

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-84317; File No. SR-NASDAQ-2018-075)

September 28, 2018

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rules 7039, 7047, 7049, 7055, and 7061 to Update the Definition of the Term FINRA/Nasdaq Trade Reporting Facility

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 September 19, 2018, The Nasdaq Stock Market LLC (“Nasdaq” or “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 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 Rules³ 7039, 7047, 7049, 7055, and 7061 to update the definition of the term “FINRA/Nasdaq Trade Reporting Facility (“TRF”)” for Nasdaq Basic, Nasdaq Last Sale (“NLS”), Nasdaq InterACT, the Short Sale Monitor and the Limit Locator to reflect approval of a second FINRA/Nasdaq TRF in Chicago, as described in further detail below.

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.

³ References to rules are to Nasdaq rules, unless otherwise noted.

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 Exchange proposes to update the definition of the term “FINRA/Nasdaq Trade Reporting Facility (‘TRF’)” for Nasdaq Basic, NLS, Nasdaq InterACT, the Short Sale Monitor and the Limit Locator to reflect approval of a second FINRA/Nasdaq TRF in Chicago.

The Commission has approved a proposed rule change by FINRA to establish a second FINRA/Nasdaq TRF in Chicago as consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.⁴ Consistent with the findings of the Commission, the Exchange proposes to define the term “FINRA/Nasdaq Trade Reporting Facility” in Rules 7039 (NLS and NLS Plus Data Feeds), 7047 (Nasdaq Basic), 7049 (Nasdaq InterACT), 7055 (Short Sale Monitor) and 7061 (Limit Locator) as the “FINRA/Nasdaq Trade Reporting Facility (‘TRF’) Carteret and the FINRA/Nasdaq TRF Chicago.” The Exchange anticipates that the FINRA/Nasdaq TRF Chicago will begin to accept trade reports for Reg NMS securities on September 24, 2018, and the Exchange will begin to distribute such data

⁴ See Securities Exchange Act Release No. 83559 (June 29, 2018), 83 FR 31589 (July 6, 2018) (SR-FINRA-2018-013) (approving the FINRA/Nasdaq TRF Chicago); see also Securities Exchange Act Release No. 83082 (April 20, 2018), 83 FR 18379 (April 26, 2018) (SR-FINRA-2018-013) (proposing the FINRA/Nasdaq TRF Chicago).

in the NLS and NLS Plus Data Feeds, Nasdaq Basic, Nasdaq InterACT, the Short Sale Monitor, and the Limit Locator on that same date. The Exchange expects to retire existing versions of these products, which do not include reports from the FINRA/Nasdaq TRF Chicago, on December 31, 2018.⁵

This is a conforming change to the FINRA filing that will not change any fee or charge by the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁷ in particular, in that it fosters cooperation and coordination with persons engaged in regulating and processing information with respect to securities, facilitates transactions in securities, protects investors and the public interest, and does not unfairly discriminate between customers, issuers, brokers or dealers. As described above, the Exchange proposes to update the definition of the FINRA/Nasdaq TRF for Nasdaq Basic, NLS, Nasdaq InterACT, the Short Sale Monitor and the Limit Locator to reflect approval of a second FINRA/Nasdaq TRF in Chicago. Updating the definition of “FINRA/Nasdaq TRF” to mean “the FINRA/Nasdaq TRF Carteret and the FINRA/Nasdaq TRF

⁵ The new data feeds for NLS, NLS Plus, Nasdaq Basic, the Short Sale Monitor, and the Limit Locator will include coding that identifies the market system that generated the trade report message, which will enable the recipient to distinguish between information from the FINRA/Nasdaq TRF Chicago and the FINRA/Nasdaq TRF Carteret. To utilize that coding, Distributors will be required to make certain technical modifications to their software. Nasdaq is working with Distributors to ensure that all such modifications will be complete before the FINRA/Nasdaq TRF Chicago commences operations, but, as a courtesy to any Distributor that has not made such modifications before such operations commence, Nasdaq will continue to make legacy feeds available until December 31, 2018.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

Chicago” fosters cooperation with persons engaged in regulating and processing securities information, facilitates transactions in securities and protects investors and the public interest by conforming the Exchange’s rule book to FINRA’s, and by reflecting the findings of the Commission that creation of the Chicago facility is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association. The proposal does not unfairly discriminate between customers, issuers, brokers or dealers because all customers, issuers, brokers and dealers will receive the benefit of a Nasdaq rule book that conforms to FINRA’s rule book and decisions by the Commission.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (“SROs”) and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act’s goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.⁸

