

the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

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

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2014-011 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-CBOE-2014-011. This file number should be included on the subject line if email 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-

2014-011 and should be submitted on or before March 6, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71507; File No. SR-NASDAQ-2014-011]

#### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Fees for NASDAQ Basic**

February 7, 2014.

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 January 27, 2014, The NASDAQ Stock Market LLC ("NASDAQ" or the "Exchange") filed with the Securities and Exchange Commission ("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 modify fees for the NASDAQ Basic data product. The proposal, which modifies monthly fees, is effective for the month of January 2014 and subsequent months. The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization 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**

NASDAQ Basic is a proprietary data product that provides best bid and offer information from the NASDAQ Market Center and last sale transaction reports from the NASDAQ Market Center and from the FINRA/NASDAQ Trade Reporting Facility ("FINRA/NASDAQ TRF"). As such, NASDAQ Basic 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 UTP Plan. In this filing, NASDAQ is proposing to (i) increase the Subscriber fees charged with respect to "Professional" Subscribers to the product, for the first time since the introduction of the product in 2009, (ii) introduce a new enterprise license for Professional Subscribers; and (iii) add rules to allow "netting," in certain instances, by Subscribers with multiple means of access to NASDAQ Basic, in order to reduce the total number of Subscribers for which a fee will be charged.

NASDAQ Basic contains three separate components, which may be purchased individually or in combination: (i) NASDAQ Basic for NASDAQ, which contains the best bid and offer on the NASDAQ Market Center and last sale transaction reports for NASDAQ and the FINRA/NASDAQ TRF for NASDAQ-listed stocks, (ii) NASDAQ Basic for NYSE, which covers NYSE-listed stocks, and (iii) NASDAQ Basic for NYSE MKT, which covers stocks listed on NYSE MKT and other listing venues whose quotes and trade reports are disseminated on Tape B.<sup>3</sup>

The fee structure for NASDAQ Basic features a fee for Professional Subscribers and a reduced fee for Non-Professional Subscribers.<sup>4</sup> The current

<sup>3</sup> NASDAQ is modifying the text of Rule 7047 to make it clear that NASDAQ Basic for NYSE MKT includes information for all Tape B listing venues and to use consistent terminology to describe the three data elements of NASDAQ Basic throughout the rule.

<sup>4</sup> 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 any commodities or futures contract market or association; (ii) engaged as an "investment adviser"

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<sup>13</sup> 17 CFR 200.30-3(a)(12).

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

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

monthly fees for Non-Professional Subscribers, which are not being modified, 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 \$10 per Subscriber for NASDAQ Basic for NASDAQ, \$5 per Subscriber for NASDAQ Basic for NYSE, and \$5 per Subscriber for NASDAQ Basic for NYSE MKT. As discussed in more detail below, NASDAQ is proposing to increase the Professional Subscriber fees to \$13, \$6.50, and \$6.50, respectively. For use cases that do not require a monthly subscription for unlimited usage, there is a Per Query option, with a fee of \$0.0025 for NASDAQ Basic for NASDAQ, \$0.0015 for NASDAQ Basic for NYSE, and \$0.0015 for NASDAQ Basic for NYSE MKT.

Distributors<sup>5</sup> of NASDAQ Basic may also be assessed a monthly Distributor Fee. The fee is \$1,500 per month for either internal or external distribution; however, a credit for Subscriber or Per Query fees may be applied against the Distributor Fee at the Distributor's request.

As an alternative to monthly Subscriber fees for Non-Professional Subscribers, NASDAQ also offers an enterprise license under which a broker-dealer may distribute NASDAQ Basic to an unlimited number of Non-Professional Subscribers with whom the broker-dealer has a brokerage relationship at a rate of \$100,000 per month (as well as the applicable monthly Distributor fee). In addition, a Distributor of data derived from NASDAQ Basic (but not NASDAQ Basic

itself) may pay a fee of \$1,500 per month (plus the applicable monthly Distributor fee) to distribute the derived data to an unlimited number of Non-Professional Subscribers. This type of Distributor will typically distribute data to a large number of downstream customers through web-based applications.

