

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80585; File No. SR-NASDAQ-2017-041)

May 3, 2017

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Fees at Rule 7047

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 April 20, 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 fees at Rule 7047 to clarify the application of Nasdaq fees to Derived Data in light of changing industry practices. Specifically, the proposed changes will: (i) limit application of the Derived Data Distributor Fee for Nasdaq Basic in Rule 7047(c)(2) only to those Distributors that both create and distribute Derived Data; (ii) clarify that the Nasdaq Basic per Subscriber user fees in Rules 7047(b)(1) and (b)(2), and the distributor fee in Rule 7047(c)(1), cover both Nasdaq data feeds and Derived Data therefrom; and (iii) clarify that the enterprise licenses for Professional and Non-Professional Subscribers in Rules 7047(b)(4) and (b)(5) cover the distribution of Derived Data from Nasdaq Basic. The proposal is described in further detail below.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of the proposed rule change is to clarify the application of Nasdaq fees to Derived Data in light of changing industry practices. Specifically, the proposed changes will: (i) limit application of the Derived Data Distributor Fee for Nasdaq Basic in Rule 7047(c)(2) only to those Distributors that both create and distribute Derived Data; (ii) clarify that the Nasdaq Basic per Subscriber user fees in Rules 7047(b)(1) and (b)(2), and the distributor fee in Rule 7047(c)(1), cover both Nasdaq data feeds and Derived Data therefrom; and (iii) clarify that the enterprise licenses for Professional and Non-Professional Subscribers in Rules 7047(b)(4) and (b)(5) cover the distribution of Derived Data from Nasdaq Basic.

Nasdaq Basic

Nasdaq Basic provides best bid and offer information from the Nasdaq Market Center, as well as last sale transaction reports from both the Nasdaq Market Center and the FINRA/Nasdaq Trade Reporting Facility ("TRF"). This is a subset of the "core" quotation and last sale data

provided by securities information processors under the CQ/CT Plan and the UTP Plan. The three components of Nasdaq Basic, which may be purchased individually or in combination, are: (i) Nasdaq Basic for Nasdaq, which contains the best bid and offer on the Nasdaq Market Center and last sale transaction reports for Nasdaq and the FINRA/Nasdaq TRF for Nasdaq-listed stocks; (ii) Nasdaq Basic for NYSE, which covers NYSE-listed stocks, and (iii) Nasdaq Basic for NYSE MKT, which provides data on stocks listed on NYSE MKT and other listing venues whose quotes and trade reports are disseminated on Tape B.

Derived Data Distributor Fee

A Distributor³ of Derived Data⁴ from Nasdaq Basic may pay a \$1,500 per month fee to disseminate such data to an unlimited number of Non-Professional Subscribers⁵ under Rule 7047(c)(2). If a Distributor elects not to pay the Derived Data Distributor Fee, the Distributor must pay the per Subscriber charges for Non-Professionals set forth in Rule 7047(b)(2). In either case, Distributors of Derived Data must also pay the Distributor fee set forth in Rule 7047(c)(1).

³ A “Distributor” is “any entity that receives NASDAQ Basic data directly from NASDAQ or indirectly through another entity and then distributes it to one or more Subscribers.” Nasdaq Rule 7047(d)(1).

⁴ “Derived Data” is “pricing data or other information that is created in whole or in part from NASDAQ information; it cannot be reverse engineered to recreate NASDAQ information, or be used to create other data that is recognizable as a reasonable substitute for NASDAQ information.” Nasdaq Rule 7047(d)(5).

⁵ A “Non-Professional Subscriber” is a natural person who is not (i) registered or qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or (ii) any commodities or futures contract market or association; engaged as an “investment adviser” as that term is defined in Section 201(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt. Nasdaq Rule 7047(d)(3)(A).

The Exchange has recently become aware that certain Distributors create Derived Data (“Primary Distributors”), and send it to other Distributors, which transmit the Derived Data in the same form that it was received to Subscribers (“Secondary Distributors”). The Exchange, in its initial filing for the Derived Data Distributor Fee in 2011, stated that the fee applied only to firms that “derive data from Nasdaq Basic”⁶ – i.e., the Primary Distributors. The text of Rule 7047(c)(2), however, does not distinguish between Primary and Secondary Distributors. Rule 7047(c)(2) states that “[a] Distributor may pay \$1,500 per month to distribute Derived Data from Nasdaq Basic,” implying that all Distributors – both Primary and Secondary – may pay that fee. Further clarification appeared to be unnecessary at the time because the Exchange was not aware of the existence of Secondary Distributors.

In light of changing industry practice, the Exchange proposes to clarify the Rule to state that only Distributors that “create and distribute Derived Data from Nasdaq Basic” pay the fee, thereby excluding Secondary Distributors from application of Rule 7047(c)(2). This is a codification of Nasdaq’s intent as set forth in the initial filing and Nasdaq’s interpretation of Rule 7047(c)(2) based on that rule and related filings, and will not change customer fees.

