

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 37		SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4		File No.* SR - 2016 - * 109	
Amendment No. (req. for Amendments *)					
Filing by NASDAQ Stock Market Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934					
Initial * <input checked="" type="checkbox"/>		Amendment * <input type="checkbox"/>		Withdrawal <input type="checkbox"/>	
Section 19(b)(2) * <input type="checkbox"/>		Section 19(b)(3)(A) * <input checked="" type="checkbox"/>		Section 19(b)(3)(B) * <input type="checkbox"/>	
Rule					
Pilot <input type="checkbox"/>		Extension of Time Period for Commission Action * <input type="checkbox"/>		Date Expires * <input type="text"/>	
<input type="checkbox"/> 19b-4(f)(1)		<input type="checkbox"/> 19b-4(f)(4)		<input type="checkbox"/> 19b-4(f)(5)	
<input checked="" type="checkbox"/> 19b-4(f)(2)		<input type="checkbox"/> 19b-4(f)(3)		<input type="checkbox"/> 19b-4(f)(6)	
Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010				Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934	
Section 806(e)(1) * <input type="checkbox"/>		Section 806(e)(2) * <input type="checkbox"/>		Section 3C(b)(2) * <input type="checkbox"/>	
Exhibit 2 Sent As Paper Document <input type="checkbox"/>		Exhibit 3 Sent As Paper Document <input type="checkbox"/>			
<b>Description</b>					
Provide a brief description of the action (limit 250 characters, required when Initial is checked *).					
Proposal to amend Rule 7047 with language indicating the removal of certain credits that a Distributor is eligible to receive in respect to Nasdaq Basic.					
<b>Contact Information</b>					
Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.					
First Name * Jurij		Last Name * Trypupenko			
Title * Associate General Counsel					
E-mail * Jurij.Trypupenko@nasdaq.com					
Telephone * (301) 978-8132		Fax <input type="text"/>			
<b>Signature</b>					
Pursuant to the requirements of the Securities Exchange Act of 1934,					
has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.					
(Title *)					
Date 08/02/2016		Executive Vice President and General Counsel			
By Edward S. Knight		<input type="text"/>			
(Name *)		edward.knight@nasdaq.com			
NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.					

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

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

**Form 19b-4 Information \***

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

**Exhibit 1 - Notice of Proposed Rule Change \***

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

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

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

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

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Exhibit Sent As Paper Document

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

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

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

**Exhibit 4 - Marked Copies**

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

**Exhibit 5 - Proposed Rule Text**

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

**Partial Amendment**

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

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend Rule 7047 (Nasdaq Basic)<sup>3</sup> with language indicating the removal of certain credits that a Distributor<sup>4</sup> is eligible to receive in respect to Nasdaq Basic.<sup>5</sup>

While changes pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on September 1, 2016.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1 and a copy of applicable portion of the Exchange’s Pricing Schedule is attached hereto as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> References to rules are to Nasdaq rules, unless otherwise noted.

<sup>4</sup> The term “Distributor” refers to any entity that receives Nasdaq Basic data directly from Nasdaq or indirectly through another entity and then distributes it to one or more Subscribers. Rule 7047 (d)(1).

<sup>5</sup> Nasdaq Basic, which is discussed below, is a proprietary data product that provides a low cost alternative to other Level 1 offerings. Rule 7047. Level 1 provides primary market data such as bid/ask price and size and last price and size.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors of the Exchange on July 1, 2015. Exchange staff will advise the Board of Directors of any action taken pursuant to delegated authority. No other action by the Exchange is necessary for the filing of the rule change.

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

Jurij Trypupenko  
Associate General Counsel  
Nasdaq, Inc.  
(301) 978-8132

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

a. Purpose

The purpose of this proposal is to amend Rule 7047(c) with language indicating that the Distributor fee for Nasdaq Basic will be uniformly applied to all Distributors, regardless of any user fees, immediately after approval to receive Nasdaq Basic, at the current fee of \$1,500 per month.<sup>6</sup>

Nasdaq Basic is a proprietary data product that provides a low cost alternative to the other Level 1 offerings. Nasdaq Basic provides the best bid and offer and last sale information for all U.S. exchange-listed securities based on liquidity within the Nasdaq market center, as well as trades reported to the FINRA/Nasdaq Trade Reporting

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<sup>6</sup> Now, as discussed below, each Distributor is eligible to receive a credit against its monthly Distributor Fee for Nasdaq Basic equal to the amount of its monthly user fees for Nasdaq Basic up to a maximum of \$1,500. Rule 7047(c).

Facility™ (TRF™) (“FINRA/Nasdaq TRF”).<sup>7</sup> Thus, Nasdaq Basic provides Nasdaq Last Sale (“NLS”) together with best bid and offer information from Nasdaq.

