Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 28

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No.* SR - 2016 - * 048

Amendment No. (req. for Amendments *)

Filing by   NASDAQ Stock Market

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * ☑	Amendment * ☐	Withdrawal ☐	Section 19(b)(2) * ☐	Section 19(b)(3)(A) * ☑	Section 19(b)(3)(B) * ☐

Rule

Pilot ☐	Extension of Time Period for Commission Action * ☐	Date Expires *	19b-4(f)(1) ☐ 19b-4(f)(2) ☑ 19b-4(f)(3) ☐	19b-4(f)(4) ☐ 19b-4(f)(5) ☐ 19b-4(f)(6) ☐

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934

Section 806(e)(1) * ☐	Section 806(e)(2) * ☐	Section 3C(b)(2) * ☐

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Proposed rule change to amend Nasdaq Rule 7039.

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Jonathan   Last Name * Cayne

Title *   Senior Associate General Counsel

E-mail *   Jonathan.Cayne@nasdaq.com

Telephone * (301) 978-8493   Fax

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title *)

Date   03/31/2016   Executive Vice President and General Counsel

By   Edward S. Knight

(Name *)

edward.knight@nasdaq.com

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Required fields are shown with yellow backgrounds and asterisks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information *

Add   Remove   View

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

Add   Remove   View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

Add   Remove   View

Exhibit Sent As Paper Document
☐

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

Add   Remove   View

Exhibit Sent As Paper Document
☐

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add   Remove   View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1.   Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act

of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] The NASDAQ Stock Market LLC

("Nasdaq" or the "Exchange") is filing with the Securities and Exchange Commission

("SEC" or "Commission") a proposed rule change to amend Nasdaq Rule 7039

(NASDAQ Last Sale and NASDAQ Last Sale Plus Data Feeds).

The changes are being filed for immediate effectiveness and will become

operative April 1, 2016.

A notice of the proposed rule change for publication in the Federal Register is

attached as Exhibit 1 and the text of the proposed rule change is attached as Exhibit 5.

(b) and (c) Not applicable.

2.   Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange

pursuant to authority delegated by the Board of Directors of the Exchange on July 1,

2015. No other action by the Exchange is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

Jonathan F. Cayne
Senior Associate General Counsel
Nasdaq, Inc.
(301) 978-8493

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[1]   15 U.S.C. 78s(b)(1).

[2]   17 CFR 240.19b-4.

3.   Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

a.   Purpose

The Exchange proposes to amend Nasdaq Rule 7039 (NASDAQ Last Sale and NASDAQ Last Sale Plus Data Feeds). Nasdaq offers two proprietary data feeds containing real-time last sale information for trades executed on Nasdaq or reported to the Nasdaq/FINRA Trade Reporting Facility. These include the "NASDAQ Last Sale for NASDAQ,"[3] which contains all transaction reports for Nasdaq-listed stocks and "NASDAQ Last Sale for NYSE/NYSE MKT,"[4] which contains all such transaction reports for NYSE- and NYSE MKT-listed stocks (collectively, the "Nasdaq Last Sale Data Feeds").

Specifically, Nasdaq proposes to amend Nasdaq Rule 7039(b) to reduce the monthly fee from $50,000 to $41,500 for each distributor of Nasdaq Last Sale Data Feeds. The new lower fee is designed to incentivize distributors to subscribe to the Nasdaq Last Sale Data Feeds. This fee is exclusive of the $1,500 monthly fee that all distributors of a Nasdaq Last Sale Data Feed must also pay and that is set forth under Nasdaq Rule 7039(c).

b.   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

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[3]   See Nasdaq Rule 7039(a)(1).

[4]   See Nasdaq Rule 7039(a)(2).

[5]   15 U.S.C. 78f(b).

[6]   15 U.S.C. 78f(b)(4) and (5).

particular, in that it provides for the equitable allocation of reasonable dues, fees and

other charges among members and issuers and other persons using its facilities which the

Exchange operates or controls, 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]

Likewise, in NetCoalition v. Securities and Exchange Commission[8]

("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]

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[7]   Securities Exchange Act Release No. 34-51808 (June 9, 2005) ("Regulation NMS
       Adopting Release").

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

[9]   Id. at 534-535.

[10]   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'…."[11]

The Exchange believes that amending Nasdaq Rule 7039(b) to reduce the monthly maximum fee from $50,000 to $41,500 for each distributor of Nasdaq Last Sale Data Feeds (exclusive of the $1,500 monthly fee applicable to all distributors of a Nasdaq Last Sale Data Feed under Nasdaq Rule 7039(c)) is reasonable because Nasdaq believes it will incentivize more distributors to subscribe to the Nasdaq Last Sale Data Feeds.

