

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-79617; File No. SR-NASDAQ-2016-168)

December 20, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange Data Fees at Rule 7052

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 12, 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 7052 to replace the current \$500 per month fee for both internal and external distribution of short sale data with two separate fees: (1) a \$750 monthly fee for the distribution of short sale data to internal users, and (2) a \$1,250 monthly fee for the distribution of short sale data to external users, as described further below.

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

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

<sup>2</sup> 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 replace the current \$500 per month fee for both internal and external distribution of short sale data with two separate fees: (1) a \$750 monthly fee for the distribution of short sale data to internal users, and (2) a \$1,250 monthly fee for the distribution of short sale data to external users.

Daily and Monthly Short Sale Files

Nasdaq distributes two types of short sale data: (1) Daily Short Sale Volume files, and (2) Monthly Short Sale Transaction files.

The Daily Short Sale Volume files reflect the aggregate number of shares executed on the Nasdaq market during regular trading hours on a daily basis. At the security level, these files show the volume for executed short sales and the total trading volume for the Nasdaq market. The files include data for Nasdaq, NYSE and regional exchange-listed securities.

The Monthly Short Sale Transaction files provide a trade-by-trade record of all short sales executed on the Nasdaq execution system and reported to a consolidated tape in Nasdaq, NYSE and regional exchange-listed securities. The records include the transaction time, price

and number of shares for every short sale transaction. The files are provided on a monthly basis, separated into daily files. Historical files are available from August 2005.

The current fee for internal and external distribution of the Daily Short Sale Volume and Monthly Short Sale Transaction files is \$500 per month.

### Proposed Changes

The Exchange proposes to replace the current \$500 per month fee for both internal and external distribution of short sale data with two separate fees: (1) a \$750 monthly fee for the distribution of short sale data to internal users, and (2) a \$1,250 monthly fee for the distribution of short sale data to external users.

The purpose of the proposed rule change is to create a pricing system that better reflects the value of the product to our customers. External Distributors, unlike Internal Distributors, are typically compensated for the distribution of short sale data through subscription fees or other mechanisms. Some External Distributors incorporate short sale data into their own proprietary products, which they sell to downstream users. These distributors may not charge separately for the Nasdaq short sale data, but nevertheless gain value from the data by incorporating it into their product. The price increase for External Distributors reflects the additional value these distributors gain from the product.

In addition, the value of the short sale data has increased over time for all distributors that have purchased short sale data over a long period of time. Short sale data is frequently used to develop trading models, conduct analyses and assess long-term risks. As time passes, long-term distributors are able to accrue a larger database, rendering the data more valuable. The proposed price increases reflect the growing value of the data over time.

Purchases of the Daily Short Sale Volume and Monthly Short Sale Transaction files are entirely optional. These reports are not necessary to execute trades, but rather are typically used

to develop trading models, conduct analyses and assess long-term risks. This type of activity is entirely at the discretion of the subscriber.

The proposed changes do not impact or raise the cost of any other Nasdaq product. Short sale reports from the Nasdaq BX and PSX Exchanges will continue to be provided free of charge, as they have been since 2010.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>3</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>4</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 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>5</sup>

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<sup>3</sup> 15 U.S.C. 78f(b).

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

<sup>5</sup> 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 Commission<sup>6</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>7</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>8</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>9</sup>

The Exchange believes that the proposal to replace the current fee of \$500 per month for the internal and external distribution of short sale data with a monthly fee of \$750 per month for the distribution of short sale data to internal users, and a monthly fee of \$1,250 for the distribution of short sale data to external users, 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, it is reasonable for external distributors to bear a higher proportion of the cost because they receive greater value from the product, and it is reasonable for Nasdaq to increase a fee for a product that has become more valuable over time. Moreover, short sale data

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<sup>6</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>7</sup> See NetCoalition, at 534 - 535.

<sup>8</sup> Id. at 537.

<sup>9</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)).

fees, 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, such as the short sale data products produced by NYSE and BATS.

The Exchange believes that the proposed change 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. 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 fees replace the current fee of \$500 per month for the internal and external distribution of short sale data with a monthly fee of \$750 per month for distribution to internal users, and a monthly fee of \$1,250 for distribution to external users. 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 Daily Short Sale Volume files and Monthly Short Sale Transaction files in three respects. First, all fees related to short sale data are constrained by competition among exchanges and other entities attracting order flow. Firms make decisions regarding short sale data 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, prices for short sale data are constrained by the sale of short sale data by other exchanges. Third, competition among Distributors will constrain the cost of short sale data.

#### Competition for Order Flow

Fees related to short sale data 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 ATSS 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.

#### Substitute Products

The price of short sale data from Nasdaq is constrained by the availability of short sale data from other exchanges, such as NYSE and BATS. Short sale data is used to support various



analytical tools, and Distributors would not pay an excessive price for such data when similar information is available from other sources.

#### 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 short sale data were set above competitive levels, Distributors purchasing such data would be at a disadvantage relative to their competitors, and would therefore either purchase a substitute or forego the product altogether. This competition for customers provides another check on the price for short sale data.

In summary, market forces constrain the price of short sale data 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 rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>10</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

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<sup>10</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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-2016-168 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-2016-168. 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; 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-2016-168 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>11</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>11</sup> 17 CFR 200.30-3(a)(12).