

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80015; File No. SR-NASDAQ-2017-007)

February 10, 2017

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Data Fees at Rule 7026

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 January 30, 2017, 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 amend the Exchange's data fees at Rule 7026 to raise the monthly Enterprise License fee for distribution of an Enhanced Display Solution from \$30,000 to \$33,500, as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on February 1, 2017.

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.

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, 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 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 raise the monthly Enterprise License fee for distribution of an Enhanced Display Solution from \$30,000 to \$33,500, and to correct a cross reference to Rule 7023.

EDS Enterprise License

An Enhanced Display Solution (“EDS”) provides a display of Nasdaq depth-of-book data—data feeds with price quotations at more than one price level, such as TotalView, OpenView and Level 2—with the capability of connecting to an Application Programming Interface (“API”). The API allows Subscribers to export the depth-of-book data to a display application of their choosing, provided that the Distributor controls access to the application, monitors its use, and prevents redistribution of the data, either externally or internally.

The Enterprise License fee allows Distributors to purchase an EDS for professional subscribers at a fixed monthly per-subscriber rate. The current fee of \$30,000 per month permits the distribution of Nasdaq depth-of-book data to an unlimited number of professional subscribers at a monthly per-subscriber rate of \$70 for TotalView and Level 2, and a monthly per-subscriber

rate of \$6 for OpenView. The monthly per-subscriber fees for Distributors that elect not to purchase an EDS Enterprise License fee are \$74 for TotalView and Level 2 and \$6 for OpenView, as provided in Rule 7026(a)(1)(B). All Distributors who purchase an EDS, whether or not an Enterprise License is purchased, must pay the distributor fees set forth in Rule 7026(a)(1)(A). The Enterprise License is designed to provide a lower fee to the largest Distributors of depth-of-book data to encourage distribution of such data.

Proposed Changes

The Exchange proposes to raise the monthly EDS Enterprise License fee from \$30,000 to \$33,500, and to correct a cross reference to Rule 7023.

EDS Enterprise License

The proposed increase in the monthly EDS Enterprise License fee is reasonable in light of the value of EDS to Distributors and Subscribers, which has increased significantly due to technological advances that have occurred since EDS was introduced in January of 2012, particularly for those Distributors with sufficient volume to purchase an Enterprise License.

The key feature of EDS—the capability of connecting to an API—allows the Subscriber to transfer Nasdaq data to any number of applications. When EDS was first introduced, data was transferred to relatively simple applications, such as spreadsheets. Since 2012, EDS has become more valuable as the use of the API has moved from spreadsheets to complex analytic tools, enhancing the value of EDS to both Subscribers and Distributors.

Distributors that purchase EDS through the Enterprise License are among the greatest beneficiaries of EDS because they have the largest number of Subscribers. They are also in the best position to bear the cost of an increase in the price of EDS because of that larger subscriber base.

In summary, the price increase is justified by the increasing value of EDS to Distributors that purchase an Enterprise License.

Technical Correction

Nasdaq also proposes to correct a cross reference to Rule 7023 (Nasdaq Depth-of-Book Data).

On January 5, 2012, the Exchange filed with the Commission a proposal to amend Rule 7026 to offer an optional tiered fee for enhanced displays.³ At the time of its inception, the EDS fee exemption made reference to the previous iteration of Rule 7023 (then, Nasdaq Total View), which established, under section (a)(1)(C), the Enterprise License fees available to a Distributor. Following the January 2012 rule change, on March 28 of that year, Nasdaq filed with the Commission a proposal to fully amend Rule 7023,⁴ renaming the rule, and providing an expanded description of the Enterprise License fees under section (c) of that rule.

Although the Exchange has changed Rule 7026 since then, it has not yet updated the reference to the Enterprise License fees. The cross reference provided under Rule 7026(a)(1)(A), establishing that Distributors subscribing to certain enterprise depth capped fees will be exempt from paying the EDS Distributor Fee, currently points to a section under Rule 7023 which provides a definition for the TotalView data feed, and not to the Enterprise License fees that would allow a Distributor to be exempt from paying the EDS distributor fee. The Exchange therefore proposes to correct that cross reference to Rule 7023(c) (Enterprise License

³ See Securities Exchange Act Release No. 66165 (January 17, 2012), 77 FR 3313 (January 23, 2012) (SR-NASDAQ-2012-005); see also Securities Exchange Act Release No. 73807 (December 10, 2014), 79 FR 78784 [sic] (December 16, 2014) (SR-NASDAQ-2014-117) (clarifying, among other changes, that the EDS Fee exemption applies to Distributors and not Customers)

⁴ See Securities Exchange Act Release No. 66740 (April 5, 2012), 77 FR 21609 (April 10, 2012) (SR-NASDAQ-2012-042).

Fees), and to modify the language to make the reference clearer, without changing its application.

The EDS Enterprise License—and the entire EDS program—is entirely optional in that Nasdaq is not required to offer it and Distributors are not required to pay for it. Distributors and Subscribers can discontinue its use at any time and for any reason, including an assessment of the fees charged.