User Fees for Nasdaq Basic

Professional Subscribers⁷ to Nasdaq Basic pay per Subscriber monthly charges of \$13.00 for Nasdaq Basic for Nasdaq, \$6.50 for Nasdaq Basic for NYSE, and \$6.50 for Nasdaq Basic for NYSE MKT under Rule 7047(b)(1). Non-Professional Subscribers pay at the reduced monthly rates of \$0.50, \$0.25, and \$0.25, respectively, under Rule 7047(b)(2).

⁶ See Securities Exchange Act Release No. 64994 (July 29, 2011), 76 FR 47621 (August 5, 2011) (SR-NASDAQ-2011-091).

⁷ A “Professional Subscriber” is any Subscriber other than a Non-Professional Subscriber. Nasdaq Rule 7047(d)(3)(B).

When the Derived Data Distributor Fee, currently set forth in Rule 7047(c)(2) was introduced in 2011, the Exchange explained in the accompanying filing that the fee “would be in lieu of non-professional subscriber fees,”⁸ indicating that the monthly per Subscriber fees set forth in Rule 7047(b)(2) applied to Derived Data. There was no explicit reference to Derived Data in Rule 7047(b)(2) because the Exchange was not aware of instances in which Derived Data was distributed without a Nasdaq Basic data feed, rendering such a reference unnecessary.

The Exchange has recently become aware, however, that certain Subscribers purchase Derived Data without a Nasdaq Basic data feed. The Exchange proposes to clarify Rule 7047(b)(2), and the parallel rule for Professional Subscribers at Rule 7047(b)(1), to state that the per Subscriber monthly charges allow the transmission of both Nasdaq Basic feeds and/or any Derived Data therefrom.

Similarly, the distributor fee for Nasdaq Basic in Rule 7047(c)(1) did not separately reference Derived Data because such data was not distributed without a Nasdaq Basic data feed. Because industry practice has changed, the Exchange proposes to clarify that the distributor fee in Rule 7047(c)(1) covers Derived Data, as well as the Nasdaq Basic data feed.

These proposed changes will not change prices, but rather are a codification of the Exchange’s original intent and its interpretation of these Rules based on the text of the Rules and their related filings, in light of changes in industry practice.

Nasdaq Basic Enterprise Licenses

Broker-dealers may purchase two enterprise licenses for Nasdaq Basic in lieu of per Subscriber user fees: (i) an enterprise license for Professional and Non-Professional Subscribers with whom the broker-dealer has a brokerage relationship under Rule 7047(b)(5); or (ii) an

⁸ See Securities Exchange Act Release No. 64994 (July 29, 2011), 76 FR 47621 (August 5, 2011) (SR-NASDAQ-2011-091).

enterprise license for internal Professional Subscribers under Rule 7047(b)(4). The enterprise license for Subscribers in a brokerage relationship was introduced in 2011,⁹ but the rule did not specify whether that the license would cover the distribution of Derived Data. The enterprise license for internal Professional Subscribers, introduced in 2014,¹⁰ did not explicitly reference Derived Data either.

The enterprise license for internal Professional Subscribers was introduced as an alternative to the Nasdaq Basic user fees set forth in Rule 7047(b)(1), and the enterprise license for Subscribers with whom the broker-dealer has a brokerage relationship was designed as an alternative to the user fees set forth in Rule 7047(b)(1) and (b)(2). For the reasons set forth above, the fees set forth at Rules 7047(b)(1) and (b)(2) were intended to cover the distribution of Derived Data. Because these enterprise licenses were introduced as alternatives to Rules 7047(b)(1) and (b)(2), these licenses were intended to cover Derived Data as well. In light of a change in industry practice in which Derived Data is sometimes distributed without a proprietary data feed, the Exchange proposes to codify the original intent of the Exchange, and its interpretation of the Rules and related filings, and explicitly state that the enterprise licenses at Rules 7047(b)(4) and (b)(5) cover the distribution of Derived Data from Nasdaq Basic.

In summary, the proposed changes clarify how Nasdaq Basic fees set forth in Rule 7047 apply to Derived Data. The first change clarifies that the Derived Data Distributor Fee does not apply to Secondary Distributors, i.e., entities that distribute, but do not create, Derived Data. The second change clarifies that the per Subscriber user fees set forth in Rule 7047(b)(1) and (b)(2), and the distributor fee in Rule 7047(c)(1) also allow the distribution of Derived Data. The third

⁹ See Securities Exchange Act Release No. 65526 (October 11, 2011), 76 FR 64137 (October 17, 2011) (SR-NASDAQ-2011-130).

¹⁰ See Securities Exchange Act Release No. 71507 (February 7, 2014), 79 FR 8763 (February 13, 2014) (SR-NASDAQ-2014-011).

change clarifies that the enterprise licenses under Rules 7047(b)(4) and (b)(5) cover the distribution of Derived Data. None of these proposed changes raise the cost of Nasdaq Basic or any other Nasdaq product, but rather codify the original intent and ongoing interpretation of Rule 7047.