The proposed increase in Professional Subscriber fees would constitute the first such increase since NASDAQ Basic was introduced in 2009. Since that time, NASDAQ has continually enhanced the product through capacity upgrades, in keeping with increases in demand for the product; during this period, the network capacity for NASDAQ Basic has increased from a 15 Mb feed to the current 84 Mb feed. Additionally, NASDAQ has enhanced the product in numerous respects. These have included the addition of messages to indicate the start and end time of the NASDAQ Market Center's system day and the end of regular trading hours; a new IPO message for NASDAQ-listed securities to relay the quotation release time as well as the IPO price to be used for intraday net change calculations; an enhanced symbol directory with limit up/limit down reference price tiers; dissemination of retail liquidity identifiers under NASDAQ Rule 4780; market-wide circuit breaker decline levels and status information; enhanced sale condition modifiers in accordance with changes made to data disseminated by the SIPs; support for a 4 a.m. start to NASDAQ's trading day; support for single stock trading pauses; latency monitoring; and clearer differentiation between NYSE and NYSE MKT trades in the data stream.

NASDAQ further notes that the professional fees for "core" quote and last-sale data provided under the NASDAQ UTP Plan were increased, effective January 2014, from \$20 to \$23 per Subscriber per month.<sup>6</sup> Similar fees under the CQ/CT Plans are \$24 per subscriber per month for securities listed on NYSE MKT and other Tape B securities, and range from \$20 to \$50 per month for NYSE-listed securities. Accordingly, NASDAQ believes that the change in NASDAQ Basic fees is also warranted as a means of ensuring that the fees for NASDAQ Basic accurately reflect the value of NASDAQ Basic data as a subset of "core" data available from the SIPs, thereby avoiding distortions in demand for core data that might result

from fees that do not accurately reflect NASDAQ Basic's value.

However, to mitigate the effect of the fee increase on Distributors and Subscribers, NASDAQ is proposing two additional changes. First, NASDAQ is proposing to introduce a net reporting option for Distributors to reduce the overall number of internal Professional Subscribers deemed to be fee liable with respect to "Display Usage" of NASDAQ Basic.<sup>7</sup> This option is similar to a net reporting option recently introduced under the NASDAQ UTP Plan.<sup>8</sup> Under the proposed netting rules:

- A Subscriber that receives access to NASDAQ Basic through multiple products controlled by an Internal Distributor will be considered one Subscriber. Thus, if a broker-dealer acts as a Distributor of NASDAQ Basic in multiple forms to its employees, each employee would be considered one Subscriber.

- A Subscriber that receives access to NASDAQ Basic through multiple products controlled by one External Distributor will be considered one Subscriber. Thus, if a broker-dealer arranges for its employees to receive access to multiple NASDAQ Basic products provided by a single vendor, each employee would be considered one Subscriber.

- A Subscriber that receives access to NASDAQ Basic through one or more products controlled by an Internal Distributor and also one or more products controlled by one External Distributor will be considered one Subscriber. Thus, if the broker-dealer provides employees with access through its own product(s) and through products from a single vendor, each employee would still be considered one Subscriber.

- A Subscriber that receives access to NASDAQ Basic through one or more products controlled by an Internal Distributor and also products controlled by multiple External Distributors will be treated as one Subscriber with respect to the products controlled by the Internal Distributor and one of the External Distributors, and will be treated as an additional Subscriber for each additional External Distributor. Thus, a Subscriber receiving products through

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 were performed for an organization not so exempt." A "Professional Subscriber" is "any Subscriber other than a Non-Professional Subscriber." Although these definitions are currently applicable to Rule 7047 through incorporation by reference, NASDAQ is adding them directly to the rule to enhance its clarity.

<sup>5</sup> The definition of the term "Distributor" is being added directly to Rule 7047 to enhance the rule's clarity. The term "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." Distributors may either be "Internal Distributors", which are "Distributors that receive NASDAQ Basic data and then distribute that data to one or more Subscribers within the Distributor's own entity," or "External Distributors", which are "Distributors that receive NASDAQ Basic data and then distribute that data to one or more Subscribers outside the Distributor's own entity."

