

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95375; File No. SR-NASDAQ-2022-042)

July 27, 2022

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Fees to Add Two New Features to the Enterprise Licenses at Equity 7, Section 123(c)

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 July 19, 2022, 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 to add two new features to the enterprise licenses at Equity 7, Section 123(c). First, the Exchange proposes to expand the enterprise license at Section 123(c)(1), which currently allows External Distribution of TotalView only to Non-Professional Subscribers with whom the firm has a brokerage relationship, to also include distribution of data externally to Professionals for no additional fees beyond the per Subscriber charges already set forth in that section. Second, the Exchange proposes to allow a purchaser of any of the TotalView enterprise license options listed at Section 123(c) to deliver TotalView using an Enhanced Display Solution for the same per Subscriber

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

fees paid by any other purchaser of the Section 123(c) enterprise licenses. The Proposal also includes a number of technical and conforming changes, described in further detail below.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, 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

As explained above, the Exchange proposes to add two new features to the enterprise licenses at Equity 7, Section 123(c).³

First, the Exchange proposes to expand the enterprise license at Section 123(c)(1), which currently allows External Distribution of TotalView only to Non-Professional Subscribers with whom the firm has a brokerage relationship, to also include distribution of data externally to Professionals for no additional fees beyond the per Subscriber charges already set forth in that section.

³ The Exchange initially proposed these fee changes on June 14, 2022, in SR-Nasdaq-2022-037. On July 19, 2022, the Exchange withdrew that filing and submitted the instant filing, which proposes the same changes as SR-Nasdaq-2022-037.

Second, the Exchange proposes to allow a purchaser of any of the TotalView enterprise license options listed at Section 123(c) to deliver TotalView using an Enhanced Display Solution for the same per Subscriber fees paid by any other purchaser of the Section 123(c) enterprise licenses.

The Exchange also proposes two sets of conforming changes. First, Nasdaq proposes to remove the \$100,000 enterprise license at Section 123(c)(2) as redundant. The newly-modified \$25,000 enterprise license at Section 123(c)(1) will have exactly the same features as the current \$100,000 at Section 123(c)(2), rendering the latter unnecessary. Second, the Exchange proposes a few conforming changes related to paragraph numbering and presentation, discussed in detail below.⁴

Products and Current Fees

Nasdaq TotalView

Nasdaq TotalView provides customers with all orders and quotes from Nasdaq members displayed in the Nasdaq Market Center, as well as the aggregate size of such orders and quotes at each price level executed at the Nasdaq Market Center, with respect to stocks listed on Nasdaq and those listed on NYSE, NYSE American, and regional exchanges.⁵ Customers that purchase TotalView also receive the Net Order Imbalance Indicator (“NOI”), a supply and demand

⁴ See infra note 19.

⁵ See Equity 7, Section 123 (a)(1)(B) (“Nasdaq TotalView means, with respect to stocks listed on Nasdaq and on an exchange other than Nasdaq, all orders and quotes from all Nasdaq members displayed in the Nasdaq Market Center as well as the aggregate size of such orders and quotes at each price level in the execution functionality of the Nasdaq Market Center.”). Nasdaq TotalView is one of two Depth-of-Book feeds. The other is Nasdaq Level 2. See Section 123(a)(1) (defining Depth-of-Book as “data feeds containing price quotations at more than one price level,” and identifying the two Depth-of-Book fees as Nasdaq Level 2 and Nasdaq TotalView); see also Nasdaq TotalView (product description), available at <https://www.nasdaq.com/solutions/nasdaq-totalview>.

monitor that provides information leading up to key liquidity events such as the Open, Close, Halt Resumptions, and Initial Public Offerings (“IPOs”).⁶ For IPOs, NOII shows the details of all orders during the pre-IPO quoting period and the number of shares and orders that would execute if the cross were to occur at an indicative price and time.

Customers that purchase Nasdaq TotalView pay per Subscriber fees as set forth at Equity 7, Section 123(b)(2). In the alternative, Nasdaq offers customers the option of lowering their costs by purchasing one of three different enterprise licenses.

The first of these three, set forth in Section 123(c)(1), permits the dissemination of Nasdaq TotalView for Display Usage for Internal Distribution, or for External Distribution to Non-Professional Subscribers with whom the firm has a brokerage relationship, for a monthly fee of \$25,000, plus Professional and Non-Professional Subscriber fees.⁷

The second, at Section 123(c)(2), permits dissemination of Nasdaq TotalView for Display Usage for Internal Distribution, as well as External Distribution to both Professional and Non-Professional Subscribers with whom the firm has a brokerage relationship.⁸ The monthly

⁶ See Securities Exchange Act Release No. 79863 (January 23, 2017), 82 FR 8632 (January 27, 2017) (SR-NASDAQ-2017-004).

⁷ See Equity 7, Section 123 (c)(1) (“A Distributor that is also a broker-dealer pays a monthly fee of \$25,000 for the right to provide Nasdaq TotalView for Display Usage for Internal Distribution, or for External Distribution to Non-Professional Subscribers with whom the firm has a brokerage relationship. This Enterprise License fee shall be in addition to a monthly fee of \$9 for each Non-Professional Subscriber and a monthly fee of \$60 for each Professional Subscriber for Display Usage based upon Direct or Indirect Access.”).