The fees for all Nasdaq Basic products – including Derived Data from Nasdaq Basic – are entirely optional, in that they apply only to Distributors or Subscribers that opt to purchase Nasdaq Basic or Derived Data therefrom. The proposed changes do not impact the cost of any Nasdaq product, including Nasdaq Basic and any Derived Data from Nasdaq Basic.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹² 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

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4) and (5).

been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹³

Likewise, in NetCoalition v. Securities and Exchange Commission¹⁴ (“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.¹⁵ 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.”¹⁶

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’”¹⁷

The Exchange believes that the current proposals – (i) to limit application of the Derived Data Distributor Fee, (ii) clarify the application of Nasdaq Basic per Subscriber user fees and a distributor fee to Derived Data, and (iii) establish that Derived Data is included in the Professional and Non-Professional enterprise licenses – are fair and equitable in accordance with

¹³ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

¹⁴ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹⁵ See NetCoalition, at 534-535.

¹⁶ Id. at 537.

¹⁷ 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)).

Section 6(b)(4) of the Act, and not unreasonably discriminatory in accordance with Section 6(b)(5) of the Act. The proposed changes do not change any fee, but rather codify and clarify Nasdaq's interpretation of its rules. Moreover, fees for Nasdaq Basic and its associated Derived Data, like all market data fees, are constrained by the Exchange's need to compete for order flow, and are subject to competition from other exchanges and among broker-dealers for customers. If Nasdaq is incorrect in its assessment, there is no barrier to block a competitor from entering the market with substantially similar products.

The Exchange believes that the proposed changes are an equitable allocation and not unfairly discriminatory because the Exchange will apply the same fees to all similarly-situated Distributors.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

Nasdaq Basic – and all data derived from Nasdaq Basic – is subject to competition from the NYSE, BATS, and other exchanges that offer similar products. If Nasdaq Basic were to

prove unattractive to market participants, it is likely that the Exchange would lose market share as a result.

As noted above, the proposed changes do not affect any existing fees, which are, in any event, constrained by market forces in three distinct respects. First, all fees related to Nasdaq Basic are constrained by the competition among exchanges and other entities in attracting order flow. Firms make decisions regarding this and other proprietary data products based on the total cost of interacting with the Exchange, and, because the supracompetitive pricing of any proprietary data product increases the total cost of interacting with the Exchange, such pricing would harm order flow. Second, the price of Nasdaq Basic is constrained by the existence of multiple substitutes that are offered, or may be offered, by entities that offer proprietary or non-proprietary data. Third, the proposed fee will be constrained by competition among Distributors for Subscribers.

Competition for Order Flow

All fees related to Nasdaq Basic 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 thirteen 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 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, and TracECN. 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, and the BATS exchanges. 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. Firms make decisions on how much and what types of data to consume based on the total cost of interacting with an exchange, and data fees are a factor in the total platform analysis. A supracompetitive increase in the fees charged for proprietary data has the potential to impair revenue for the exchange as a result. The competition for order flow will therefore constrain prices for proprietary data products, including charges relating to Nasdaq Basic.

Substitute Products

The price of data derived from Nasdaq Basic is also constrained by the existence of multiple substitutes offered by numerous entities, including both proprietary data offered by other SROs or other entities, and non-proprietary data disseminated by Nasdaq in its capacity as a Securities Information Processor (“SIP”) for the national market system plan governing securities listed on Nasdaq as a national securities exchange (“Nasdaq UTP Plan”).

The information provided through Nasdaq Basic is a subset of the best bid and offer and last sale data provided by the SIP. The “core” data disseminated by the SIP consists of best-price quotations and last sale information from all markets in U.S.-listed equities; Nasdaq Basic provides best bid and offer and last sale information for all U.S. exchange-listed stocks based on trade reports from the Nasdaq Market Center and the FINRA/Nasdaq Trade Reporting Facility. Many customers that purchase SIP data do not also purchase Nasdaq Basic. Where customers buy both products, they may shift the extent to which they purchase one or the other based on relative price changes. The SIP constrains the price of Nasdaq Basic because no purchaser would pay an excessive price for Nasdaq Basic when similar data is available from the SIP.

Proprietary data sold by other exchanges also constrain the price of Nasdaq Basic because other exchanges, such as NYSE and BATS, also sell proprietary non-core data that include best bid and offer and last sale data. Customers would not pay an excessive price for Nasdaq Basic when substitute data is available from other proprietary sources, and customers would not typically purchase proprietary best bid and offer and last sale data from multiple exchanges.

Competition for Subscribers

Distributors that disseminate data derived from Nasdaq Basic are in competition for Subscribers. If the price of such data were set above competitive levels, Distributors would be at

a competitive disadvantage relative to their competitors, and may lower their costs by substituting Nasdaq data with other products, in whole or in part. Competition for Subscribers therefore provides another constraint on the cost of Derived Data.

In summary, market forces constrain the price of Nasdaq Basic through competition for order flow, competition from substitute data products, and in the competition among Distributors for Subscribers. 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.¹⁸

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.

¹⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2017-041 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-2017-041. 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-2017-041 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.¹⁹

Eduardo A. Aleman
Assistant Secretary

¹⁹ 17 CFR 200.30-3(a)(12).