The Commission was speaking to the question of whether broker-dealers should be subject to a regulatory requirement to purchase data, such as depth-of-book data, that is *in excess of* the data provided through the consolidated tape feeds, and the Commission concluded that the choice should be left to them. Accordingly, Regulation NMS removed unnecessary regulatory

⁸ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“Regulation NMS Adopting Release”).

restrictions on the ability of exchanges to sell their own data, thereby advancing the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

The market data products affected by this proposal are all voluntary products for which market participants can readily find substitutes. Accordingly, Nasdaq is constrained from pricing these products in a manner that would be inequitable or unfairly discriminatory. Moreover, the fees for these products, like all proprietary data fees, are constrained by the Exchange's need to compete for order flow.

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. The proposed change—which will simply define FINRA/Nasdaq TRF as it is used in the context of several market data products to reflect approval of a second FINRA/Nasdaq TRF in Chicago—does not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act, but rather provides both current and potential customers more precise description of the information contained in certain Exchange products without changing any fee or charge by the Exchange.

The market for data products is extremely competitive and firms may freely choose alternative venues and data vendors based on the aggregate fees assessed, the data offered, and the value provided. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to

produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price, and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform, the cost of implementing cybersecurity to protect the data from external threats and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs.

Moreover, the operation of the Exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the

incremental cost of providing that software to an additional user is typically small, or even zero (e.g., if the software can be downloaded over the internet after being purchased).⁹

In Nasdaq's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and each are subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, Nasdaq would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of TRF trade reports without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating,¹⁰ and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

An exchange's broker-dealer customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer will disfavor a particular exchange if the expected revenues from executing trades on the exchange do not exceed net transaction execution costs and the cost of data that the broker-dealer chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it. Moreover, as a broker-dealer chooses to direct fewer orders to a particular exchange, the value of the product

⁹ See William J. Baumol and Daniel G. Swanson, "The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power," Antitrust Law Journal, Vol. 70, No. 3 (2003).

¹⁰ It should be noted that the costs of operating the FINRA/Nasdaq TRF borne by Nasdaq include regulatory charges paid by Nasdaq to FINRA.

to that broker-dealer decreases, for two reasons. First, the product will contain less information, because executions of the broker-dealer's trading activity will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that broker-dealer because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the broker-dealer is directing more orders will become correspondingly more valuable.

Similarly, vendors provide price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail broker-dealers offer their retail customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. Exchanges, TRFs, and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, Nasdaq believes that market data products can enhance order flow to Nasdaq by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market by investors with access to the internet or television. Conversely, the value of such products to Distributors and investors decreases if order flow falls, because the products contain less content.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. Nasdaq pays rebates to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an “excessive” price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.¹¹

Moreover, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including SRO markets, internalizing broker-dealers and various forms of alternative trading systems (“ATs”), including dark pools

¹¹ Cf. Ohio v. American Express, No. 16-1454 (S. Ct. June 25, 2018), https://www.supremecourt.gov/opinions/17pdf/16-1454_5h26.pdf (recognizing the need to analyze both sides of a two-sided platform market in order to determine its competitiveness).

and electronic communication networks (“ECNs”). Each SRO market competes to produce transaction reports via trade executions, and the FINRA-regulated TRFs compete to attract internalized transaction reports. It is common for broker-dealers to further exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, broker-dealers, and ATSS that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and broker-dealer is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including Nasdaq, NYSE, NYSE American, NYSE Arca, IEX, and BATS/Direct Edge.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹² and Rule 19b-4(f)(6) thereunder.¹³

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act¹⁴ normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)¹⁵ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative upon filing. Waiver of the operative delay would allow the Exchange to reflect in its rules that there are now two Nasdaq TRFs to which trades can be reported and would provide customers with more precise information about the data contained within certain Exchange products. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.¹⁶

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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 17 CFR 240.19b-4(f)(6)(iii).

¹⁶ For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-2018-075 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-2018-075. 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.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2018-075, 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.¹⁷

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¹⁷ 17 CFR 200.30-3(a)(12).