NLS was approved by the Commission in June of 2008. NLS is a non-core market data product designed for distribution through internet portals and broadcast television, as well as distribution to individuals that access the data via a username/password-identified account and/or quote-counting mechanisms.<sup>8</sup> NLS includes two data elements: (1) last sale transaction reports from the Nasdaq Market Center, and (2) last sale transaction reports from the FINRA/Nasdaq TRF.<sup>9</sup> As such, NLS is a “non-core” product that provides a subset of the “core” quotation and last sale data provided by securities information processors (“SIPs”) under the CQ/CT Plan and the Nasdaq Unlisted Trading Privileges (“UTP”) Plan.

Nasdaq Basic, another non-core market data product, was approved by the Commission about a year later in March of 2009.<sup>10</sup> As originally proposed, the Nasdaq Basic product was to provide two data feeds: (1) A feed carrying the best bid and offer on

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<sup>7</sup> “FINRA” is the Financial Industry Regulatory Authority.

<sup>8</sup> See Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060) (approval order establishing NLS pilot). See also Securities Exchange Act Release No. 71351 (January 17, 2014), 79 FR 4200 (January 24, 2014) (SR-NASDAQ-2014-006) (notice of filing and immediate effectiveness regarding permanent approval of NLS pilot).

<sup>9</sup> See Rule 7039(a)-(c).

<sup>10</sup> See Securities Exchange Act Release No. 59582 (March 16, 2009), 74 FR 12423 (March 24, 2009) (SR-NASDAQ-2008-102) (order approving Nasdaq Basic pilot and finding it to be consistent with Sections 6(b)(4), (5) and (8) of the Act and Rule 603(a) under Regulation NMS). See also Securities Exchange Act Release No. 65527 (October 11, 2011), 76 FR 64147 (October 17, 2011) (SR-NASDAQ-2011-129) (notice of filing and immediate effectiveness re permanent approval of Nasdaq Basic pilot).

the Nasdaq Market Center, and (2) a feed containing NLS which carries last sale transaction reports from Nasdaq and from the FINRA/Nasdaq TRF.

Nasdaq Basic, which is described in current Rule 7047, was expanded to three separate components, which may be purchased individually or in combination.<sup>11</sup> The Nasdaq Basic components 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 contains the best bid and offer on the Nasdaq Market Center and last sale transaction 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 transaction 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.<sup>12</sup>

The fee structure for Nasdaq Basic features a fee for Professional Subscribers and a reduced fee for Non-Professional Subscribers.<sup>13</sup> The current monthly fees for Non-

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<sup>11</sup> See Rule 7047.

<sup>12</sup> Tape A and Tape B securities are disseminated pursuant to the Security Industry Automation Corporation's ("SIAC") Consolidated Tape Association Plan/Consolidated Quotation System, or CTA/CQS ("CTA"). Tape C securities are disseminated pursuant to the UTP Plan.

<sup>13</sup> Per Rule 7047(d)(3): (A) 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

Professional Subscribers are \$0.50 per Subscriber for Nasdaq Basic for Nasdaq, \$0.25 per Subscriber for Nasdaq Basic for NYSE, and \$0.25 per Subscriber for Nasdaq Basic for NYSE MKT. The current monthly fees for Professional Subscribers are \$13 per Subscriber for Nasdaq Basic for Nasdaq, \$6.50 per Subscriber for Nasdaq Basic for NYSE, and \$6.50 per Subscriber for Nasdaq Basic for NYSE MKT. There is also a per query option for use cases that do not require a monthly subscription for unlimited usage, a distributor fee for internal and external distribution, and certain credits for Nasdaq Basic users.<sup>14</sup>

There is also a separate Distributor fee for Nasdaq Basic.<sup>15</sup> Currently, each Distributor of any Nasdaq Basic product shall pay a fee of \$1,500 per month for either internal or external distribution or both.<sup>16</sup> Currently, each Distributor is eligible to

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were performed for an organization not so exempt. (B) A “Professional Subscriber” is any Subscriber other than a Non-Professional Subscriber.

<sup>14</sup> See Rule 7047. See also Securities Exchange Act Release No. 72620 (July 16, 2014), 79 FR 42572 (July 22, 2014) (SR-NASDAQ-2014-070) (notice of filing and immediate effectiveness regarding Nasdaq Basic fees).

<sup>15</sup> In addition, there is also an enterprise license available for certain Nasdaq Basic recipients. Rule 7047(b)(4) states in part, for example: (4) As an alternative to (b)(1), a broker-dealer may purchase an enterprise license for internal Professional Subscribers to receive Nasdaq Basic for Nasdaq, Nasdaq Basic for NYSE, and Nasdaq Basic for NYSE MKT. The fee will be \$365,000 per month; provided, however, that if the broker-dealer obtains the license with respect to usage of Nasdaq Basic provided by an External Distributor that controls display of the product, the fee will be \$365,000 per month for up to 16,000 internal Professional Subscribers, plus \$2 for each additional internal Professional Subscriber over 16,000; and provided further that the broker-dealer must obtain a separate enterprise license for each External Distributor that controls display of the product if it wishes such External Distributor to be covered by an enterprise license rather than per-Subscriber fees.