⁸ See Equity 7, Section 123 (c)(2) (“A Distributor that is also a broker-dealer pays a monthly fee of \$100,000 for the right to provide Nasdaq TotalView for Display Usage for Internal Distribution, or for External Distribution to both Professional and Non-Professional Subscribers with whom the firm has a brokerage relationship. This Enterprise License fee shall be in addition to a monthly fee of \$9 for each Non-

fee for this license is \$100,000, plus Professional and Non-Professional Subscriber fees. The key difference between the first and second licenses is the latter allows External Distribution to Professionals.

The third, at Section 123(c)(3), permits Internal and External Distribution to both Professional and Non-Professional Subscribers with whom the firm has a brokerage relationship for a monthly fee of \$500,000.⁹ The key difference between the third enterprise license and the first two is that the third has no Professional or Non-Professional Subscriber fees.

Enhanced Display Solution

An Enhanced Display Solution (“EDS”) allows the purchaser to display Depth-of-Book data and connect to an Application Programming Interface (“API”) that allows users to export data to a display application of their choosing.¹⁰ EDS is available for Display Usage¹¹ only, and may not be used for Non-Display¹² purposes.¹³

Professional Subscriber and a monthly fee of \$60 for each Professional Subscriber for Display Usage based upon Direct or Indirect Access.”).

⁹ See Section 123 (c)(3) (“As an alternative to subsections (1) and (2) above, a Distributor that is also a broker-dealer may pay a monthly fee of \$500,000 to provide Nasdaq Level 2 or Nasdaq TotalView for Display Usage by Professional or Non-Professional Subscribers with whom the firm has a brokerage relationship. This Enterprise License shall not apply to relevant Level 1 or Depth Distributor fees.”).

¹⁰ See Securities Exchange Act Release No. 80015 (February 10, 2017), 82 FR 10944 (February 16, 2017) (SR-NASDAQ-2017-007).

¹¹ See Equity 7, Section 123(a)(2)(A) (“Display Usage means any method of accessing Depth-of-Book data that involves the display of such data on a screen or other visualization mechanism for access or use by a natural person or persons . . .”).

¹² See Equity 7, Section 123(a)(2)(B) (“Non-Display Usage means any method of accessing Depth-of-Book data that involves access or use by a machine or automated device without access or use of a display by a natural person or persons.”)

¹³ See Securities Exchange Act Release No. 73807 (December 10, 2014), 79 FR 74784 (December 16, 2014) (SR-NASDAQ-2014-117) (“While Distributors are not required to

Customers that wish to purchase EDS pay a Distributor fee¹⁴ and a per Subscriber fee.¹⁵ EDS may also be purchased through an enterprise license for \$33,500 per month.¹⁶

Proposed Changes

As explained above, the Exchange proposes to add two features to the enterprise licenses at Equity 7, Section 123(c).

First, the Exchange proposes to expand the enterprise license at Section 123(c)(1), which currently allows External Distribution of TotalView only to Non-Professional Subscribers with whom the firm has a brokerage relationship, to allow distribution of data externally to Professionals as well as Non-Professionals. The Exchange will charge no additional fees for this external distribution beyond the per Subscriber charges already set forth in that section. To accomplish this, the Exchange proposes to add Professional Subscribers to the list of users eligible for External Distribution in that subsection.

technically control against non-display usage (due to the difficulty of achieving such control), the Distributor is required to restrict non-display usage contractually by including such restrictions in any agreements with recipients of the Information.”); see also Nasdaq, US Equities and Options Data Policies at 20-21, available at <http://www.nasdaqtrader.com/content/AdministrationSupport/Policy/USEquitiesandOptionsDataPolicies.pdf>.

¹⁴ See Equity 7, Section 126(a)(1). The Distributor fee is based on the number of users, as follows: \$4,000/month for 1-399 users; \$7,500/month for 400-999 users; \$15,000/month for 1,000 users.

¹⁵ The per Subscriber fee is \$80 per month for Professionals, and the underlying rate for Nasdaq Level 2 or TotalView for Non-Professionals. See Equity 7, Section 126(a)(1)(B).

¹⁶ See Equity 7, Section 126(a)(1)(C) (“EDS Distributors may elect to purchase an Enterprise License for \$33,500 per month. Such Enterprise License shall entitle the EDS Distributor to distribute to an unlimited number of Professional EDS Subscribers for a monthly fee of \$76 for TotalView and/or Level 2, notwithstanding the fees set forth in subsection (B) above.”).

Second, the Exchange proposes to allow a purchaser of any of the TotalView enterprise license options listed at Section 123(c) to deliver TotalView using EDS for the same per Subscriber fee paid by a purchaser of any of the Section 123(c) enterprise licenses. Under the current rule, Distributors that subscribe to the enterprise depth fees at Section 123(c) are exempt from paying EDS Distributor fees.¹⁷ The proposed change is to add a clause exempting such purchasers from the EDS per Subscriber fees as well. Such customers would pay only the applicable per Subscriber fees set forth in Section 123(c).