The Exchange also believes that the proposed rule fee change is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the new lower fee uniformly across all distributors of Nasdaq Last Sale Data Feeds.

4.   Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Notwithstanding its determination that the Commission may rely upon competition to establish fair and equitably allocated fees for market data, the NetCoalition court found that the Commission had not, in that case, compiled a record that adequately supported its conclusion that the market for the data at issue in the case

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[11]   Id. at 539 (quoting ArcaBook Order, 73 FR at 74782-74783).

was competitive. Nasdaq believes that a record may readily be established to demonstrate the competitive nature of the market in question.

There is intense competition between trading platforms that provide transaction execution and routing services and proprietary data products. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. Data products are valuable to many end Subscribers only insofar as they provide information that end Subscribers expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs.

Moreover, an exchange's customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer ("BD") will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the BD chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the BD will choose not to buy it. Moreover, as a BD chooses to direct fewer orders to a particular

exchange, the value of the product to that BD decreases, for two reasons. First, the

product will contain less information, because executions of the BD's orders will not be

reflected in it. Second, and perhaps more important, the product will be less valuable to

that BD because it does not provide information about the venue to which it is directing

its orders. Data from the competing venue to which the BD is directing orders will

become correspondingly more valuable.

Thus, an increase in the fees charged for either transactions or data has the

potential to impair revenues from both products. "No one disputes that competition for

order flow is 'fierce'."[12] However, the existence of fierce competition for order flow

implies a high degree of price sensitivity on the part of BDs with order flow, since they

may readily reduce costs by directing orders toward the lowest-cost trading venues. A

BD that shifted its order flow from one platform to another in response to order execution

price differentials would both reduce the value of that platform's market data and reduce

its own need to consume data from the disfavored platform. Similarly, if a platform

increases its market data fees, the change will affect the overall cost of doing business

with the platform, and affected BDs will assess whether they can lower their trading costs

by directing orders elsewhere and thereby lessening the need for the more expensive data.

Analyzing the cost of market data distribution in isolation from the cost of all of

the inputs supporting the creation of market data will inevitably underestimate the cost of

the data. Thus, because it is impossible to create data without a fast, technologically

robust, and well-regulated execution system, system costs and regulatory costs affect the

price of market data. It would be equally misleading, however, to attribute all of the

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12   Id.

exchange's costs to the market data portion of an exchange's joint product. Rather, all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. Nasdaq pays rebates to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an "excessive" price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in

the price of data will ultimately have to be accompanied by a decrease in the cost of

executions, or the volume of both data and executions will fall.

The level of competition and contestability in the market is evident in the

numerous alternative venues that compete for order flow, including eleven SRO markets,

as well as internalizing 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 TRFs compete to attract internalized transaction reports. It is common for BDs

to further and exploit this competition by sending their order flow and transaction reports

to multiple markets, rather than providing them all to a single market. Competitive

markets for order flow, executions, and transaction reports provide pricing discipline for

the inputs of proprietary data products.

The large number of SROs, TRFs, BDs, and ATSs that currently produce

proprietary data or are currently capable of producing it provides further pricing

discipline for proprietary data products. Each SRO, TRF, ATS, and BD is currently

permitted to produce proprietary data products, and many currently do or have announced

plans to do so, including NASDAQ, NYSE, NYSE MKT, NYSE Arca, and BATS/Direct

Edge.

Any ATS or BD can combine with any other ATS, BD, or multiple ATSs or BDs

to produce joint proprietary data products. Additionally, order routers and market data

vendors can facilitate single or multiple BDs' production of proprietary data products.

The potential sources of proprietary products are virtually limitless. Notably, the

potential sources of data include the BDs that submit trade reports to TRFs and that have

the ability to consolidate and distribute their data without the involvement of FINRA or an exchange-operated TRF.