<sup>16</sup> Internal distribution is where a Distributor receives Nasdaq Basic data and then distributes that data to one or more Subscribers within the Distributor’s own entity. External distribution is where a Distributor receives Nasdaq Basic data

receive a credit against its monthly Distributor Fee for Nasdaq Basic equal to the amount of its monthly user fees for Nasdaq Basic up to a maximum of \$1,500 (the “credit”). The Exchange now proposes to eliminate the credit from subsection (c)(2) of Rule 7047.<sup>17</sup> Going forward, the Exchange proposes to apply the Distributor Fee (currently \$1,500 per month) for all Distributors of Nasdaq Basic immediately after the Exchange approves a Distributor for the product.

The Exchange believes that the proposed rule change is reasonable and proper. This is because Distributors will not be disadvantaged by the rule change because this would be applied to all Distributors after approval to receive Nasdaq Basic data. The credit was implemented in order to incentivize new firms to subscribe to Nasdaq Basic and grow the product. Due to strong product growth and continued overall industry cost savings with Nasdaq Basic compared to Level 1 data, as well as the administrative burden of maintaining the credit, the Exchange believes the change to remove the Distributor fee credit as described will not deter new subscribers or be unfairly discriminatory. Charging a monthly fixed fee without a credit available to all eligible Distributors makes this product similar to nearly all other Nasdaq data products and makes its administration less burdensome on the Exchange.

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and then distributes that data to one or more Subscribers outside the Distributor’s own entity. Rule 7047(d)(1).

<sup>17</sup> Subsection (c)(3) of Rule 7047 will be re-numbered to subsection (c)(2), and will continue to state: A Distributor may pay \$1,500 per month to distribute data derived from Nasdaq Basic to an unlimited number of non-professional subscribers. This fee is in addition to the Distributor Fee listed in (c)(1)..



b. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>18</sup> in general, and with Sections 6(b)(4) and (5) of the Act,<sup>19</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Nasdaq Basic product provides a subset of the data that is also provided by the Level 1 data feed available under the Nasdaq UTP Plan. Moreover, the current fees for Nasdaq Basic, similarly to the fees for NLS and NLS Plus, having been previously established, and the Commission has either specifically determined them to be consistent with the Act or has permitted them to become effective on an immediately effective basis.<sup>20</sup> Thus, this proposed rule change does not change a fee of the Exchange, but

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<sup>18</sup> 15 U.S.C. 78f.

<sup>19</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>20</sup> See, e.g., Securities Exchange Act Release Nos. 59582 (March 16, 2009), 74 FR 12423 (March 24, 2009) (SR-NASDAQ-2008-102) (finding current per user and per subscriber fees to be consistent with the Act); 59933 (May 15, 2009), 74 FR 24889 (May 26, 2009) (SR-NASDAQ-2009-208) (finding current distributor fees for Nasdaq Basic to be consistent with the Act); 64994 (July 29, 2011), 76 FR 47621 (August 5, 2011) (SR-NASDAQ-2011-091) (immediate effectiveness of optional derived data fee); and 65526 (October 11, 2011), 76 FR 64137 (October 17, 2011) (SR-NASDAQ-2011-130) (immediate effectiveness of enterprise license fee). Similarly, Non-Professional, as opposed to Professional, fees have been established and approved. See Securities Exchange Act Release Nos. 21856 (March 15, 1985), 50 FR 11472 (March 21, 1985) (SR-NASD-85-1); and 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060). See also Securities Exchange Act Release No. 72620 (July 16, 2014), 79 FR 42572 (July 22, 2014) (SR-NASDAQ-2014-070) (notice of filing and immediate effectiveness regarding Nasdaq Basic fees). See also Securities Exchange Act Release No. 75600 (August 4, 2015), 80 FR 47968 (August 10, 2015) (SR-NASDAQ-2015-88) (notice of filing and immediate effectiveness regarding NLS fees).

rather eliminates the Distributor fee credit, such that going forward the Exchange will uniformly apply the Distributor fee for all subscribers of Nasdaq Basic. However, to the extent that the proposed rule change is effectively a proposed fee that has already been approved, Nasdaq believes that this also provides further justification that the proposed credit elimination provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers,<sup>21</sup> in that the change reflects the full value of the product without increase in its cost.

The proposed credit elimination continues to reflect an equitable allocation and continues to be not unfairly discriminatory. Nasdaq Basic, like NLS and NLS Plus, are voluntary products for which market participants can readily substitute core data feeds that provide quotation and last sale information. Accordingly, Nasdaq is constrained from pricing such products in a manner that would be inequitable or unfairly discriminatory. The distinction between fees for professional and non-professional users, and between Distributors and other users, is consistent with the distinction made under Commission-approved fees for core data, and the applicable fees are lower than applicable fees for core data to reflect the lesser quantum of data made available. The Exchange believes that the proposed rule change is reasonable, equitable and not unfairly discriminatory. This is because current Distributors will not be disadvantaged by the rule change, because even if the credit deletion could be seen in the nature of a fee increase, current Distributors have been able to take advantage of the credit under current Rule

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<sup>21</sup> 15 U.S.C. 78f(b)(4), (5).

