

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-79863; File No. SR-NASDAQ-2017-004)

January 23, 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 7023

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 January 10, 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 7023 to: (i) increase the monthly Nasdaq Level 2 Non-Professional Subscriber fee ("Level 2 Non-Professional Fee") from \$9 to \$14; and (ii) increase the monthly Nasdaq Level 2 Professional Subscriber fee ("Level 2 Professional Fee") from \$60 to \$70, and to make conforming changes.

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

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

<sup>2</sup> 17 CFR 240.19b-4.

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) increase the monthly Level 2 Non-Professional Fee from \$9 to \$14; and (ii) increase the monthly Level 2 Professional Fee from \$60 to \$70 for any Display Usage, or for Non-Display Usage based upon Indirect Access. The fee increases will set the Level 2 Non-Professional Fee equal to the TotalView fee for Non-Professional Subscribers under Rule 7023(b)(2)(A), and will set the Level 2 Professional Fee equal to the TotalView fee for Professional Subscribers set forth under Rule 7023(b)(2)(B).

The proposed change will equate the price of Level 2 with TotalView in anticipation of retiring Level 2 as a separate product, which will occur on a date to be determined by Nasdaq, based on an analysis of customer demand. Until Level 2 is retired, Nasdaq will continue to support this legacy product in tandem with its full-depth product, TotalView.

Level 2 and Depth-of-Book Data

Nasdaq Level 2 provides best-price orders and quotes from each market participant in the Nasdaq Market Center for Nasdaq-listed securities. It was introduced in 1983 as the Nasdaq Quotation Dissemination Service, and was the first product to provide best-price orders and quotes for Nasdaq market participants. Level 2, like all of Nasdaq's depth-of-book data products, is entirely optional.

As part of Nasdaq's continuing efforts to augment its depth-of-book products, Nasdaq created TotalView, a premier product designed to substantially enhance the amount of data available to the investor. TotalView provides all orders and quotes from all Nasdaq members displayed in the Nasdaq Market Center for Nasdaq-listed securities. This allows the user to view approximately 20 times more information about market liquidity than Level 2, which provides only the best-price orders and quotes for each market participant. In addition to a deeper view of orders and quotes, TotalView also provides other information not available on Level 2, such as the Net Order Imbalance Indicator, which supplies data on the daily auctions that take place at the open and close of the market.

Along with Level 2 and TotalView, Nasdaq also offers OpenView, which provides the depth-of-book information available in TotalView, except that OpenView provides information for securities not listed on Nasdaq. OpenView is typically purchased as an add-on to TotalView or Level 2.

#### Proposed Changes

Nasdaq intends to offer TotalView as its main depth-of-book product. The purpose of the proposed change is to equate the prices of Level 2 and TotalView in anticipation of retiring Level 2. In response to feedback from Distributors, the Exchange will continue to offer Level 2 for those Distributors that require time to transition their systems from Level 2 to TotalView, rather than retire Level 2 abruptly. The price increase will compensate Nasdaq for offering both the Level 2 and TotalView data feeds during this transition period.

Nasdaq anticipates retiring Level 2 for three reasons.

First, demand for Level 2 has fallen over the last two years. Nasdaq incurs a cost to support multiple depth-of-book products, and maintaining such an expenditure is not viable in view of falling demand.

Second, Level 2 has become less viable as a stand-alone product as industry standards have changed. While there was a market for Level 2 when it was first introduced, the market has moved toward either high-level products such as Nasdaq Basic (which offers best bid and offer and last sale information), or full depth-of-book data similar to TotalView. The market niche for intermediate products such as Level 2 is disappearing.

Third, the usefulness of Level 2 will continue to decrease over time as full depth-of-book products continue to add more features, such as the Net Order Imbalance Indicator in TotalView. Nasdaq plans to continue enhancing TotalView with additional features, which will further widen the gap in functionality between TotalView and Level 2.

Level 2 will not be retired immediately. There may be customers who, because of special circumstances, continue to use Level 2 for the time being. Nasdaq will monitor customer demand to identify an appropriate retirement date. Until Level 2 is retired, Nasdaq will continue to support this legacy product in tandem with its full-depth product, TotalView.

Because of the price increase for Level 2, the Exchange proposes three conforming changes to market data rules that reference Level 2.

First, under Rule 7023(c)(1), a Distributor that is also a broker-dealer may pay a monthly fee of \$25,000 for the right to provide Nasdaq TotalView and Nasdaq OpenView for Display Usage for Internal Distribution, or for External Distribution to Non-Professional Subscribers with whom the firm has a brokerage relationship. Payment of this optional enterprise license fee allows the purchaser to obtain TotalView and OpenView at the previous Level 2 rate because,

under Rule 7023(c)(1), the Enterprise License shall not apply to relevant Level 1 and Nasdaq Level 2 fees.<sup>3</sup> In other words, because Distributors receiving TotalView also receive the information contained in Nasdaq Level 2, those Distributors must also pay per-subscriber fees at the same level as the Level 2 fees, in addition to the Enterprise License fee.

