

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82072; File No. S7-24-89)

November 14, 2017

Joint Industry Plan; Notice of Filing and Immediate Effectiveness of the Fortieth Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis

Pursuant to Section 11A of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 608 thereunder,² notice is hereby given that on October 19, 2017, the Participants³ in the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (“NASDAQ/UTP Plan” or “Plan”) filed with the Securities and Exchange Commission (“Commission”) a proposal to amend the NASDAQ/UTP Plan.⁴ The amendment is the 40th Amendment to the NASDAQ/UTP Plan (“Amendment”).⁵ The

¹ 15 U.S.C. 78k-1.

² 17 CFR 242.608.

³ The Participants are: Bats BYX Exchange, Inc.; Bats BZX Exchange, Inc.; Bats EDGA Exchange, Inc.; Bats EDGX Exchange, Inc.; Chicago Board Options Exchange, Incorporated; Chicago Stock Exchange, Inc.; Financial Industry Regulatory Authority, Inc.; Investors Exchange LLC; Nasdaq BX, Inc.; Nasdaq ISE, LLC; Nasdaq PHLX LLC; The Nasdaq Stock Market LLC; New York Stock Exchange LLC; NYSE Arca, Inc.; NYSE American LLC; and NYSE National, Inc. (collectively, the “Participants”).

⁴ The Plan governs the collection, processing, and dissemination on a consolidated basis of quotation information and transaction reports in Eligible Securities for each of its Participants. This consolidated information informs investors of the current quotation and recent trade prices of Nasdaq securities. It enables investors to ascertain from one data source the current prices in all the markets trading Nasdaq securities. The Plan serves as the required transaction reporting plan for its Participants, which is a prerequisite for their trading Eligible Securities. See Securities Exchange Act Release No. 55647 (April 19, 2007), 72 FR 20891 (April 26, 2007).

⁵ See Letter from Emily Kasparov to Brent J. Fields, dated October 18, 2017 (“Transmittal Letter”).

Amendment proposes to modify the text of the fee schedule of the Plan to conform the text of the Plan to what was described in both the transmittal letter for the Thirty-Third Amendment to the Plan and the Commission’s public notice of the filing of the Thirty-Third Amendment to the Plan.⁶

The original filing and notice included the following language designed to direct Participants to look to the regular fee schedule: “but the data may be fee liable under the regular fee schedule.”⁷ Due to what the Participants state was an inadvertent omission, the language described in the transmittal letter and included in the public notice of the filing was omitted from the text of the Plan.⁸ The Participants propose to amend the Plan language to state that the Non-Display fees do not apply when data is used to create derived data and the derived data is used for the purposes of solely displaying the derived data, and also to conform the Plan language to the original filing and notice directing subscribers to separate provisions of the Plan that still apply.⁹ Thus, the following conforming language would be added: “but the data may be fee liable under the regular fee schedule.”¹⁰ No comments were received on this topic when the Thirty-Third Amendment was noticed.

⁶ See, e.g., Transmittal Letter at 1, 3; Securities Exchange Act Release No. 73279 (October 1, 2014), 79 FR 60522, (October 7, 2014)(“October 2014 Non-Display Filing”).

⁷ See October 2014 Non-Display Filing, 79 FR at 60525.

⁸ See Transmittal Letter at 1, 3.

⁹ See Transmittal Letter at 3.

¹⁰ See Addendum 1 to the Thirty-Third Amendment to the Plan. The Addendum is marked to show the changes to the text of the Plan that the Participants proposed in the Thirty-Third Amendment.

Pursuant to Rule 608(b)(3)(i) under Regulation NMS,¹¹ the Participants designate the Amendment as establishing or changing a fee or other charge collected on behalf of the Participants in connection with access to, or use of, any facility contemplated by the Nasdaq/ UTP Plan and are submitting the amendment for immediate effectiveness.

The Commission is publishing this notice to solicit comments from interested persons on the Amendment. Set forth in Sections I and II is the statement of the purpose and summary of the Amendments, along with the information required by Rules 608(a) and 601(a) under the Act, prepared and submitted by the Participants to the Commission.