The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and NYSE Arca did before registering as exchanges by publishing proprietary book data on the internet. Second, because a single order or transaction report can appear in a core data product, an SRO proprietary product, and/or a non-SRO proprietary product, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with 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.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While BDs have 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. Multiple market data vendors already have the capability to aggregate data and disseminate it on a

profitable scale, including Bloomberg and Thomson Reuters. In Europe, Cinnober

aggregates and disseminates data from over 40 brokers and multilateral trading

facilities.[13]

In the case of TRFs, the rapid entry of several exchanges into this space in 2006-

2007 following the development and Commission approval of the TRF structure

demonstrates the contestability of this aspect of the market.[14] Given the demand for trade

reporting services that is itself a by-product of the fierce competition for transaction

executions – characterized notably by a proliferation of ATSs and BDs offering

internalization – any supra-competitive increase in the fees associated with trade

reporting or TRF data would shift trade report volumes from one of the existing TRFs to

the other[15] and create incentives for other TRF operators to enter the space.

Alternatively, because BDs reporting to TRFs are themselves free to consolidate the

market data that they report, the market for over-the-counter data itself, separate and

apart from the markets for execution and trade reporting services – is fully contestable.

Moreover, consolidated data provides two additional measures of pricing

discipline for proprietary data products that are a subset of the consolidated data stream.

First, the consolidated data is widely available in real-time at $1 per month for non-

professional users. Second, consolidated data is also available at no cost with a 15- or

20- minute delay. Because consolidated data contains marketwide information, it

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13   See http://www.cinnober.com/boat-trade-reporting.

14   The low cost exit of two TRFs from the market is also evidence of a contestable
        market, because new entrants are reluctant to enter a market where exit may
        involve substantial shut-down costs.

15   It should be noted that the FINRA/NYSE TRF has, in recent weeks, received
        reports for almost 10% of all over-the-counter volume in NMS stocks.

effectively places a cap on the fees assessed for proprietary data (such as last sale data)

that is simply a subset of the consolidated data. The mere availability of low-cost or free

consolidated data provides a powerful form of pricing discipline for proprietary data

products that contain data elements that are a subset of the consolidated data, by

highlighting the optional nature of proprietary products.

In this instance, the Exchange believes that amending Nasdaq Rule 7039(b) to

reduce the monthly maximum fee from $50,000 to $41,500 for each distributor of Nasdaq

Last Sale Data Feeds (exclusive of the $1,500 monthly fee that all distributors of a

Nasdaq Last Sale Data Feed must also pay and that is set forth under Nasdaq Rule

7039(c)) does not impose a burden on competition and may increase competition through

making this a more affordable option for distributors. Accordingly, the Exchange does

not believe that the proposed change will impair the ability of members or competing

order execution venues to maintain their competitive standing in the financial markets.

5.   Self-Regulatory Organization's Statement on Comments on the Proposed Rule
      Change Received from Members, Participants, or Others

      Written comments were neither solicited nor received.

6.   Extension of Time Period for Commission Action

      Not applicable.

7.   Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated
      Effectiveness Pursuant to Section 19(b)(2)

      Pursuant to Section 19(b)(3)(A)(ii) of the Act,[16] the Exchange has designated this

proposal as establishing or changing a due, fee, or other charge imposed by the self-

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[16]   15 U.S.C. 78s(b)(3)(A)(ii).

regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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.

8.   Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9.   Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10.   Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11.   Exhibits

1.   Form of Notice of the Proposed Rule Change for the Federal Register.

5.   Text of Proposed Rule Change

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-   ; File No. SR-NASDAQ-2016-048)

April __, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and
Immediate Effectiveness of Proposed Rule Change to Amend Nasdaq Rule 7039

        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 March 31, 2016, The

NASDAQ Stock Market LLC ("Nasdaq" or the "Exchange") filed with the Securities and

Exchange Commission ("SEC" or "Commission") a 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

        Nasdaq is proposing changes to amend Nasdaq Rule 7039 (NASDAQ Last Sale

and NASDAQ Last Sale Plus Data Feeds).

        The text of the proposed rule change is available at nasdaq.cchwallstreet.com, at

Nasdaq's principal office, 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, Nasdaq included statements concerning the

purpose of, and basis for, the proposed rule change and discussed any comments it

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[1]   15 U.S.C. 78s(b)(1).

[2]   17 CFR 240.19b-4.

received on the proposed rule change. The text of those 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 parts of such statements.

A.   Self-Regulatory Organization's Statement of the Purpose of, and Statutory
        Basis for, the Proposed Rule Change

1.   Purpose

The Exchange proposes to amend Nasdaq Rule 7039 (NASDAQ Last Sale and

NASDAQ Last Sale Plus Data Feeds). Nasdaq offers two proprietary data feeds

containing real-time last sale information for trades executed on Nasdaq or reported to

the Nasdaq/FINRA Trade Reporting Facility. These include the "NASDAQ Last Sale for

NASDAQ,"[3] which contains all transaction reports for Nasdaq-listed stocks and

"NASDAQ Last Sale for NYSE/NYSE MKT,"[4] which contains all such transaction

reports for NYSE- and NYSE MKT-listed stocks (collectively, the "Nasdaq Last Sale

Data Feeds").