The proposed change does not raise the cost of any other Nasdaq product, except to the extent that it increases the total cost of purchasing depth-of-book data for those who obtain such data through an EDS Enterprise License.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁵ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁶ 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 prices and SRO revenues and, also, recognized that current regulation of the market system “has

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4) and (5).

been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁷

Likewise, in NetCoalition v. Securities and Exchange Commission⁸ (“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.⁹ 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.”¹⁰

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’”¹¹

The Exchange believes that the proposal to raise the monthly EDS Enterprise License fee from \$30,000 to \$33,500 is fair and equitable in accordance with Section 6(b)(4) of the Act, and not unreasonably discriminatory in accordance with Section 6(b)(5) of the Act. As described above, the proposed fee increase reflects the increasing value of EDS to Distributors and

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

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

⁹ See NetCoalition, at 534 - 535.

¹⁰ Id. at 537.

¹¹ 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)).

Subscribers, particularly those Distributors with sufficient volume to purchase an Enterprise License. Moreover, Enterprise License fees are constrained by the Exchange's need to compete for order flow, and are subject to competition from other exchanges and among broker-dealers for customers. If Nasdaq is incorrect in its assessment, there is no barrier to block a competitor from entering the market with a substantially similar product.

The Exchange believes that the proposed fee changes are an equitable allocation and not unfairly discriminatory because the Exchange will apply the same fee to all similarly-situated Subscribers.

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 fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees 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 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.

The proposed fee will raise the monthly EDS Enterprise License fee from \$30,000 to \$33,500. The EDS Enterprise License is used to distribute TotalView, Level 2, and OpenView, Nasdaq's depth-of-book products. The question of whether the prices of depth-of-view products

are constrained by competitive forces was examined in 2016 by an Administrative Law Judge in a petition filed by the Securities Industry and Financial Markets Association for a review of certain actions by Self-Regulatory Organizations.¹² After a four-day hearing, the Administrative Law Judge found that “competition plays a significant role in restraining exchange pricing of depth-of-book products”¹³ because “depth-of-book products from different exchanges function as substitutes for each other,”¹⁴ and therefore “the threat of substitution from depth-of-book customers constrains their depth-of-book prices.”¹⁵ As such, Nasdaq’s depth-of-book fees—including those fees for the distribution of TotalView, Level 2 and OpenView—are “constrained by significant competitive forces.”¹⁶ If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. 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.

Market forces specifically constrain the EDS Enterprise License fee in three respects. First, the EDS Enterprise License is one element of the total cost of purchasing depth-of-book data. Firms make purchasing decisions based on the total cost of interacting with the Exchange and, if the price of the EDS Enterprise License were set above competitive levels, competition for order flow would be harmed. Second, Distributors may elect to purchase EDS through per-subscriber fees in lieu of an Enterprise License, or may reduce their purchases of Nasdaq

¹² Sec. Indus. Fin. Mkts. Ass’n (SIFMA), Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (ALJ June 1, 2016).

¹³ Id. at 33.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id. at 43.

proprietary data. Third, the competition among Distributors for Subscribers provides another constraint on the cost of the EDS Enterprise License.

Competition for Order Flow

Depth-of-book data fees are constrained by competition among exchanges and other entities seeking to attract order flow. Order flow is the “life blood” of the exchanges. Broker-dealers currently have numerous alternative venues for their order flow, including self-regulatory organization (“SRO”) markets, as well as 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 transaction reports via trade executions, 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, AT, 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. The cost of EDS is one factor in this total platform analysis. A supracompetitive price for the EDS Enterprise License has the potential to impair competition for order flow, and the need to compete effectively for order flow will constrain its price.

Competition for Distributors

An Enterprise License is one among several methods of purchase available to EDS Distributors. If the price of the EDS Enterprise License were to become too high, Distributors would use another purchase option, such as per-subscriber fees.

The total cost of Nasdaq depth-of-book data relative to other options also functions as an effective constraint. If the total price of depth-of-book data, including the EDS Enterprise License, were to become too high, Distributors would be able to purchase similar data from a competitor such as NYSE or BATS, or curtail their purchases of other Nasdaq products.

The availability of alternative payment methods to purchase EDS, as well as the availability of depth-of-book data from other sources, will act as effective constraints on the price of the EDS Enterprise License.

Competition for Subscribers

Distributors who purchase the EDS Enterprise License are in competition for Subscribers. If the price of the Enterprise License were set above competitive levels, the Distributors that purchase that license would be at a disadvantage relative to their competitors. As such, they may lower costs by paying per-subscriber fees, curtailing their purchases of Nasdaq products, or purchasing depth-of-book data from one of Nasdaq's competitors. The competition among Distributors for Subscribers therefore provides another constraint on the cost of the EDS Enterprise License.

In summary, market forces constrain the price of the EDS Enterprise License through competition for order flow, the availability of other methods of delivery for depth-of-book data, and in the competition among Distributors for Subscribers. 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 rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the

Act.¹⁷

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. Please include File Number SR-NASDAQ-2017-007 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-2017-007. 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

¹⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2017-007, 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.¹⁸

Eduardo A. Aleman
Assistant Secretary

¹⁸ 17 CFR 200.30-3(a)(12).