I. Rule 608(a)

A. Purpose of the Amendment

1. Background

Derived data consists of pricing data or other information that is created in whole or part from consolidated quotation or last sale information and:

- Cannot be reverse-engineered to recreate the information, or
- Cannot be used to create other data that is recognized by NASDAQ to be a reasonable facsimile for the consolidated quotation or last sale information.

Historically, derived data that contains price data and is based upon a single security symbol is fee liable at the underlying product rates. If derived real-time volume data for a single security does not also include price data, however, it is not fee liable. Additionally, derived data that contains price and/or volume data based upon multiple security symbols is not fee liable. This approach as to when derived data may be considered fee liable is due to the similarity

¹¹ 17 CFR 242.608(b)(3)(i).

between single security derived data containing price data and the consolidated quotation or last sale information.

The application of the above-described derived data policy has been in place since at least 2007.¹² The derived data policy for UTP market data paralleled the derived data policy adopted by Nasdaq for its proprietary data.¹³

2. Correcting Oversight in 2014 Non-Display Amendments

In October 2014, the Participants amended the Plan's fee schedule to establish fees for Non-Display Uses and to reduce the Subscriber fees assessed on Professional Subscribers.¹⁴ As part of the amendment, the Participants made clear in their submission that, although Non-Display fees were not applicable when using the data in Non-Display to create derived data and the derived data was used for the purposes of solely displaying the derived data, the data still

¹² See NASDAQ and UTP Market Data Policies V. 2007-02 (September 13, 2007). The Plan's derived data policy differs from the treatment of derived data by the CTA and CQ Plan. Under the CTA and CQ Plan, derived data is never fee liable, even at the underlying product rates, regardless of how the derived data is used.

¹³ As part of the Non-Display amendment in October 2014, the Participants stated that the fee changes proposed therein would "move in the direction of continuing to harmonize fee structures under the Plan with fee structures under the CTA Plan, CQ Plan, and the OPRA Plan." See October 2014 Non-Display Filing, 79 FR at 60523. This language in the October 2014 Non-Display Filing was intended for the Professional Subscriber device fees, the Non-Display fees, and the per-query fees and did harmonize these aspects of the various market data plans' fee structure. It was not intended to remove all differences that existed at the time the 2014 Non-Display Filing was submitted to the Commission and that continue today. For instance, the CTA and CQ Plans have a tiered fee structure for Professional Subscribers based on the number of devices while the Plan has a single tier for Professional Subscriber fees. Conversely, the UTP Plan has a tiered fee structure for its Cable Television Ticker fee while the CTA and CQ Plan have a single tier with a set maximum for the same fee. These differences, along with a difference in the various market data plans' approaches to the fee liability of derived data, is due to the longstanding historical differences between the administration of each market data plan.

¹⁴ See generally October 2014 Non-Display Filing.

could be fee liable under the regular fee schedule.¹⁵ The Participants included this language to resolve a potential ambiguity between the existing derived data policy and the Non-Display fees. This language was designed to make clear that simply creating derived data would not result in Non-Display fees because the creation of derived data could conceivably fall within the definition of a Non-Display Use. Instead, like the derived data policy since at least 2007, derived data is meant to be fee liable at the underlying product rates.

Although this language was a part of the transmittal letter and notice for the October 2014 amendments, the language was inadvertently left out of the text of the Plan in that amendment. Currently, Exhibit 2 of the Plan states that “Non-Display Use does not apply to the creation and use of derived data.” The Participants are proposing to correct this inadvertent clerical omission to include in the Plan language the detail contained in the October 2014 submission. Therefore, the Participants are proposing to amend the text of the Plan’s fee schedule to insert the Plan’s historical derived data policy that derived data will be subject to the underlying products fee schedule. As such, the use of data will be excepted from the Non-Display fees when such data is used to create derived data and such derived data is used for the purpose of solely displaying the derived data.