7047. And, on a going forward basis the monthly Distributor fee would be applied uniformly to all Distributors after approval to receive Nasdaq Basic data, which would help with the administration of costs by the Exchange.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers (“BDs”) increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. Nasdaq believes that its Nasdaq Basic, as also NLS and NLS Plus, market data products are precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act’s goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.<sup>22</sup>

By removing unnecessary regulatory restrictions on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

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<sup>22</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“Regulation NMS Adopting Release”).

Moreover, fee liable data products such as Nasdaq Basic, and also NLS and NLS Plus, are a means by which exchanges compete to attract order flow, and this proposal simply codifies the relevant fee structure into an Exchange rule. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they are able to provide. Conversely, to the extent that exchanges are unsuccessful, the inputs needed to add value to data products are diminished. Accordingly, the need to compete for order flow places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.

The Exchange believes that data products are a means by which exchanges compete to attract order flow. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they are able to provide. Conversely, to the extent that exchanges are unsuccessful, the inputs needed to add value to data products are diminished. Accordingly, the need to compete for order flow places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.

The fee structure for Nasdaq Basic, similarly to NLS and NLS Plus, also continues to reflect an equitable allocation and continues not be unfairly discriminatory, because these are voluntary products which market participants can readily substitute (or put together themselves).<sup>23</sup> Accordingly, Nasdaq is constrained from providing such

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<sup>23</sup> See, e.g., Securities Exchange Act Release No. 75257 (June 22, 2015), 80 FR 36862 (June 26, 2015) (SR-NASDAQ-2015-055) (order approving NLS Plus), wherein the Exchange notes that NLS Plus is a data product that a competing market data vendor could create and sell on his own without being in a disadvantaged position relative to the Exchange.

products in a manner that would be inequitable or unfairly discriminatory. Moreover, the fee schedules for Nasdaq Basic, as also for NLS and NLS Plus, are designed to ensure that the fees charged are tailored to the specific usage patterns of a range of potential customers. Thus, for example, Professional Subscriber fees provide a means for brokerage customers to use the information internally; and the distinction between fees for Professional and Non-Professional users, as also Distributors, is consistent with the distinction made under Commission-approved fees for core data, and the applicable fees are lower than applicable fees for core data to reflect the lesser quantum of data made available. The range of fee options further ensures that customers are not charged a fee that is inequitably disproportionate to the use that they make of the product.

In summary, deletion of the Distributor credit so that the Distributor fee for Nasdaq Basic will be uniformly applied to all Distributors, regardless of any user fees, will help to protect a free and open market by continuing to provide additional non-core data (offered on an optional basis for a fee) to the marketplace and by providing investors with greater choices.<sup>24</sup> Additionally, the proposal would not permit unfair discrimination because Basic will be available to all Distributors as discussed.

4. 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

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<sup>24</sup> See Sec. Indus. Fin. Mkts. Ass'n (SIFMA), Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (ALJ June 1, 2016) (finding the existence of vigorous competition with respect to non-core market data). See also the decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010) ("NetCoalition I") (upholding the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data).

Act. The proposed fee structure is designed to ensure a fair and reasonable use of Exchange resources by allowing the Exchange to recoup costs while continuing to offer its data products at competitive rates to firms.

The market for data products is extremely competitive and firms may freely choose alternative venues and data vendors based on the aggregate fees assessed, the data offered, and the value provided. This rule proposal does not burden competition, which continues to offer alternative data products and, like the Exchange, set fees, but rather reflects the competition between data feed vendors and will further enhance such competition. Nasdaq Basic, like NLS and NLS Plus, compete directly with existing similar products and potential products of market data vendors. Nasdaq Basic, like NLS and NLS Plus, are part of the existing market for proprietary last sale data products that is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market. Similarly, with respect to the FINRA/Nasdaq TRF data that is a component of Nasdaq Basic, NLS, and NLS Plus, allowing exchanges to operate TRFs has permitted them to earn revenues by providing technology and data in support of the non-exchange segment of the market. This revenue opportunity has also resulted in fierce competition between the two current TRF operators, with both TRFs charging

extremely low trade reporting fees and rebating the majority of the revenues they receive from core market data to the parties reporting trades.

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price, and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (e.g., if the software can be downloaded over the

internet after being purchased).<sup>25</sup> In Nasdaq's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, Nasdaq would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of TRF trade reports without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating,<sup>26</sup> and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. Nasdaq pays rebates and credits to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may

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<sup>25</sup> See William J. Baumol and Daniel G. Swanson, "The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power," Antitrust Law Journal, Vol. 70, No. 3 (2003).

