

Required fields are shown with yellow backgrounds and asterisks.

Filing by NASDAQ Stock Market  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

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| Initial *<br><input checked="" type="checkbox"/> | Amendment *<br><input type="checkbox"/>                                      | Withdrawal<br><input type="checkbox"/> | Section 19(b)(2) *<br><input type="checkbox"/>  | Section 19(b)(3)(A) *<br><input checked="" type="checkbox"/> | Section 19(b)(3)(B) *<br><input type="checkbox"/> |
|  |  |  | Rule  |  |   |
| Pilot<br><input type="checkbox"/>                | Extension of Time Period for Commission Action *<br><input type="checkbox"/> | Date Expires *<br><input type="text"/> | <input type="checkbox"/> 19b-4(f)(1)            | <input type="checkbox"/> 19b-4(f)(4)                         |   |
|  |  |  | <input checked="" type="checkbox"/> 19b-4(f)(2) | <input type="checkbox"/> 19b-4(f)(5)                         |   |
|  |  |  | <input type="checkbox"/> 19b-4(f)(3)            | <input type="checkbox"/> 19b-4(f)(6)                         |   |

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| 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) *<br><input type="checkbox"/>   | Section 806(e)(2) *<br><input type="checkbox"/>                                |
| Section 3C(b)(2) *<br><input type="checkbox"/>  |  |

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| Exhibit 2 Sent As Paper Document<br><input type="checkbox"/> | Exhibit 3 Sent As Paper Document<br><input type="checkbox"/> |
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**Description**

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

Proposal to amend Nasdaq Rule 7046 by adding the corresponding fee for the optional Nasdaq Trading Insights product, as well to make a clarification to previously proposed language.

**Contact Information**

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 * Jonathan                    | Last Name * Cayne |
| Title * Senior Associate General Counsel |                   |
| E-mail * Jonathan.Cayne@nasdaq.com       |                   |
| Telephone * (301) 978-8493               | Fax               |

**Signature**

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 08/29/2016     | Executive Vice President and General Counsel |
| By Edward S. Knight |  |
| (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 \***

Add Remove View

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 \***

Add Remove View

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 \***

Add Remove View

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**

Add Remove View

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 proposed Nasdaq Rule 7046 (Nasdaq Trading Insights) by adding the corresponding fee for the optional Nasdaq Trading Insights product, as well to make a clarification to the previously proposed language.

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 the applicable portion of the Exchange’s Pricing Schedule is attached hereto as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

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 August 15, 2016. 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.

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

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

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

Jonathan F. Cayne  
Senior Associate General Counsel  
Nasdaq, Inc.  
(301) 978-8493

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

a. Purpose

The Exchange proposes to amend previously proposed Nasdaq Rule 7046 (Nasdaq Trading Insights) (the "NTI Filing") by adding the corresponding fee for the optional Nasdaq Trading Insights product, as well to make a clarification to the previously proposed language.<sup>3</sup> As discussed in the NTI Filing, the Nasdaq Trading Insights product is an optional market data service comprised of four market data components. Specifically, the market data components include: (a) Missed Opportunity – Liquidity; (b) Missed Opportunity – Latency; (c) Peer Benchmarking; and (d) Liquidity Dynamics Analysis.

Upon request by a potential subscribing firm, Nasdaq will provide the Nasdaq Trading Insights product for a 14 day period at no charge. This waiver may be provided only once to a potential subscribing firm. Otherwise, the applicable monthly charge for a subscriber will be based on the number of ports the subscriber requests for inclusion for the Nasdaq Trading Insights product in accordance with the following table:

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<sup>3</sup> This filing is referenced in the NTI Filing that proposed Nasdaq Rule 7046 (Nasdaq Trading Insights) to the Exchange rule book, which also will be implemented on September 1, 2016, if approved by the SEC. See Securities Exchange Act Release No. 78462 (Aug. 2, 2016), 81 FR 52486 (Aug. 8, 2016) (SR-NASDAQ-2016-101).

| TIERS  | PORTS | CHARGES |
|--------|-------|---------|
| Tier 1 | 1-5   | \$1,500 |
| Tier 2 | 6-15  | \$2,000 |
| Tier 3 | 16-25 | \$2,500 |
| Tier 4 | 26+   | \$3,500 |

The Exchange also proposes to make a clarification to the pending rule text in the NTI Filing in Nasdaq Rule 7046(a) to clarify that the Nasdaq Trading Insights product consists of all four components mentioned above.

b. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>4</sup> in general, and with Sections 6(b)(4) and (5) of the Act,<sup>5</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.