The Participants believe that this proposed change will align the October 2014 submission and text of the Plan and maintain the historical approach of the fee liability of derived data. As such, instances where a data recipient is using the data in Non-Display to create derived data, such as Indications of Interest or Volume-Weighted Average Prices, for the purpose of solely displaying such data, then the Non-Display fee schedule does not apply. Such use may be fee

¹⁵ Id. at 60525.

liable for the Subscriber fees, and other fees such as Access and/or Redistributor fees, if applicable.

B. Governing or Constituent Documents

Not applicable.

C. Implementation of the Amendments

Because the Participants have designated the Amendment as one establishing or changing fee or other charge collected on behalf of the Participants in connection with access to, or use of, any facility contemplated by the Nasdaq/ UTP Plan,¹⁶ the Amendment became effective upon filing with the Commission.

D. Development and Implementation Phases

See Item I.C. above.

E. Analysis of Impact on Competition

The Participants assert that the Amendment does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Securities Exchange Act of 1934 (the “Act”). Additionally, the Participants do not believe that the proposed amendment introduces terms that are unreasonably discriminatory for the purposes of Section 11A(c)(1)(D) of the Act. The Participants have submitted this amendment to simply correct an inadvertent omission in the Plan language to correspond to language previously contained in a submission to the Commission. This amendment simply aligns the text of the Plan with the language contained in the October 2014 submission and the longstanding practice of the Plan’s application of fees to derived data.

¹⁶ See 17 CFR 242.608(b)(3)(i)

Furthermore, the Participants believe that this longstanding derived data policy is reasonable in order to protect the Plan's proprietary rights over consolidated quotation and last sale information. As previously stated, derived data that contains price data and is based upon a single security symbol is fee liable at the underlying product rates. Derived data that contains volume data but no price data and derived data that is based upon multiple security symbols is not currently fee liable. Such an approach is logical given the similarity between derived data that contains price data and is based upon a single security symbol to the consolidated quotation and last sale information disseminated by the Plan.

F. Written Understanding or Agreements relating to Interpretation of, or Participation in, Plan

Not applicable.

G. Approval by Sponsors in Accordance with Plan

See Item I.C. above.

H. Description of Operation of Facility Contemplated by the Proposed Amendments

Not applicable.

I. Terms and Conditions of Access

Not applicable.

J. Method of Determination and Imposition, and Amount of, Fees and Charges

The Participants believe that the amendment proposed herein is fair and reasonable since it corrects an inadvertent omission in order to ensure the continued implementation of the derived data policy that has been in place for at least ten years.

The longstanding derived data policy is reasonable in order to protect the Plan's proprietary rights over consolidated quotation and last sale information. As previously stated, derived data that contains price data and is based upon a single security symbol is fee liable at the

underlying product rates. Derived data that contains volume data but no price data and derived data that is based upon multiple security symbols is not currently fee liable. Such an approach is logical given the similarity between derived data that contains price data and is based upon a single security symbol to the consolidated quotation and last sale information disseminated by the Plans.

K. Method and Frequency of Processor Evaluation

Not applicable.

L. Dispute Resolution

Not applicable.

II. Rule 601(a)

A. Equity Securities for which Transaction Reports Shall be Required by the Plan

Not applicable.

B. Reporting Requirements

Not applicable.

C. Manner of Collecting, Processing, Sequencing, Making Available and Disseminating Last Sale Information

Not applicable.

D. Manner of Consolidation

Not applicable.

E. Standards and Methods Ensuring Promptness, Accuracy and Completeness of Transaction Reports

Not applicable

F. Rules and Procedures Addressed to Fraudulent or Manipulative Dissemination

Not applicable.

G. Terms of Access to Transaction Reports

Not applicable.

H. Identification of Marketplace of Execution

Not applicable.

III. Solicitation of Comments

The Commission seeks comments on the Amendment. Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed Amendment 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 S7-24-89 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 File No. S7-24-89. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all written statements with respect to the proposed Amendment that are filed with the Commission, and all written communications relating to the proposed Amendment 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 the Amendment also will be available for website viewing and printing at the principal office of the Plan. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number S7-24-89 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

By the Commission.

Brent J. Fields
Secretary