<sup>26</sup> It should be noted that the costs of operating the FINRA/Nasdaq TRF borne by Nasdaq include regulatory charges paid by Nasdaq to FINRA.



provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an “excessive” price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.<sup>27</sup>

The proposed fee structure is designed to ensure a fair and reasonable use of Exchange resources by allowing the Exchange to recoup costs and ease administrative burden while continuing to offer its data products at competitive rates to firms.

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<sup>27</sup> Moreover, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including eleven SRO markets, as well as internalizing BDs and various forms of alternative trading systems (“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. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, BDs, and ATs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATs, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including Nasdaq, NYSE, NYSE MKT, NYSE Arca, and BATS/Direct Edge.

5. 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.

6. Extension of Time Period for Commission Action

Not applicable.

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

Pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>28</sup> the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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

Not applicable

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

Not applicable.

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

Not applicable.

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<sup>28</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

11. Exhibits

1. Completed notice of proposed rule change for publication in the Federal Register.
5. Proposed rule text.

**EXHIBIT 1**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. SR-NASDAQ-2016-109)

August \_\_, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Nasdaq Rule 7047

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 2, 2016, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is proposing to amend Rule 7047 (Nasdaq Basic)<sup>3</sup> with language indicating the removal of certain credits that a Distributor<sup>4</sup> is eligible to receive in respect to Nasdaq Basic.<sup>5</sup>

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 C.F.R. 240.19b-4.

<sup>3</sup> References to rules are to Nasdaq rules, unless otherwise noted.

<sup>4</sup> The term “Distributor” refers to any entity that receives Nasdaq Basic data directly from Nasdaq or indirectly through another entity and then distributes it to one or more Subscribers. Rule 7047 (d)(1).

<sup>5</sup> Nasdaq Basic, which is discussed below, is a proprietary data product that provides a low cost alternative to other Level 1 offerings. Rule 7047. Level 1

While changes pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on September 1, 2016.

The text of the proposed rule change is available at [nasdaq.cchwallstreet.com](http://nasdaq.cchwallstreet.com), at Nasdaq's principal office, and at the Commission's Public Reference Room.

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

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

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

1. Purpose

The purpose of this proposal is to amend Rule 7047(c) with language indicating that the Distributor fee for Nasdaq Basic will be uniformly applied to all Distributors, regardless of any user fees, immediately after approval to receive Nasdaq Basic, at the current fee of \$1,500 per month.<sup>6</sup>

Nasdaq Basic is a proprietary data product that provides a low cost alternative to the other Level 1 offerings. Nasdaq Basic provides the best bid and offer and last sale information for all U.S. exchange-listed securities based on liquidity within the Nasdaq

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provides primary market data such as bid/ask price and size and last price and size.

<sup>6</sup> Now, as discussed below, each Distributor is eligible to receive a credit against its monthly Distributor Fee for Nasdaq Basic equal to the amount of its monthly user fees for Nasdaq Basic up to a maximum of \$1,500. Rule 7047(c).

market center, as well as trades reported to the FINRA/Nasdaq Trade Reporting Facility™ (TRF™) (“FINRA/Nasdaq TRF”).<sup>7</sup> Thus, Nasdaq Basic provides Nasdaq Last Sale (“NLS”) together with best bid and offer information from Nasdaq.

NLS was approved by the Commission in June of 2008. NLS is a non-core market data product designed for distribution through internet portals and broadcast television, as well as distribution to individuals that access the data via a username/password-identified account and/or quote-counting mechanisms.<sup>8</sup> NLS includes two data elements: (1) last sale transaction reports from the Nasdaq Market Center, and (2) last sale transaction reports from the FINRA/Nasdaq TRF.<sup>9</sup> As such, NLS is a “non-core” product that provides a subset of the “core” quotation and last sale data provided by securities information processors (“SIPs”) under the CQ/CT Plan and the Nasdaq Unlisted Trading Privileges (“UTP”) Plan.

Nasdaq Basic, another non-core market data product, was approved by the Commission about a year later in March of 2009.<sup>10</sup> As originally proposed, the Nasdaq

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<sup>7</sup> “FINRA” is the Financial Industry Regulatory Authority.

<sup>8</sup> See Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060) (approval order establishing NLS pilot). See also Securities Exchange Act Release No. 71351 (January 17, 2014), 79 FR 4200 (January 24, 2014) (SR-NASDAQ-2014-006) (notice of filing and immediate effectiveness regarding permanent approval of NLS pilot).

<sup>9</sup> See Rule 7039(a)-(c).

<sup>10</sup> See Securities Exchange Act Release No. 59582 (March 16, 2009), 74 FR 12423 (March 24, 2009) (SR-NASDAQ-2008-102) (order approving Nasdaq Basic pilot and finding it to be consistent with Sections 6(b)(4), (5) and (8) of the Act and Rule 603(a) under Regulation NMS). See also Securities Exchange Act Release No. 65527 (October 11, 2011), 76 FR 64147 (October 17, 2011) (SR-NASDAQ-2011-129) (notice of filing and immediate effectiveness re permanent approval of Nasdaq Basic pilot).

