

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79456; File No. SR-NASDAQ-2016-162)

December 2, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Transaction Fees at Rule 7047

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 November 21, 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 amend the Exchange's data fees at Rule 7047 to: (i) reduce the enterprise license fee for Nasdaq Basic from \$350,000 to \$100,000 per month for broker-dealers distributing Nasdaq Basic to Non-Professional and Professional Subscribers with whom the broker-dealer has a brokerage relationship; and (ii) eliminate a requirement that broker-dealers purchase other products—specifically, Nasdaq Last Sale and Nasdaq TotalView/OpenView—to qualify for the license. The Exchange also proposes a number of conforming changes: (1) to clarify which Subscribers may receive the data; (2) to limit the use of the data by Professional Subscribers; and (3) to specify that each electronic system used to distribute data under the enterprise license must be separately approved. The proposal is described in further detail below.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

These amendments are effective upon filing.

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 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: (i) reduce the enterprise license fee for Nasdaq Basic from \$350,000 to \$100,000 per month for broker-dealers distributing Nasdaq Basic to Professional and Non-Professional Subscribers with whom the broker-dealer has a brokerage relationship; and (ii) eliminate the requirement that broker-dealers purchase other products—specifically, Nasdaq Last Sale and Nasdaq TotalView/OpenView—to qualify for the license. To clarify how to apply the proposed fee reduction, the Exchange is also proposing language specifying that Subscribers must be natural persons; limiting use of the data by Professional Subscribers to their brokerage relationships with the broker-dealer; and requiring that each electronic system used to distribute data from the enterprise license be separately approved by the Exchange.

Current Nasdaq Basic Enterprise License

Nasdaq Basic provides best bid and offer and last sale information from the Nasdaq Market Center and from the FINRA/Nasdaq Trade Reporting Facility (“FINRA/NASDAQ TRF”). Data is taken from three sources, which may be purchased individually or in combination: (i) Nasdaq Basic for Nasdaq, which contains the best bid and offer on the Nasdaq Market Center and last sale trade reports for Nasdaq and the FINRA/Nasdaq TRF for Nasdaq-listed stocks; (ii) Nasdaq Basic for NYSE, which contains the best bid and offer on the Nasdaq Market Center and last sale trade reports for Nasdaq and the FINRA/Nasdaq TRF for NYSE-listed stocks; and (iii) Nasdaq Basic for NYSE MKT, which contains the best bid and offer on the Nasdaq Market Center and last sale trade reports for Nasdaq and the FINRA/Nasdaq TRF for stocks listed on NYSE MKT and other listing venues whose quotes and trade reports are disseminated on Tape B.

Nasdaq Basic may be purchased through per-subscriber monthly charges, per-query fees, or, for broker-dealers, monthly enterprise licenses. These monthly enterprise licenses are available in two types: an internal license for Professional Subscribers, and a license for Non-Professional and Professional Subscribers with whom the broker-dealer has a brokerage relationship.

The second type of license, for Professional and Non-Professional Subscribers in a brokerage relationship with the broker-dealer, is currently available for \$350,000 per month. To qualify for this license, the broker-dealer must also: (i) distribute Nasdaq Last Sale for Nasdaq or Nasdaq Last Sale for NYSE/NYSE MKT via an internet-based electronic system approved by Nasdaq pursuant to Rule 7039(b)(2)(B), at a level that allows it to qualify for the fee cap provided for in Rule 7039(b); (ii) distribute Nasdaq TotalView or Nasdaq OpenView data under

an enterprise license pursuant to Rule 7023(c)(1); and (iii) pay the Distributor Fee for Nasdaq Basic under paragraph [sic] (c)(1) or for Nasdaq Last Sale under Rule 7039(c). The electronic system used to distribute Nasdaq Basic must be approved by Nasdaq, and the broker-dealer must report the number of Subscribers at least once per calendar year.

