

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80891; File No. SR-NASDAQ-2017-054)

June 8, 2017

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Merge the OpenView Depth-of-Book Product into TotalView

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 May 26, 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 merge the OpenView depth-of-book product into TotalView, and to amend the Exchange’s fees at Rules 7023 and 7026 to reflect the merger of these two products, as described further below. The Exchange has designated the proposed amendments to be operative on August 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.

¹ 15 U.S.C. 78s(b)(1).

² 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange’s fees at Rules 7023 and 7026 to merge the OpenView depth-of-book product into TotalView.

TotalView and OpenView

TotalView, the Exchange’s complete depth data feed product for Nasdaq-listed securities, provides every eligible order at every price level for all Nasdaq members, as well as Net Order Imbalance information.³ OpenView—almost universally purchased in conjunction with Nasdaq’s other depth-of-book products, TotalView and Level 2⁴—provides the same information as TotalView for stocks listed on other exchanges.

TotalView and OpenView may be purchased through monthly subscription fees or enterprise license fees. Different fee structures apply if purchasers opt to view TotalView or

³ Net Order Imbalance information provides data relating to buy and sell interest at the open and close of the trading day, in the context of an Initial Public Offering, and after a trading halt.

⁴ See Securities Exchange Act Release No. 79863 (January 23, 2017) 82 FR 8632 (January 27, 2017) (SR-NASDAQ-2017-004) (explaining that Level 2 will be retired as a separate product).

OpenView using an Enhanced Display Solution (“EDS”) or utilize the data in a non-display fashion using a Managed Data Solution (“MDS”). The current fees associated with TotalView and OpenView that will be affected by the proposed changes, set forth in Rules 7023 and 7026, are as follows:

1. Per Subscriber Fees. Monthly Non-Professional per Subscriber fees are \$14 for TotalView,⁵ and \$1 for OpenView.⁶ Monthly Professional Subscriber fees are \$70 for TotalView,⁷ and \$6 for OpenView.⁸

2. Professional Subscriber Fees for Non-Display Usage. The professional Subscriber fees for Non-Display Usage based upon direct access set forth in Rule 7023(b)(4) allow for the purchase of all depth-of-book products, including TotalView, Level 2 and OpenView, for one fee.⁹

3. Enterprise License Fees. The enterprises [sic] license fees set forth in Nasdaq Rules 7023(c)(1) and (c)(2) allow for the purchase of TotalView and OpenView, and the enterprise license fees at 7023(c)(3) allow for the purchase of all three depth-of-book products, including TotalView, Level 2 and OpenView, under the same fee structure.¹⁰

⁵ Nasdaq Rule 7023(b)(2)(A).

⁶ Nasdaq Rule 7023(b)(3)(A).

⁷ Nasdaq Rule 7023(b)(2)(B). Fees are for Display Usage, or for Non-Display Usage based upon indirect access.

⁸ Nasdaq Rule 7023(b)(3)(B). Fees are for Display Usage, or for Non-Display Usage based upon indirect access.

⁹ The Rule 7023(b)(4) fees are based on the number of Subscribers; the fee structure allows a Subscriber to obtain any combination of TotalView, Level 2 and OpenView, or all three products, for the same per Subscriber fee.

¹⁰ The enterprise license fees set forth in Rules 7023(c)(1) and 7023(c)(2) are comprised of two components: an enterprise license fee and per-Subscriber monthly fees. A Distributor may obtain any combination of TotalView, Level 2 and OpenView, or all three products, for the same enterprise license and per-Subscriber monthly fees under

4. Per Subscriber Fees for Enhanced Display Solutions. The monthly fee for Professional Subscribers using EDS under Rule 7026(a)(1)(B) is \$74 for TotalView and Level 2 and \$6 for OpenView. Non-Professional Subscribers of EDS pay the applicable TotalView, Level 2 or OpenView rates.¹¹

5. Enhanced Display Solution Enterprise License. The EDS enterprise license set forth in Rule 7026(a)(1)(C) allows TotalView and Level 2 to be distributed to an unlimited number of Professional Subscribers for \$70, and OpenView for \$6.

6. Managed Data Solutions. Rule 7026(b) sets forth a fee structure for MDS that applies the same fees for the distribution of TotalView, Level 2 and OpenView.

Proposed Changes

The Exchange proposes to amend the fees at Rules 7023 and 7026 to merge OpenView into TotalView. In substance, the Exchange will combine all fees for TotalView and OpenView into a single sum, without increasing the total price of the two products, and make a number of conforming changes to delete specific references to OpenView. The specific fee changes to Rules 7023 and 7026 are as follows:

1. Per Subscriber Fees. Monthly Non-Professional per Subscriber fees will be changed from \$14 for TotalView¹² and \$1 for OpenView¹³ to \$15 for TotalView, which will be redefined in current Rule 7023(a)(1)(C) to include OpenView data. Monthly Professional

Rules 7023(c)(1) and (c)(2). The fee structure set forth in Rule 7023(c)(3) is an enterprise license fee without per-Subscriber monthly fees. A Distributor may obtain any combination of TotalView, Level 2 and OpenView, or all three products, for the enterprise license fee set forth in Rule 7023(c)(3).