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 Trading Insights market data product is precisely the sort of market data product that the Commission envisioned when it adopted Regulation

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<sup>4</sup> 15 U.S.C. 78f.

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

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>6</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.

Moreover, fee liable data products such as the Nasdaq Trading Insights product, 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 fee structure for the Nasdaq Trading Insights product also continues to reflect

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<sup>6</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“Regulation NMS Adopting Release”).

an equitable allocation and continues not be unfairly discriminatory because it is a voluntary product designed to ensure that the amount of the charge is tailored to the specific port usage patterns of the subscriber. Thus, for example, a subscriber's monthly charge for receiving access to the Nasdaq Trading Insights product for five ports is \$1,500, while a subscriber's monthly charge for receiving access to the Nasdaq Trading Insights product for 26 ports is \$3,500. The range of fee options further ensures that subscribers are not charged a fee that is inequitably disproportionate to the use that they make of the product.

The proposal would not permit unfair discrimination because the Nasdaq Trading Insights product will be available to all interested market participants opting to subscribe and 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>7</sup>

The Exchange also believes that the proposed clarifying correction is reasonable, fair and equitable, and not unreasonably discriminatory because it simply clarifies that proposed Exchange Rule 7046 is accurate as to the composition of the Nasdaq Trading Insights product. The proposed clarification does not impact in any manner the actual assessment of fees by the Exchange.

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<sup>7</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).

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 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. The Nasdaq Trading Insights product is part of the existing market for proprietary market 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.

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>8</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

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<sup>8</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).

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>9</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 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

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<sup>9</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.

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>10</sup>

The proposed charges for the Nasdaq Trading Insights product are 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. Also, the proposed clarification that proposed Nasdaq Rule 7046 is accurate as to the composition of the Nasdaq Trading Insights product does not impact in any manner the actual assessment of fees by the Exchange.

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.

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<sup>10</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.

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>11</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.

11. Exhibits

1. Notice of proposed rule change for publication in the Federal Register.

5. Proposed rule text.

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

**EXHIBIT 1**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. SR-NASDAQ-2016-124)

August \_\_, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Nasdaq Rule 7046

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 29, 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 proposed Nasdaq Rule 7046 (Nasdaq Trading Insights) by adding the corresponding fee for the optional Nasdaq Trading Insights product, as well to make a clarification to the previously proposed language.

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.

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

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

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 Exchange proposes to amend previously proposed Nasdaq Rule 7046 (Nasdaq Trading Insights) (the "NTI Filing") by adding the corresponding fee for the optional Nasdaq Trading Insights product, as well to make a clarification to the previously proposed language.<sup>3</sup> As discussed in the NTI Filing, the Nasdaq Trading Insights product is an optional market data service comprised of four market data components. Specifically, the market data components include: (a) Missed Opportunity – Liquidity; (b) Missed Opportunity – Latency; (c) Peer Benchmarking; and (d) Liquidity Dynamics Analysis.

Upon request by a potential subscribing firm, Nasdaq will provide the Nasdaq Trading Insights product for a 14 day period at no charge. This waiver may be provided only once to a potential subscribing firm. Otherwise, the applicable monthly charge for a

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<sup>3</sup> This filing is referenced in the NTI Filing that proposed Nasdaq Rule 7046 (Nasdaq Trading Insights) to the Exchange rule book, which also will be implemented on September 1, 2016, if approved by the SEC. See Securities Exchange Act Release No. 78462 (Aug. 2, 2016), 81 FR 52486 (Aug. 8, 2016) (SR-NASDAQ-2016-101).

subscriber will be based on the number of ports the subscriber requests for inclusion for the Nasdaq Trading Insights product in accordance with the following table:

| TIERS  | PORTS | CHARGES |
|--------|-------|---------|
| Tier 1 | 1-5   | \$1,500 |
| Tier 2 | 6-15  | \$2,000 |
| Tier 3 | 16-25 | \$2,500 |
| Tier 4 | 26+   | \$3,500 |

The Exchange also proposes to make a clarification to the pending rule text in the NTI Filing in Nasdaq Rule 7046(a) to clarify that the Nasdaq Trading Insights product consists of all four components mentioned above.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>4</sup> in general, and with Sections 6(b)(4) and (5) of the Act,<sup>5</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.

