

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-81697; File No. SR-NASDAQ-2017-095)

September 25, 2017

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Expand the Features of the Enterprise License set Forth 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 September 12, 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 expand the features of the enterprise license set forth at Rule 7047(b)(5).

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Exchange proposes to amend its fees at Rule 7047 to expand the features of the enterprise license set forth at Rule 7047(b)(5). The proposed changes will: (i) allow distribution of Nasdaq Basic data to certain Professional Subscribers that are currently excluded from the license; and (ii) permit the distribution of NLS data along with Nasdaq Basic data without paying per user, per query, per visitor or per household fees. This proposal, which also includes technical and conforming changes, will increase the features of this Nasdaq Basic enterprise license without changing its fee, thereby lowering the overall cost of the product.

Current Fee Structure

Nasdaq Basic provides best bid and offer and last sale information from the Nasdaq Market Center and the FINRA/Nasdaq Trade Reporting Facility (“FINRA/Nasdaq TRF”). It is a “non-core” product that provides a subset of the “core” last-sale data provided by securities information processors (“SIPs”) under the CTA Plan and the Nasdaq UTP Plan. Data is taken from three sources, which may be purchased individually or in combination: (i) Nasdaq Basic for Nasdaq, which contains the best bid and offer on the Nasdaq Market Center and last sale trade reports for Nasdaq and the FINRA/Nasdaq TRF for Nasdaq-listed stocks; (ii) Nasdaq Basic for NYSE, which contains the best bid and offer on the Nasdaq Market Center and last sale trade reports for Nasdaq and the FINRA/Nasdaq TRF for NYSE-listed stocks; and (iii) Nasdaq Basic for NYSE MKT, which contains the best bid and offer on the Nasdaq Market Center and last sale

trade reports for Nasdaq and the FINRA/Nasdaq TRF for stocks listed on NYSE MKT and other listing venues whose quotes and trade reports are disseminated on Tape B.

User fees for Nasdaq Basic may be paid through per Subscriber monthly charges, per query fees, or two types of enterprise licenses: an internal enterprise license for Professional Subscribers at Rule 7047(b)(4) (for \$365,000 per month); and an enterprise license for Non-Professional and Professional Subscribers with whom the broker-dealer has a brokerage relationship at Rule 7047(b)(5) (for \$100,000 per month). The Exchange proposes to modify the second of these two enterprise licenses, at Rule 7047(b)(5), which allows the distribution of Nasdaq Basic, or Derived Data therefrom, to Professional and Non-Professional Subscribers who are natural persons and with whom the broker-dealer has a brokerage relationship. As a current condition of this license, Professional Users [sic] who receive data may not use that data within the scope of any professional engagement or registration. In addition, Nasdaq must approve any electronic system used to distribute such data, and a separate enterprise license must be purchased for each such system. Broker-dealers purchasing this license must also report the number of Subscribers at least once per year.

As noted above, the Exchange proposes to add NLS data as an additional feature to the Nasdaq Basic enterprise license at Rule 7047(b)(5). NLS provides real-time last sale information, including price, volume, and time of execution, for transactions on the Nasdaq Market Center or reported to the FINRA/Nasdaq TRF.³ It is, like Nasdaq Basic, a non-core product that provides a subset of the core data provided by the SIPs under the CTA Plan and the Nasdaq UTP Plan. NLS was designed to “increase[] the availability of NASDAQ proprietary

³ See NASDAQ Rule 7039(a)-(c); see also Securities Exchange Act Release No. 71351 (January 17, 2014), 79 FR 4200 (Jan. 24, 2014) (SR-NASDAQ-2014-006) (notice of filing and immediate effectiveness regarding permanent approval of NLS).

market data to individual investors.”⁴ The Exchange does not explicitly offer an enterprise license for NLS, but has set a cap of \$41,500 per month for NLS for Nasdaq and NLS for NYSE/NYSE MKT.

Proposed Changes

As explained above, the proposed changes will expand the features of the enterprise license set forth at Rule 7047(b)(5) by: (i) allowing distribution of Nasdaq Basic data to certain Professional Users [sic] that are currently excluded from the license; and (ii) permitting the distribution of NLS data, along with Nasdaq Basic data, without paying per user, per query, per visitor or per household fees. The proposal will also include technical and conforming changes as described below.