Specifically, Nasdaq proposes to amend Nasdaq Rule 7039(b) to reduce the

monthly fee from $50,000 to $41,500 for each distributor of Nasdaq Last Sale Data

Feeds. The new lower fee is designed to incentivize distributors to subscribe to the

Nasdaq Last Sale Data Feeds. This fee is exclusive of the $1,500 monthly fee that all

distributors of a Nasdaq Last Sale Data Feed must also pay and that is set forth under

Nasdaq Rule 7039(c).

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[3]   See Nasdaq Rule 7039(a)(1).

[4]   See Nasdaq Rule 7039(a)(2).

        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 its facilities which the

Exchange operates or controls, 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]

        Likewise, in NetCoalition v. Securities and Exchange Commission[8]

("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

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[5]   15 U.S.C. 78f(b).

[6]   15 U.S.C. 78f(b)(4) and (5).

[7]   Securities Exchange Act Release No. 34-51808 (June 9, 2005) ("Regulation NMS
        Adopting Release").

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

[9]   Id. at 534-535.

"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 amending Nasdaq Rule 7039(b) to reduce the monthly maximum fee from $50,000 to $41,500 for each distributor of Nasdaq Last Sale Data Feeds (exclusive of the $1,500 monthly fee applicable to all distributors of a Nasdaq Last Sale Data Feed under Nasdaq Rule 7039(c)) is reasonable because Nasdaq believes it will incentivize more distributors to subscribe to the Nasdaq Last Sale Data Feeds.

The Exchange also believes that the proposed rule fee change is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the new lower fee uniformly across all distributors of Nasdaq Last Sale Data Feeds

B.   Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Notwithstanding its determination that the Commission may rely

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[10]   Id. at 537.

[11]   Id. at 539 (quoting ArcaBook Order, 73 FR at 74782-74783).

upon competition to establish fair and equitably allocated fees for market data, the NetCoalition court found that the Commission had not, in that case, compiled a record that adequately supported its conclusion that the market for the data at issue in the case was competitive. Nasdaq believes that a record may readily be established to demonstrate the competitive nature of the market in question.

There is intense competition between trading platforms that provide transaction execution and routing services and proprietary data products. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. Data products are valuable to many end Subscribers only insofar as they provide information that end Subscribers expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs.

Moreover, an exchange's customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer ("BD") will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the BD chooses to buy to support its trading decisions (or those of its customers). The choice

of data products is, in turn, a product of the value of the products in making profitable

trading decisions. If the cost of the product exceeds its expected value, the BD will

choose not to buy it. Moreover, as a BD chooses to direct fewer orders to a particular

exchange, the value of the product to that BD decreases, for two reasons. First, the

product will contain less information, because executions of the BD's orders will not be

reflected in it. Second, and perhaps more important, the product will be less valuable to

that BD because it does not provide information about the venue to which it is directing

its orders. Data from the competing venue to which the BD is directing orders will

become correspondingly more valuable.

Thus, an increase in the fees charged for either transactions or data has the

potential to impair revenues from both products. "No one disputes that competition for

order flow is 'fierce'."[12] However, the existence of fierce competition for order flow

implies a high degree of price sensitivity on the part of BDs with order flow, since they

may readily reduce costs by directing orders toward the lowest-cost trading venues. A

BD that shifted its order flow from one platform to another in response to order execution

price differentials would both reduce the value of that platform's market data and reduce

its own need to consume data from the disfavored platform. Similarly, if a platform

increases its market data fees, the change will affect the overall cost of doing business

with the platform, and affected BDs will assess whether they can lower their trading costs

by directing orders elsewhere and thereby lessening the need for the more expensive data.

Analyzing the cost of market data distribution in isolation from the cost of all of

the inputs supporting the creation of market data will inevitably underestimate the cost of

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[12]   Id.

the data. Thus, because it is impossible to create data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of the exchange's costs to the market data portion of an exchange's joint product. Rather, all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. Nasdaq pays rebates to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an "excessive" price for one of the joint products will ultimately have to be reflected in lower prices for

other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including eleven SRO markets, as well as internalizing 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 TRFs compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, NYSE MKT, NYSE Arca, and BATS/Direct Edge.