Because the proposed language equates Level 2 fees with the price of TotalView, Distributors that purchase the \$25,000 Enterprise License would be required to pay the monthly per-subscriber fees at the new, higher rate, unless the language is adjusted. To maintain the current price structure, the Exchange proposes to delete the reference to Level 1 and Level 2 fees, and replace it with a set fee that reflects the current fee for Level 2. The proposal would require Distributors to pay a monthly fee of \$9 for each Non-Professional Subscriber and a monthly fee of \$60 for each Professional Subscriber for Display Usage based upon Direct or Indirect Access, in addition to the \$25,000 monthly enterprise license. This change preserves the current per-subscriber fees associated with the \$25,000 enterprise license. Deleting the reference to Level 1 has no effect because Level 1 is not a Nasdaq product.

Second, under Rule 7023(c)(2), a Distributor that is also a broker-dealer may pay a monthly fee of \$100,000 for the right to provide Nasdaq TotalView and Nasdaq OpenView for Display Usage for Internal Distribution, or for External Distribution to both Professional and Non-Professional Subscribers with whom the firm has a brokerage relationship. Payment of this optional enterprise license fee allows the purchaser to obtain TotalView and OpenView at the previous Level 2 rate because, under Rule 7023(c)(2), the Enterprise License shall not apply to relevant Level 1 and Nasdaq Level 2 fees.

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<sup>3</sup> The language regarding Level 1 has no effect because Level 1 has never been a product owned by Nasdaq. Level 1 is distributed under the UTP Plan.

As was the case for the \$25,000 Enterprise License under Rule 7023(c)(1), the proposed increase in the price of Level 2 would require Distributors that purchase the \$100,000 Enterprise License to pay the monthly per-subscriber fees at the new, higher rate, unless the language is adjusted. To maintain the prior price structure, the Exchange proposes to delete the reference to Level 1 and Level 2, and replace it with a set fee for Professional and Non-Professional Subscribers. The proposal would require Distributors to pay a monthly fee of \$9 for each Non-Professional Subscriber and a monthly fee of \$60 for each Professional Subscriber for Display Usage based upon Direct or Indirect Access, in addition to the \$100,000 monthly enterprise license. This change preserves the current per-subscriber fees associated with the \$100,000 enterprise license. As previously noted, deleting the reference to Level 1 has no effect because it is not a Nasdaq product.

Third, the Exchange proposes to remove a sentence from Rule 7023(e) that has been rendered meaningless. That rule currently provides a 30-day fee waiver for a trial offer of TotalView, provided that the waiver does not include incremental fees for the Nasdaq Level 2-only service. Because the proposal removes the price differential between Level 2 and TotalView, no incremental fees will exist, and the Exchange therefore proposes deleting that sentence.

The Level 2 Professional and Non-Professional fees are entirely optional, in that they apply only to Subscribers that opt to purchase Level 2. They do not impact or raise the cost of any other Nasdaq product, except for those subscribers who opt to purchase OpenView together with Level 2, for whom the price of the combined product will rise by the same amount as Level 2.

2. Statutory Basis

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

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>7</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>8</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>9</sup>

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

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

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

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

<sup>8</sup> See NetCoalition, at 534 - 535.

<sup>9</sup> Id. at 537.

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>10</sup>

The Exchange believes that the proposals to increase the monthly Level 2 Non-Professional Fee and the Level 2 Professional Fee—which will be implemented in anticipation of retiring Level 2 as a separate product—are reasonable. The Exchange is providing time for Distributors to transition from Level 2 to TotalView feeds, and the price increase compensates Nasdaq for providing both feeds during that transition period. The fees for Level 2, 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. If Nasdaq is incorrect in its assessment of the Level 2 market, there are no barriers to entry for competitors with substantially similar products.

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

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<sup>10</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)).

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 fees will: (i) increase the monthly Level 2 Non-Professional Fee from \$9 to \$14; and (ii) increase the monthly Level 2 Professional Fee from \$60 to \$70. 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 Level 2 in three respects. First, all fees related to Level 2 are constrained by competition among exchanges and other entities attracting order flow. Firms make decisions regarding Level 2 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 Level 2 is constrained by the existence of substitutes that are offered, or may be offered, by entities that offer proprietary data. Third, competition among Distributors for customers will further constrain the cost of Level 2. An example of the impact of market forces on the price of proprietary data is the decrease in the Nasdaq Basic enterprise license fee for broker-dealers distributing such information to

subscribers in the context of a brokerage relationship, which was recently decreased from \$350,000 to \$100,000.

### Competition for Order Flow

Fees related to Level 2 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 (“ATSs”), 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 depth-of-book data is constrained by the existence of competition from other exchanges, such as NYSE and BATS, which sell proprietary depth-of-book data. While a small number of highly sophisticated traders purchase depth-of-book products from multiple exchanges, most customers do not. Because most customers would not pay an excessive price for Level 2 when substitute data is available from other proprietary sources, the Exchange is constrained in its pricing decisions.

### Competition Among Distributors

Competition among Distributors provides another form of price discipline for proprietary data products. If the price of Level 2 were set above competitive levels, Distributors purchasing

Level 2 would be at a disadvantage relative to their competitors, and would therefore either purchase a substitute or forego the product altogether.

In summary, market forces constrain the price of depth-of-book data such as Level 2 through competition for order flow, competition from substitute products, and in the competition among vendors 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>11</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 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:

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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-2017-004 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-2017-004. 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-2017-004 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>12</sup>

Eduardo A. Aleman  
Assistant Secretary

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