Proposed Changes

The Exchange proposes: (i) reducing the enterprise license fee for Nasdaq Basic from \$350,000 to \$100,000 per month for broker-dealers distributing Nasdaq Basic to Non-Professional and Professional Subscribers with whom the broker-dealer has a brokerage relationship; and (ii) eliminating the two requirements that the purchaser distribute Nasdaq Last Sale for Nasdaq or Nasdaq Last Sale for NYSE/NYSE MKT at a level that allows it to qualify for the fee cap provided for in Rule 7039(b), and distribute Nasdaq TotalView or Nasdaq OpenView data under an enterprise license pursuant to Rule 7023(c)(1). The proposed changes will promote the use of Nasdaq Basic by lowering its cost to investors and broadening the scope of its distribution to the investing public.

The Exchange also proposes three conforming changes to clarify how to apply the proposed fee reduction.

First, although the term “Professional Subscribers” is defined elsewhere in the rule to include legal entities that are not natural persons, the enterprise license set forth under Rule 7047(b)(5) may not be used to provide information to any business or other entity that is not a natural person. This is a clarification of current practice.

Second, Professional Subscribers may use the data obtained through this license only in the context of the brokerage relationship between the Professional Subscriber and the broker-dealer, and may not use such data within the scope of any professional engagement or

registration identified in Rule 7047(d)(3)(A). Specifically, a Professional Subscriber may not use that data in his or her capacity as a person who is: (i) registered or qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, or any securities exchange or association; (ii) engaged as an ‘investment adviser’ as that term is defined in Section 201(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.³ Professional Subscribers who use Nasdaq Basic in the course of their professional duties will be charged for such usage as appropriate, based on the service(s) used. This clarifying language does not change current practice.

Third, if more than one electronic system is used to distribute information under this license, each such system must be separately approved by the Exchange. In addition, the approved electronic systems may be used to distribute information to any customer eligible to receive such information under this rule. Prior language limiting distribution to employees of the broker-dealer is deleted. Language is also added to clarify that the broker-dealer must pay for any Nasdaq Last Sale data distributed under Rule 7039(c), if the broker-dealer elects to distribute such data. None of these proposed modifications represent a change from current practice.

The enterprise license fee is entirely optional, in that it applies only to broker-dealers that opt to distribute Nasdaq Basic to Professional and Non-Professional Subscribers as described

³ The phrase “any commodities or futures contract market or association” has been deleted from this summary of Rule 7047(d)(3)(A) as unduly repetitive. Only natural persons may be Subscribers under this rule. A “commodities or futures contract market or association” is not a natural person, and therefore is not eligible to receive information under this rule.

herein.⁴ It does not impact or raise the cost of any other Nasdaq product, and in fact serves to decrease the cost of Nasdaq Basic in instances where a broker-dealer elects to purchase this 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 been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁷

⁴ Nasdaq notes, moreover, that no broker-dealer may provide, in a context in which a trading or order-routing decision can be implemented, a display of any information with respect to quotations for or transactions in an NMS stock without also providing, in an equivalent manner, a consolidated display for such stock. 17 CFR 242.603(c).

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4) and (5).

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

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 proposed fee reduction and the elimination of conditions to qualify for the Nasdaq Basic enterprise license under Rule 7047(b)(5) is reasonable. The proposed changes will benefit the investing public by lowering the cost and increasing the availability of information in the marketplace. Moreover, the fees for Nasdaq Basic, like all proprietary data fees, are constrained by the Exchange’s need to compete for order flow, and are subject to competition from other products and among broker-dealers for customers.

The Exchange believes that the proposed fee reduction is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all similarly situated

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)).

broker-dealers. Moreover, by allocating the fee reduction to broker-dealers that distribute the product widely among customers, the change will assist in promoting a wider distribution of information to the investing public.