<sup>6</sup> Securities Exchange Act Release No. 70953 (November 27, 2013), 78 FR 72932 (December 4, 2013) (File No. S7-24-89).

<sup>7</sup> As reflected in a new definition being added to Rule 7047, "Display Usage" means "any method of accessing NASDAQ Basic data that involves the display of such data on a screen or other visualization mechanism for access or use by a natural person or persons." Netting does not apply to uses other than Display Usage (*i.e.*, use by an automated device without visual access by natural persons).

<sup>8</sup> Securities Exchange Act Release No. 70953 (November 27, 2013), 78 FR 72932 (December 4, 2013) (File No. S7-24-89).

an Internal Distributor and two External Distributors will be treated as two Subscribers. Put another way, access through an Internal Distributor may be netted against access through one External Distributor, but two External Distributors may not be netted.

Distributors benefitting from net reporting must demonstrate adequate internal controls for identifying, monitoring, and reporting all usage. The burden will be on the Distributor to demonstrate that particular instances of netting are justified.

Second, NASDAQ is proposing to offer a new enterprise license for Professional Subscribers. Under the enterprise license, a broker-dealer may distribute NASDAQ Basic for NASDAQ, NASDAQ Basic for NYSE, and NASDAQ Basic for NYSE MKT for a flat fee of \$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.<sup>9</sup> Thus, given the total proposed modified fee of \$26 per Subscriber per month for receiving all three components of NASDAQ Basic, the option will reduce costs for broker-dealers with more than 14,038 Internal Subscribers (\$365,000 ÷ \$26). A broker-dealer that purchases an enterprise license will also be entitled to receive, at no additional charge, access to NASDAQ Last Sale ("NLS") data for its own stock price and the stock price of up to ten of its competitors or peers, for display use on the broker-dealer's internal Web site. NLS provides, in real time, last sale information for stocks listed on NASDAQ, NYSE, and other listing venues, as reported by the NASDAQ Market Center or reported to the FINRA/NASDAQ TRF.

## 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act<sup>10</sup> in general, and with Sections 6(b)(4) and (5) of the Act<sup>11</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among recipients of NASDAQ data and is not designed to permit unfair

discrimination between them. In adopting Regulation NMS, the Commission granted self-regulatory organizations ("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 market data product is 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>12</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 at all, it follows that the price at which such data is sold should be set by the market as well. NASDAQ Basic exemplifies the optional nature of proprietary data, since, depending on a customer's specific goals, it may opt to purchase core SIP data or only the subset provided through NASDAQ Basic. Moreover, as discussed in more detail below, the price that NASDAQ is able to charge is constrained by the existence of substitutes in the form of SIP data and competitive products offered by other SROs.

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*"), upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data. "In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are

removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.' *NetCoalition I*, at 535 (quoting H.R. Rep. No. 94-229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323). The court agreed with the Commission's conclusion that "Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.'"<sup>13</sup>

The Court in *NetCoalition I*, while upholding the Commission's conclusion that competitive forces may be relied upon to establish the fairness of prices, nevertheless concluded that the record in that case did not adequately support the Commission's conclusions as to the competitive nature of the market for NYSE Arca's data product at issue in that case. As explained below in NASDAQ's Statement on Burden on Competition, however, NASDAQ believes that there is substantial evidence of competition in the marketplace for data that was not in the record in the *NetCoalition I* case, and that the Commission is entitled to rely upon such evidence in concluding fees are the product of competition, and therefore in accordance with the relevant statutory standards.<sup>14</sup> Moreover, NASDAQ further notes that the product at issue in this filing—a NASDAQ quotation and last sale data product that replicates a subset of the information available through "core" data products whose fees have been reviewed and approved by the SEC—is quite different from the NYSE Arca depth-of-book data product at issue in *NetCoalition I*. Accordingly, any findings of the court with respect to that product may not be relevant to the product at issue in this filing. As the Commission noted in approving the initial pilot for NASDAQ Basic, all of the information available in NASDAQ Basic is included in the core data feeds made available pursuant to the joint-SRO plans.<sup>15</sup> As the Commission further

<sup>13</sup> *NetCoalition I*, at 535.