Basic product was to provide two data feeds: (1) A feed carrying the best bid and offer on the Nasdaq Market Center, and (2) a feed containing NLS which carries last sale transaction reports from Nasdaq and from the FINRA/Nasdaq TRF.

Nasdaq Basic, which is described in current Rule 7047, was expanded to three separate components, which may be purchased individually or in combination.<sup>11</sup> The Nasdaq Basic components 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 contains the best bid and offer on the Nasdaq Market Center and last sale transaction 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 transaction 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.<sup>12</sup>

The fee structure for Nasdaq Basic features a fee for Professional Subscribers and a reduced fee for Non-Professional Subscribers.<sup>13</sup> The current monthly fees for Non-

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<sup>11</sup> See Rule 7047.

<sup>12</sup> Tape A and Tape B securities are disseminated pursuant to the Security Industry Automation Corporation's ("SIAC") Consolidated Tape Association Plan/Consolidated Quotation System, or CTA/CQS ("CTA"). Tape C securities are disseminated pursuant to the UTP Plan.

<sup>13</sup> Per Rule 7047(d)(3): (A) 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

Professional Subscribers are \$0.50 per Subscriber for Nasdaq Basic for Nasdaq, \$0.25 per Subscriber for Nasdaq Basic for NYSE, and \$0.25 per Subscriber for Nasdaq Basic for NYSE MKT. The current monthly fees for Professional Subscribers are \$13 per Subscriber for Nasdaq Basic for Nasdaq, \$6.50 per Subscriber for Nasdaq Basic for NYSE, and \$6.50 per Subscriber for Nasdaq Basic for NYSE MKT. There is also a per query option for use cases that do not require a monthly subscription for unlimited usage, a distributor fee for internal and external distribution, and certain credits for Nasdaq Basic users.<sup>14</sup>

There is also a separate Distributor fee for Nasdaq Basic.<sup>15</sup> Currently, each Distributor of any Nasdaq Basic product shall pay a fee of \$1,500 per month for either

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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. (B) A “Professional Subscriber” is any Subscriber other than a Non-Professional Subscriber.

<sup>14</sup> See Rule 7047. See also Securities Exchange Act Release No. 72620 (July 16, 2014), 79 FR 42572 (July 22, 2014) (SR-NASDAQ-2014-070) (notice of filing and immediate effectiveness regarding Nasdaq Basic fees).

<sup>15</sup> In addition, there is also an enterprise license available for certain Nasdaq Basic recipients. Rule 7047(b)(4) states in part, for example: (4) As an alternative to (b)(1), a broker-dealer may purchase an enterprise license for internal Professional Subscribers to receive Nasdaq Basic for Nasdaq, Nasdaq Basic for NYSE, and Nasdaq Basic for NYSE MKT. The fee will be \$365,000 per month; provided, however, that if the broker-dealer obtains the license with respect to usage of Nasdaq Basic provided by an External Distributor that controls display of the product, the fee will be \$365,000 per month for up to 16,000 internal Professional Subscribers, plus \$2 for each additional internal Professional Subscriber over 16,000; and provided further that the broker-dealer must obtain a separate enterprise license for each External Distributor that controls display of the product if it wishes such External Distributor to be covered by an enterprise license rather than per-Subscriber fees.



internal or external distribution or both.<sup>16</sup> Currently, each Distributor is eligible to receive a credit against its monthly Distributor Fee for Nasdaq Basic equal to the amount of its monthly user fees for Nasdaq Basic up to a maximum of \$1,500 (the “credit”). The Exchange now proposes to eliminate the credit from subsection (c)(2) of Rule 7047.<sup>17</sup> Going forward, the Exchange proposes to apply the Distributor Fee (currently \$1,500 per month) for all Distributors of Nasdaq Basic immediately after the Exchange approves a Distributor for the product.

The Exchange believes that the proposed rule change is reasonable and proper. This is because Distributors will not be disadvantaged by the rule change because this would be applied to all Distributors after approval to receive Nasdaq Basic data. The credit was implemented in order to incentivize new firms to subscribe to Nasdaq Basic and grow the product. Due to strong product growth and continued overall industry cost savings with Nasdaq Basic compared to Level 1 data, as well as the administrative burden of maintaining the credit, the Exchange believes the change to remove the Distributor fee credit as described will not deter new subscribers or be unfairly discriminatory. Charging a monthly fixed fee without a credit available to all eligible Distributors makes this product similar to nearly all other Nasdaq data products and makes its administration less burdensome on the Exchange.

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<sup>16</sup> Internal distribution is where a Distributor receives Nasdaq Basic data and then distributes that data to one or more Subscribers within the Distributor’s own entity. External distribution is where a Distributor receives Nasdaq Basic data and then distributes that data to one or more Subscribers outside the Distributor’s own entity. Rule 7047(d)(1).

<sup>17</sup> Subsection (c)(3) of Rule 7047 will be re-numbered to subsection (c)(2), and will continue to state: A Distributor may pay \$1,500 per month to distribute data derived from Nasdaq Basic to an unlimited number of non-professional subscribers. This fee is in addition to the Distributor Fee listed in (c)(1)..