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 Trading Insights market data product is precisely the sort

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<sup>4</sup> 15 U.S.C. 78f.

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

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>6</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.

Moreover, fee liable data products such as the Nasdaq Trading Insights product, 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.

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<sup>6</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“Regulation NMS Adopting Release”).

The fee structure for the Nasdaq Trading Insights product also continues to reflect an equitable allocation and continues not be unfairly discriminatory because it is a voluntary product designed to ensure that the amount of the charge is tailored to the specific port usage patterns of the subscriber. Thus, for example, a subscriber's monthly charge for receiving access to the Nasdaq Trading Insights product for five ports is \$1,500, while a subscriber's monthly charge for receiving access to the Nasdaq Trading Insights product for 26 ports is \$3,500. The range of fee options further ensures that subscribers are not charged a fee that is inequitably disproportionate to the use that they make of the product.

The proposal would not permit unfair discrimination because the Nasdaq Trading Insights product will be available to all interested market participants opting to subscribe and 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>7</sup>

The Exchange also believes that the proposed clarifying correction is reasonable, fair and equitable, and not unreasonably discriminatory because it simply clarifies that proposed Exchange Rule 7046 is accurate as to the composition of the Nasdaq Trading Insights product. The proposed clarification does not impact in any manner the actual assessment of fees by the Exchange.

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<sup>7</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).

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The 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. The Nasdaq Trading Insights product is part of the existing market for proprietary market 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.

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>8</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

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<sup>8</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).

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>9</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 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

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<sup>9</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.

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>10</sup>

The proposed charges for the Nasdaq Trading Insights product are 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. Also, the proposed clarification that proposed Nasdaq Rule 7046 is accurate as to the composition of the Nasdaq Trading Insights product does not impact in any manner the actual assessment of fees by the Exchange.

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.

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<sup>10</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.

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>11</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-2016-124 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-2016-124. 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

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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-2016-124, 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>12</sup>

Robert W. Errett  
Deputy Secretary

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

**EXHIBIT 5**

The text of the proposed rule change is below. Pending language is underlined with new language double underlined; proposed deletions are double bracketed.

**The NASDAQ Stock Market Rules**

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**7046. [Reserved]Nasdaq Trading Insights**

(a) The Nasdaq Trading Insights product will consist of [[one or more of ]]the following components[[products]]:

(1) Missed Opportunity – Liquidity. This component identifies when an order from a market participant could have been increased in size and executed more shares and is identified primarily through a market participant’s Missed Opportunity – Liquidity shares.

(2) Missed Opportunity – Latency. This component identifies by how much time a marketable order missed executing a resting order that was canceled or executed and is identified primarily through a market participant’s Missed Opportunity – Latency times.

(3) Peer Benchmarking. This component ranks the quality of a firm’s trading performance against their peers trading with the Nasdaq exchange. The following is a list of categories for this component:

(A) Trade and Order Information as to Price/Volume/Size

(B) Statistics as to Price/Volume/Size

(C) Information as to Missed Opportunities

(4) Liquidity Dynamics Analysis. This component offers extensive historical insight into visible and non-displayed orders on the Nasdaq exchange. This includes statistics regarding quantity and price at each of the top five price levels per buy/sell side and per stated time period.

(b) Standard Charge

(1) 14-Day Free-Trial Offer. Upon subscriber request, Nasdaq shall provide new Nasdaq Trading Insights subscribers and potential new Nasdaq Trading Insights subscribers a 14-day waiver of the charges for the Nasdaq Trading Insights product, which consists of all four components listed above in (a)(1) – (a)(4). This waiver may be provided only once to a specific new subscriber or potential subscriber.

(2) The following monthly charges shall apply to Nasdaq Trading Insights subscribers. The charges are based on the number of ports the subscriber requests for inclusion for the Nasdaq Trading Insights product:

| <u>TIERS</u>  | <u>PORTS</u> | <u>CHARGES</u> |
|---------------|--------------|----------------|
| <u>Tier 1</u> | <u>1-5</u>   | <u>\$1,500</u> |
| <u>Tier 2</u> | <u>6-15</u>  | <u>\$2,000</u> |
| <u>Tier 3</u> | <u>16-25</u> | <u>\$2,500</u> |
| <u>Tier 4</u> | <u>26+</u>   | <u>\$3,500</u> |

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