<sup>14</sup> It should also be noted that Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") has amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make it clear that all exchange fees, including fees for market data, may be filed by exchanges on an immediately effective basis. See also *NetCoalition v. SEC*, 715 F.3d 342 (D.C. Cir. 2013) ("*NetCoalition II*") (finding no jurisdiction to review Commission's non-suspension of immediately effective fee changes).

<sup>15</sup> Securities Exchange Act Release No. 12425 (March 16, 2009), 74 FR 12423, 12425 (March 24, 2009) (SR-NASDAQ-2008-102).

<sup>9</sup> The \$2 fee is necessary to defray additional costs incurred by NASDAQ when distributing NASDAQ Basic through an External Distributor that controls display of the product, costs which NASDAQ would not otherwise be able to recoup under an enterprise license arrangement.

<sup>10</sup> 15 U.S.C. 78f.

<sup>11</sup> 15 U.S.C. 78f(b)(4), (5).

<sup>12</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

determined, “the availability of alternatives to NASDAQ Basic significantly affect the terms on which NASDAQ can distribute this market data. In setting the fees for its NASDAQ Basic service, NASDAQ must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange’s data.”<sup>16</sup> Thus, to the extent that the fees for core data have been established as reasonable under the Act, it follows that the fees for NASDAQ Basic are also reasonable, since charging unreasonably high fees would cause market participants to rely solely on core data or purchase proprietary products offered by other exchanges rather than purchasing NASDAQ Basic.

Moreover, as discussed in the order approving the initial pilot, and as further discussed below in NASDAQ’s Statement on Burden on Competition, data products such as NASDAQ Basic 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 proposed changes do not alter the reasonableness of the fees for NASDAQ Basic. Although the per subscriber fees for professional users of NASDAQ Basic are increasing, such fees continue to reflect the value of NASDAQ Basic as a subset of the data provided through core data products.<sup>17</sup> Moreover, the fees in question have not changed since NASDAQ Basic’s introduction in 2009, and since that time, numerous enhancements have been made to the product, as described above in the section of the proposed rule change discussing its purpose. In addition, the proposed enterprise license for Professional Subscribers and the proposed netting rules will provide means to mitigate the effect of the fee increase.

The changed fees for NASDAQ Basic also continue to reflect an equitable allocation and continue not to be unfairly discriminatory, because

NASDAQ Basic is a voluntary product for which market participants can readily substitute core data feeds that provide additional quotation and last sale information not available through NASDAQ Basic. Accordingly, NASDAQ is constrained from pricing the product in a manner that would be inequitable or unfairly discriminatory. The distinction between fees for Professional and Non-Professional Subscribers is consistent with the distinction made under 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. Moreover, the proposed enterprise license will help to ensure that fees for professional users are not inequitable or unfairly discriminatory, because they will be subject to limitations that will enable broker-dealers with large numbers of subscribers to moderate the fees that they would otherwise be required to pay. The proposed netting feature will also moderate fees by limiting the extent to which a Subscriber is charged for multiple uses of the data.

#### *B. Self-Regulatory Organization’s Statement on Burden on Competition*

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. NASDAQ’s ability to price NASDAQ Basic is constrained by (1) competition among exchanges, other trading platforms, and TRFs that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and market-specific data and free delayed consolidated data; and (3) the inherent contestability of the market for proprietary data.

The market for proprietary data products 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 TRF data component of NASDAQ Basic, 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 executions 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.<sup>18</sup> 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>19</sup> In NASDAQ’s case, it is costly to build and

<sup>18</sup> A complete explanation of the pricing dynamics associated with joint products is presented in a study that NASDAQ originally submitted to the Commission in SR-NASDAQ-2011-010, and which is also submitted as Exhibit 3 to this filing. See Statement of Janusz Ordovery and Gustavo Bamberger at 2–17 (December 29, 2010).

<sup>19</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>16</sup> *Id.* at 12425.

