily List and Fundamental Data product. Third, competition among Distributors constrains the cost of the data.

#### Competition for Order Flow

Fees related to this product are constrained by competition among exchanges and other entities seeking to attract order flow. Order flow is the “life blood” of exchanges. Broker-dealers currently have numerous alternative venues for their order flow, including self-regulatory organization (“SRO”) markets, internalizing broker-dealers (“BDs”), and various forms of alternative trading systems (“ATs”), including dark pools and electronic communication networks (“ECNs”). Each SRO market competes to produce quotation information and transaction reports, and two FINRA-regulated Trade Reporting Facilities (“TRFs”) compete to attract internalized transaction reports. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs, which may readily reduce costs by directing orders toward the lowest-cost trading venues.

The level of competition and contestability in the market for order flow is demonstrated by the numerous examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading and BATS/Direct Edge. A proliferation of dark pools and other ATs operate profitably with fragmentary shares of consolidated market volume.

For a variety of reasons, competition from new entrants, especially for order execution, has increased dramatically over the last decade.

Each SRO, TRF, ATS, and BD that competes for order flow is permitted to produce proprietary data products. Many currently do or have announced plans to do so, including NYSE, NYSE Amex, NYSE Arca, BATS, and IEX. This is because Regulation NMS deregulated the market for proprietary data. While BDs had previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce proprietary products cooperatively in a manner never before possible. Order routers and market data vendors can facilitate production of proprietary data products for single or multiple BDs. The potential sources of proprietary products are virtually limitless.

The markets for order flow and proprietary data are inextricably linked: a trading platform cannot generate market information unless it receives trade orders. As a result, the competition for order flow constrains the prices that platforms can charge for proprietary data products. Firms make decisions on how much and what types of data to consume based on the total cost of interacting with Nasdaq and other exchanges. Data fees are but one factor in a total platform analysis. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it. A supracompetitive increase in the fees charged for either transactions or proprietary data has the potential to impair revenues from both products. In this manner, the competition for order flow constrains prices for proprietary data products.

#### Substitute Products

The price of the data contained in the Daily List and Fundamental Data product is constrained by the ability of a data vendor to obtain the information necessary to create and sell competing products. Nasdaq does not have unique access to the information that is provided through the product, and market participants do not have an unqualified need for the information



provided. Therefore, the price that Nasdaq can charge for the product is constrained by the ability of market participants to reduce their demand for the product and the ability of competitors to enter the market and profitably undercut any supracompetitive price increase.

#### Competition among Distributors

Distributors provide another form of price discipline for proprietary data products. Distributors are in competition for users, and can simply refuse to purchase any proprietary data product that fails to provide sufficient value for the price. If the price of this product were set above competitive levels, Distributors could determine whether the product was sufficiently attractive to their own customers to warrant incurring the costs associated with purchasing it for distribution. Since distributors are in competition with one another to attract customers, they must continually evaluate their cost base and the value of their product offering to customers to determine whether they allow them to maximize profitability. This competition for customers provides another check on the price for proprietary data products such as the Daily List and Fundamental Data.

In summary, market forces constrain the price of the product through competition for order flow, competition from substitute products, and in the competition among distributors for customers. For these reasons, the Exchange has provided a substantial basis demonstrating that the fee is equitable, fair, reasonable, and not unreasonably discriminatory, and therefore consistent with and in furtherance of the purposes of the Exchange Act.

#### 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 proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>12</sup>

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](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2016-175 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-2016-175. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

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<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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 such 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-2016-175, 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.<sup>13</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).