¹¹ Nasdaq Rule 7026(a)(1)(B).

¹² Nasdaq Rule 7023(b)(2)(A).

¹³ Nasdaq Rule 7023(b)(3)(A).

Subscriber fees will be changed from \$70 for TotalView¹⁴ and \$6 for OpenView¹⁵ to \$76 for TotalView, which will include OpenView data.

2. Professional Subscriber Fees for Non-Display Usage. There will be no substantive change to the Professional Subscriber fees for Non-Display Usage set forth in Nasdaq Rule 7023(b)(4), which already allows for the purchase of all three depth-of-book products, including OpenView, TotalView and Level 2, under the same fee structure. Explicit references to OpenView will be deleted as a technical, conforming change.

3. Enterprise License Fees. There will be no substantive change to the enterprises [sic] license fees set forth in Nasdaq Rules 7023(c)(1), (c)(2) and (c)(3), which already allow for the purchase of depth-of-book products, including OpenView and TotalView,¹⁶ for the same fee. Explicit references to OpenView will be deleted as a technical, conforming change.

4. Per Subscriber Fees for Enhanced Display Solutions. The monthly fee for Professional Subscribers using EDS will be changed from \$74 for TotalView and Level 2 and \$6 for OpenView¹⁷ to \$80 for TotalView, which will include all OpenView data, and Level 2. Non-Professional Subscribers of EDS will continue to pay at the applicable TotalView or Level 2 rates.¹⁸ Explicit references to OpenView will be deleted as a technical, conforming change.

5. Enhanced Display Solution Enterprise License. The monthly professional subscriber fee for purchasers of an enterprise license with EDS will be changed from \$70 for

¹⁴ Nasdaq Rule 7023(b)(2)(B). Fees are for Display Usage, or for Non-Display Usage based upon indirect access.

¹⁵ Nasdaq Rule 7023(b)(3)(B).

¹⁶ Level 2 data is included under Nasdaq Rule 7023(c)(3).

¹⁷ Nasdaq Rule 7026(a)(1)(B).

¹⁸ Id.

TotalView and Level 2 and \$6 for OpenView¹⁹ to \$76 for TotalView, which will include all OpenView data, and Level 2.

6. Managed Data Solutions. There will be no substantive change to the fee structure for MDS set forth in Rule 7026(b), which already allows for the distribution of all three depth-of-book products, including OpenView, TotalView and Level 2, under the same fee structure. Explicit references to OpenView will be deleted as a technical, conforming change.

In addition to all of these changes, the definition of OpenView will be removed from the current Rule book at Rule 7023(a)(1)(B), and the data provided in OpenView will be added to the definition of TotalView currently in Rule 7023(a)(1)(C), which will be re-designated as Rule 7023(a)(1)(B).

The proposed rule change will lower administrative costs and simplify the purchase of depth-of-book products, with no impact on fees for most customers. Almost all purchasers of depth products already purchase OpenView in conjunction with TotalView or Level 2, and prices will not change for these customers. Most of the limited number of customers purchasing TotalView or OpenView alone are in the process of phasing out the practice, and will not be materially affected by the proposed change.

Depth-of-book customers that purchase TotalView and OpenView together have to manage separate reporting, billing and approvals for two products that they utilize as a single product. The resulting administrative burden applies to four separate categories of fees: (i) Non-Professional per Subscriber fees for TotalView²⁰ and OpenView;²¹ (ii) Professional Subscriber

¹⁹ Nasdaq Rule 7026(a)(1)(C).

²⁰ Nasdaq Rule 7023(b)(2)(A).

²¹ Nasdaq Rule 7023(b)(3)(A).

fees for TotalView²² and OpenView;²³ (iii) monthly fees for Professional and Non-Professional Subscribers using EDS;²⁴ and (iv) monthly subscriber fees for purchasers of an EDS enterprise license.²⁵ The proposed change will lessen the administrative burden on these customers—representing the bulk of depth-of-book purchasers—while leaving fees and product quality unaffected.

Nasdaq has engaged in discussions with Distributors that purchase OpenView without TotalView or Level 2—or TotalView or Level 2 without OpenView—and determined that this practice is being phased out. This practice had its origins before Nasdaq became an Exchange, when Nasdaq did not trade a significant number of securities listed on other exchanges. Now, Nasdaq routinely trades the securities of other exchanges, and the rationale for this practice is obsolete. As such, Nasdaq does not expect merging OpenView into TotalView to have a long-term impact on customers that are already in the process of deciding whether to purchase either both products, or neither, because of fundamental changes in the economic environment. The proposed fee change—which leaves the total cost of OpenView and TotalView unchanged—is unlikely to alter that decision.