<sup>17</sup> Professional Subscriber fees for core data under all of the SIP plans range from \$67 to \$97 per month, while Professional Subscriber fees for all three components of NASDAQ Basic would be \$26 per month.

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>20</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.

An exchange's BD customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A BD will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the BD chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the BD will choose not to buy it. Moreover, as a BD chooses to direct fewer orders to a particular exchange, the value of the product to that BD decreases, for two reasons. First, the product will contain less information, because executions of the BD's trading activity will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that BD because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the BD is directing orders will become correspondingly more valuable.

Similarly, in the case of products such as NASDAQ Basic that may be distributed through market data vendors, the vendors provide price discipline for proprietary data products because they control a means of access to end users. Vendors impose price restraints based upon their business

models. For example, vendors such as Bloomberg and Thomson Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail BDs, such as Charles Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. Exchanges, TRFs, and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, NASDAQ believes that products such as NASDAQ Basic can enhance order flow to NASDAQ by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market by investors with access to the data through their brokerage firm or other distribution sources. Conversely, the value of such products to distributors and investors decreases if order flow falls, because the products contain less content.

Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably underestimate the cost of the data. Thus, because it is impossible to create exchange data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of the exchange's costs to the market data portion of an exchange's joint product. Rather, all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products. Similarly, the inclusion of trade reporting data in a product such as NASDAQ Basic may assist in attracting customers to the product, thereby assisting in covering the additional costs associated with operating and regulating a TRF.

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 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 of its sales that will be adverse to its overall profitability. In other words, an unreasonable 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.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including thirteen 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

<sup>20</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.

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, BATS, and Direct Edge.

Any ATS or BD can combine with any other ATS, BD, or multiple ATSs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate single or multiple BDs' production of proprietary data products. The potential sources of proprietary products are virtually limitless. Notably, the potential sources of data include the BDs that submit trade reports to TRFs and that have the ability to consolidate and distribute their data without the involvement of FINRA or an exchange-operated TRF.

The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and Arca did before registering as exchanges by publishing proprietary book data on the internet. Second, because a single order or transaction report can appear in a core data product, an SRO proprietary product, and/or a non-SRO proprietary product, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace. Indeed, in the case of NASDAQ Basic, the data provided through that product appears both in (i) real-time core data products offered by the SIPs for a fee, and (ii) free SIP data products with a 15-minute time delay, and finds a close substitute in similar products of competing venues.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading and Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume.

Regulation NMS, by deregulating the market for proprietary data, has

increased the contestability of that market. While BDs have previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg and Thomson Reuters. In Europe, Markit aggregates and disseminates data from over 50 brokers and multilateral trading facilities.<sup>21</sup>

In the case of TRFs, the rapid entry of several exchanges into this space in 2006–2007 following the development and Commission approval of the TRF structure demonstrates the contestability of this aspect of the market.<sup>22</sup> Given the demand for trade reporting services that is itself a by-product of the fierce competition for transaction executions—characterized notably by a proliferation of ATSs and BDs offering internalization—any supra-competitive increase in the fees associated with trade reporting or TRF data would shift trade reporting volumes from one of the existing TRFs to the other<sup>23</sup> and create incentives for other TRF operators to enter the space. Alternatively, because BDs reporting to TRFs are themselves free to consolidate the market data that they report, the market for over-the-counter data itself, separate and apart from the markets for execution and trade reporting services—is fully contestable.

Moreover, consolidated data provides substantial pricing discipline for proprietary data products that are a subset of the consolidated data stream. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data (such as quotation and last sale data) that is simply a subset of the consolidated data. The availability provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data, by

highlighting the optional nature of proprietary products.

The competitive nature of the market for non-core “sub-set” products such as NASDAQ Basic is borne out by the performance of the market. In May 2008, the internet portal Yahoo! began offering its Web site viewers real-time last sale data (as well as best quote data) provided by BATS. In June 2008, NASDAQ launched NLS, which was initially subject to an “enterprise cap” of \$100,000 for customers receiving only one of the NLS products, and \$150,000 for customers receiving both products. The majority of NASDAQ's sales were at the capped level. In early 2009, BATS expanded its offering of free data to include depth-of-book data. Also in early 2009, NYSE Arca announced the launch of a competitive last sale product with an enterprise price of \$30,000 per month. In response, NASDAQ combined the enterprise cap for the NLS products and reduced the cap to \$50,000 (*i.e.*, a reduction of \$100,000 per month). Similarly, the enterprise license and netting option being offered for NASDAQ Basic through this proposed rule change reflects a means by which the overall cost of the product is limited in accordance with the existence of competitive alternatives, including both core and proprietary data.