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, or rebate opportunities available at other venues to be more favorable. 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 change will: (i) reduce the enterprise license fee for Nasdaq Basic from \$350,000 to \$100,000 per month for broker-dealers distributing Nasdaq Basic to Non-Professional and Professional Subscribers with whom the broker-dealer has a brokerage relationship; and (ii) eliminate the requirement that broker-dealers purchase other products—specifically, Last Sale for Nasdaq or Last Sale for NYSE/NYSE MKT, and TotalView or OpenView—to qualify for the license. This will reduce the cost of Nasdaq Basic to investors, resulting in information becoming more widely available to the investing public.

As illustrated by the proposed fee reduction, market forces constrain fees for Nasdaq Basic. This occurs in three distinct respects. First, all fees related to Nasdaq Basic are constrained by competition among exchanges and other entities attracting order flow. Firms make decisions regarding Nasdaq Basic and other proprietary data based on the total cost of interacting with the Exchange, and order flow would be harmed by the supracompetitive pricing of any proprietary data product. Second, the price of Nasdaq Basic is constrained by the existence of multiple substitutes that are offered, or may be offered, by entities that offer proprietary or non-proprietary data. The proposed price reduction itself provides evidence of the need to maintain low prices in a competitive marketplace. Third, competition among broker-dealers for customers will further constrain the cost of a Nasdaq Basic enterprise license.

Competition for Order Flow

Fees related to Nasdaq Basic 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 thirteen 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, 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 will constrain prices for proprietary data products, including charges relating to Nasdaq Basic.

Substitute Products

The price of data derived from Nasdaq Basic is constrained by the existence of multiple substitutes offered by numerous entities, including both proprietary data offered by other SROs or other entities, and non-proprietary data disseminated by Securities Information Processors (“SIPs”).

The information provided through Nasdaq Basic is a subset of the best bid and offer and last sale data provided by the SIPs. The “core” data disseminated by the SIP consists of best-price quotations and last sale information from all markets in U.S.-listed equities; Nasdaq Basic provides best bid and offer and last sale information for all U.S. exchange-listed stocks based on trade reports from the Nasdaq Market Center and the FINRA/Nasdaq Trade Reporting Facility. Many customers that purchase SIP data do not also purchase Nasdaq Basic because they are closely related products. In cases where customers buy both products, they may shift the extent to which they purchase one or the other based on price changes. The SIP constrains the price of Nasdaq Basic because no purchaser would pay an excessive price for Nasdaq Basic when similar data is also available from the SIP.

Proprietary data sold by other exchanges also constrain the price of Nasdaq Basic. NYSE and BATS, like Nasdaq, sell proprietary non-core data that include best bid and offer and last sale data. Customers do not typically purchase proprietary best bid and offer and last sale data from multiple exchanges. Other proprietary data products constrain the price of Nasdaq Basic because no customer would pay an excessive price for Nasdaq Basic when substitute data is available from other proprietary sources.

Competition among Broker-Dealers for Customers

The enterprise license at issue is sold for use by the customers of a broker-dealer. There is no legal or regulatory requirement that such customers have direct access to data feeds containing best bid and offer or last sale information through Nasdaq Basic. If the price of the enterprise license were to be set above competitive levels, the broker-dealer purchasing that license would be at a competitive disadvantage relative to broker-dealers purchasing an alternative product as well as broker-dealers not purchasing any comparable product at all. As such, the broker-dealer at a competitive disadvantage would either purchase a substitute or forego the product altogether. The competition among broker-dealers for customers thereby provides yet another check on the price for Nasdaq Basic.

In summary, the proposed rule change lowers the cost of Nasdaq Basic and broadens its availability to the investing public. Market forces constrain the Nasdaq Basic enterprise license through competition for order flow, competition from substitute products, and in the competition among broker-dealers 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 rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.¹²

At any time within 60 days of the filing of the proposed rule change, the Commission

¹² 15 U.S.C. 78s(b)(3)(A)(ii).

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-2016-162 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-2016-162. 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 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-2016-162, 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.¹³

Eduardo A. Aleman
Assistant Secretary

¹³ 17 CFR 200.30-3(a)(12).