No transition time is needed to merge OpenView into TotalView—they are already offered in a compatible formats [sic] and Distributors require no time to modify their systems to accommodate the change.

The proposed fees are optional in that they apply only to firms that elect to purchase these products. The proposed changes do not impact the cost of any other Nasdaq product.

²² Nasdaq Rule 7023(b)(2)(B).

²³ Nasdaq Rule 7023(b)(3)(B).

²⁴ Nasdaq Rule 7026(a)(1)(B).

²⁵ Nasdaq Rule 7026(a)(1)(C).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁶ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²⁷ 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.”²⁸

Likewise, in NetCoalition v. Securities and Exchange Commission²⁹ (“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.³⁰ As the court emphasized, the Commission “intended in Regulation NMS that

²⁶ 15 U.S.C. 78f(b).

²⁷ 15 U.S.C. 78f(b)(4) and (5).

²⁸ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

²⁹ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

³⁰ See NetCoalition, at 534 - 535.

‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”³¹

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’”³²

The Exchange believes that the proposal to integrate Nasdaq TotalView and OpenView into a single depth-of-book product is an equitable allocation of reasonable dues, fees or other charges. Almost all purchasers of Nasdaq depth-of-book products already treat TotalView and OpenView as a single, combined product, and the proposed changes will reduce administrative burden. Customers that do not currently purchase both products are already in the process of deciding whether to purchase either both products, or neither, and the proposed fee change—which leaves the total cost of OpenView and TotalView unchanged—is unlikely to alter that decision. The fees for TotalView and OpenView, 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 these markets, there are no barriers to entry for competitors with substantially similar products.

The Exchange believes that the proposed fee changes are an equitable allocation because the fees appropriately reflect the value of depth-of-market data to customers as well as industry

³¹ Id. at 537.

³² 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)).

practice in which most customers purchase the current versions of TotalView and OpenView concurrently. The proposed fee changes are 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 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 question of whether the prices of depth-of-view products are constrained by competitive forces was examined in 2016 by an Administrative Law Judge in an application for review by the Securities Industry and Financial Markets Association of actions taken by Self-Regulatory Organizations.³³ After a four-day hearing and presentation of substantial evidence, the administrative law judge stated that “competition plays a significant role in restraining exchange pricing of depth-of-book products”³⁴ because “depth-of-book products from different

³³ Securities Industry and Financial Markets Association, Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (A.L.J. June 1, 2016).

³⁴ Id. at 33.

exchanges function as substitutes for each other,”³⁵ and, as such, “the threat of substitution from depth-of-book customers constrains their depth-of-book prices.”³⁶ In addition, the administrative law judge stated that “[s]hifts in order flow and threats of shifting order flow provide a significant competitive force in the pricing of . . . depth-of-book data.”³⁷ As such, Nasdaq’s depth-of-book fees are “constrained by significant competitive forces.”³⁸ As an example of the impact of market forces on the price of proprietary data, the Exchange recently lowered the Nasdaq Basic enterprise license fee for the distribution of certain information by broker-dealers from \$350,000 to \$100,000.³⁹

The proposed changes will integrate Nasdaq TotalView and OpenView into a single depth-of-book product. If the proposed product revisions are unattractive to market participants, it is likely that the Exchange will lose market share.

Market forces constrain fees for TotalView, like all depth-of-book products, in three respects. First, all fees related to TotalView are constrained by competition among exchanges and other entities attracting order flow. Firms make decisions regarding depth-of-book products 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 prices of TotalView are constrained by the existence of substitutes that are offered, or may be

³⁵

Id.

³⁶

Id.

³⁷

Id. at 37.

³⁸

Id. at 43.

³⁹

See Securities Exchange Act Release No. 79456 (December 2, 2016) 81 FR 88716 (December 8, 2016) (SR-NASDAQ-2016-162) (fee decrease for an enterprise license for the distribution of Nasdaq Basic to Non-Professional and Professional Subscribers with whom the broker-dealer has a brokerage relationship).

offered, by entities that offer proprietary data. Third, competition among Distributors for customers will further constrain the cost of TotalView.

Competition for Order Flow

Fees related to TotalView 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, and the BATS exchanges. 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, the BATS exchanges, 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 the BATS exchanges, 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 TotalView 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 to ensure that fees are equitable, fair, reasonable and not unfairly discriminatory. If the price of TotalView were set above competitive levels, Distributors purchasing TotalView 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 TotalView through competition for order flow, competition from substitute products, and in the competition among vendors for customers.

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)(iii) of the Act⁴⁰ and subparagraph (f)(6) of Rule 19b-4 thereunder.⁴¹

⁴⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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. The Exchange has satisfied this requirement.

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:

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-2017-054 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-2017-054. 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-2017-054, 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.⁴²

Robert W. Errett
Deputy Secretary

⁴² 17 CFR 200.30-3(a)(12).