As a conforming change, the Exchange proposes to remove the \$100,000 enterprise license at Section 123(c)(2) as redundant. As explained above, the newly modified \$25,000 enterprise license at Section 123(c)(1) will have exactly the same features that the \$100,000 at Section 123(c)(2) has currently, rendering the latter unnecessary.¹⁸ The Proposal also includes a number of other minor conforming changes to paragraph numbering and presentation.¹⁹

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,²⁰ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²¹ in particular, in

¹⁷ See Equity 7, Section 126(a)(1)(A)

¹⁸ The proposed removal of the \$100,000 enterprise license at Section 123(c)(2) will not impact current customers, as no customers currently purchase this license.

¹⁹ The Exchange proposes the following additional conforming changes: (i) change the numbering of current subparagraph 123(c)(3) to 123(c)(2) to reflect removal of the current \$100,000 enterprise license and to remove references to the former paragraph; (ii) substitute the word “license” for “depth” at Section 126(a)(1)(A) as a more accurate description of the license at Section 123(c); and (iii) remove the asterisk from Section 123(c), given that the modified subsection no longer applies solely to Distributor fees.

²⁰ See 15 U.S.C. 78f(b).

²¹ See 15 U.S.C. 78f(b)(4) and (5).

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 proposed changes are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. The fact that the market for order flow is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated, “[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’”²² Market data, often mistakenly characterized as the “exhaust” of an exchange, is related to order flow because it advertises liquidity available on the exchange, which encourages firms to send more order flow to the exchange.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine 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

²² See NetCoalition, 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”²³

Congress directed the Commission to “rely on ‘competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.’”²⁴ As a result, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. “If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”²⁵ Accordingly, “the existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”²⁶ In its 2019 guidance on fee proposals, Commission staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a “proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.”²⁷

This specific Proposal will support and expand competition by providing customers with more options for lowering fees or enhancing services. The options available to a particular

²³ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

²⁴ See NetCoalition, 615 F.3d at 534-35; see also H.R. Rep. No. 94-229 at 92 (1975) (“[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.”).

²⁵ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 Fed. Reg. 74,770 (December 9, 2008) (SR-NYSEArca-2006-21).

²⁶ See id.

²⁷ See U.S. Securities and Exchange Commission, “Staff Guidance on SRO Rule filings Relating to Fees” (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

customer depends on that customer's use cases. The Proposal will enable a customer that currently purchases the \$25,000 enterprise license at Section 123(c)(1) to distribute information externally to Professional Subscribers, enhancing the value of that license. A customer that would otherwise purchase the \$100,000 enterprise license at Section 123(c)(2) would be able to obtain the same service for the lower monthly fee of \$25,000 under the proposed modifications. A customer that currently purchases the \$25,000 license at proposed Section 123(c)(1) and also uses EDS as a delivery method would be able to pay the relatively lower per Subscriber fees at the proposed Section 123(c)(1). A customer that pays for the \$500,000 enterprise license at proposed Section 123(c)(2) and uses EDS would be required to pay no additional per Subscriber fees at all.

All of these proposed modifications enhance customer choice. If the total cost of service based on the underlying fees exceeds the cost of the enterprise license, the customer will purchase the enterprise license to reduce cost; otherwise, the customer will not. Customer choice—the customer's ability to choose whether or not to purchase an enterprise license depending on whether the purchase is economically advantageous—is a competitive force that constrains the ability of the Exchange to charge excessive fees for enterprise licenses.

The proposed changes are not unfairly discriminatory. As explained above, a customer chooses whether to purchase an enterprise license based on its economic benefits. Customers that choose to avail themselves of the additional features will benefit. Customers that do not choose to purchase any of these licenses, or which choose not to avail themselves of the additional features, will remain unaffected.

The enterprise licenses subject to the Proposal are available to all potential customers on a non-discriminatory basis. They are entirely optional in that Nasdaq is not required to offer

them and customers are not required to purchase them. Customers can discontinue their use at any time and for any reason, including an assessment of the fees charged.

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. The Exchange 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. Because competitors are free to modify their own fees in response to proposed changes, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

As explained above, the Proposal will support and expand competition by providing customers with more options for lowering fees or enhancing services. Customers that choose to purchase the enterprise licenses will benefit from lower fees and enhanced features. Customers that elect not to purchase the enterprise licenses, or not to avail themselves of the additional services, will remain unaffected.

Nothing in the Proposal burdens inter-market competition (the competition among self-regulatory organizations) because all self-regulatory organization will have the option of proposing changes to their own fee schedules.

Nothing in the Proposal burdens intra-market competition (the competition among consumers of exchange data) because each customer will be able to decide whether or not to purchase an enterprise license depending on whether it is economically advantageous for it to do so.

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.²⁸

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2022-042 on the subject line.

²⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2022-042. 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, 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. 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 SR-NASDAQ-2022-042 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.²⁹

J. Matthew DeLesDernier
Deputy Secretary

²⁹ 17 CFR 200.30-3(a)(12).