In this environment, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. “No one disputes that competition for order flow is ‘fierce’.” *NetCoalition I* at 539. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A BD that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. If a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected BDs will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data. Similarly, increases in the cost of NASDAQ Basic would impair the willingness of distributors to take a product for which there are numerous alternatives, impacting NASDAQ Basic data revenues, the value of NASDAQ Basic as a tool for attracting order flow, and ultimately, the volume of orders routed to NASDAQ and

<sup>21</sup> <http://www.markit.com/en/products/data/boat/boat-boat-data.page>.

<sup>22</sup> The low cost exit of two TRFs from the market is also evidence of a contestible market, because new entrants are reluctant to enter a market where exit may involve substantial shut-down costs.

<sup>23</sup> It should be noted that the FINRA/NYSE TRF has, in recent weeks, received reports for over 10% of all over-the-counter volume in NMS stocks. In addition, FINRA has announced plans to update its Alternative Display Facility, which is also able to receive over-the-counter trade reports. See Securities Exchange Act Release No. 70048 (July 26, 2013), 78 FR 46652 (August 1, 2013) (SR-FINRA-2013-031).

reported to the FINRA/NASDAQ TRF and the value of its other data products.

Competition has also driven NASDAQ continually to improve its data offerings and to cater to customers' data needs. The NASDAQ Basic product itself is a product of this competition, offering a subset of core data to users that may not wish to receive or pay for all consolidated data. Moreover, as detailed in the section of this proposed rule change discussing its purpose, NASDAQ has made continual enhancements to the NASDAQ Basic product to ensure that it remains an attractive offering to its customers. Despite these enhancements and a dramatic increase in message traffic, NASDAQ's fees for professional usage of NASDAQ Basic have hitherto remained flat.

The existence of numerous alternatives to NASDAQ Basic, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources ensures that NASDAQ cannot set unreasonable fees, or fees that are unreasonably discriminatory, without losing business to these alternatives. Accordingly, NASDAQ believes that the acceptance of the NASDAQ Basic product in the marketplace demonstrates the consistency of these fees with applicable statutory standards. Likewise, the fee changes proposed herein will be subject to these same competitive forces. If the proposed fee increase is excessive, or if the proposals for an enterprise license and netting are unattractive to market participants, only NASDAQ will suffer, since its customers will merely migrate to competitive alternatives.

#### *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 rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>24</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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2014-011 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2014-011. This file number should be included on the subject line if email 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2014-011 and should be submitted on or before March 6, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-71506; File No. SR-BX-2014-008]**

### **Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Not Charge the Extranet Access Fee**

February 7, 2014.

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 January 31, 2014, NASDAQ OMX BX, Inc. ("BX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change**

The Exchange proposes to not charge the extranet access fee ("Extranet Access Fee") set forth in BX Rule 7025.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are bracketed.<sup>3</sup>

\* \* \* \* \*

#### **7025. Extranet Access Fee**

Extranet providers that establish a connection with the Exchange to offer direct access connectivity to market data feeds shall *not* be assessed a monthly access fee [of \$1,000] per client organization Customer Premises Equipment ("CPE") Configuration. [If an extranet provider uses multiple CPE Configurations to provide market data feeds to any client organization, the monthly fee shall apply to each such CPE Configuration.] For purposes of this Rule 7025, the term "Customer Premises Equipment Configuration" shall mean

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

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

<sup>3</sup> Changes are marked to the rules of NASDAQ OMX BX, Inc. found at <http://nasdaqomxbx.cchwallstreet.com>.

<sup>24</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>25</sup> 17 CFR 200.30-3(a)(12).