

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79556; File No. SR-NASDAQ-2016-167)

December 14, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Distributor Fees for ITTO and BONO Data Feeds

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 December 2, 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 Chapter XV of the Options Rules for the Nasdaq Stock Market, entitled “Options Pricing,” at Section 4, which governs Nasdaq Options Market (“NOM”) data distributor fees. Specifically, the Exchange proposes to separate the distributor fees for the ITCH³ to Trade Options (“ITTO”) and Best of Nasdaq Options (“BONO”) data feeds, which are now charged as a single fee, into two separate fees, and conforming language to clarify that there will be no change to the Monthly Non-Display Enterprise License for ITTO and BONO. The proposal is described further below.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ ITCH is a direct data feed interface for NOM.

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 separate the distributor fees for the ITTO and BONO data feeds, which are now charged together as a single fee, into two separate fees.

ITTO and BONO are proprietary data feeds designed to facilitate trading in options markets. ITTO provides in-depth quote and order information, last sale information, and Net Order Imbalance ("NOI") data for NOM. BONO provides top-of-market data for NOM, including best bid and offer and last sale information. The information provided in BONO can be derived from ITTO. Customers typically purchase either ITTO or BONO, but not both.

Nasdaq currently charges a monthly distributor fee of \$1,500 for the internal distribution of either ITTO or BONO or both, and a monthly external distributor fee of \$2,000 for the external distribution of either or both feeds. Nasdaq also offers an enterprise license for BONO and ITTO for a monthly fee of \$10,000.

Proposed Changes

The Exchange proposes to separate the internal and external distributor fees for ITTO and BONO. After the proposed changes take effect, a firm that distributes either ITTO or BONO, but not both, will be charged the current fee. A firm that elects to distribute both ITTO and BONO, however, will be charged a fee for the distribution of ITTO and a separate fee for the distribution of BONO. The proposal will not affect the other fees associated with ITTO and BONO: the monthly external and internal per user fees and the monthly enterprise license fee will remain the same.

The proposed fee change is reasonable and necessary because of the increase in the value of ITTO and BONO to customers resulting from the growth in NOM listings and recent infrastructure upgrades. NOM listings have increased from 663 in June of 2011 to over 2,800 today—over a 300 percent increase—while NOM’s market share has jumped more than 250 percent between July of 2011 and November of 2016, according to data from the Options Clearing Corporation. In addition, in August of 2016, NOM commenced a market-wide technology refresh for several options systems, including ITTO and BONO, to provide a more efficient and robust infrastructure for options trading. The increase in the value of ITTO and BONO to customers generated by the growth in NOM and infrastructure investments, together with Nasdaq’s reasonable objective to recoup costs associated with the growth of NOM and infrastructure investments, justify the proposed price increase.

The impact of the proposed change on firms that use BONO and ITTO will be minimal. Because BONO data is a subset of ITTO, most firms buy either ITTO or BONO, but not both. To the extent that firms use both BONO and ITTO, the higher fee is reasonable in light of the higher demands placed on Nasdaq’s infrastructure by those firms.

The proposed changes do not affect the enterprise license fee for BONO and ITTO. The Nasdaq Options Rules, Chapter XV, Section 4(a), currently present the Monthly Enterprise License (Non-Display) Fee of \$10,000 in the same chart that sets forth the distributor fees for ITTO and BONO. To avoid implying that the enterprise license fee for ITTO and BONO will be separated as well, the Exchange proposes taking the enterprise license fee out of that chart, and placing it in a separate paragraph under Section 4(a).

The new paragraph will not change current fees: the \$10,000 per month enterprise license fee will permit the distribution of BONO and ITTO as provided in Section 4(c), and the fee will be in addition to the monthly distributor fees set forth in Section 4(a). This is consistent with the current rule and practice.

The ITTO and BONO internal and external distributor fees are entirely optional in that they apply only to firms that opt to distribute ITTO and BONO. The proposed changes do not impact or raise the cost of any other Nasdaq product.

2. Statutory Basis

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

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4) and (5).

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.”⁶

Likewise, in NetCoalition v. Securities and Exchange Commission⁷ (“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.⁸ 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.”⁹

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’”¹⁰ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

⁶ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁷ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

⁸ See NetCoalition, at 534 - 535.

⁹ Id. at 537.

¹⁰ 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)).

The Exchange believes that the proposed separation of distributor fees for the ITTO and BONO data feeds 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 change in fees is reasonable and necessary to reflect the growing value of these products to customers and to offset the cost of systems upgrades and greater data demands resulting from growing NOM listings.

The Exchange believes that the proposed changes are reasonable and will benefit the investing public by supporting the distribution of these products and encouraging investment in infrastructure. Moreover, the fees for ITTO and BONO, 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 distributors of ITTO and BONO data for customers.

The Exchange believes that the proposed change in fees is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all similarly-situated distributors.

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 changes establish separate monthly internal and external distributor fees for BONO and ITTO, which are justified by the increasing value of the product and the greater data demands created by growing NOM listings and a technology refresh for the options market. 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.

Specifically, market forces constrain fees for ITTO and BONO in three respects. First, all fees related to ITTO and BONO are constrained by competition among exchanges and other entities attracting order flow. Firms make decisions regarding 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, prices for ITTO and BONO are constrained by the existence of substitutes that are offered, or may be offered, by other entities. Third, competition among options market data distributors will further constrain the cost of ITTO and BONO.

Competition for Order Flow

Fees related to ITTO and BONO are constrained by competition among exchanges and other entities seeking to attract order flow. Order flow is the “life blood” of the exchanges. For a variety of reasons, competition from new entrants, especially for order execution, has increased dramatically over the last decade, as demonstrated by the proliferation of new options exchanges such as ISE Mercury, BATS EDGX, ISE Gemini and MIAX Options within the last four years. Each options exchange is permitted to produce proprietary data products.

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.

Substitute Products

The price of depth-of-book data 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 the Options Price Reporting Authority, LLC (“OPRA”). OPRA is a securities information processor that disseminates last sale reports and quotations, as well as the number of options contracts traded, open interest and end-of-day summaries. As noted above, ITTO provides in-depth quote and order information, last sale information, and NOI data, while BONO provides best bid and offer and last sale information. Many customers that obtain information from OPRA do not also purchase ITTO and BONO, but in cases where customers buy both products, they may shift the extent to which they purchase one or the other based on price changes. OPRA constrains the price of ITTO and BONO because no purchaser would pay an excessive price for these products when similar data is also available from OPRA. It is not necessary that products be identical in order to be reasonable substitutes for each other.

Proprietary data sold by other exchanges also constrain the price of ITTO and BONO. NYSE, BATS and CBOE, like Nasdaq, sell proprietary data for options markets. Other proprietary data products constrain the price of ITTO and BONO because no customer would pay an excessive price for these products when substitute data is available from other proprietary sources.

Competition Among Distributors

Distributors provide another form of price discipline for proprietary data products because they control the primary means of access to users. 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. Nasdaq and other producers of proprietary data products must understand and respond to the needs of distributors to market such products successfully.

In summary, market forces constrain the price of depth-of-book data such as ITTO and BONO through competition for order flow, competition from similar 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 rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.¹¹

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.

¹¹ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2016-167 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-2016-167. 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-2016-167, 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.¹²

Robert W. Errett
Deputy Secretary

¹² 17 CFR 200.30-3(a)(12).