The enterprise license at Rule 7047(b)(5) currently allows distribution of data to Professionals in the context of a brokerage relationship with the broker-dealer, and explicitly prohibits Professionals who receive data under that license from using it within the scope of a professional engagement or registration. The Exchange proposes to loosen that restriction by allowing the broker-dealer to make Nasdaq Basic data available to up to and including 4,500 internal Subscribers operating on approved electronic system for use by Professionals who work for the broker-dealer and use that data to provide brokerage services to investors. Use of the license for internal Subscribers will be limited to Professionals providing brokerage services to investors, but will not be available to any Professionals involved in proprietary trading, surveillance activities, or performing any other function solely for the benefit of the broker-

⁴ See SR-NASDAQ-2006-060 at 3 (Amendment No. 2, June 10, 2008) (available at http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2006/SR-NASDAQ-2006-060_Amendment_2.pdf); see also Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060) (approving SR-NASDAQ-2006-060, as amended by Amendment Nos. 1 and 2, to implement NLS on a pilot basis).

dealer. Internal Subscribers may operate only on an approved electronic system to ensure that appropriate controls are in place to prevent use of the data by unauthorized personnel or for impermissible purposes. Any distribution to over 4,500 internal Subscribers, or any usage by Professional Users [sic] not in support of brokerage services to investors on an approved platform, would be subject to the applicable fees set forth in Rule 7047(b).

The difference between internal distribution of Nasdaq Basic through the newly proposed \$100,000 enterprise license at Rule 7047(b)(5), and internal distribution under the existing \$365,000 license under Rule 7047(b)(4), is of magnitude and scope. The new license will be limited to 4,500 internal Professional Subscribers, whereas the number of internal Subscribers able to obtain data under the \$365,000 enterprise license is not so limited.⁵ In addition, use of the data by internal Professional Users [sic] under the proposed license will be limited to the provision of brokerage services to investors, whereas use of the data through the \$365,000 license under Rule 7047(b)(4) is not limited to such services. Under the proposed rule, Professional Subscribers who do not obtain Nasdaq Basic through internal distribution, but rather through their own brokerage relationship with the broker-dealer, will still be prohibited from using such data within the scope of any professional engagement.

In addition to allowing distribution for up to 4,500 internal Subscribers, the Exchange also proposes to permit distribution of NLS data without paying the fees set forth in Rule

⁵ The enterprise license at Rule 7047(b)(4) allows distribution to 16,000 internal Professional Subscribers for no additional cost, with an additional charge of \$2 for each internal Professional Subscriber above that level, provided that the broker-dealer obtains the license through an External Distributor that controls display of the product, and the broker-dealer obtains a separate license for each such External Distributor.

7039(b).⁶ The Exchange does not currently offer an enterprise license for NLS, although there is a maximum distributor fee for any Distributor using the per user, per query, per visitor or per household pricing models of \$41,500 per month. There are no additional restrictions on the use of NLS data under this license, although all other fees and restrictions other than the fees set forth in Rule 7039(b) will continue to apply.

The technical and conforming changes proposed by the Exchange are to: (i) require broker-dealers purchasing the enterprise license at Rule 7047(b)(5) to report the number of Professional Subscribers on a monthly basis; (ii) clarify that Professional Users [sic] receiving Nasdaq Basic data through internal Subscribers (not in the context of their own brokerage relationship with the broker-dealer) are not prohibited from using the data within the scope of any professional engagement or registration; and (iii) replace references to “NASDAQ,” with all letters capitalized, with “Nasdaq,” in which only the first letter of the company is capitalized. All of these changes are necessary to support the primary fee changes sought by the Exchange, or to correct technical errors. The change in reporting is necessary to monitor the number of internal Subscribers receiving data. The clarification to the ability of Professionals to utilize Nasdaq Basic data is necessary to allow Professionals to effectively use the data in support of providing brokerage services to investors. The change from NASDAQ to Nasdaq is necessary to replace an older version of the Exchange’s name.

The purpose of the proposed changes is to make the purchase of the enterprise license at Rule 7047(b)(5) more attractive to broker-dealers by adding features without increasing fees. The cost of the license will remain \$100,000 per month, but services will be augmented by

⁶ The Exchange anticipates filing changes to Rule 7039 that would eliminate Distributor fees under Rule 7039(c) for any firm paying such a fee for Nasdaq Basic, effectively eliminating all NLS fees with the purchase of this enterprise license.

allowing internal distribution to up to 4,500 Professionals and including distribution of NLS to private investors. The proposal will lower the costs to broker-dealers of distributing Nasdaq Basic and NLS, thereby encouraging the dissemination of such data to individual investors.

The enterprise license at Rule 7047(b)(5) is optional in that Nasdaq is not required to offer it and broker-dealers are not required to purchase it. Firms can discontinue use at any time and for any reason, including an assessment of the fees charged.