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>18</sup> in general, and with Sections 6(b)(4) and (5) of the Act,<sup>19</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Nasdaq Basic product provides a subset of the data that is also provided by the Level 1 data feed available under the Nasdaq UTP Plan. Moreover, the current fees for Nasdaq Basic, similarly to the fees for NLS and NLS Plus, having been previously established, and the Commission has either specifically determined them to be consistent with the Act or has permitted them to become effective on an immediately effective basis.<sup>20</sup> Thus, this proposed rule change does not change a fee of the Exchange, but

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<sup>18</sup> 15 U.S.C. 78f.

<sup>19</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>20</sup> See, e.g., Securities Exchange Act Release Nos. 59582 (March 16, 2009), 74 FR 12423 (March 24, 2009) (SR-NASDAQ-2008-102) (finding current per user and per subscriber fees to be consistent with the Act); 59933 (May 15, 2009), 74 FR 24889 (May 26, 2009) (SR-NASDAQ-2009-208) (finding current distributor fees for Nasdaq Basic to be consistent with the Act); 64994 (July 29, 2011), 76 FR 47621 (August 5, 2011) (SR-NASDAQ-2011-091) (immediate effectiveness of optional derived data fee); and 65526 (October 11, 2011), 76 FR 64137 (October 17, 2011) (SR-NASDAQ-2011-130) (immediate effectiveness of enterprise license fee). Similarly, Non-Professional, as opposed to Professional, fees have been established and approved. See Securities Exchange Act Release Nos. 21856 (March 15, 1985), 50 FR 11472 (March 21, 1985) (SR-NASD-85-1); and 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060). See also Securities Exchange Act Release No. 72620 (July 16, 2014), 79 FR 42572 (July 22, 2014) (SR-NASDAQ-2014-070) (notice of filing and immediate effectiveness regarding Nasdaq Basic fees). See also Securities Exchange Act Release No. 75600 (August 4, 2015), 80 FR 47968 (August 10, 2015) (SR-NASDAQ-2015-88) (notice of filing and immediate effectiveness regarding NLS fees).

rather eliminates the Distributor fee credit, such that going forward the Exchange will uniformly apply the Distributor fee for all subscribers of Nasdaq Basic. However, to the extent that the proposed rule change is effectively a proposed fee that has already been approved, Nasdaq believes that this also provides further justification that the proposed credit elimination provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers,<sup>21</sup> in that the change reflects the full value of the product without increase in its cost.

The proposed credit elimination continues to reflect an equitable allocation and continues to be not unfairly discriminatory. Nasdaq Basic, like NLS and NLS Plus, are voluntary products for which market participants can readily substitute core data feeds that provide quotation and last sale information. Accordingly, Nasdaq is constrained from pricing such products in a manner that would be inequitable or unfairly discriminatory. The distinction between fees for professional and non-professional users, and between Distributors and other users, is consistent with the distinction made under Commission-approved fees for core data, and the applicable fees are lower than applicable fees for core data to reflect the lesser quantum of data made available. The Exchange believes that the proposed rule change is reasonable, equitable and not unfairly discriminatory. This is because current Distributors will not be disadvantaged by the rule change, because even if the credit deletion could be seen in the nature of a fee increase, current Distributors have been able to take advantage of the credit under current Rule

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<sup>21</sup> 15 U.S.C. 78f(b)(4), (5).

7047. And, on a going forward basis the monthly Distributor fee would be applied uniformly to all Distributors after approval to receive Nasdaq Basic data, which would help with the administration of costs by the Exchange.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers (“BDs”) increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. Nasdaq believes that its Nasdaq Basic, as also NLS and NLS Plus, market data products are precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act’s goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.<sup>22</sup>

By removing unnecessary regulatory restrictions on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

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<sup>22</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“Regulation NMS Adopting Release”).

Moreover, fee liable data products such as Nasdaq Basic, and also NLS and NLS Plus, are a means by which exchanges compete to attract order flow, and this proposal simply codifies the relevant fee structure into an Exchange rule. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they are able to provide. Conversely, to the extent that exchanges are unsuccessful, the inputs needed to add value to data products are diminished. Accordingly, the need to compete for order flow places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.

The Exchange believes that data products are a means by which exchanges compete to attract order flow. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they are able to provide. Conversely, to the extent that exchanges are unsuccessful, the inputs needed to add value to data products are diminished. Accordingly, the need to compete for order flow places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.