Any ATS or BD can combine with any other ATS, BD, or multiple ATSs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate single or multiple BDs' production of proprietary data products.

The potential sources of proprietary products are virtually limitless. Notably, the potential sources of data include the BDs that submit trade reports to TRFs and that have the ability to consolidate and distribute their data without the involvement of FINRA or an exchange-operated TRF.

The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and NYSE Arca did before registering as exchanges by publishing proprietary book data on the internet. Second, because a single order or transaction report can appear in a core data product, an SRO proprietary product, and/or a non-SRO proprietary product, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with 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.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While BDs have 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. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg and Thomson Reuters. In Europe, Cinnober aggregates and disseminates data from over 40 brokers and multilateral trading facilities.[13]

In the case of TRFs, the rapid entry of several exchanges into this space in 2006-2007 following the development and Commission approval of the TRF structure demonstrates the contestability of this aspect of the market.[14] Given the demand for trade reporting services that is itself a by-product of the fierce competition for transaction executions – characterized notably by a proliferation of ATSs and BDs offering internalization – any supra-competitive increase in the fees associated with trade reporting or TRF data would shift trade report volumes from one of the existing TRFs to the other[15] and create incentives for other TRF operators to enter the space. Alternatively, because BDs reporting to TRFs are themselves free to consolidate the market data that they report, the market for over-the-counter data itself, separate and apart from the markets for execution and trade reporting services – is fully contestable.

Moreover, consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at $1 per month for non-

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[13]   See http://www.cinnober.com/boat-trade-reporting.

[14]   The low cost exit of two TRFs from the market is also evidence of a contestable market, because new entrants are reluctant to enter a market where exit may involve substantial shut-down costs.

[15]   It should be noted that the FINRA/NYSE TRF has, in recent weeks, received reports for almost 10% of all over-the-counter volume in NMS stocks.

professional users. Second, consolidated data is also available at no cost with a 15- or

20- minute delay. Because consolidated data contains marketwide information, it

effectively places a cap on the fees assessed for proprietary data (such as last sale data)

that is simply a subset of the consolidated data. The mere availability of low-cost or free

consolidated data provides a powerful form of pricing discipline for proprietary data

products that contain data elements that are a subset of the consolidated data, by

highlighting the optional nature of proprietary products.

In this instance, the Exchange believes that amending Nasdaq Rule 7039(b) to

reduce the monthly maximum fee from $50,000 to $41,500 for each distributor of Nasdaq

Last Sale Data Feeds (exclusive of the $1,500 monthly fee that all distributors of a

Nasdaq Last Sale Data Feed must also pay and that is set forth under Nasdaq Rule

7039(c)) does not impose a burden on competition and may increase competition through

making this a more affordable option for distributors. Accordingly, the Exchange does

not believe that the proposed change will impair the ability of members or competing

order execution venues to maintain their competitive standing in the financial markets.

      C.   <u>Self-Regulatory Organization's Statement on Comments on the Proposed
Rule Change Received From Members, Participants or Others</u>

Written comments were neither solicited nor received.

III.   <u>Date of Effectiveness of the Proposed Rule Change and Timing for Commission
Action</u>

The foregoing change has become effective pursuant to Section 19(b)(3)(A)(ii) of

the Act[16]. 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

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[16]   15 U.S.C. 78s(b)(3)(A)(ii).

Commission that such action is necessary or appropriate in the public interest, for the

protection of investors, or otherwise in furtherance of the purposes of the Act.

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-2016-048 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-2016-048. 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 Web site (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 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

offices 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-2016-048, 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.[17]

Robert W. Errett
Deputy Secretary

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[17]   17 CFR 200.30-3(a)(12).

EXHIBIT 5

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are bracketed.

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7039. NASDAQ Last Sale and NASDAQ Last Sale Plus Data Feeds

(a) No change.

(b) Each distributor of the NASDAQ Last Sale Data Feeds may elect between two alternate fee schedules, depending upon the choice of distributors to report usage based on either a username/ password entitlement system or a quote counting mechanism or both. All fees for the NASDAQ Last Sale Data Products are "stair-stepped" in that the fees are reduced for distributors with more users but the lower rates apply only to users in excess of the specified thresholds rather than applying to all users once a threshold is met. In addition, there shall be a maximum fee of $[50,000]41,500 per month for NASDAQ Last Sale for NASDAQ and NASDAQ Last Sale for NYSE/NYSE MKT.

(1) – (2) No change.

(c) – (d) No change.

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