The proposed change does not change the cost of any other Nasdaq product.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁸ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁹

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4) and (5).

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

Likewise, in NetCoalition v. Securities and Exchange Commission¹⁰ (“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.¹¹ 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.”¹²

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’”¹³

The Exchange believes that the proposal to expand the features of the enterprise license set forth at Rule 7047(b)(5) without increasing fees is an equitable allocation of reasonable dues, fees and other charges in accordance with Section 6(b)(4) of the Act, and not designed to permit unfair discrimination between customers, issuers, brokers, or dealers in accordance with Section 6(b)(5) of the Act. As described above, the proposed changes will: (i) allow distribution of Nasdaq Basic data to certain Professional Subscribers that are currently excluded from the license; and (ii) permit the distribution of NLS data along with Nasdaq Basic data without paying per user, per query, per visitor or per household fees. The proposal will provide greater value to

¹⁰ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹¹ Id. at 534 - 535.

¹² Id. at 537.

¹³ 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)).

the broker-dealers purchasing the enterprise license, and increase market transparency by lowering the cost of distributing both NLS and Basic to investors. The proposal is an equitable allocation of reasonable dues, fees and other charges because the services will be the same for all broker-dealers that purchase the license. The services are not designed to permit unfair discrimination because all broker-dealers will be able to purchase the same license at the same price. As is the case for the current enterprise licenses, offering the enterprise license only to broker-dealers is not unfair discrimination because the license is primarily designed to allow data distribution to investors, and investors execute trades through broker-dealers. It is reasonable to limit use of the expanded enterprise license to internal Subscribers operating on approved platforms to ensure that the data is being used to support brokerage services for investors, rather than any other purpose. Moreover, enterprise license fees, 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 of price, it may lose market share as a result.

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.

The proposed changes will effectively lower the cost to broker-dealers to distribute NLS and Nasdaq Basic by expanding the features of the enterprise license set forth at Rule 7047(b)(5) without increasing fees. This proposal to lower costs is itself evidence of the need to maintain low prices is [sic] a competitive marketplace. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

Market forces constrain the prices for NLS and Nasdaq Basic in two respects. First, market data fees are one element of the total cost of interacting with the Exchange and, if the price of these products were set above competitive levels, competition for order flow would be harmed. Second, the competition among broker-dealers for customers will provide another constraint on the cost of NLS and Nasdaq Basic.

Competition for Order Flow

Market data fees are constrained by competition among exchanges and other entities seeking to attract order flow. Order flow is the “life blood” of the exchanges. Broker-dealers currently have numerous alternative venues for their order flow, including self-regulatory organization (“SRO”) markets, as well as internalizing broker-dealers 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 broker-dealers, which may readily reduce costs by directing orders toward the lowest-cost trading venues.

The level of competition and contestability in the market for order flow is demonstrated by the numerous examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading and BATS/Direct Edge. 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 broker-dealer 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, BATS, and IEX. This is because Regulation NMS deregulated the market for proprietary data. While broker-dealers had previously published their proprietary data individually, Regulation NMS encourages market data vendors and broker-dealers 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 broker-dealers. The potential sources of proprietary products are virtually limitless.

The markets for order flow and proprietary data are inextricably linked: a trading platform cannot generate market information unless it receives trade orders. As a result, the competition for order flow constrains the prices that platforms can charge for proprietary data products. Firms make decisions on how much and what types of data to consume based on the total cost of interacting with Nasdaq and other exchanges. The cost of market data is one factor in this total platform analysis. A supracompetitive price for NLS and Nasdaq Basic has the potential to impair competition for order flow, and the need to compete effectively for order flow will constrain its price.

Competition for Customers

Broker-dealers that purchase NLS and Nasdaq Basic are in competition for customers. If the price of these products were set above competitive levels, the broker-dealers that purchase these products would be at a disadvantage relative to their competitors. As such, they may lower costs by curtailing their purchases of Nasdaq products, thereby providing a constraint on the price of NLS and Nasdaq Basic.

In summary, market forces constrain the price of NLS and Nasdaq Basic through competition for order flow and in the competition among broker-dealers for customers. For these reasons, the Exchange has provided a substantial basis for demonstrating that the fee is equitable, fair, reasonable, and not unreasonably discriminatory, and that it is 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.¹⁴

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.

¹⁴ 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-2017-095 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-2017-095. 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-2017-095 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.¹⁵

Eduardo A. Aleman
Assistant Secretary

¹⁵ 17 CFR 200.30-3(a)(12).