The fee structure for Nasdaq Basic, similarly to NLS and NLS Plus, also continues to reflect an equitable allocation and continues not be unfairly discriminatory, because these are voluntary products which market participants can readily substitute (or put together themselves).<sup>23</sup> Accordingly, Nasdaq is constrained from providing such

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<sup>23</sup> See, e.g., Securities Exchange Act Release No. 75257 (June 22, 2015), 80 FR 36862 (June 26, 2015) (SR-NASDAQ-2015-055) (order approving NLS Plus), wherein the Exchange notes that NLS Plus is a data product that a competing market data vendor could create and sell on his own without being in a disadvantaged position relative to the Exchange.

products in a manner that would be inequitable or unfairly discriminatory. Moreover, the fee schedules for Nasdaq Basic, as also for NLS and NLS Plus, are designed to ensure that the fees charged are tailored to the specific usage patterns of a range of potential customers. Thus, for example, Professional Subscriber fees provide a means for brokerage customers to use the information internally; and the distinction between fees for Professional and Non-Professional users, as also Distributors, is consistent with the distinction made under Commission-approved fees for core data, and the applicable fees are lower than applicable fees for core data to reflect the lesser quantum of data made available. The range of fee options further ensures that customers are not charged a fee that is inequitably disproportionate to the use that they make of the product.

In summary, deletion of the Distributor credit so that the Distributor fee for Nasdaq Basic will be uniformly applied to all Distributors, regardless of any user fees, will help to protect a free and open market by continuing to provide additional non-core data (offered on an optional basis for a fee) to the marketplace and by providing investors with greater choices.<sup>24</sup> Additionally, the proposal would not permit unfair discrimination because Basic will be available to all Distributors as discussed.

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

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<sup>24</sup> See Sec. Indus. Fin. Mkts. Ass'n (SIFMA), Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (ALJ June 1, 2016) (finding the existence of vigorous competition with respect to non-core market data). See also the decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010) ("NetCoalition I") (upholding the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data).

Act. The proposed fee structure is designed to ensure a fair and reasonable use of Exchange resources by allowing the Exchange to recoup costs while continuing to offer its data products at competitive rates to firms.

The market for data products is extremely competitive and firms may freely choose alternative venues and data vendors based on the aggregate fees assessed, the data offered, and the value provided. This rule proposal does not burden competition, which continues to offer alternative data products and, like the Exchange, set fees, but rather reflects the competition between data feed vendors and will further enhance such competition. Nasdaq Basic, like NLS and NLS Plus, compete directly with existing similar products and potential products of market data vendors. Nasdaq Basic, like NLS and NLS Plus, are part of the existing market for proprietary last sale data products that is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market. Similarly, with respect to the FINRA/Nasdaq TRF data that is a component of Nasdaq Basic, NLS, and NLS Plus, allowing exchanges to operate TRFs has permitted them to earn revenues by providing technology and data in support of the non-exchange segment of the market. This revenue opportunity has also resulted in fierce competition between the two current TRF operators, with both TRFs charging

extremely low trade reporting fees and rebating the majority of the revenues they receive from core market data to the parties reporting trades.

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price, and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (e.g., if the software can be downloaded over the



internet after being purchased).<sup>25</sup> In Nasdaq's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, Nasdaq would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of TRF trade reports without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating,<sup>26</sup> and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. Nasdaq pays rebates and credits to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may

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<sup>25</sup> See William J. Baumol and Daniel G. Swanson, "The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power," Antitrust Law Journal, Vol. 70, No. 3 (2003).

<sup>26</sup> It should be noted that the costs of operating the FINRA/Nasdaq TRF borne by Nasdaq include regulatory charges paid by Nasdaq to FINRA.

provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an “excessive” price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.<sup>27</sup>

The proposed fee structure is designed to ensure a fair and reasonable use of Exchange resources by allowing the Exchange to recoup costs and ease administrative burden while continuing to offer its data products at competitive rates to firms.

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<sup>27</sup> Moreover, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including eleven SRO markets, as well as internalizing BDs and various forms of alternative trading systems (“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. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, BDs, and ATs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATs, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including Nasdaq, NYSE, NYSE MKT, NYSE Arca, and BATS/Direct Edge.

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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>28</sup>.

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 necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2016-109 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.

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<sup>28</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to File Number SR-NASDAQ-2016-109. This file number should be included on the subject line if e-mail is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NASDAQ-2016-109, 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.<sup>29</sup>

Robert W. Errett  
Deputy Secretary

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<sup>29</sup> 17 C.F.R. 200.30-3(a)(12).

**EXHIBIT 5**

Deleted text is [bracketed]. New text is underlined>.

**NASDAQ Stock Market Rules  
Equity Rules**

\* \* \* \* \*

**7047. Nasdaq Basic**

(a) – (b) No change.

(c) Distributor Fees

- (1) Each Distributor of any NASDAQ Basic product shall pay a fee of \$1,500 per month for either internal or external distribution or both.
- (2) [Each Distributor will receive a credit against its monthly Distributor Fee for NASDAQ Basic equal to the amount of its monthly user fees for NASDAQ Basic up to a maximum of \$1,500.
- (3) ]A Distributor may pay \$1,500 per month to distribute data derived from Nasdaq Basic to an unlimited number of non-professional subscribers. This fee is in addition to the Distributor Fee listed in (c)(1).

(d) No change.

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